

**'NORMALISING' WHAT? ABORIGINAL LAND TENURE REFORM IN
THE NORTHERN TERRITORY OF AUSTRALIA**

by

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ABSTRACT

This thesis examines recent Aboriginal land tenure reform in the Northern Territory of Australia. The Commonwealth and Northern Territory governments have introduced three reforms since 2006: Township Leases, 5-year Intervention Leases and 40-year Housing Leases. Each of the reforms provides for the grant of a “head-lease” on land owned under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) to a government entity, which then has the power to issue sub-leases to Aboriginal and non-Aboriginal persons.

Scholars have tended to focus attention on the first two reforms, the Township Leases and the 5-year Intervention Leases, and the extent to which they have been successful or otherwise in achieving their policy objectives. Scholars have also tended to interpret one policy objective associated with all three reforms – the so-called “normalisation” of Aboriginal communities – as having a static meaning, often criticising it as a return to the Northern Territory’s colonial past.

This thesis takes a different approach, attempting to examine the legal structure of all three reforms as part of wider discourse surrounding Aboriginal land tenure reform in the Northern Territory. I first analyse the legal structure of the reforms as evidenced in legislation and policy documentation, and then qualitatively examine the meaning of the term “normalise” in parliamentary Hansard. My analysis reveals that the meaning of the word “normalise” has shifted since the first reform was introduced, and this change has been reflected by a parallel change in the legal structure of the reforms. The first two reforms (Township Leases and 5-year Intervention Leases) exhibit some parallels with the Northern Territory’s colonial property regime. However, the 40-year Housing Leases do not appear to possess the same characteristics and in fact may result in traditional Aboriginal owners of land in the Northern Territory exercising greater legal and economic control over their land.

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1. Introduction, research design and methodology

1.1 Introduction

Few indigenous policy initiatives have garnered more attention in recent years in Australia than the reform of tenure arrangements on land owned under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (“the *Land Rights Act*”) in the Northern Territory of Australia (“Aboriginal land”). While the scheme and operation of the *Land Rights Act* remained relatively untouched by legislators for decades, since 2006 a succession of governments has introduced a stream of legislative and policy changes aimed at fundamentally reforming the tenure of those parts of Aboriginal land upon which major Aboriginal communities are located.

Three overarching, and closely-related, reforms have been introduced to facilitate these changes: long term (generally 99-year) leases to a federal government entity over whole communities located on Aboriginal land (“Township Leases”); the compulsory acquisition by the federal government of 5-year leases of Aboriginal land as part of the controversial intervention into Aboriginal communities in the Northern Territory (“5-year Intervention Leases”); and, most recently, 40-year leases of Aboriginal land to a Northern Territory government entity for housing and associated purposes (“40-year Housing Leases”). The first two of these reforms were introduced and pursued by the federal government, but responsibility for implementing the last reform, the 40-year Housing Leases, was transferred to the Northern Territory government.

While they may appear complicated, the reforms are similar in key respects and relatively simple in structure. Specifically, each of them provides for the grant of a “head-lease” of Aboriginal land to government or government-controlled entities, which then have the power to issue sub-leases to

Aboriginal and non-Aboriginal persons. The reforms are only concerned with land upon which major Aboriginal communities are located; they leave untouched the vast majority of Aboriginal land granted under the *Land Rights Act*. Nevertheless, the reforms have far-reaching implications for Aboriginal people in the Northern Territory. According to research conducted in 2001, over 70% of the Northern Territory's indigenous population resides on Aboriginal-owned land in settlements or communities of varying size,¹ with many of these communities the target of the reforms.

At the risk of over-simplifying the policy reasons for the reforms, most public debate about land tenure reform in the Northern Territory has centred on the former federal government's policy rationale that existing "communal" land-owning arrangements are a barrier to the economic development of Aboriginal communities in the Northern Territory, drawing largely on the influential thesis of Peruvian economist, Hernando de Soto, who argues for formal, enforceable and individual property rights on the basis that informal and communal land-owning arrangements lock up capital and preclude access to credit.² The new land tenure arrangements facilitated by the reforms, according to the former and current federal governments, will facilitate the grant of private property rights on Aboriginal land, regularise land tenure within Aboriginal communities, streamline transaction costs, and promote economic development through the subjection of Aboriginal land and communities to normal market forces.

Much of the legal scholarship produced to date has also focused on this policy rationale, with commentators pointing out a number of inconsistencies and contradictions when the reforms are viewed in light of their stated policy objectives, and claiming that other hidden agendas lie behind

¹ J. Taylor, *Indigenous economic futures in the Northern Territory: The demographic and socioeconomic background*, Discussion Paper No 246, Centre for Aboriginal Economic Policy Research, ANU, Canberra, 2003 at 5. Taylor's calculation also includes two other forms of Aboriginal-owned tenure, community living areas excised from pastoral leases under Northern Territory legislation and special purpose lease town camps within or close to urban areas.

² H. De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, (New York, Basic Books, 2000).

the reforms.³ For example, Altman, Linkhorn and Clarke criticise the policy rationale of Township Leases on the basis that “mainstream housing models are difficult to transpose to these areas dominated by community rental because there is a limited mainstream economic base, the market value of the land is low, the capacity of Indigenous people in these areas to borrow money is limited and mainstream financial institutions are generally absent.”⁴ Hepburn refers to the failed individual titling experiments in New Zealand and the United States, arguing that the primary effect of these overseas experiments “has been the acceleration of land loss and the abolition of indigenous communities as ‘autonomous and integral sociopolitical entities’” rather than economic development.⁵ And Terrill’s examination of the provisions of Township Leases demonstrates how the reforms aim to alter local Aboriginal governance structures, noting that “[p]aradoxically, 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.”⁶

While the existing legal scholarship on the reforms is revealing and instructive, it focuses almost exclusively on the Township Lease reforms. There is no significant analysis of the 40-year Housing Leases, and no scholarship examines all three reforms in detail, despite the similarities in their structure, and their successive introduction in a relatively short period.

Perhaps more significantly for my research, scholars have focused on the policy rationale for the reforms, and their critiques hinge on an assessment of the reforms in light of these policy objectives.

³ For example, see J. Altman, C. Linkhorn and J. Clark, *Land Rights and Development Reform in Remote Australia*, Discussion Paper No. 276, Centre for Aboriginal Economic Policy Research, ANU, Canberra, 2005, D. Dalrymple, “The Abnormalisation of Land Tenure” in J. Altman and M. Hinkson (eds), *Coercive Reconciliation: Stabilise, normalise, exit Aboriginal Australia* (Melbourne, Arena Publications, 2007), S. Hepburn, “Transforming Customary Title to Individual Title: Revisiting the Cathedral”, in (2006) 11:1 *Deakin Law Review* 63, M. Stephenson, “To lease or not to lease? The leasing of indigenous statutory lands in Australia: lessons from Canada”, (2009) 35:3 *Commonwealth Law Bulletin* 545, S. Brennan, “Modernising the Land Rights Act or the Same Old Same Old?” (2006) *Australian Indigenous Law Reporter* 65, L. Terrill, “The Days of the Failed Collective: Communal Ownership, Individual Ownership and Township Leasing in Aboriginal Communities in the Northern Territory”, (2009) 32:3 *UNSW Law Journal* 814.

⁴ J. Altman, C. Linkhorn and J. Clark, *supra* note 3 at 12.

⁵ S. Hepburn, *supra* note 3 at 65.

⁶ L. Terrill, *supra* note 3 at 816.

This is unsurprising - the parameters of the debate about Aboriginal land tenure reform in the Northern Territory have been set by policy-makers, and in trying to make a practical contribution to the debate which might affect policy and law in the area scholars may feel constrained to speak within these parameters. Sarat and Silbey describe this force as “the pull of the policy audience”.⁷ In addition, the existing scholarship does on the whole adhere to an instrumentalist view of the law as a “‘tool’ used to realize goals and purposes that are independent of the law”.⁸ In other words, the relevant inquiry in the literature is the extent to which the law is effective for achieving social goals which are framed by the policy-makers.

However, and without detracting from the continuing importance of this scholarship particularly in the pursuit of still unanswered policy-related questions,⁹ I do not attempt to respond to the problems or issues as they have been framed by government policy. Instead, I interrogate *how* these problems or issues have been formulated by wider discourse in relation to Aboriginal land tenure reform in the Northern Territory, and how the laws used to implement the reforms are a product of this discourse. My use of the term “discourse” in this context draws principally on Foucault’s understanding of discourses as open and changing, yet also socially constitutive. In particular, discourses:

impose frameworks which limit what can be experienced or the meaning that experience can encompass, and thereby influence what can be said and done. Each discourse allows certain things to be said and impedes or prevents other things from being said. Discourses thus provide specific and distinguishable mediums through which communicative action takes place.¹⁰

⁷ A. Sarat and S. Silbey, “The Pull of the Policy Audience” in (1988) 10:2/3 *Law and Policy* 97 at 98.

⁸ S. Robertson, “What’s Law got to do with it? Legal Records and Sexual Histories” in (2005) 14:1/2 *Journal of the History of Sexuality* 161 at 182.

⁹ For example, there is still important empirical work (both qualitative and quantitative) to be conducted to test the “simple narrative” given by the federal government on Aboriginal dysfunction and the economic and social benefits which will flow from reform of Aboriginal land tenure.

¹⁰ T. Purvis and A. Hunt, “Discourse, Ideology, Discourse, Ideology, Discourse, Ideology...” (1993) 44:3 *The British Journal of Sociology* 473 at 476.

Accordingly, discourses are means of communication which are both constraining and enabling, and are inherently implicated in the construction of “knowledge” by limiting how things can be represented. This constructed knowledge is in itself a form of power rather than simply a reflection of power relations in the ‘real’ world ‘beyond’ the academy, the media or government task force.”¹¹ Despite this constraining effect, discourses are not static, and their boundaries are never fixed – they are “subject to negotiation, challenge and transformation” although this occurs “through the medium of particular discourses.”¹² Adopting such an understanding of discourses as constituting experiences and circumscribing communication, nothing is immune from the restraining and constitutive effects of discourse, including what we understand as “the law” itself – discourses necessarily affect and circumscribe the way in which the law develops.

In examining the way the legal reforms are a product of wider discourse in relation to Aboriginal land tenure reform in the Northern Territory, I focus on the use of the term “normalisation” and on the way that this has found expression in the legal landscape of the reforms.¹³

As one example, when the amending legislation for the Township Leases was first introduced in May 2006, the then Minister for Indigenous Affairs, Mal Brough, summarised the tenure reforms as facilitating the “normalisation” of Aboriginal communities or townships,¹⁴ urging in Parliament in relation to the proposed legislation that:

[t]he appalling levels of violence and abuse in many of these communities are a stark reminder of the failed policies of the past... Much more needs to be done to normalise life for these Australian citizens. The reforms to the *Land*

¹¹ T.J. Barnes and J.S. Duncan, “Introduction: Writing Worlds” in T.J. Barnes and J.S. Duncan (eds), *Writing Worlds – Discourse, text and metaphor in the representation of landscape* (London and New York, Routledge, 1992) at 9.

¹² *Ibid* at 8.

¹³ In this thesis I have used the Australian spelling of this term and its variants (e.g. normalisation, normalise, normalising), rather than the North American spelling (normalization).

¹⁴ M. Brough, Commonwealth Minister for Indigenous Affairs, “Historic reforms to NT Land Rights”, Media Release, 31 May 2006.

Rights Act will help to create a new environment offering better prospects and hope for the future... The days of the failed collective are over.¹⁵

A year later, when the federal government's intervention into Aboriginal communities in response to widespread allegations of child sexual abuse was announced, an objective of "normalisation" again loomed large, with Brough justifying the decision to compulsorily acquire 5-year leases over 64 Aboriginal communities in the Northern Territory thus:

we need to be able to ensure that people are living in hygienic conditions, so that the conditions that currently prevail where people are living in overcrowded houses, where there are no norms and where all of the abuse can take place can stop. But we need to have control over the homes—the condition they are in, who is in them and what is occurring in them. We are asking for that now, so that we can do that and return to normality over the next five years. There are three phases to what we are doing: (1) stabilisation, (2) normalisation and (3) exit.¹⁶

Most recently, "normalisation" has been cited as an integral part of the latest manifestation of Aboriginal land tenure reform in the Northern Territory, the 40-year Housing Leases. A review of the 40-year Lease program stated that "[n]ormalisation' of remote housing arrangements in accordance with the public housing model is intended to achieve more effective property and tenancy management and a higher standard of housing outcomes."¹⁷

But if "normalisation" is a fundamental and enduring objective in Aboriginal land tenure reform in the Northern Territory, its meaning remains curiously obscure. The *Oxford English Dictionary Online* defines "normalise" to mean, "to make normal; to bring or return to a normal or standard condition or state,"¹⁸ but this definition is unhelpful without understanding the wider context within which the term appears, including the purported target or object of normalisation (which by implication, is apparently not in a "normal" condition or state). Many commentators have

¹⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 31 May 2006, 5 (Mal Brough, Minister for Indigenous Affairs).

¹⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 June 2007, 77 (Mal Brough, Minister for Indigenous Affairs).

¹⁷ O. Donald and J. Canty-Waldron, *Strategic Indigenous Housing Infrastructure Program (SIHIP) – Post Review Assessment (PRA)*, online, Department of Families, Housing, Community Services and Indigenous Affairs, <http://www.fahcsia.gov.au/sa/indigenous/pubs/housing/sihip_pra/Documents/sihip_pra_report.pdf>.

¹⁸ "normalize, *v.*", online, Oxford English Dictionary Online, <<http://dictionary.oed.com>>.

criticised the policy objective of “normalisation” in the context of the Township Leases and the 5-year Intervention Leases.¹⁹ Terrill and Dalrymple argue that the purported aim of the Township Leases and 5-year Intervention Leases is to normalise “land tenure” in Aboriginal communities, cogently arguing that what is in fact being created is a complicated, bureaucratic and third-rate system of land-holding.²⁰ Other scholars such as Altman and Mazel have argued that the target of “normalisation” is Aboriginal society itself, and that the aim of the reforms is to transform “the culture and economy of Aboriginal communities to produce a ‘normalised’ Aboriginal population”.²¹ These scholars have tended to focus upon a single interpretation of the objective and target of the policy objective of “normalisation”, although this interpretation varies depending on the author and the emphasis of their research. More significantly, existing scholarship has not recognised or explored ambiguities and shifts in the meaning of the term as Aboriginal land tenure reform in the Northern Territory has developed over time, nor the legal effects or manifestations of these changes.

To the extent that the objective of “normalisation” is or was to transform Aboriginal society itself, there may be additional implications. Postcolonial theorists have written about the legitimating function of dominant, generally Western, societies constructing the colonised or “the Other” in specific terms. Drawing on texts including Said’s *Orientalism*,²² Australian scholars have argued that the colonial construction of Aboriginal people as primitive, savage and different was a discourse in the Foucauldian sense which served to shore up the hegemonic position of the colonisers and to justify oppressive laws and policies, including the annexation of land and its

¹⁹ Including for its colonial associations, see for example K.N. Gulson and R.J. Parkes, “From the barrel of the gun: policy incursions, land and Aboriginal peoples in Australia” in (2010) 42 *Environment and Planning A* 300, O. Mazel, “Development in the ‘First World’: Alleviating Indigenous Disadvantage in Australia – the Dilemma of Difference”, (2009) 18:2 *Griffith Law Review* 475.

²⁰ L. Terrill, *supra* note 3 and D. Dalrymple, *supra* note 3.

²¹ O. Mazel, *supra* note 19 at 492, citing J Altman and M Hinkson (eds), *supra* note 3.

²² E Said, *Orientalism*, (New York, Vintage Books, 1978).

transformation into clearly-defined units of privately-owned property.²³ Additionally, scholars have emphasised the transformative (often “civilizing”) agenda of colonial discourse, and law’s role in effecting this change – if colonialism was primarily a process “in which one society endeavoured to rule and transform another”, then law was its “cutting edge”.²⁴ Similarly to colonial discourse, the “normalisation” rhetoric being used currently in relation to Aboriginal land tenure reform may also appear to be informed by a dichotomised construction of Aboriginal people as different compared with the rest of Australian society, with property law tasked with effecting some sort of transformation from this inferior state.

Prompted by these questions, in this thesis I explore the key characteristics of the “normalisation discourse” in the context of recent Aboriginal land tenure reform in the Northern Territory, and consider how these are reflected in the legal structure of the reforms. I have approached this task primarily by undertaking a qualitative analysis of the word “normalise” as it appears in number of texts, comprising parliamentary Hansard and other government-sourced documents. In particular, I interrogate whether, as a matter of textual interpretation, policy-makers are evincing an intention to “normalise” Aboriginal communities premised upon a construction of Aboriginal people which is suggestive of the Northern Territory’s colonial history and whether and how the characteristics of normalisation discourse have shifted over time.

I contend that normalisation discourse has indeed informed the way that recent Aboriginal land tenure reform has developed since 2006. In particular, during the introduction and implementation of the Township Leases and 5-year Intervention Leases by the Commonwealth

²³ See, for example, B. Attwood, “Introduction: Power, Knowledge and Aborigines”, (1992) 35 *Journal of Australian Studies* i, S. Banner, “Why Terra Nullius? Anthropology and Property Law in Early Australia” (2005) 23 *Law and History Review* 95, L. Godden, “The Invention of Tradition: Property Law as a Knowledge Space for the Appropriation of the South”, (2007) 16:2 *Griffith Law Review* 375, A. Roy “Postcolonial Theory and Law: A Critical Introduction” (2008) 29 *Adelaide Law Review* 315.

²⁴ S. Engle Merry, “Law and Colonialism” (1991) 25 *Law & Soc’y Rev* 891.

government, normalisation discourse as manifested in the Commonwealth Parliament did possess some distinctly “colonial” attributes, including the consistent construction of Aboriginal communities in the Northern Territory as spatially-segregated, economically stagnant and socially dysfunctional spaces, with an individual property rights regime imposed to transform these elements of Aboriginal society.

However, since the introduction of the 40-year Housing Leases, and the transfer of responsibility for their implementation to the Northern Territory, these characteristics have become less prominent in debate about Aboriginal land tenure reform in the Northern Territory Legislative Assembly. Indeed, more recently, the explicit focus of “normalisation” has been not so much on changing the alleged socially aberrant elements of Aboriginal communities through private property, but on correcting the government’s decades-old failure to secure appropriate tenure on Aboriginal land and standardising basic services and infrastructure in communities. I suggest that one of the key reasons for this shift may be the presence of a significant number of indigenous politicians in the Northern Territory Legislative Assembly, some of whom have adopted the term with vigour but use it in a different way than their Commonwealth counterparts did previously.

The shifts evident in normalisation discourse are also reflected by a parallel shift in the legal structure of the reforms. Specifically, the Township Lease reforms and the 5-year Intervention Leases involve the grant of leases over entire communities to a Commonwealth government entity which has nearly unfettered discretion to grant sub-leases and other dependent interests for generations. By effectively supplanting Aboriginal control with government control over entire communities, this legal structure reflects the socially transformative objective of these reforms which was evident in Commonwealth parliamentary discourse. By contrast, 40-year Housing Leases involve the grant of leases to a Northern Territory government entity over smaller “blocks” within

communities for specific and limited public housing purposes, and the Aboriginal owners retain the power to negotiate leases and other forms of tenure over other community land. This, more moderate approach to Aboriginal land tenure reform in the Northern Territory reflects the narrower focus of “normalisation discourse” on securing tenure for government assets in communities and standardising services and infrastructure.

1.2 Research design and methodology

I have divided my research into three substantive parts, adopting a combination of methodological approaches. In Chapter 2, I place the *Land Rights Act* in the historical context of colonial property legislation in the Northern Territory, before describing the property regime created by the *Land Rights Act* and the recent reforms. In Chapter 3, I describe the key characteristics of “normalisation discourse” through a qualitative analysis of the word “normalise” in parliamentary Hansard and policy documents. Finally, in Chapter 4, I return to the legal reforms to re-examine them in light of my findings about the characteristics of normalisation discourse.

1.2.1 The property regime in the Northern Territory, the *Land Rights Act* and recent Aboriginal land tenure reform

In Chapter 2, I describe the property regime in the Northern Territory, focusing on the *Land Rights Act* and the legislation and policies introduced to implement recent Aboriginal land tenure reform. First, I identify some of the features of colonial land legislation which made the Northern Territory’s property map so distinctive, and indeed enabled the *Land Rights Act* to become such a powerful piece of legislation. I focus on a key statute -- the *Northern Territory Waste Lands Act* -- which created the basis for the alienation of land in the Northern Territory in the nineteenth century. Relying on insights from historical sources and postcolonial theory, I elucidate some of the

“colonial” features of this legislation. This analysis provides important context for the subsequent enactment of the *Land Rights Act*, as well as providing a counterpoint for my analysis of whether “normalisation discourse” exhibits similar colonial characteristics.

I then explain the operation of the *Land Rights Act* and the substance of recent reforms to Aboriginal land granted under the legislation. My analysis of these sources is largely doctrinal, to the extent that I am attempting to reveal the law and to demonstrate how it applies using conventional legal legislative research and analytic methods.²⁵ I use the *Land Rights Act* and its amendments, focusing specifically on the amendment of the leasing provisions.²⁶ I also use government policy documents produced in relation to the reforms, parliamentary debates relating to this legislation, and the reports and submissions of parliamentary committees which reviewed the legislation,²⁷ all of which are in the public domain and easily accessible online.

1.2.2 Qualitative textual analysis of the reforms

In Chapter 3, I explore the key characteristics of “normalisation discourse” through a qualitative analysis of the use of “normalise” in state-sourced documents such as parliamentary hansard and government policy documents. My analysis is premised upon a particular understanding of texts and their significance. I have viewed my sources as cultural productions, as expressions of the constraining and constitutive effects of discourse as well as constitutive of discourse in and of themselves. On this view, texts are understood as “elements of social events”²⁸ or “as part of the

²⁵ M McConville and W Hong Chui, *Research Methods for Law* (Edinburgh, Edinburgh University Press, 2007) at 19.

²⁶ These include the *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* (Cth), the *Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Act 2007* (Cth), and the *Northern Territory National Emergency Response Act 2007* (Cth).

²⁷ For example, the reports and submissions relating to the Senate Community Affairs Legislation Committee which reviewed the *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006* and the reports and submissions relating to the Senate Legal and Constitutional Affairs Committee which reviewed the *Northern Territory National Emergency Response Bill 2007*.

²⁸ N. Fairclough, *Analysing Discourse – Textual analysis for social research* (New York, Routledge, 2003) at 8.

action, as what people do, or as occurring in particular local settings of people’s activities”.²⁹ While texts are necessarily produced within and are subject to the framework of particular discourses, texts also work to reinforce and constitute the discourses and social practices within which they operate – texts are thus “constitutive of reality rather than mimicking it – in other words, as cultural practices of signification rather than as referential duplications.”³⁰ Although the relationship is not mechanically causal, texts thus have discernible social effects – as Dorothy Smith suggests, “the importance of texts, as of any phenomena of language, to the social is as coordinator of the diversities of people’s subjectivities, their consciousness.”³¹

Characterising my sources as socially constituted and the product of various discourses takes my research into the realm of qualitative content analysis, which “emphasizes the fluidity of text and context in the interpretive understanding of culture”.³² According to Lange, the emphasis in qualitative legal research is “on understanding the social world ‘from within’ rather than measuring a priori defined attitudes, norms and behavioural characteristics”,³³ reflecting my understanding of the law as part of social relations and wider discourse rather than as something “out there” to be objectively interpreted.

Adopting this understanding of texts, the concept of “intertextuality”, or the relationship between and within texts, becomes an important site of investigation, including questions such as:

What is the relation of a text’s parts to each other? What is the relation of the text to other texts? What is the relation of the text to those who participated in constructing it? What is the relation of the text to

²⁹ D. Smith, “Incorporating texts into ethnographic practice” in Dorothy E. Smith (ed) *Institutional Ethnography as Practice* (Lanham, Rowman & Littlefield, 2006).

³⁰ T.J Barnes and J.S. Duncan, *supra*, note 11 at 5.

³¹ D. Smith, *supra* note 29 at 65.

³² R. Ericson, *Representing Order: Crime, Law and Justice in the News Media*, (Toronto, University of Toronto Press, Toronto, 1991) at 50.

³³ B. Lange, ‘Understanding Regulatory Law: Empirical versus Systems-Theoretical Approaches?’ in (1998) 18 *Oxford Journal of Legal Studies* 449 at 453.

realities conceived of as lying outside of it? What empirical patterns are evidence in these intra- and intertextual relations and what do these indicate about the meaning of ... discourse?³⁴

Thus, I do not analyse my sources in isolation but in accordance with their relationship with each other.

Giving my sources this contextual reading does not underplay their powerful prescriptive and constitutive role. For example, according to Smith there is still an “intertextual hierarchy”, whereby “higher-order texts regulate and standardize texts that enter directly into the organization of work in multiple local settings.”³⁵ While Smith was referring to how texts work within institutions, her comments about intertextual hierarchy have a special resonance in a legal context. Given the authoritative context within which they were created and their wide-ranging regulatory and “legal” consequences, state-sourced texts such as parliamentary hansard and policy documents occupy an elevated position in the intertextual hierarchy, and might be categorised by Smith as regulatory texts with considerable coordinating power vis-a-vis social relations and the production of other texts.

“Normalise” is not used in the enabling legislation and nor does it appear in the leases themselves. The term appears most frequently in parliamentary hansard, government policy documents and government committee reports and submissions. For the purposes of my research, I have restricted my analysis to documents produced during a four year period, from May 2006 (when the Commonwealth introduced the Township Lease reforms) until May 2010. This is a significant task. The parliamentary debates on the reforms occupy hundreds of pages of hansard. Nevertheless, I have reviewed all this material, a task made possible by the electronic availability the documents and the use of targeted analytic process.

³⁴ R. Ericson, *Supra*, note 32 at 48.

³⁵ D. Smith, *Supra*, note 29 at 79.

The threshold question for reviewing my sources was whether the text included the word “normalise” or its variants (normalisation, normalising, normalised, etc).³⁶ If it did, then I reviewed the text in which the word appeared according to a number of categories. I generally limited my review by reference to the author (or speaker) of the text. For example, if the word “normalise” was used by a politician during a parliamentary debate, then I reviewed the entire speech in which the word. Similarly, if the word “normalise” appeared in a policy document, then I reviewed the whole document. It was also usually necessary to read preceding and subsequent texts (for example, speeches by other politicians on the same subject or day) to understand the context, meaning and effects of my primary text.

Within each text containing the word “normalise”, I focused on particular features of the term’s use in order to determine its meaning, which were influenced by the key characteristics of colonial land legislation in the Northern Territory identified in Chapter 2. These features included the frequency of use, the author or speaker, the “object” of normalisation (e.g. land tenure, Aboriginal communities, Aboriginal people themselves), the stated objective of normalisation and how Aboriginal people and communities were portrayed, viewed and constructed within the text. I also examined how each text related to other texts, and in particular the nature of the text and its context, how influential the text was on other texts, and its relationship with other texts. Using this analysis, I was able to identify changing patterns in the use, context and meaning of the word “normalise” and reach some conclusions about the key elements of normalisation discourse.

1.2.3 The legal reforms as a product of normalisation discourse

Having set out the key elements of normalisation discourse in the sources identified above, in Chapter 4 my analysis turns to how these elements have found expression in the law. I return

³⁶ Since nearly all sources were available online, this was generally conducted using a simple electronic search.

here to my doctrinal analysis of the land tenure reforms made under the *Land Rights Act*, but consider these texts according to the principles of intertextual analysis explained above, that is, as part of and as a consequence of normalisation discourse. I then draw conclusions about the interaction between normalisation discourse and the reforms, and whether normalisation discourse contains, or has contained, some attributes of the colonial property regime in the Northern Territory identified in Chapter 2.

1.2.4 Limitations of the research design

While my research design enables me to answer my research question, there are clearly some important questions left unanswered, in part because of the inherent limitations of text-based research. Spivak's work highlights some of the limitations of textual analysis. She claims that there is an "epistemic violence" exercised by many (particularly postcolonial) theorists in attempts to construct the colonial subject as "Other".³⁷ By focusing primarily on legal texts produced by the colonising or dominant society, the voices of Aboriginal people are silenced and "the way in which these peoples received, contributed to, modified, or challenged such discourses" is neglected.³⁸ Indeed, Spivak suggests that given the exigencies and extent of colonial repression, it is actually impossible for us to recover the voice of the oppressed colonial subject through textual analysis.³⁹ Moreover, and in a related vein, the effects and context of the texts which form the basis of my analysis cannot be properly understood without an analysis of the way in which the texts are received by, interpreted by and acted upon by certain actors. Sometimes it may be possible to examine how the text is "taken up and incorporated into a sequence or sequences of action"⁴⁰

³⁷ G.C. Spivak, "Can the Subaltern Speak?" in N. Cary and G. Lawrence (eds) *Marxism and the Interpretation of Culture*, (London, Macmillan) at 25.

³⁸ A. Loomba, *Colonialism/Postcolonialism* (London and New York, Routledge, London, 2005) at 193.

³⁹ G.C. Spivak "Can the Subaltern Speak? Speculations on Widow Sacrifice" in (1985) Winter/Spring *Wedge* at 120.

⁴⁰ D. Smith, *Supra*, note 29 at 75.

through the analysis of another text, but often the consequent action will not be reduced to a textual representation.

In order to analyse more comprehensively the relationship between the reforms and the discourse(s) within which they operate, including the articulation of Aboriginal views on the reforms, it would be helpful to conduct interviews with various actors in the field of Aboriginal land tenure reform. There are diverse views and perspectives which could be sought, including those of traditional Aboriginal owners of land affected by the reforms, other Aboriginal community members, politicians and bureaucrats at both the Northern Territory and Commonwealth government levels, employees from Land Councils tasked with representing traditional Aboriginal owners in lease negotiations, and representatives of local Aboriginal organisations located in the affected communities. These interviews are beyond the scope of this thesis, and my conclusions will be affected by the inherent limitations of my textual sources. As a result, I am not purporting to speak for Aboriginal people and nor do I claim to understand or articulate the views of Aboriginal people in relation to the reforms.

My research design might also be criticised for subscribing to the very view of law as a simple instrument of state legality which I am trying to avoid. This stems from my sources which are derived almost solely from government. My focus on these sources might be seen as neglecting how the reforms and the law more generally are constituted by social forms *other* than by legislators and policy-makers.

There are other textual sources that I could use to analyse normalisation discourse in a wider context, particularly media sources. A rigorous review of these sources is also beyond the scope of this project. However, beyond the time and resource constraints, a focus on state-source texts is justified on two principal grounds. First, my sources reflect the elevated regulatory power that state-

sourced texts have in relation to the reforms. Lange criticises what she perceives as an undue focus in qualitative legal research on other social “actors” to understand the social reality of law because “it becomes difficult to distinguish any specific concept of law from a general and vague notion of normative social practices.”⁴¹ I do not think it is necessary to fall into this trap in conducting qualitative legal research if state-sourced law is given due emphasis, reflecting Fitzpatrick’s view that “in the constitution and maintenance of its identity, state law stands in opposition to and asserted domination over social forms that support it.”⁴² Second, given my understanding that state-sourced texts and the laws implementing the reforms themselves are themselves a part of wider discourse, the sources which I have chosen to analyse will still go some way to demonstrating the key characteristics of normalisation discourse.

⁴¹ B. Lange, *Supra*, note 33 at 453.

⁴² P. Fitzpatrick, “Law and Societies”, (1984) 22 *Osgoode Hall Law Journal* 115.

2. The Northern Territory's colonial property regime, Aboriginal land rights, and Aboriginal land tenure reform

Before examining “normalisation discourse” in the context of recent Aboriginal land tenure reform, it is necessary to have an understanding of the colonial basis of the property regime in the Northern Territory, the scheme of the *Land Rights Act* and the substance of the recent reforms. First, I explore some of the key characteristics of the distinctive property regime which was created historically in the Northern Territory. This analysis provides important context to the subsequent enactment of the *Land Rights Act*, as well as providing a counterpoint for my analysis of whether “normalisation discourse” exhibits similar colonial characteristics.

2.1 Colonial underpinnings of the property regime in the Northern Territory

Said has said that “[a]t some very basic level, imperialism means thinking about, settling on, and controlling land that you do not possess, that is distant, that is lived on and often involves untold misery for others.”¹ As in other settler societies, the acquisition of land was central to the colonial enterprise in Australia. The introduction of a system of private property ownership through the grant by the Crown of proprietary interests to settlers, without the consent of the indigenous inhabitants, broadly characterises the legal process by which land was appropriated in Australia. As Godden states, the “‘commons’ on terra firma were progressively enclosed and divided in an emerging system of absolute individual ownership.”²

¹ E. Said, *Culture and Imperialism* (New York, Alfred A. Knopf, 1993) at 7.

² L. Godden, “The Invention of Tradition: Property Law as a Knowledge Space for the Appropriation of the South”, in (2007) 16:2 *Griffith Law Review* (2007) at 380.

The legal source of the Crown's ability to grant interests in land in Australia was the assertion of sovereignty by the Crown, by which the common law of England was imported to Australia including "the power to create and to extinguish private rights and interests within the Sovereign's territory."³ The British Crown first asserted sovereignty over part of the Australian continent on 7 February 1788, when Captain Arthur Phillip read letters patent at Sydney Cove, thus claiming for New South Wales land encompassing approximately one third of the present Northern Territory.⁴ In 1825, the boundary of New South Wales was extended east so that the whole of the land now comprising the Northern Territory was contained within that colony.⁵ The drawing of these boundaries would have enormous legal power, but was largely arbitrary, dictated by lines of latitude and longitude rather than any natural features.

The British Crown did not seek permission from the Aboriginal inhabitants to settle Australia - the assertion of sovereignty and subsequent grant of property interests was a unilateral act. There is debate as to why the Crown considered Australia *terra nullius*,⁶ and why the colonisers made no attempt to form treaties or other agreements with the indigenous inhabitants of Australia as had occurred to varying degrees in the settler colonies of Canada and New Zealand.

³ *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 63 per Brennan J.

⁴ The letters patent asserted sovereignty over land to the east of meridian 135 degrees east. A. Powell, *Far Country: A Short History of the Northern Territory* (Melbourne, Melbourne University Press, 1996) at 1.

⁵ The boundaries of New South Wales were extended to the land east of meridian 129 degrees east in accordance with a proclamation of Governor Darling. A. Powell, *Ibid* at 1.

⁶ I acknowledge that there has been some recent debate in Australia as to whether the term *terra nullius* is a "legal fiction" (and hence that the basis for the High Court's judgment in *Mabo* was flawed) – see for example, M. Connor, *The Invention of Terra Nullius – Historical and Legal Fictions on the Foundation of Australia* (Paddington, Macleay Press, 2005). I am not persuaded by these arguments, and do not consider them in detail here. In particular, while the specific term *terra nullius* may not have been in use at the time of Australia's settlement, I consider that the underlying principle (ie that Australia, while inhabited, did not have a system of laws which was recognized at the time by the British Crown) did apply and underpinned the settlement of Australia until overruled in *Mabo*. For a brief, but erudite, refutation of Connor's thesis, see J. Basten, "A Curious History of the Mabo Litigation", Paper delivered at Native Title Conference 2006: Tradition and Change, Darwin, Northern Territory, 26 May 2006 at <[http://www.lawlink.nsw.gov.au/lawlink.Supreme_Court/ll_sc.nsf/vwFiles/basten260506.pdf/\\$file/basten260506.pdf](http://www.lawlink.nsw.gov.au/lawlink.Supreme_Court/ll_sc.nsf/vwFiles/basten260506.pdf/$file/basten260506.pdf)>.

Banner suggests that this was due to a view held by the colonisers, informed by philosophers including Adam Smith and John Locke, that Aboriginal people in Australia did not possess the requisite level of “civilization” to own the land. Locke had theorised in the seventeenth century that property was only gained from mixing one’s labour with natural resources in a particular way, thus physically transforming the landscape and providing the basis for appropriating the land.⁷ The acquisition of property rights in this manner was associated with “a society’s passage through specific stages of civilization”, as Banner writes:

By the time the English got to Australia, many writers had used the connection between agriculture and property to develop a framework for understanding the development of societies. All societies progressed through four stages, Adam Smith (among others) explained: "hunting, pasturage, farming, and commerce." Each stage corresponded to a particular set of political and economic institutions, including the institution of property. Hunters knew no property. Pastoralists needed, and thus developed, property in their animals. Farmers developed property in their land. And a commercial people like the English invented more complex property arrangements, to suit their needs.⁸

According to Banner, British observers singled out Aboriginal people in Australia as being at the bottom of the hierarchy of civilization when compared with indigenous peoples in other parts of the world – according to primary sources “they were ‘far behind other savages’, ‘the lowest link in the connection of the human races’, ‘the lowest of the nations in the order of civilization’.”⁹ More importantly, since Aboriginal people did not “improve” the land as stipulated by Locke and showed no propensity to do so, they fell into the “uncivilised” hunting category and could not acquire property – accordingly, Australia was *terra nullius* and there for the taking. This representation or construction of Aboriginal people informed and legitimated the appropriation of land in Australia through the legal assertion of sovereignty, and subsequent grant of private property interests.

There is a commonality between Banner’s thesis and some of the key tenets of postcolonial theory, although Banner does not explicitly place his work within this milieu. Postcolonial theorists

⁷ J. Locke, *Two Treatises of Government*, (Everyman’s Library, 1993).

⁸ S. Banner, “Why terra nullius? Anthropology and Property Law in Early Australia” (2005) 23 *Law and History Review* 95 at 106.

S. Banner, *Ibid* at 108.

have written about the legitimating function of dominant, generally Western, societies constructing the colonised, subaltern or “the Other” in specific terms. Drawing on Said’s *Orientalism*,¹⁰ Australian scholars have also argued that the colonial construction of Aboriginal people as uncivilised, “savage” and different was a discourse which served to buttress the hegemonic position of the colonisers and to justify oppressive laws and policies, including the annexation of land and its transformation into clearly-defined units of privately-owned property.¹¹ Additionally, scholars have emphasised the transformative (or “civilizing”) agenda of colonial discourse, and law’s role in effecting this change – if colonialism was primarily a process “in which one society endeavoured to rule and transform another”, then law was its “cutting edge”.¹²

There is debate about the merits of postcolonial theory,¹³ including its relevance in an Australian context.¹⁴ I do not intend here to enter into this debate. For the purposes of my analysis, I accept the broad assertion that the colonial appropriation of land in Australia was tied to particular negative representations of Aboriginal people, and implemented and legitimated by the force of colonial property law. As Mawani suggests, “the links between land, law and identity were (and are) critical to colonial appropriations... The identities of Aboriginal peoples and their relationships to land figured prominently in colonial reterritorialization”.¹⁵

¹⁰ E Said, *Orientalism* (New York, Vintage Books, 1978).

¹¹ See, for example, B. Attwood, “Introduction: Power, Knowledge and Aborigines”, (1992) 35 *Journal of Australian Studies* i; L. Godden, *Supra* note 2, A. Roy “Postcolonial Theory and Law: A Critical Introduction” (2008) 29 *Adelaide Law Review* 315.

¹² S. Engle Merry, “Law and Colonialism” (1991) 25 *Law & Soc’y Rev* 891 at 890.

¹³ See, for example, H.K. Bhabha, “Signs Taken for Wonders” in B. Ashcroft, G. Griffiths and H. Tiffin (eds) *The Postcolonial Studies Reader* (London and New York, Routledge, 1995), H.K. Bhabha, “The Other Question: Difference, Discrimination and the Discourse of Colonialism” in F. Barker (ed), *Literature, Politics and Theory* (London and New York, Routledge, 1986), G.C. Spivak, “Can the Subaltern Speak?” in C. Nelson and L. Grossberg (eds) *Marxism and the Interpretation of Culture* (MacMillan, London, 1988).

¹⁴ See, for example, K. Anderson and C. Perrin, “Beyond Savagery: The Limits of Australian ‘Aboriginalism’” (2008) 14:2 *Cultural Studies Review* 147.

¹⁵ R. Mawani, “Genealogies of the Land: Aboriginality, Law, and Territory in Vancouver’s Stanley Park”, (2005) 14:3 *Social and Legal Studies* 315 at 323.

That said, there were tensions and nuances in the legal process by which land was appropriated from Aboriginal people in the Northern Territory specifically, including in the way that Aboriginal people were represented as part of that process and the legal rights that were granted to them under the new legal regime. These complexities were evident in early “waste lands” settlement legislation which established two very different legal processes for the disposition of land in the Northern Territory – the grant of fee simple interests in land and the grant of pastoral leases.

2.1.1 Surveying, sub-dividing and selling the “waste lands” of the Northern Territory

The land now comprising the Northern Territory remained part of the colony of New South Wales until 6 July 1863, when it was annexed to the recently established colony of South Australia.¹⁶ The land annexed was vast, unsettled and largely unseen by the colonisers, comprising some 1,335,742 square kilometres - approximately six times the size of Great Britain. Despite its vastness, South Australia designed an ambitious process to transform the Northern Territory to a system of private property ownership. The principal legal mechanism for achieving this was the evocatively named “waste lands” legislation.

The original basis for the legislative disposition of land in the Australian colonies was *The Sale of Waste Lands Act 1842 (Imp)*,¹⁷ whereby “the management and disposal of Crown land was first brought under statutory control”.¹⁸ This legislation formed the model for subsequent land settlement legislation in Australia, including in the Northern Territory, creating a system for the conveyance and alienation of “waste lands” in the various Australian colonies by sale only. “Waste Lands of the Crown” were defined as lands in the colonies “which have not been already granted or

¹⁶ *Letters patent annexing the Northern Territory to South Australia*, 1863.

¹⁷ *The Sale of Waste Lands Act 1842 (Imp)* 5&6 Vic c 36.

¹⁸ *Wik Peoples v Queensland* (1996) 187 CLR 1, per Toohey J at 108.

lawfully contracted to be granted to any Person or Persons in Fee Simple, or for an Estate of Freehold, or for a Term of Years, and which have not been dedicated and set apart for some public Use.”¹⁹ It was a precondition to the disposition of lands under the legislation that the land in question be surveyed (unless it was for blocks of land comprising twenty thousand acres or more).²⁰

Upon the grant of responsible government to South Australia in 1856, legislative power to deal with unallocated land was vested in the Parliament of South Australia,²¹ and in 1857 the South Australian Parliament enacted its own waste lands legislation, the *Waste Lands Act 1857 (SA)*,²² which provided (inter alia) for the survey, subdivision and sale of land in South Australia in terms substantially similar to the 1842 Imperial legislation.²³ This legislation would apply in part to the Northern Territory. However, after its annexation to South Australia in 1863, legislation specific to the Northern Territory was enacted (“the *Northern Territory Waste Lands Act*”)²⁴ which created a process for the grant of 500,000 acres of land in the Northern Territory. The remainder of land was to be allocated according to the *Waste Lands Act 1857 (SA)*.

The *Northern Territory Waste Lands Act* provided, inter alia, for the sale by private contract of 500,000 acres of “waste lands” in the Northern Territory on a speculative basis.²⁵ The Governor of South Australia would receive applications for the purchase of 160 acre “country lots” from individuals who would then be issued with “preliminary land orders”.²⁶ In order to be granted as fee simple, the land had to be surveyed within five years, then “selected” by the relevant purchaser. For

¹⁹ *The Sale of Waste Lands Act 1842 (Imp)* 5&6 Vic c 36, s 23.

²⁰ *Ibid*, s 4.

²¹ Section 5 of *The Australian Waste Lands Act 1855 (Imp)* 18&19 Vict c 56 repeated the 1842 legislation relating to the sale of waste lands from the assent date of *The Constitution Act 1856 (SA)*, conferring on the South Australian Parliament the power to make laws regulating the sale and disposal of Crown lands.

²² *The Waste Lands Act 1857 (SA)* 5 Vic 21.

²³ The legislation also provided for the grant of pastoral leases, which will be discussed in the next sub-paragraph.

²⁴ *An Act for regulating the sale or other disposal of Waste Lands of the Crown lately annexed to the Province of South Australia, and for other purposes 1863 (SA)*.

²⁵ *Northern Territory Waste Lands Act*, s 2.

²⁶ *Northern Territory Waste Lands Act*, s 3.

every 160 acre country lot purchased, the purchaser would also be entitled to select “one town lot” within a “proposed township”.²⁷ Thus, a “rigidly defined matrix yeoman farming based on units of 160 acres (65 ha)”²⁸ was envisaged by the legislation, with an attendant process stipulated for the orderly creation of an as yet unnamed and unlocated township. Once 500,000 acres had been so allocated, the remainder of Northern Territory’s waste lands were to be disposed of under the 1857 South Australian waste lands legislation.²⁹

While the ambitious land disposition process set out in the *Northern Territory Waste Lands Act* was largely unsuccessful,³⁰ the legislation provides a striking expression some of the key characteristics of the Northern Territory’s colonial property regime. The very use of the term “waste lands” in the legislation constitutes a powerful metaphor suggesting empty and unoccupied spaces. Legally, “waste lands” were defined as lands which had not been allocated by way of grant of fee simple or leasehold property tenure, and the use of this particular term may owe something to Locke’s theory of the origins of property. The term “waste land” was used by Locke to mean “Land that is left wholly to Nature, that hath no improvement to Pasturage, Tillage or Planting, is called, as indeed it is, waste; and we shall find the benefit of it amount to little more than nothing.”³¹ Arneil writes that this notion of waste land underpinned the defence of England’s right to American soil, “simultaneously imparting a perjorative [sic] connotation to land lying in common and invoking a direct, inverse correlation to European forms of cultivation.”³² Similarly, the use of the term “waste lands” in Australian settlement legislation buttressed European appropriation of the land by

²⁷ *Northern Territory Waste Lands Act*, s7.

²⁸ J.M. Powell, *An Historical Geography of Modern Australia: The restive fringe* (Cambridge University Press, Cambridge, 1988) at 60.

²⁹ *Northern Territory Waste Lands Act*, s 8.

³⁰ For a detailed account of the reasons for this failure, see A. Powell, *Supra* note 4 at 78.

³¹ J. Locke, *Supra* note 7 at par 36.

³² B. Arneil, *The Defence of English Colonialism*, (Clarendon Press, Oxford, 1996) at 142.

invoking Locke's "creation myth"³³ of property, while also invalidating any indigenous claims to the soil on the basis that the Aboriginal inhabitants did not cultivate the land. The absence of any explicit reference to indigenous people in the waste lands legislation is thus telling, but unsurprising – for all legal purposes the lands were uncultivated, "waste" and there for the taking.

The waste lands legislation also made clear the importance of the survey to the disposition of the waste lands in Australia – without surveys recorded in the public maps of the colonies, tenure could not be granted. The survey was thus inseparable from the legal alienation of land, and specifically the conversion of waste lands into private property. As Australian geographer Williams has pointed out in the context of the settlement of South Australia, "the survey system, besides being the conscious embodiment of and vehicle for the implementation of the ideals of the new society, also had a definite geographical expression – [o]n the face of the land there was imposed a deliberately created design; an intricate pattern of roads, fences, paddocks, towns and, eventually, farm boundaries and administrative areas, which formed the framework for all subsequent geographical activities."³⁴

Blomley suggests the survey was a crucial colonial tool for re-ordering space within the hegemony of private property. By the apparently objective act of drawing lines on a map and marking boundaries on the land according to specialised technical surveying expertise, the paradigm of private property was indelibly imprinted on the landscape. Moreover, the survey arbitrated "between an acknowledged regime and those forms of property deemed to lie 'outside' the frontier".³⁵ What lay inside the frontier was safe, civilized, surveyed and clearly defined private

³³ N. Blomley "Law, Property and the Geography of Violence: The Frontier, the Survey, and the Grid" in (2003) 93:1 *Annals of the Association of American Geographers* 121 at 122.

³⁴ M. Williams, *The Making of the South Australian Landscape: a study in the historical geography of Australia* (Academic Press, London and New York, 1974) at 65.

³⁵ N. Blomley, *Supra* note 33 at 128.

property ownership, backed by the legal force of the state. Outside the frontier was wild and savage space devoid of any legally-sanctioned or recognised system of property.³⁶

The visual image created by the land disposition process mandated in the *Northern Territory Waste Lands Act* is of an empty wilderness, being gradually tamed by the orderly grids of the survey and the attendant grant of freehold title. Inside the surveyed lands was order, outside the wild “waste lands”. Although physically present on the land itself, Aboriginal people were absent – rendered legally invisible perhaps by their failure to cultivate the land. However, the existence of a second, very different, legal mechanism for the grant of a unique proprietary interest in the same piece of legislation demonstrates that the characterisation of the colonial property regime in the Northern Territory as being predicated on the legal invisibility or absence of the Aboriginal inhabitants is too simplistic. This proprietary interest was the pastoral lease, and it was a uniquely Australian property law creation.

2.1.2 The Northern Territory pastoral lease

While the *Northern Territory Waste Lands Act* created its own system for the survey and sale of 500,000 acres of fee simple title, it otherwise incorporated the provisions of the *Waste Lands Act* 1857 (SA) and amending legislation. Thus, section 12 of the 1857 legislation was incorporated into the *Northern Territory Waste Lands Act*, which provided for the grant of leases of up to 14 years for “pastoral purposes” to “the discoverer or first occupier” of the land. While the term “discoverer or first occupier” was not intended to include Aboriginal people, explicit provision was made for Aboriginal people in regulations promulgated under the legislation, which provided that leases would

³⁶ *Ibid* at 128.

be subject to such conditions “as the Government shall think necessary to insert therein for the protection of the Aborigines”.³⁷

These conditions took the form of reservations guaranteeing certain rights to Aboriginal people in Northern Territory pastoral leases, “the purpose of which was to ensure that Aboriginal people could continue to exercise rights over and enjoy the use of lands held under lease, according to their customs.”³⁸ Indeed, the first pastoral lease granted in the Northern Territory (in 1876) provided for quite extensive rights, not only of access, but to hunt and to erect dwellings:

RESERVING NEVERTHELESS AND EXCEPTING out of the demise to Her Majesty Her Heirs and Successors for and on account of the present Aboriginal Inhabitants of the Province and their descendants during the continuance of this demise full and free rights of ingress egress and regress into and upon and over the said Waste Lands of the Crown hereby demised and every part thereof and in and to the springs and surface water thereon and to make and erect such wurlies and other dwellings as the said Aboriginal Natives have been heretofore accustomed to make and erect and to take and use for food birds and animals *ferae naturae* in such manner as they would have been entitled to do if this demise had not been made.³⁹

Reservations in favour of Aboriginal people drafted in similar terms have remained a feature of Northern Territory pastoral leases from this time (although there were short periods where pastoral leases were granted without a reservation clause).⁴⁰ Pastoral leases constituted non-exclusive private property interests, with the rights of the pastoralist co-existing with Aboriginal rights and interests under Australian law.⁴¹ The pastoral lease in the Northern Territory did acknowledge an Aboriginal presence in the landscape, and on a relatively large scale given the amount of land subject to such leases. While the amount of land subject to pastoral lease has varied throughout the Northern Territory’s history in accordance with the fortunes of the pastoral industry, as at 2004,

³⁷ *Waste Lands Regulations* 1857 (SA), reg 8 promulgated under the *Waste Lands Act 1857* (Cth).

³⁸ J. Dalziel, “Pastoral Leases in the Northern Territory and the Reservation of Aboriginal Rights, 1863-1931” in (1999) 22:2 *University of New South Wales Law Journal* 462 at 472.

³⁹ Pastoral Leases Nos 1 and 2 issued to EM Bagot quoted in J. Dalziel, *Ibid* at 480.

⁴⁰ *Ibid* at 462.

⁴¹ *Wik Peoples v Queensland* (1996) 187 CLR 1.

these lands covered approximately 619,000 square kilometres or 46 percent of the Northern Territory's land mass.⁴²

It may seem difficult to reconcile a piece of legislation which simultaneously created a system for the grant of exclusive fee simple title over the waste lands of the Northern Territory with no provision at all for Aboriginal people, and for the grant of pastoral leases which expressly reserved Aboriginal rights of access. The former appeared to be predicated upon an image of empty waste lands, whereas the pastoral lease gave some recognition of Aboriginal-occupied space within these waste lands, prima facie challenging any simple characterisation of the Northern Territory's colonial property regime as relying on a frontier myth of vast landscapes devoid of Aboriginal presence.

The simultaneous recognition and denial of an Aboriginal presence in the *Northern Territory Waste Lands Act* may have occurred in response to the particular exigencies of colonialism in the Northern Territory. Historians such as Reynolds have detailed how, by the time the Northern Territory was settled, the architects of colonial policy were becoming increasingly concerned about the welfare of Aboriginal people, particularly in the context of often violent pastoral settlement.⁴³ The High Court has acknowledged that there was an increased concern by Imperial authorities that the rights of indigenous people be respected in colonising South Australia (and thus the Northern Territory), compared with the earlier settlement of the eastern colonies of Australia.⁴⁴ Aboriginal people may have been afforded some recognition in the property landscape through the mechanism of the pastoral lease in response to these concerns.

⁴² Northern Territory Department of Infrastructure, Planning and Environment, *Discussion Paper – Review of the Pastoral Land Act 1992*, July 2004 at <http://www.nretas.nt.gov.au/_data/assets/pdf_file/0017/12860/julydiscussion.pdf>.

⁴³ H. Reynolds, "Native Title and Pastoral Leases" in M.A. Stephenson and S. Ratnapala (eds) *Mabo: A Judicial Revolution* (St Lucia, University of Queensland Press, 1993).

⁴⁴ *Fejo v The Northern Territory* (1998) 195 CLR 96 at par 49 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

However, and despite this increased recognition of Aboriginal presence, the explicit mention of Aboriginal rights in the *Northern Territory Waste Lands Act* relied on a careful representation of indigeneity, so that Aboriginal people could not threaten the proprietary interests of settlers. Specifically, the wording of pastoral lease reservations depended on the representation of Aboriginal people as nomadic hunters of wild animals who erected only temporary structures and who did not cultivate. An 1848 despatch from Secretary of State Earl Grey to the Governor of New South Wales reflects this view – according to him, leases granted for pastoral purposes were:

not intended to deprive the natives of their former right to hunt over these districts, or to wander over them in search of subsistence, in the manner in which they have been heretofore accustomed, from the spontaneous product of the soil, except over land actually cultivated or fenced in for that purpose.⁴⁵

Thus, Aboriginal people lived a subsistence existence, reaping only “spontaneous” produce and expressly excluded from land which was farmed or “fenced in”. In addition, the type of Aboriginal rights recognised were deliberately circumscribed so as not to interfere with the pastoralists’ superior property rights – only rights of access, hunting and relating to the erection of dwellings were recognised.⁴⁶ Thus, Aboriginal people were firmly boxed into the “hunter” category of the developmental model of civilization, which gave them no entitlement to property in the land itself under Australian law.

The simultaneous denial and recognition of an Aboriginal presence by the *Northern Territory Waste Lands Act* occurred through the grant of different proprietary interests. The fee simple title conferred upon the grantee the “lawful right to exercise over, upon, and in respect to, the land, every

⁴⁵ Earl Grey to Governor Sir CA FitzRoy, Despatch No 24, 11 February 1848, Historical Records of Australia, Series 1, vol 26, CO 201/382 in J. Dalziel, *Supra* note 38 at 465.

⁴⁶ The subordination of Aboriginal interests in the land covered by pastoral leases in the Northern Territory has since been recognised by Australian courts, with pastoral leases extinguishing exclusive Aboriginal rights to control access to the land, and pastoral rights prevailing over any remaining non-extinguished native title rights and interests (see *Western Australia v Ward* (2002) 213 CLR 1).

act of ownership which can enter into the imagination.”⁴⁷ Thus, the grant of fee simple title could not, by definition, recognise the existence of other rights in the landscape. By contrast, pastoral leases were non-exclusive in nature, deliberately designed to give the pastoralists a right of pasturage only and permitting the co-existence of other rights. The lesser property right granted by the pastoral lease reflected the position of pastoralism on the continuum of civilization envisaged by Locke - after hunting, but before farming and commerce. While pastoralists had property in their animals, it was only through cultivation that property rights in the land were acquired.⁴⁸ Thus, pastoral leases were lower on the hierarchy of Australian property interests, and permitted the legal and geographical co-existence of Aboriginal people and their non-proprietary interests.

In summary, the *Northern Territory Waste Lands Act* provides an illuminating example of the colonial property regime in the Northern Territory, and the way that property law reflected and reinforced ideas about Aboriginal people. The exclusive nature of fee simple title through the land disposition processes in the *Northern Territory Waste Lands Act* and subsequent legislation necessarily excluded Aboriginal people from the property landscape. The survey facilitated this process - through the apparently objective process of drawing lines on a map in accordance with specialised surveying expertise, the colonial spatial paradigm was indelibly imprinted on the landscape, and the land converted into exclusive private property ownership with any Aboriginal presence removed or ignored. However, and simultaneously, Aboriginal people were afforded space in the colonial property landscape through the mechanism of the pastoral lease, although any recognition of Aboriginal presence was always subject to the superior proprietary rights of the settlers.

⁴⁷ *Commonwealth v New South Wales* (1923) 33 CLR 1 per Isaacs J.

⁴⁸ S. Banner, *Supra* note 8 at 105.

2.1.3 Conclusions about Northern Territory colonial property regime

There were a multitude of other factors which contributed to the unique tenurial map in the Northern Territory, and which are not investigated in any great detail here. Perhaps most significantly, non-indigenous settlement did not occur on the scale either envisaged by the architects of colonial policy in the Northern Territory or experienced elsewhere in Australia. According to the 1971 Census, just a few years prior to the introduction of Aboriginal land rights legislation in the Northern Territory, there were only 62,947 people usually resident in the Northern Territory⁴⁹ of whom 23,253 were Aboriginal.⁵⁰ It seems likely that the slow rate of settlement contributed to a property regime where Aboriginal people were, even if by default through the failure to grant tenure, afforded more legal space than in other parts of Australia. By the advent of land rights in 1976 there still existed in the Northern Territory large tracts of unalienated Crown land which had not been transformed to private property ownership, comprising approximately 22 percent of the Northern Territory's land mass.⁵¹ In addition, large reserves were created in the Northern Territory for the use and benefit of Aboriginal people from the early twentieth century onwards. By 1976, reserve lands comprised some 257,988 square kilometres or 19 percent of the Northern Territory's land mass.⁵²

Thus, in the Northern Territory Aboriginal people retained rights to significant areas of land – in particular, co-existing Aboriginal rights on pastoral leases and the existence of large areas of reserve land ensured legal acknowledgement of Aboriginal interests in approximately 65 percent of

⁴⁹ 1971 Australian Census, Australian Bureau of Statistics

<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3105.0.65.0012006?OpenDocument>>.

⁵⁰ J.C. Altman and J. Nieuwenhuysen, *The Economic Status of Australian Aborigines* (Cambridge University Press, London, 1979) at 4.

⁵¹ This figure is based on the quantity of land granted after land claim under the *Land Rights Act* until 2000, which was restricted to “unalienated Crown land” per D. Pollack, “Indigenous Land in Australia: A Quantitative Assessment of Indigenous Landholdings in 2000”, Working Paper No 221/2001, Centre for Aboriginal Economic Policy Research, Australian National University, 2001 at 19.

⁵² *Ibid* at 19.

the Northern Territory's land mass.⁵³ The vast majority of the Northern Territory (some 89 percent) was covered either by reserves created for the benefit of Aboriginal people or non-exclusive pastoral leases which preserved certain Aboriginal rights of access, or had not been the subject of a Crown grant. This picture of the Northern Territory landscape is at odds with characterisations of Australia's colonial property regime as predicated on the exclusion of Aboriginal people through the inexorable growth of exclusive private property ownership and on the frontier myth of the Northern Territory as a vast empty wilderness. In fact, the state created a complex web of property interests that conferred varying degrees of rights on Aboriginal people. This resulted in a diverse and complex property map in the Northern Territory, which simultaneously denied and acknowledged an indigenous presence.

2.2 The *Land Rights Act*

In 1976, the Commonwealth Parliament enacted the *Land Rights Act*⁵⁴ following an extensive inquiry by a specially-appointed Aboriginal Land Rights Commissioner, Justice Woodward, and, in doing so, substantially redrew the tenorial map in the Northern Territory. The *Land Rights Act* is a remarkable enactment, predating by nearly two decades the recognition of native title by the Australian judiciary in *Mabo*,⁵⁵ establishing the first statutory scheme in Australia whereby Aboriginal people could make land claims based on their traditional connections to the land. It represented a radical departure from previous colonial land policies in Australia. The legislation provided for the transfer of existing Aboriginal reserves to fee simple Aboriginal ownership and established a land claims process by which unalienated Crown lands in the Northern Territory could be claimed and

⁵³ This figure was arrived at by adding the figures of 19 percent of reserve lands and 46 percent covered by pastoral leases in the Northern Territory.

⁵⁴ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

⁵⁵ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

transferred to freehold Aboriginal ownership. These lands are generally referred to as Aboriginal land.

The *Land Rights Act* is federal legislation, and hence it is the Commonwealth, rather than the Northern Territory, that has jurisdiction over Aboriginal land granted under the legislation. Despite the fact that the Commonwealth government granted responsible government to the Northern Territory shortly after the enactment of the *Land Rights Act* in 1978,⁵⁶ the powers of its Parliament fell far short of statehood. The Northern Territory's legal status as a territory of Australia meant that the Commonwealth retained legislative power over the Northern Territory by virtue of the "territories power" in the Australian Constitution.⁵⁷ This ensured that the *Land Rights Act*, as Commonwealth legislation, continued to apply. It also gave the Commonwealth the power to override Northern Territory legislation. In addition, Aboriginal land cannot be resumed, compulsorily acquired, or forfeited under any law of the Northern Territory,⁵⁸ further limiting the Northern Territory's jurisdiction over the land. As a result, the Commonwealth (as opposed to the Northern Territory) has been the key architect of policy and legislative reform in relation to Aboriginal land.

The *Land Rights Act* attempts to recognise the extraordinarily complex systems of traditional Aboriginal land-holding operating in the Northern Territory and to give them legal effect, an entirely novel approach for any legislature in Australia. There are obvious limitations inherent in a western and state-based property system attempting to categorize and define traditional Aboriginal land ownership with entirely different cultural and societal foundations. In addition, large areas of the most economically viable Northern Territory land were excluded from the legislative scheme (most

⁵⁶ *Northern Territory (Self-Government) Act 1978 (Cth)*. In 1911, the Commonwealth had assumed responsibility for the Northern Territory from South Australia.

⁵⁷ Section 122 of the Australian Constitution authorises the Commonwealth to make laws with respect to the territories, including the Northern Territory.

⁵⁸ *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*, s 67.

significantly, land within proclaimed towns and the vast area of Northern Territory land covered by pastoral leases). Nevertheless, the legislation has been an effective mechanism to return large areas of land to exclusive Aboriginal ownership and control. As at 30 June 2000, the state had granted approximately 44 percent of land in the Northern Territory as inalienable Aboriginal freehold,⁵⁹ an area of nearly 600,000 square kilometres (or of nearly two thirds the size of British Columbia's land mass).⁶⁰ By comparison, in 1996 just 0.2% of the land in New South Wales was held by indigenous interests.⁶¹ South Australia had the next largest proportion of indigenous land after the Northern Territory, comprising 19.3% of the total land mass.⁶² The Northern Territory is thus unprecedented in Australia in terms of the sheer quantity of land under the exclusive control of Aboriginal people.

Taylor estimates that over 70% of the Northern Territory's indigenous population resides on Aboriginal-owned land in settlements or communities of varying size.⁶³ These Aboriginal communities are small in size. In 2001, according to Taylor, there were approximately 9 Aboriginal communities in the Northern Territory with a population of between 1000 and 2000, 50 communities with a population of between 200 and 999 inhabitants, and some 570 "widely dispersed and small population clusters comprised of family groups" on outstations located on Aboriginal land, pastoral station excisions and "town camps" on leasehold tenure located on the periphery of major Northern Territory towns.⁶⁴ Of the 73 Aboriginal communities comprising 100 people or

⁵⁹ D. Pollack, *Supra* note 51 at 19.

⁶⁰ This statistic excludes other forms of indigenous land interests and ownership in the Northern Territory, which may include native title interests, special purposes leases, pastoral leases, crown leases, and community living areas excised from pastoral leases.

⁶¹ D. Pollack, *Supra* note 51 at 9.

⁶² *Ibid* at 9.

⁶³ Taylor's calculation also includes two other forms of Aboriginal-owned tenure, community living areas excised from pastoral leases under Northern Territory legislation and special purpose lease town camps within or close to urban areas. J. Taylor, "Indigenous economic futures in the Northern Territory: The demographic and socioeconomic background", *CAEPR Discussion Paper No 246*, CAEPR, ANU, Canberra, 2003 at 5.

⁶⁴ *Ibid*, p 4.

more in the Northern Territory,⁶⁵ 52 are located on Aboriginal land granted under the *Land Rights Act*.⁶⁶

2.2.1 Land-holding and leasing under the Land Rights Act

The *Land Rights Act* provided for the transfer of existing Aboriginal reserves to fee simple Aboriginal ownership, and established a land claims process by which unalienated Crown lands in the Northern Territory could be claimed by “traditional Aboriginal owners” and subsequently transferred to them in fee simple.⁶⁷

Traditional Aboriginal owners are, in relation to a relevant tract of land, a “local descent group” of Aboriginals who:

- a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
- b) are entitled by Aboriginal tradition to forage as of right over that land.⁶⁸

While this definition may seem broad, the dual requirements of a “local descent group” with “*primary spiritual responsibility*” (emphasis added) for sites on the relevant land are quite restrictive. The consequence is that the traditional Aboriginal owners of a particular area of land, including of land upon which communities are located and where many Aboriginal people live, will often be a relatively small and defined group. The distinction between traditional Aboriginal owners and the wider Aboriginal community, including residents in communities on Aboriginal land, is crucial for

⁶⁵ Australian Government, *Communities and Prescribed Areas*, <http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/about_response/overview/communitiesprescribed/Pages/default.aspx>.

⁶⁶ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), Sch 7.

⁶⁷ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 50.

⁶⁸ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s3.

understanding how land-holding works under the *Land Rights Act*, and the policy reasons underpinning recent Aboriginal land tenure reform.

Traditional Aboriginal owners do not own Aboriginal land directly. Instead, there is a rather complex “tripartite relationship between traditional Aboriginal owners, land trusts and land councils ... [which] has the effect of balancing a number of customary imperatives about use of and responsibility for land with western legal accountabilities for dealings in land”.⁶⁹

Aboriginal land granted under the *Land Rights Act* is vested in land trusts. They are corporate bodies with common seals that are capable of suing and being sued in their corporate name.⁷⁰ Land trusts must have a chairperson and at least three other members appointed by the Minister on the nomination of the relevant land council for the area.⁷¹ They hold the land for the benefit of Aboriginal people entitled by tradition to use or occupy the land,⁷² and accordingly, the beneficiaries of land trusts are not limited to traditional Aboriginal owners, but encompass a broader category of Aboriginal persons who may live on the land and have traditional rights in the land (which rights do not amount to traditional ownership). A land trust may acquire, hold and dispose of real and personal property,⁷³ and its functions include holding title to Aboriginal land and exercising “its powers as owner of that land for the benefit of the Aboriginals concerned.”⁷⁴

However, land trusts cannot exercise their functions in relation to the land they own except in accordance with a direction given by the land council for the area where the land is located. The

⁶⁹ J.C Altman, C. Linkhorn and J. Clarke, J. Altman, C. Linkhorn and J. Clark, *Land Rights and Development Reform in Remote Australia*, Discussion Paper No. 276, Centre for Aboriginal Economic Policy Research, ANU, Canberra, 2005 at 5.

⁷⁰ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 4.

⁷¹ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 7.

⁷² *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 4(1).

⁷³ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 4(3)(c).

⁷⁴ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 5(1).

land trust must act in accordance with any direction given to it by the land council.⁷⁵ Thus, “although title is held by a land trust, it is the land council for the area in which the land is situated which effectively manages the land, subject to the limitations on dealings with land set out in the Act.”⁷⁶ Land councils are corporate bodies created by the *Land Rights Act* whose functions include consulting with, representing and assisting Aboriginal land owners and administering Aboriginal land generally.⁷⁷ Land council members live in the area of the land council and are chosen by Aboriginal people living in the area.⁷⁸ There are currently four land councils established by the *Land Rights Act*: the Northern Land Council, the Central Land Council, the Anindilyakwa Land Council and the Tiwi Land Council.

Land councils are significantly constrained in the way they can act in relation to Aboriginal land. In particular, in carrying out their functions, a land council shall have regard to the interests of and shall consult with the traditional Aboriginal owners of the land. More importantly, land councils cannot take any action in any matter in connection with land held by a land trust, including the giving of a direction to a land trust, unless the land council is satisfied that the traditional Aboriginal owners of the land understand the nature and purpose of the proposed action and, as a group, consent to it.⁷⁹ This requirement ensures that decisions about land owned by land trusts are ultimately and always made by those who own the land under Aboriginal tradition.

This tripartite relationship between land trusts, land councils and traditional Aboriginal owners governs the leasing provisions of the *Land Rights Act*. Section 19 enables a land trust to grant leases,

⁷⁵ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 5(2).

⁷⁶ G. Neate, *Aboriginal Land Rights Law in the Northern Territory: Volume 1* (Alternative Publishing Cooperative Ltd, 1989) at 354.

⁷⁷ *Aboriginal Land Rights Act (Northern Territory) 1976* (Cth) s 23.

⁷⁸ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), ss 22 and 29.

⁷⁹ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 23.

licences, easements, and other interests upon the direction in writing from the relevant land council.

A land council cannot give such a direction unless satisfied that:

- a) the traditional Aboriginal owners (if any) of that land understand the nature and purpose of the proposed grant, transfer or surrender and, as a group, consent to it;
- b) any Aboriginal community or group that may be affected by the proposed grant, transfer or surrender has been consulted and has had adequate opportunity to express its view to the Land Council; and
- c) in the case of a proposed grant of a lease or licence – the terms and conditions of that lease or licence are reasonable.⁸⁰

Consent must be given in accordance with the traditional decision-making processes of traditional Aboriginal owners, and if there is no such process, then by a process as agreed by the traditional Aboriginal owners.⁸¹ Accordingly, traditional Aboriginal owners have a veto over the alienation of their land as a collective. Other Aboriginal people with traditional rights on the land (but who are not traditional owners) must also be consulted, but do not have a power of veto. Any rent or other payments received by a land council on behalf of a land trust are payable to or for the benefit of the traditional Aboriginal owners.⁸² The consent of the relevant land council (and by extension the traditional Aboriginal owners) must be obtained if the holder of an interest wishes to transfer that interest or grant a subsidiary interest (for example, if a leaseholder wishes to grant a sub-lease or obtain a mortgage).⁸³

While traditional Aboriginal owners control the alienation of their land, there are significant legal constraints on their power. First, the Commonwealth Minister for Aboriginal Affairs must consent to the grant of long-term interests in land⁸⁴ and for contracts entered into by land trusts

⁸⁰ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 19(5).

⁸¹ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s77A.

⁸² J.C Altman, C. Linkhorn and J. Clarke, *supra* note 69 at 7.

⁸³ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 19(8).

⁸⁴ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s19(7). The maximum term which could be granted without Ministerial consent was originally 10 years, was then extended to 21 years pursuant to amendments made by the *Aboriginal Land Rights (Northern Territory) Amendment Act 1987* (Cth), and was most recently extended to 40 years pursuant to amendments made by the *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* (Cth).

(which would include leases, licences and other interests in land) involving large monetary amounts.⁸⁵ Secondly, the *Land Rights Act* permits ongoing “occupation” of Aboriginal land by Government entities that were occupying the land before its grant to a land trust.⁸⁶ The government entities only pay rent where continuing occupation is not for a “community purpose”.⁸⁷ Thus, there is no obligation on the government to negotiate leases or to pay rent for pre-existing government occupation of Aboriginal land for services such as schools, police stations, and medical clinics.

Access to Aboriginal land, and hence to many Aboriginal communities, is restricted. Aboriginal people are entitled to enter upon Aboriginal land and use or occupy that land “to the extent that that entry, occupation or use is in accordance with Aboriginal tradition.” This ensures the continued enjoyment of traditional rights by Aboriginal people regardless of whether the people also come within the narrow category of traditional Aboriginal owners of the land.⁸⁸ Pursuant to section 70(1) of the *Land Rights Act*, it is an offence for any other person to enter or remain on Aboriginal land. Section 73(1) empowers the Legislative Assembly of the Northern Territory to make laws regulating or authorizing the entry of persons on Aboriginal land, and in 1979 the Northern Territory passed the *Aboriginal Land Act* (NT), which provides, inter alia, that a person should not enter onto or remain on Aboriginal land or use certain types of roads unless issued with a permit to do so. Traditional Aboriginal owners and their delegates, and the relevant Land Council have the power to issue or revoke permits. The Northern Territory Minister in charge of the Act may also issue permits to people in certain categories (for example, Commonwealth and Northern Territory public servants). Thus, the traditional Aboriginal owners and the relevant land councils operate a permit system for entry onto Aboriginal land in the Northern Territory.

⁸⁵ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s27(3). The cap in the 1976 legislation was \$50,000, which was extended to \$100,000 and is now \$1000,000 following the 2006 amendments.

⁸⁶ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 14.

⁸⁷ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 15(1).

⁸⁸ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s71(1).

In contrast to other towns in Australia, most Aboriginal communities in the Northern Territory are located on freehold land owned by an Aboriginal land trust, and the land must be dealt with in accordance with the *Land Rights Act* rather than under general property law. The legal regime created by the *Land Rights Act* is a day-to-day reality for most Aboriginal people living in these communities (whether or not they are traditional Aboriginal owners of the relevant land), with a permit system in effect for non-indigenous people and traditional rights and uses of the land preserved. The traditional Aboriginal owners hold ultimate legal authority over any dealings in Aboriginal land upon which communities are located, as opposed to Aboriginal residents or community members generally. As discussed, the traditional Aboriginal owners of a particular tract of land may be small in number compared with the broader Aboriginal community who reside there. This distinction has led Terrill to suggest that the *Land Rights Act* “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.”⁸⁹ Nevertheless, traditional Aboriginal owners’ legal control is not absolute; the Northern Territory has the power to grant permits to access Aboriginal land in particular circumstances, certain dealings on Aboriginal land must be approved by the Commonwealth Minister, pre-existing occupancy by government bodies is preserved by the legislation, and perhaps most significantly, the Commonwealth retains the power to amend the legislation at any time and to compulsorily acquire Aboriginal land.

2.2.2 Formal tenure in Aboriginal communities – the reality

Despite the location of most Aboriginal communities on Aboriginal land, and the existence of a statutory regime for dealing with that land through the mechanism of section 19 of the *Land*

⁸⁹ L. Terrill, “The Days of the Failed Collective: Communal Ownership, Individual Ownership and Township Leasing in Aboriginal Communities in the Northern Territory”, (2009) 32:3 *UNSW Law Journal* 814 at 842.

Rights Act, most property dealings within Aboriginal communities on Aboriginal land occur informally.⁹⁰ Terrill canvases a range of explanations and suggests that one of the main reasons for the informal nature of tenure in communities is that government agencies have historically failed to obtain leases for infrastructure and buildings which they fund or occupy.⁹¹ The vast majority of infrastructure and buildings in Aboriginal communities are funded and/or built by the Northern Territory or Commonwealth governments, rather than through private enterprise. While leases have been granted with respect to some premises in Aboriginal communities (generally to private proponents for commercial operations), the Northern Territory government has not obtained secure tenure for buildings and infrastructure which it owns or funds, such as police stations, health clinics and schools.⁹² Indeed, it appears to have been Northern Territory government policy *not* to obtain tenure on Aboriginal land.⁹³

Michael Dillon and Neil Westbury, senior government advisers on indigenous affairs with highly influential views on government policy, point out that this policy was partly based on section 14 of the *Land Rights Act*, discussed above, but also that the “implicit rationale for the Northern Territory policy (this is rarely discussed publicly by Northern Territory officials) is 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.”⁹⁴

⁹⁰ The focus here is on Aboriginal land upon which communities are located, as distinguished from Aboriginal land outside communities. On land outside Aboriginal communities, a variety of agreements have been and are negotiated pursuant to s19 of the *Land Rights Act*, including with respect to commercial developments, tourism, pastoral operations, wildlife harvesting and other private enterprises.

⁹¹ L. Terrill, *Supra* note 89 at 821. This view is also held by influential economist Jon Altman, who in a jointly-authored paper argues that “[e]xisting state occupation of Aboriginal land should be regularised and put on a proper legal and commercial footing through the negotiation of leases.” (J. Altman, C. Linkhorn and J. Clarke, *Supra* note 69 at 9).

⁹² Dillon and Westbury suggest that the Commonwealth has historically tended to be more likely to secure tenure for its buildings and other infrastructure, see M. Dillon and N. Westbury, *Beyond Humbug: Transforming government engagement with Indigenous Australia*, (West Lakes, Seaview Press, 2007) at 131.

⁹³ M. Dillon and N. Westbury, *Ibid* at 131.

⁹⁴ *Ibid* at 132.

The Northern Territory government's failure to obtain secure tenure has denied traditional Aboriginal owners a significant revenue stream for use of their land and perhaps prevented the emergence of a market in the land. As Dillon and Westbury point out, "these governments are effectively avoiding their primary task of putting in place the institutional framework necessary for economic, social and cultural development of their citizens."⁹⁵ While claiming that government bears some responsibility for the lack of formal tenure in townships, Dillon and Westbury blame the overly bureaucratized and costly process for granting leases under the existing leasing mechanisms in the *Land Rights Act*. They believe that this "structural bottleneck" has prevented the emergence of markets in township land.⁹⁶ Terrill rejects this argument, pointing to the failure of governments to apply for leases as the key reason for the lack of formal tenure in communities, rather than perceived transaction costs in obtaining leases.⁹⁷

Perhaps most significantly in the context of recent Aboriginal land tenure reform, the vast majority of Aboriginal people resident in communities live in publicly-funded housing. Historically, there has been minimal (if not zero) private home ownership on Aboriginal land in the Northern Territory, leading Dillon and Westbury to suggest that "it is increasingly clear that public housing provision ... is the most effective means to address the substantial housing shortages in remote communities."⁹⁸ However, tenure has never been sought or granted for publicly-funded housing in Aboriginal communities. Thus, there are "significant populations of Indigenous residents within townships who are not traditional owners and thus do not have formal property rights within townships".⁹⁹ While public housing on Aboriginal land is owned by the relevant land trust pursuant

⁹⁵ *Ibid* at 132.

⁹⁶ *Ibid* at 140.

⁹⁷ L. Terrill, *Supra* note 89 at 822, footnote 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 to cumbersome. There is no evidence of such a practice."

⁹⁸ M. Dillon and N. Westbury, *Supra* note 92 at 152.

⁹⁹ *Ibid* at 131.

to the law of fixtures, it is not traditional owners who have acted as landlords but local community councils (distinct from land councils established by the *Land Rights Act*) to whom residents pay a nominal fee for basic services and maintenance. The lack of formal tenure arrangements has meant that the government has not been formally required as a lessor to maintain and manage community housing on Aboriginal land, and nor have Aboriginal residents of public housing been required to comply with normal tenants' responsibilities. In addition, traditional Aboriginal owners have had little or no formal say over the terms and conditions of their occupancy, and the Aboriginal residents of communities have not held any enforceable property rights.

2.3 Aboriginal land tenure reform in the Northern Territory

2.3.1 Township Leases

It is against this background that the recent barrage of land tenure reforms affecting Aboriginal land must be considered. Mal Brough, the former Minister for Indigenous Affairs, seized upon the lack of enforceable property rights held by Aboriginal residents within Aboriginal communities in 2006 when he introduced the first significant reforms to the *Land Rights Act*. However, Brough saw the reason for the lack of formal tenure in communities (and more particularly, lack of home ownership) on Aboriginal land not as a failure of government and other parties to obtain leases or other interests to secure their assets, but rather to the character of land-holding under the *Land Rights Act* itself.

Brough's view drew on an emerging body of scholarship and opinion in Australia that was based on the enormously influential ideas of Peruvian economist Hernando de Soto. De Soto argued that informal and communal land-owning arrangements lock up capital and preclude access to credit, and that the way to free this capital is through formal, enforceable and individual property

rights.¹⁰⁰ In 2004, the influential Aboriginal leader, Noel Pearson, co-authored a paper based on de Soto's ideas, claiming that communally-owned inalienable title was effectively "dead capital" that created structural barriers to Aboriginal peoples' participation in the real economy.¹⁰¹ In 2005, Helen Hughes of the Centre for Independent Studies (a conservative think-tank in Australia) foreshadowed the land tenure reforms to come, claiming that Aboriginal land policy since the 1970s had been a failed socialist experiment,¹⁰² and that "[a]n individual property rights land ownership framework must be established to enable Aborigines and Torres Strait Islanders to develop enterprises and attract investment to create jobs and incomes. Ninety-nine year leases are essential to facilitate individually owned private housing."¹⁰³

In early 2006 the conservative Howard Government introduced legislative amendments designed to transform land-holding in Aboriginal communities located on Aboriginal land in the Northern Territory. Using strong language, Brough decried that Aboriginal people in the Northern Territory were "marooned in unsafe settlements devoid of economic activity and hope for the future".¹⁰⁴ He attributed the alleged dysfunction, as well as the poverty and lack of economic activity in Aboriginal communities to the communal nature of land-holding under the *Land Rights Act*. Notwithstanding the fact that section 19 of the *Land Rights Act* already provided a mechanism by which individual property rights could be granted, Brough introduced the *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006* (Cth), which "provides for a new tenure system for townships on Aboriginal land that will allow individuals to have property rights. It is individual

¹⁰⁰ H. De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York, Basic Books, 2000).

¹⁰¹ N Pearson and L Kostakisi-Liano, "Building Indigenous Capital: Removing Obstacles to Participation in the Real Economy" in (2004) 2:3 *Australian Prospect*.

¹⁰² H. Hughes and J. Warin, "A New Deal for Aborigines and Torres Strait Islanders in Remote Communities" (2005) *Issue Analysis No 54*, 1 March 2005, Centre for Independent Studies at 1.

¹⁰³ *Ibid* at 2.

¹⁰⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 31 May 2006, 5 (Mal Brough, Minister for Indigenous Affairs).

property rights that drive economic development. The days of the failed collective are over.”¹⁰⁵ The legislation was aimed directly at facilitating private home ownership on Aboriginal land, and encouraging private enterprise (whether or not by Aboriginal people).

The legislation created an additional mechanism by which a specific type of lease could be granted under the *Land Rights Act*. Section 19A of the *Land Rights Act* permits land trusts to grant a lease over an entire community (or “township”) on Aboriginal land for periods of between 40 and 99 years (“Township Leases”),¹⁰⁶ and section 20 created the office of Executive Director of Township Leasing to enter into Township Leases.¹⁰⁷ While the grant of a Township Lease requires the direction in writing of the relevant land council and the consent of traditional owners in accordance with tripartite relationship described above, the Executive Director has absolute discretion to issue sub-leases to any person¹⁰⁸ with “no requirement to go back to traditional owners for further approvals once the ‘headlease’ is agreed.”¹⁰⁹ Existing rights and interests, including leases and traditional rights of access pursuant to section 71 of the *Land Rights Act*, are preserved.¹¹⁰ However, if those rights and interests were granted by a land trust (eg, leases and licences) then they take effect as though they were granted by the Executive Director.¹¹¹ Thus, with the exception of traditional rights of access, a government entity (the Executive Director of Township Leasing) has exclusive control over land which is subject to a Township Lease. As Terrill points out, Township Leases “effectively takes as a model the position of vacant crown land as the natural starting point for the development of individual tenure”, but “instead of actual vacant crown land, a 99 year lease

¹⁰⁵ *Ibid.*

¹⁰⁶ The legislation originally provided that Township Leases could only be granted for a period of 99 years. However, this was later changed under the new federal Labor government to allow the grant of leases for between 40 and 99 years (*Indigenous Affairs Legislation Amendment Act 2008* (Cth)).

¹⁰⁷ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 20C(a).

¹⁰⁸ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 19A(14) provides that a Township Lease cannot contain any provision requiring the consent of any person to the grant of a sub-lease.

¹⁰⁹ M. Dillon and N. Westbury, *Supra* note 92 at 122.

¹¹⁰ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 19A(10).

¹¹¹ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 19A(11).

to a government entity becomes the substructure on which normalised tenure arrangements could be established.”¹¹²

Beyond the express requirements contained in section 19A, the terms and conditions of Township Leases are a matter for negotiation between the parties to the Township Lease. However, fairly rigid policies dictating the “standard” terms of Township Leases has meant that in reality there is little room for the parties to manoeuvre.¹¹³ For example, in relation to rent, an up-front payment is to be made by the Executive Director to cover the first fifteen years of the lease, with traditional Aboriginal owners receiving rental income from sub-leases granted by the Executive Director after this point, less the operating and administrative costs of the Executive Director. This effectively means that rental income to traditional Aboriginal owners from Township Leases is uncertain (at least after payment is made for the first fifteen years), and entirely dependent on the quantum of rent and sub-leases negotiated by the Executive Director. The standard Township Lease terms also require the Executive Director to form a “consultative forum” for traditional Aboriginal owners to discuss issues related to the Township Lease.¹¹⁴ This forum is not vested with decision-making power with respect to the Township Lease – its role is to “recommend, provide advice and keep the [Executive Director] aware of emerging issues”.¹¹⁵ Indeed, there is no provision for traditional Aboriginal owner governance or decision-making in respect of land subject to Township Leases – these functions are supplanted entirely by the Executive Director.

The Township Lease reforms were controversial. Some critics focused on the reform’s economic rationale, suggesting that Township Leases would not provide the anticipated lever for economic development trumpeted by the policy-makers because of the unique economic conditions

¹¹² L. Terrill, *Supra* note 89 at 825.

¹¹³ Office of Township Leasing Fact Sheet, “Whole-of-township leases: standard terms”, at <http://www.otl.gov.au/userfiles/file/factsheet_6.PDF>.

¹¹⁴ *Ibid.*

¹¹⁵ L. Terrill, *Supra* note 89 at 849.

in remote Aboriginal communities in the Northern Territory. For example, Altman, Linkhorn and Clarke criticised the Township Lease model on the basis that “mainstream housing models are difficult to transpose to these areas dominated by community rental because there is a limited mainstream economic base, the market value of the land is low, the capacity of Indigenous people in these areas to borrow money is limited and mainstream financial institutions are generally absent.”

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Other scholars attempted comparative analyses of the Township Lease model with individual titling regimes overseas. Hepburn critiqued the reforms by reference to failed individual titling experiments in New Zealand and the United States, arguing that the primary effect of these overseas experiments “has been the acceleration of land loss and the abolition of indigenous communities as ‘autonomous and integral sociopolitical entities’”.¹¹⁷ Stephenson compares the Township Lease reforms with Canadian regimes of individual titling on reserve land, concluding that under the Township Lease model Aboriginal people do not have as much economic and legal control over their lands as in the provisions of the Canadian *Indian Act* regarding the surrender and designation of reserve lands.¹¹⁸

Other critics have attempted to unravel the extent to which other policy agendas might lie at the heart of the reforms. Sean Brennan linked the Township Lease reforms (and other changes to the *Land Rights Act*) to the key recommendations of a controversial Howard Government-commissioned review into the *Land Rights Act* almost a decade earlier, a review widely perceived as an attack on

¹¹⁶ J. Altman, C. Linkhorn and J. Clark, *Supra* note 69 at 12.

¹¹⁷ S. Hepburn, “Transforming Customary Title to Individual Title: Revisiting the Cathedral”, in (2006) 11:1 *Deakin Law Review* 63.

¹¹⁸ M. Stephenson, “To lease or not to lease? The leasing of indigenous statutory lands in Australia: lessons from Canada”, (2009) 35:3 *Commonwealth Law Bulletin* 545.

land rights and at Aboriginal power and governance structures in the Northern Territory.¹¹⁹

Brennan criticised the federal government for yielding to a “temptation to grandstand and trumpet decisive government action, when the opportunity existed for less spectacular but more inclusive collaboration with stakeholders,” but admitted that only time will tell if “changes in land title arrangements ... [are] aimed at the development needs of Aboriginal people’ or, alternatively, at ‘giving governments and third parties more power over land use and access at the expense of Aboriginal rights’”.¹²⁰ Terrill recently took up Brennan’s challenge to re-examine the real aim of the reforms by analyzing the legislative framework of the reforms and the two leases negotiated thus far under the Township Lease reforms. He found that the reforms are intended to remove local Aboriginal governance structures and replace them with government control, noting that “[p]aradoxically, 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.”¹²¹

In the end, Township Leases have proved to hold little appeal for most traditional Aboriginal owners of Aboriginal land upon which communities were located in the Northern Territory. Two Township Leases have been granted over communities in the Northern Territory, and only one of these was negotiated prior to the change of federal government in November 2007.¹²² However, in August 2007 the Commonwealth government introduced a second, even more radical, reform to

¹¹⁹ J Reeves, *Building on Land Rights for the Next Generation: Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976* (1999) *Australian Indigenous Law Reporter* 6.

¹²⁰ S. Brennan, “Modernising the Land Rights Act or the Same Old Same Old?” (2006) *Australian Indigenous Law Reporter* 65.

¹²¹ L. Terrill, *Supra* note 89 at 816.

¹²² A Township Lease was granted over Nguuu community on the Tiwi Islands on 30 August 2007 by the Tiwi Aboriginal Land Trust for a period of 99 years. Under the new Labor Government, a second Township Lease was granted over the communities of Angurugu, Umbakumba and Milyakburra by the Anindilyakwa Land Trust for a period of 40 years, with a 40 year option to renew.

Aboriginal land tenure in the Northern Territory that resulted in the Commonwealth obtaining leases over 64 Aboriginal communities, 47 of which were located on Aboriginal land.

2.3.2 The 5-year Intervention Leases

The 5-year Intervention Leases came about as part of the federal government's intervention "emergency response" in the Northern Territory to widespread allegations of child sexual abuse in Aboriginal communities ("the Intervention"). The Northern Territory government-commissioned inquiry released its report, entitled *Little Children are Sacred*, on 15 May 2007. It provided details of sexual abuse of children in Aboriginal communities in the Northern Territory. In response, the federal government announced on 21 June 2007 that it would "intervene" immediately. It introduced an unprecedented package of measures which applied to people according to geographic criteria centred on whether they were living on certain communities located on either Aboriginal land or on leasehold land granted to Aboriginal-controlled corporations.¹²³ Then Prime Minister, John Howard, said in parliament on the day the Intervention was announced:

This is a national emergency. There is no greater obligation that this parliament has than the obligation of caring for the young and vulnerable in our community. We are dealing with a group of young Australians for whom the concept of childhood innocence has never been present. That is a sad and tragic event. Exceptional measures are required to deal with an exceptionally tragic situation.¹²⁴

On the same day, Minister for Indigenous Affairs Mal Brough described the objective of the Intervention as a return to "normality" for Aboriginal communities over a 5 year period: "There are three phases to what we are doing: (1) stabilisation, (2) normalisation and (3) exit."¹²⁵

¹²³ These include community living areas, which are generally situated remotely on leasehold tenure which has been excised from pastoral leases, and town camps, which are situated on leasehold tenure on the fringes of major urban centres in the Northern Territory (Darwin, Katherine, Tennant Creek and Alice Springs).

¹²⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 June 2007, 73 (John Howard, Prime Minister).

¹²⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 June 2007, 77 (Mal Brough, Minister for Indigenous Affairs).

The non-legislative measures began in June 2007, and included health checks, increased policing and additional child protection workers. In August the government introduced five bills to Parliament.¹²⁶ They contained measures including compulsory acquisition by the Commonwealth of leases for a term of 5 years in certain communities; the removal of the permit system in certain communities on Aboriginal land and on roads leading to those communities; the “quarantining” of a portion of payments received by welfare recipients living on Aboriginal land, community living areas and town camps; the prohibition of alcohol and pornography on Aboriginal land, community living areas and town camps; the requirement that internet filters be installed on publicly-funded computers; the management of government activities and services within certain Aboriginal communities by “government business managers”; and the removal of customary law as a consideration in sentencing and bail in the Northern Territory. In order to pass what was discriminatory legislation, the parliament also suspended the operation of the *Racial Discrimination Act* 1975 (Cth).¹²⁷

Under the 5-year Intervention Leases the Commonwealth compulsorily acquired leasehold title over land upon which 64 Aboriginal communities are located for a period of five years until approximately 2012.¹²⁸ 47 of these communities are located on Aboriginal land owned by land trusts pursuant to the *Land Rights Act*. The remainder of the leases were acquired in respect of “community living area” land (Aboriginal communities located on crown leases excised from pastoral leases in the Northern Territory). The terms and conditions of the leases were not negotiated with traditional Aboriginal owners and nor are they contained in a lease document

¹²⁶ *Northern Territory National Emergency Response Bill 2007* (Cth), *Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007*(Cth), *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007*(Cth), *Appropriation (Northern Territory National Emergency Response) Bill (No 1) 2007* (Cth), *Appropriation (Northern Territory National Emergency Response) Bill (No 2) 2007* (Cth).

¹²⁷ The *Racial Discrimination Act 1975* (Cth) prohibits discrimination on the grounds of race, however, ‘special measures’ are legitimate to promote the members of a particular race when that race is disadvantaged. The Intervention legislation declared that it contained such “special measures”.

¹²⁸ *Northern Territory Emergency Response Act 2007* (Cth), s 31.

executed by the parties. They are mandated by legislation and create a very unusual form of leasehold title.

The Commonwealth has the right to “exclusive possession and quiet enjoyment of the land”, a normal condition in most common law leases.¹²⁹ However, existing registered leases are expressly excluded from the 5-year Intervention Leases (including Township Leases).¹³⁰ In addition, any other pre-existing rights, titles or interests are included in the leased area but preserved by the legislation.¹³¹ This preserves traditional rights of access to the leasehold area under section 71 of the *Land Rights Act* as well as the rights of the holders of any existing unregistered leases or licences, and means that the 5-year Intervention Leases (like the Township Leases) are not “exclusive” in the way that most common law leases are. In addition, despite the existence of a 5-year Intervention Lease the relevant land trust retains the power to grant Township Leases¹³² and other leases pursuant to section 19 of the *Land Rights Act*, albeit only with the consent of the Commonwealth Minister.¹³³ These provisions suggest that the 5-year Intervention Leases confer fewer rights than would ordinarily be granted to a lessee at common law.

However, in some key respects the 5-year Intervention Leases give the Commonwealth power far beyond what would normally be the subject of a grant of leasehold title. The Commonwealth Minister has the right to terminate unilaterally both existing registered leases excluded from the 5-year Intervention Leases and any pre-existing rights, titles and interests within the leased area.¹³⁴ The High Court has recently held that this right of termination does not apply to traditional rights of

¹²⁹ *Northern Territory Emergency Response Act 2007* (Cth), s 35(1)

¹³⁰ *Northern Territory Emergency Response Act 2007* (Cth), s 31(3)

¹³¹ *Northern Territory Emergency Response Act 2007* (Cth), s 34.

¹³² *Northern Territory Emergency Response Act 2007* (Cth), s 36(6).

¹³³ *Northern Territory Emergency Response Act 2007* (Cth), s 52. Note that it is only “leases” which can be granted by land trusts within the 5-year Intervention Lease areas. This presents significant problems for land trusts wanting to negotiate lesser forms of tenure within communities, such as licences for gravel extraction or pastoral operations.

¹³⁴ *Northern Territory Emergency Response Act 2007* (Cth), s 37.

access under section 71 of the *Land Rights Act*.¹³⁵ In addition, and in contrast with Township Leases, the Commonwealth is not liable to pay any rent for 5-year Intervention Leases,¹³⁶ although it may “from time to time” ask the Valuer-General to determine a reasonable amount of rent for the leases, which amount the Commonwealth must pay.¹³⁷ However, the legislation provides that the Commonwealth is “liable to pay a reasonable amount of compensation” if the acquisition of the leases would result in an acquisition of property under section 51(xxxi) of the Australian Constitution.¹³⁸ Finally, the Commonwealth has the power to unilaterally vary the terms and conditions of 5-year Intervention Leases.¹³⁹

The Intervention legislation treated “town camps” differently from other Aboriginal communities. Town camps are communities of Aboriginal residents located on perpetual leasehold title within major urban centres in the Northern Territory, such as Alice Springs, Katherine and Darwin. Instead of immediately acquiring 5-year leasehold tenure, the legislation created a process by which the Commonwealth could compulsorily and permanently acquire all interests in town camp land by taking steps including giving notice to the Aboriginal corporations which held the leasehold title.¹⁴⁰ In May 2009, the Commonwealth provided notice to the town camp corporations that it intended to compulsorily acquire interests in Alice Springs town camps under this provision in May 2009.¹⁴¹ Under the threat of compulsory acquisition, and following a bitter legal dispute, the

¹³⁵ *Wurridjal v the Commonwealth* (2009) 237 CLR 309, per French CJ at 366–7, per Gummow and Hayne JJ at 379–80, per Crennan J at 456–7, per Kiefel J at 468.

¹³⁶ *Northern Territory Emergency Response Act 2007* (Cth), s 35(2)

¹³⁷ *Northern Territory Emergency Response Act 2007* (Cth), s 62. The Valuer-General has finalised rental valuations, and payments commenced in respect of most communities on Aboriginal land on 25 May 2010. See “Closing the Gap in the Northern Territory Monitoring Report – July to December 2009 – Part Two” at <http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/closing_gap_NT_jul_dec_2009/Documents/Part2_Monitoring_Report/sec5.htm>.

¹³⁸ *Northern Territory Emergency Response Act 2007* (Cth), s 60(2). This section (and its unusual wording), was the subject of an unsuccessful High Court challenge (*Wurridjal v Commonwealth* (2009) 237 CLR 309).

¹³⁹ *Northern Territory Emergency Response Act 2007* (Cth), ss 35(6) and 36.

¹⁴⁰ *Northern Territory Emergency Response Act 2007* (Cth), s47.

¹⁴¹ Jenny Macklin, “First steps on Alice Springs town camps”, Media Release, 25 May 2009.

town camp corporations sub-leased the town camp land to the Executive Director of Township Leasing for a term of 40 years in December 2009.¹⁴²

In addition, the Intervention created certain statutory rights in the Commonwealth and Northern Territory in respect of buildings and infrastructure built or repaired on Aboriginal land using government funds.¹⁴³ These rights are exclusive,¹⁴⁴ and include the right to occupy, use, maintain, repair or replace buildings or infrastructure as well as the right to carry out works, occupy, use and provide services to a broader area (termed the construction area).¹⁴⁵ The statutory rights can be transferred between governments,¹⁴⁶ can be exercised by other people with the consent of the holder of the statutory rights¹⁴⁷ and are terminable only at the will of the holder.¹⁴⁸ The land trust is prevented from granting a lease to anyone else over land in respect of which statutory rights exist. These statutory rights are far-reaching and represent a significant extension of existing government rights on Aboriginal land under section 14 of the *Land Rights Act*. Formal tenure granted under section 19 is not required to secure certain government assets, although the written consent of the relevant Land Council is required¹⁴⁹ and the parties must enter into good faith lease negotiations after the rights have been acquired.¹⁵⁰ This means that governments can effectively circumvent the leasing sections of the *Land Rights Act* and still secure exclusive rights in buildings and infrastructure funded on Aboriginal land, as well as the surrounding “construction area”. Despite this, it is

¹⁴² Australian Government Office of Township Leasing, “Current Leases” at <<http://www.otl.gov.au/site/current.asp>>.

¹⁴³ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), Part IIB as amended by the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth).

¹⁴⁴ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), ss 20W(3) and 20ZH(3).

¹⁴⁵ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), ss 20W(2) and 20ZH(2).

¹⁴⁶ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), ss 20X and 20ZI.

¹⁴⁷ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), ss 20Y and 20ZJ.

¹⁴⁸ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), ss 20ZE and 20ZP.

¹⁴⁹ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), ss 20U(1)(b) and 20ZF(1)(b).

¹⁵⁰ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), ss 20ZC and 20ZN.

difficult to imagine circumstances where a land council would elect to give written consent to the creation of these statutory rights rather than negotiating formal leases or other interests.

As the final measure relevant to land tenure, the amendments removed the permit system applying on Aboriginal land insofar as it applied to land upon which communities were located, roads leading to those communities, and airstrips.¹⁵¹ Areas which are already leased pursuant to section 19 are expressly excluded,¹⁵² as are sacred sites and buildings.¹⁵³ The permit system remains intact for other areas of Aboriginal land, including where outstations are located.

Together, these measures represent a significant interference in the property rights of traditional Aboriginal owners. Moreover, it is not obvious how they are connected to the protection of children from sexual abuse, which was the overarching objective of the Intervention. When he introduced the 5-year Intervention Leases, Mal Brough claimed that the Commonwealth needed urgently to obtain “control” of communities to build and upgrade housing and infrastructure because overcrowded housing was causally related to the prevalence of child abuse in communities:

We are doing that [acquiring the 5-Year Intervention Leases] because we need to be able to ensure that people are living in hygienic conditions, so that the conditions that currently prevail where people are living in overcrowded houses, where there are no norms and where all of the abuse can take place can stop. But we need to have control over the homes – the condition they are in, who is in them and what is occurring in them.¹⁵⁴

However, critics characterized the measures as a land grab which did little to regularise Aboriginal land tenure and instead created a third-rate system of individual land holding laden with bureaucracy.¹⁵⁵ Most legal attention focused on whether the compensation aspects of the 5-year Intervention Leases were unconstitutional as an acquisition of property other than on just terms.

¹⁵¹ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), ss 70B and 70F.

¹⁵² *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 70F(2).

¹⁵³ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 70F(20).

¹⁵⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 June 2007, 77 (Mal Brough, Minister for Indigenous Affairs).

¹⁵⁵ For example, see D. Dalrymple, “The Abnormalisation of Land Tenure” in J Altman and M Hinkson (eds), *Coercive Reconciliation: Stabilise, normalise, exit Aboriginal Australia* (Melbourne, Arena Publications, 2007) at 219.

This was the subject of a High Court challenge, which the Court resolved in the Commonwealth's favour,¹⁵⁶ but the acquisition of 5-year Intervention Leases and associated land tenure measures as part of the Intervention remain enormously controversial.

2.3.3 40-year Housing Leases

The newly elected Labor government announced a third and final policy aimed at reforming tenure arrangements on Aboriginal land in April 2008. Under the Strategic Indigenous Housing and Infrastructure Project ("SIHIP"), the Commonwealth and Northern Territory governments announced the intention to build 750 new houses in 16 major Aboriginal communities located on Aboriginal land in the Northern Territory, and upgrade housing and infrastructure in 57 other communities, by 2013. Most significantly for land tenure reform, housing delivered through the project must be secured by appropriate tenure.¹⁵⁷ In contrast with previous Aboriginal land tenure reforms, the Commonwealth transferred responsibility for the SIHIP's administration and implementation (including the securing of appropriate tenure) to the Northern Territory.¹⁵⁸ The focus of SIHIP on 16 larger communities complements a policy subsequently introduced by the Northern Territory, entitled "A Working Future", whereby larger Aboriginal communities in the Northern Territory have been relabelled "growth towns", which will have "proper town plans, private investment, targeted Government infrastructure and commercial centres" and will be "towns like anywhere else in Australia".¹⁵⁹

¹⁵⁶ *Wurridjal v the Commonwealth* (2009) 237 CLR 309.

¹⁵⁷ J. Macklin, P. Henderson and W. Snowdon "Landmark Housing Projects for NT Indigenous Communities", Media Release, 12 April 2008.

¹⁵⁸ "The Australian Government will have no further responsibility for the delivery of Indigenous housing, municipal, essential and infrastructure services in the Northern Territory from 1 July 2008." See *Memorandum of Understanding Between the Australian Government and the Northern Territory Government - Indigenous Housing, Accommodation and Related Services - September 2007* at <http://www.aph.gov.au/senate/committee/indig_ctte/submissions/sub28_attachment_8.pdf>.

¹⁵⁹ Paul Henderson, Chief Minister of the Northern Territory, "A Working future: Real Towns, Real Jobs, Real Opportunities", Media Release, 20 May 2009.

The form of tenure for securing the SIHIP housing is leases of Aboriginal land in communities for a term of 40 years (40-year Housing Leases). The legal mechanism for securing 40-year Housing Leases is section 19 of the *Land Rights Act*, which enables land trusts to grant leases, licences and other forms of tenure on Aboriginal land (and has been part of the *Land Rights Act* since its inception). In contrast to the Township Leases and 5-year Intervention Leases which are granted to Commonwealth entities, 40-year Housing Leases are granted to Territory Housing (a Northern Territory government entity responsible for the provision of public housing in the Northern Territory).

While the 40-year Housing Leases that have been negotiated to date have not yet been registered with the Land Titles Office, some information about the leases is publicly available. The leases are granted for a specified purpose, being housing and related services. As head-lessee, Territory Housing would then have the ability to negotiate sub-leases with residents, as it would in public housing elsewhere in the Northern Territory, without the need to go back to traditional Aboriginal owners for consent. The *Residential Tenancies Act* (NT) would apply to the tenancies, giving tenants enforceable property rights and requiring both the tenants and Territory Housing to comply with their respective obligations of maintenance and repair under the legislation. The leased area for 40-year Housing Leases is far smaller than in previous land tenure reforms. Instead of covering an entire community and its surrounding area, the 40-year Housing Leases cover a “block” of land within a community which could be used for housing purposes only. And, in contrast with Township Leases and the 5-year Intervention Leases which provide for consideration of some kind

to be paid to the land trust, only peppercorn rental has been negotiated for the 40-year Housing Leases.¹⁶⁰

Despite some major controversy about the slow delivery of outcomes under SIHIP, the Northern Territory appears to have had much greater success in negotiating 40-year Housing Leases than the Commonwealth has had negotiating Township Leases. So far, 40-year Housing Leases have been granted or negotiated in principle in 10 communities on Aboriginal land, with negotiations in the remaining communities reportedly nearing completion.¹⁶¹

In contrast with the Township Lease reforms and 5-year Intervention Leases, there has been little legal commentary about the 40-year Housing Leases. Terrill briefly refers to them in his discussion of the Township Lease reforms, suggesting that they are an extension of the same policies that underpinned earlier Aboriginal land tenure reforms.¹⁶²

Indeed, there is significant interplay between the 40-year Housing Leases, the 5-year Intervention Leases and the earlier Township Lease reforms. First, there are clear similarities in structure. They each involve the grant of an exclusive “head-lease” to a government entity, which then has the power to grant dependent interests to other persons, without further reference to traditional Aboriginal owners. Thus, land trust (and by extension traditional Aboriginal owner) ownership and control of land is supplanted by government control over the leased area. Second, the reforms only apply to land where Aboriginal populations are concentrated, which leaves

¹⁶⁰ “The land councils and local traditional owners have accepted the public good nature of this work and agreed on peppercorn rent under these lease arrangements.” Northern Territory, *Parliamentary Debates*, 23 February 2011 (Malarndirri McCarthy).

¹⁶¹ Gunbalanya, Galiwinku, Gapuwiyak, Hermannsburg, Lajamanu, Maningrida, Milingimbi, Ngukurr, Numbulwar and Wadeye. See “Closing the Gap in the Northern Territory Monitoring Report – July to December 2009 – Part Two” at <http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/closing_gap_NT_jul_dec_2009/Documents/Part2_Monitoring_Report/sec5.htm>.

¹⁶² “SIHIP provides an example of how policies that were formulated under the Coalition Government are now being implemented by the Labor Government without substantial change.” L. Terrill, *Supra* note 88 at 814-815.

untouched the vast majority of Aboriginal land, but focuses attention on Aboriginal land with the greatest economic potential. Third, it appears that the Commonwealth and Northern Territory's aim is that all three forms of leasehold title introduced by the reforms will apply in the 16 "growth towns" or larger communities. 5-year Intervention Leases are already operative in the 16 communities, and policy documents indicate that the 40-year Housing Leases are considered an interim measure, the ultimate goal is the negotiation of Township Leases over these communities in their entirety.¹⁶³

However, there are key differences between the reforms which indicate that the 40-year Housing Leases actually represent a departure from the earlier two reforms, and may well be the end point of Aboriginal land tenure reform in the Northern Territory. Rather than leasing all the land in a community to a government entity which has nearly unfettered discretion over granting sub-leases and other dependent interests, 40-year Housing Leases are granted over smaller "blocks" within communities for defined public housing purposes. In other words, 40-year Housing Leases are granted to secure government assets and implement a public housing tenancy model over defined land within communities, rather than to substitute a government landlord for traditional Aboriginal owners in entire communities. In this sense, the 40-year Housing Leases can be viewed as part of a recent wider Commonwealth and Northern Territory policy that tenure must be secured for *all* government-funded or constructed infrastructure on Aboriginal land.¹⁶⁴ While only peppercorn rental has been negotiated for the 40-year Housing Leases, the Northern Territory government has

¹⁶³ *Remote Service Delivery Bilateral Plan – Plan Period: 2009-2014 – Implementation Plan for National Partnership Agreement on Remote Service Delivery* between the Northern Territory and Commonwealth states that Township Leases are to be negotiated in 15 identified growth communities, but that negotiations should occur "with Traditional Owners for interim block lease arrangements over new government infrastructure pending agreement to whole of township lease arrangements." At <http://cgris.gov.au/userfiles/file/NT_RSD_NP_BIP.pdf>.

¹⁶⁴ This policy has been stated in a number of policy documents since 2007, including the *National Partnership Agreement on Remote Service Delivery*, and *Remote Service Delivery Bilateral Plan – Plan Period: 2009-2014 – Implementation Plan for National Partnership Agreement on Remote Service Delivery* at <http://cgris.gov.au/userfiles/file/NT_RSD_NP_BIP.pdf>.

committed to paying rent for tenure secured for other infrastructure on Aboriginal land.¹⁶⁵ Given the decades-old failure of government to obtain secure tenure for its assets on Aboriginal land which is described above, this policy (of which 40-year Housing Leases are a part) represents an historic shift.

Further, notwithstanding the grant of 40-year Housing Leases, the decision-making and governance structures established by the *Land Rights Act* remain intact in respect of the remainder of Aboriginal land in a community. Thus, traditional Aboriginal owners retain the power to negotiate directly with proponents seeking to obtain tenure on Aboriginal land within communities, including both government and private interests. Given that it is now government policy to secure and pay rental for tenure for all government-funded infrastructure on Aboriginal land, this constitutes a significant commercial opportunity for traditional Aboriginal owners of larger communities. By contrast, under the Township Lease model, the Executive Director of Township Leasing negotiates and grants sub-leases in entire communities without reference to the traditional Aboriginal owners, and the Executive Director's operating costs are deducted from any rent payable to the land trust pursuant to those sub-leases.

Despite the emphasis in much of the literature on Township Leases and the 5-year Intervention Leases, the importance of the 40-year Housing Leases should not be under-estimated in the context of recent Aboriginal land tenure reform in the Northern Territory. Even though it is government policy to pursue Township Leases in the same communities where 40-year Housing Leases have been negotiated, Township Lease negotiations appear to have stagnated. This is unsurprising given the incentive that traditional Aboriginal owners now have to negotiate leases and rental directly with

¹⁶⁵ "Normalising arrangements involves accepting and recognising a fair payment may be required for the use of land for government assets." Northern Territory, *Parliamentary Debates*, 15 February 2011 (Malarndirri McCarthy). Nevertheless, the rationale for treating rent payable for the 40-year Housing Leases differently from other government tenure is unclear.

government and other proponents following the change in government policy regarding securing tenure on Aboriginal land. Thus, the 40-year Housing Leases may well represent the culmination of recent Aboriginal land tenure reform, rather than an interim measure or extension of previous reforms. I will return to the significance of the legal differences between the 40-year Housing Leases and the earlier land tenure reforms in Chapter 4, after I have discussed the key elements of “normalisation discourse” in the next chapter.

3. “Normalisation discourse”: a qualitative consideration of the reforms

3.1 Introduction

In Chapter 2, I outlined some of the key features of the colonial property regime in the Northern Territory, suggesting that property law helped to legitimate the appropriation of land there, in the process both reflecting and reinforcing colonial representations of Aboriginal people (including as lacking the requisite degree of “civilization” to own property). Nevertheless, the grants of private property interests in the Northern Territory did not exclude Aboriginal people from the property landscape. In fact, property interests including the pastoral lease and Aboriginal reservations permitted Aboriginal people a limited legal presence across significant tracts of land in the Northern Territory. However, Aboriginal interests were carefully circumscribed so as not to threaten non-indigenous settlers.

The *Land Rights Act*, which represented a significant departure from colonial land policies, has returned large areas of land in the Northern Territory to exclusive Aboriginal ownership through grants of fee simple title. More recently, three Aboriginal land tenure reforms introduced in the Northern Territory - Township Leases, 5-year Intervention Leases and the 40-year Housing Leases - share key structural similarities, but are significantly different. In the first two reforms, entire communities or “townships” are leased and hence Aboriginal control of that land is supplanted by government control. However, in the latest reform, a smaller area of land is leased within a community for a defined purpose, with traditional Aboriginal owners retaining the ability to negotiate tenure with other proponents over the remainder of the land.

In this chapter, I broaden my textual examination of the reforms to a qualitative textual analysis of the term “normalise”¹ as it has been used in government-sourced documents. My sources include Hansard from Commonwealth Parliament and the Northern Territory Legislative Assembly, parliamentary committee and council reports and submissions, and Commonwealth and Northern Territory policy documents produced over a four year period.² The threshold question for reviewing my sources was whether the text included the word “normalise” or its variants (normalisation, normalising, normalised, etc).³ While I cannot claim that I have located every use of the word “normalise” by government sources in the context of recent Aboriginal land tenure reform, I have analysed key publicly available government-sourced documents containing this term. The purpose of my analysis is to understand the key characteristics of “normalisation discourse”, including whether and to what extent this discourse evokes elements of the colonial property regime in the Northern Territory.

My analysis reveals changing patterns in the use, context and meaning of the word “normalise” during the period studied. Specifically, there are significant differences between normalisation discourse as evidenced in the Commonwealth Parliament and the Northern Territory Legislative Assembly. Following some brief quantitative observations in sub-chapter 3.2, I first consider the use of the term “normalise” in Commonwealth Parliament (in sub-chapter 3.3) followed by an analysis of the term in the Northern Territory Legislative Assembly (sub-chapter 3.4).

In the Commonwealth Parliament, use of the term “normalise” spiked during the introduction of the Township Lease reforms and the 5-year Intervention Leases, but was abandoned by politicians from 2008. In sub-chapter 3.3.1, I consider how Commonwealth politicians described

¹ And its variants, including “normalisation”, “normalising”, “normalised”, etc.

² From May 2006 until May 2010.

³ Since nearly all sources were available online, this was generally conducted using a simple electronic search.

the target or objective of “normalisation”, finding that the explicit policy objective of normalisation perceptibly changed between 2006 and 2008 from one of “normalising” Aboriginal communities themselves to standardizing services and infrastructure in those communities.

However, and despite the paring back of the stated scope of Aboriginal land tenure reform, Commonwealth parliamentary rhetoric describing Aboriginal communities in the Northern Territory remained strikingly consistent during this period. I examine the way Aboriginal communities were described or constructed in Commonwealth parliamentary Hansard in sub-chapter 3.3.2, finding a number of recurring themes. In particular, Aboriginal communities were consistently described during this period as economically stagnant places which hid horrific violence, abuse and depraved behaviours, and where social norms were either different from those in wider Australian society or absent completely. Further, Commonwealth politicians repeatedly asserted that Aboriginal communities were physically, culturally and socially isolated from the rest of Australian society, with Aboriginal culture itself and the *Land Rights Act* (and particularly the permit system) seen as causing or perpetuating this segregation. Thus, while the description of the target of “normalisation” changed, the principal characteristic of normalisation discourse remained the transformation of “abnormal” communities and behaviours within them rather than simply standardising services and infrastructure. There are parallels between the “normalisation discourse” evidenced in Commonwealth Parliament, and elements of the colonial property regime in the Northern Territory. Specifically, normalisation discourse was predicated on a dichotomised view of Aboriginal “space” in the Northern Territory as almost universally dysfunctional, abnormal, wild, and locked away with wider Australian society, which served to legitimate and justify the first two Aboriginal land tenure reforms in the Northern Territory, the Township Lease reforms and the 5-year Intervention Leases.

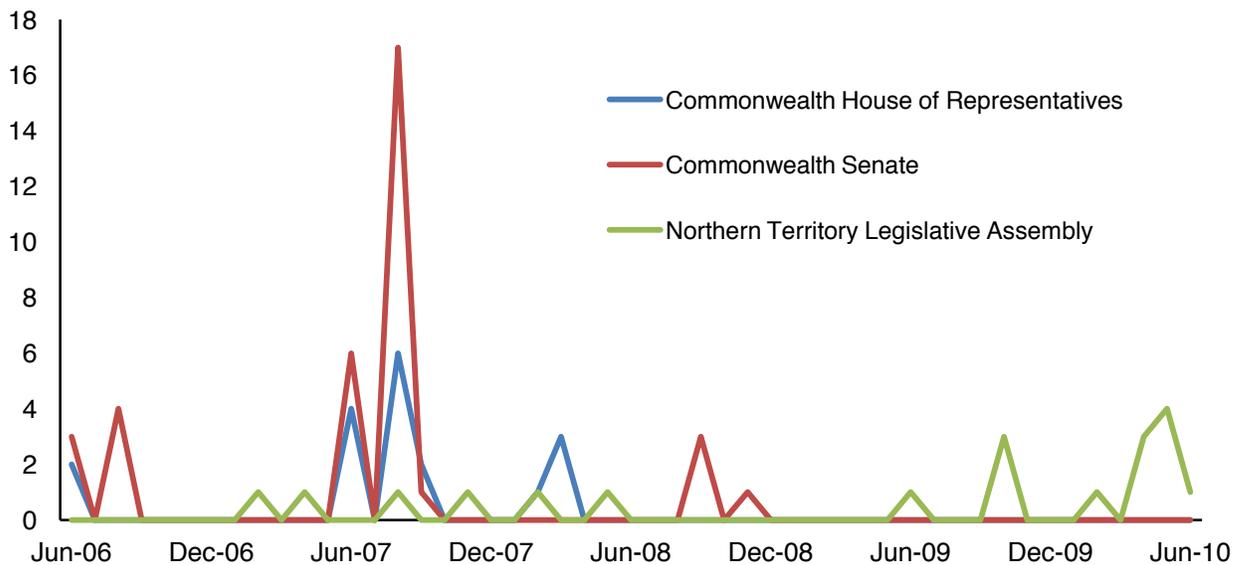
The Northern Territory Legislative Assembly parliamentary records tell an entirely different story, as I discuss in sub-chapter 3.4. In contrast with the Commonwealth parliament, use of the term actually increased over the 4 year period studied. Further, and in contrast to the Commonwealth parliamentary record, Northern Territory politicians became progressively more comfortable talking about a policy objective of normalising Aboriginal communities and town camps, compared with Commonwealth politicians' trend towards reducing its scope to the mere standardisation of services and infrastructure. However, despite Northern Territory politicians' relative comfort in describing the target of normalisation as Aboriginal communities, their depictions of Aboriginal communities were far less inflammatory and negative than in the Commonwealth Parliament, with the emphasis usually upon poor infrastructure, housing and services in those communities. The absence of this rhetoric about Aboriginal communities in the Northern Territory Legislative Assembly record meant that normalisation discourse as manifested there appeared to lack the distinctly “colonial” attributes evident in Commonwealth hansard.

3.2 Some preliminary quantitative observations

From the texts which I analysed, Parliamentary hansard contained the most occurrences of the term “normalise”. The term was used 72 times by Commonwealth and Territory politicians in parliament in the context of Aboriginal land tenure reforms in the Northern Territory. By contrast, parliamentary committee reports and submissions contained 19 uses of the term, and key policy documents produced by both the Northern Territory and Commonwealth governments guiding the implementation of the reforms used the term only 4 times. The term does not appear at all in the legislation designed to give effect to the reforms. As a result, the focus of my textual analysis of normalisation discourse is on the parliamentary record.

Within parliamentary hansard, there are discernible patterns in the frequency with which the term appears. As demonstrated in Figure 1, below, the term “normalise” has been used more frequently in Commonwealth Parliament (53 times) than in the Northern Territory Legislative Assembly. In Commonwealth Parliament, the term appears more in the Senate (35 times) than the House of Representatives (18 times). Use of the term spiked in both Commonwealth parliamentary houses in mid-2006 and more significantly in mid-2007. However, in both Commonwealth Houses, the term seems to have been abandoned since 2008.⁴ By contrast, politicians in the Northern Territory Legislative Assembly (a unicameral parliament) have adopted the term more recently, and its use has actually increased since the middle of June 2009.

Figure 1 – Occurrences of the term “normalise” in Commonwealth and Northern Territory parliamentary houses



While these patterns are intriguing, they raise more questions than they answer. In particular, the numbers alone fail to explain the shifting patterns in its use described above, or to answer deeper questions about the meaning of the word “normalise”, whether that meaning has shifted over time

⁴ Since March 2008 in the House of Representatives, and since November 2008 in the Senate.

or differs between the Commonwealth and the Northern Territory, the context in which it is being used, and what its effects might be (including on other texts, such as the legislation and policy documents). I now attempt to answer these questions, considering the Commonwealth Parliament first, and then the Northern Territory Legislative Assembly.

3.3 Disassembling normalisation discourse in the Commonwealth Parliament

Politicians used the term “normalise” 53 times in Commonwealth parliament over the four year period.⁵ Within the Commonwealth Parliament, Coalition⁶ politicians used the term far more frequently than politicians from other political parties (see Figure 2 below). Given that two of the three Aboriginal land tenure reforms were introduced by the former Coalition government under Prime Minister John Howard, this is unsurprising.

Figure 2 – Occurrences of the term “normalise” in Commonwealth Parliament Hansard by political party

	Coalition (Liberal Party and National Party)	Labor	Greens and Democrats	Total
House of Representatives	16	2	N/A	18
Senate	21	8	6	35

Within the political parties, there are a small number of politicians who have used the term the most frequently over the four year period. Figure 3, below, shows the five politicians who used the term four or more times between May 2006 and May 2010, their political party, and the house of parliament to which they belong(ed). The context within which these politicians used the term and the meaning they ascribed to it are discussed further below.

⁵ Compared with 19 times in the Northern Territory Legislative Assembly.

⁶ The Coalition is an alliance of conservative political parties in Australia, including the Australian Liberal Party, the National Party, and in the Northern Territory, the Country Liberal Party.

Figure 3: Politicians who used the term “normalise” 4 or more times in Commonwealth parliament

Member	Political party	Frequency of use
House of Representatives		
Mal Brough	Liberal Party	5
David Tollner	Country Liberal Party	6
Senate		
Nigel Scullion	Country Liberal Party	16
Chris Evans	Australian Labor Party	5
Rachel Siewert	The Greens	4

3.3.1 “Normalising” what?

Understanding the object or scope of normalisation is crucial for interpreting the meaning of the term “normalise” in the context of Aboriginal land tenure reform. In other words, what is the target of normalisation? There is no uniformity in the Commonwealth parliamentary record about the target of normalisation. Politicians have claimed the reforms are about normalising tenure arrangements on Aboriginal land, normalising housing in Aboriginal communities, normalising services and infrastructure, normalising access to Aboriginal communities, normalising Aboriginal communities themselves, or even more vaguely, normalising “arrangements” and “life” in Aboriginal communities. In many instances (particularly in the context of the Intervention), there is no identified object; politicians use the noun “normalisation” without specifying an object. Nevertheless, it is possible to discern trends and patterns in the way that the target of normalisation has been described by Commonwealth politicians over the four year period.

Commonwealth Hansard reveals two principal, and very different, targets of normalisation. In the first, politicians describe the reforms as facilitating the normalisation of services and infrastructure in Aboriginal communities to bring them up to the standard provided elsewhere in Australia. In the other, the reforms are described as “normalising” Aboriginal communities, life and behaviour in those communities. This goes further, suggesting an objective more akin to societal transformation by denoting that Aboriginal people and communities are behaviourally and socially “abnormal” in some respect.

Initially, two Coalition politicians in the House of Representatives used the word “normalise” in the latter sense, suggesting in fairly inflammatory terms that Aboriginal land tenure reforms would normalise Aboriginal communities themselves, and in the case of Brough, lives in those communities.

In the speech for the second reading of the legislation introducing the Township Lease reforms,⁷ Brough referred to the “appalling levels of violence and abuse” in communities, with residents “marooned in unsafe settlements devoid of economic opportunity and hope for the future” and claimed that “much more needs to be done to normalise life for these Australian citizens”.⁸ “Life” in Aboriginal communities was thus emotively characterised by Brough as unsafe, violent and altogether without hope, not to mention economically stagnant. The Township Lease reforms, by creating individual property rights, would allegedly go some way to normalising Aboriginal people's lives from this aberrant state through stimulating economic development. Brough departed from official policy statements made by his department about the Township Lease reforms, which

⁷ *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006* (Cth).

⁸ Mal Brough, Australian House of Representatives, Hansard, 31 May 2006, p 5. Commonwealth, *Parliamentary Debates*, House of Representatives, 31 May 2006, 5 (Mal Brough, Minister for Indigenous Affairs).

claimed that the aim of the scheme was to normalise land tenure arrangements,⁹ rather than “life” in communities. More than anything, this suggests that for Brough, the living conditions of Aboriginal people were inextricably linked to the nature of landholding under the *Land Rights Act* – normalising tenure was synonymous with normalising people’s lives.

When the Coalition government introduced the 5-year Intervention Leases a year later, Brough’s rhetoric of transforming the lives and behaviours of people living in Aboriginal communities assumed a renewed force in the emotional and heated debate over the reforms. Justifying the 5-year Intervention Leases, Brough referred to the alleged absence of social norms in Aboriginal communities thus:

...we need to be able to ensure that people are living in hygienic conditions, so that the conditions that currently prevail where people are living in overcrowded houses, where there are no norms and where all of the abuse can take place can stop. But we need to have control over the homes – the condition they are in, who is in them and what is occurring in them.¹⁰

Brough called for a three staged approach to the Intervention, “(1) stabilisation, (2) normalisation and (3) exit”,¹¹ with Aboriginal communities firmly the target of normalisation,¹² which were allegedly devoid of any social norms at all. While Brough stopped short of expressly saying that the Township Lease and Intervention Lease reforms were intended to “normalise” Aboriginal people themselves, his clear intention was to make the communities within which they lived and their behaviours more “normal”.

Brough’s rhetoric of normalising the behaviour of those living within Aboriginal communities was contentious, and was seized upon (and sometimes distorted) by certain politicians

⁹ Department of Families, Community Services and Indigenous Affairs, *Submission to the Senate Community Affairs Legislation Committee Inquiry into the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006*, July 2006 at 4.

¹⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 June 2007, 77 (Mal Brough, Minister for Indigenous Affairs).

¹¹ *Ibid.*

¹² Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 7 (Mal Brough, Minister for Indigenous Affairs).

from opposing political parties. Other Coalition politicians in the House of Representatives did not go nearly as far as Brough when describing the target of “normalisation”, even during heated debate about the Intervention legislation. Indeed, Coalition politicians in the House of Representatives seemed to narrow the scope of normalisation significantly, before abandoning the term altogether.

David Tollner, member for Solomon in the Northern Territory, discussed the normalisation of communities during debate about the Township Lease reforms, but his focus was on economic development rather than any alleged absence of social norms in the sense described by Brough.

Tollner bemoaned the lack of economic activity in Aboriginal communities:

... when you travel around community after community on Aboriginal land in the Northern Territory nowhere do you see a market garden that grows fresh vegetables; nowhere do you see a butcher shop or a small abattoir, nowhere do you see bakeries. You do not see hairdressers; you do not see clothing stores – let alone a McDonald’s or an Irish theme pub.¹³

He continued:

I think the great changes being proposed today will go some way towards changing that. The normalisation of townships and the creation of long-term leases on towns will enable Aboriginal people and others to buy land and build houses in Aboriginal communities. It will allow businesses to set up. Some may not flourish – some may go broke – but that is business. It will allow people to set up market gardens and have an entrepreneurial attitude. It will allow for butchers shops, bakeries, hairdressers and clothing stores and present a whole range of other opportunities to indigenous people.¹⁴

Thus, Aboriginal “townships” were to be normalised through the Township Lease reforms, which would facilitate the development of private home ownership and business enterprise.

But Tollner’s rhetoric changed in the course of debate about the Intervention. He initially lauded the Intervention legislation as offering a “normalisation solution for town camps and communities”¹⁵ in August 2007. Yet only one month later, he used much more subdued terminology to describe the object of normalisation:

¹³ Commonwealth, *Parliamentary Debates*, House of Representatives, 19 June 2006, 93 (David Tollner).

¹⁴ *Ibid.*

¹⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 95 (David Tollner).

The [*Little Children are Sacred*] report made it clear that child abuse in the Territory's Aboriginal community was at crisis levels. The Australian government announced immediate, broad-ranging measures to protect children, stabilise communities, normalise services and infrastructure and provide longer term support to build better communities.¹⁶

And in relation to the 5-year Intervention Leases specifically he argued:

The link between adequate housing and child safety has also been comprehensively made. Overcrowded housing is linked directly to children's exposure to sexualised behaviour, family violence and vulnerability to abuse. The government's intervention plan to reform housing arrangements by establishing market based rents for public housing with normalised tenancy requirements is welcome. It will improve infrastructure in communities and the level of available housing stock.¹⁷

Thus, Tollner was no longer characterising the 5-year Intervention Leases as normalising Aboriginal communities, but instead the services, infrastructure and public housing tenancy arrangements within them. The third arm of the Intervention, the rather abrupt "exit" of Aboriginal communities, had been abandoned for "longer term support to build better communities".

Other Coalition politicians in the House of Representatives who used the term "normalise" during and after debate about the Intervention adopted this much more modest definition of its target (as well as the modified third element of the Intervention strategy). In August 2007, Wakelin spoke about the government's three-pronged strategy – "stabilisation, normalisation of services and infrastructure and, in the longer term, support."¹⁸ And after the Coalition lost power, Brendan Nelson (then leader of Coalition Opposition) spoke in February 2008 about the Intervention's tripartite aims:

The first was to stabilise the situation. The second was to try to normalise the services that are provided to Indigenous people in the Northern Territory, including in infrastructure. The third was to provide longer term support.¹⁹

By this stage, use of the term in the House of Representatives had dwindled. "Normalise" occurs one more time in Hansard in the context of Aboriginal land tenure reform: to describe the removal of the permit system as part of the Intervention as normalising "access" to Aboriginal communities

¹⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 September 2007, 19 (David Tollner).

¹⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 September 2007, 21 (David Tollner).

¹⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 74 (Barry Wakelin).

¹⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 245 (Brendan Nelson).

in the Northern Territory.²⁰ Yet in the course of its use by Coalition politicians from May 2006 until March 2008, its target had metamorphosed from Aboriginal communities to the provision of services and infrastructure in those communities.

In the Senate, where the term was used much more frequently, a similar shift in the use of normalisation by Coalition politicians was evident, although some ambivalence about its intended scope remained. Scullion, who used the term almost three times more than any other politician, initially spoke about normalisation of communities themselves in the context of the Township Lease reforms:

The principle that most Territorians and I know all Indigenous Australians want is equality in their communities. That is exactly what they are going to get under this government. We actually plan to make sure that people live in communities that work in exactly the same way that every other community works. It is a very simple process: it is a process of normalisation.²¹

And when the Intervention was announced, Scullion used “normalise” in a similar way, using emotive language to describe “normalisation” as akin to dealing with devastation from a cyclone:

This is no less than a national emergency. I am happy to inform the Senate that we will not be dealing with this in any other way than as a national emergency. We have had the cyclone of child abuse leave battered the minds and bodies of the most vulnerable of First Australians across the Northern Territory and very likely across the top of the entire Australian continent.

We have today announced a range of initiatives that deal with the emergency response in much the same way as we would with any other type of cyclone. We will first move to stabilise the communities in which this is happening, and then we will move to normalise them.²²

Like Brough and Tollner in the House of Representatives, Scullion’s initial target of normalisation was Aboriginal communities themselves, at least up until the introduction of the Intervention.

However, Scullion and other Coalition politicians in the Senate moved towards defining the target of normalisation as services, infrastructure and housing in Aboriginal communities. By August 2007, Scullion saw the 5-year Intervention Leases as facilitating the normalisation of

²⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 20 March 2008, 2413 (Sharman Stone).

²¹ Commonwealth, *Parliamentary Debates*, Senate, 19 June 2006, 63 (Nigel Scullion).

²² Commonwealth, *Parliamentary Debates*, Senate, 21 June 2007, 74 (Nigel Scullion).

infrastructure and services rather than communities themselves, saying it was the Coalition’s “clear intention to assist these communities, to provide normalisation and to provide infrastructure that will clearly help people’s wellbeing, whether it relates to crowded houses or completely failed and retarded infrastructure.”²³ Other Coalition politicians in the Senate also adopted this understanding of “normalisation” in the context of the Intervention. For example, Senator Egglestone characterised the three components of the Intervention as “firstly, a stabilisation phase, which is occurring at the present time; secondly, the normalisation of services and infrastructure; and thirdly, longer term support based on the norms and choices that apply to all the people of Australia.”²⁴

Looking at the use of the word “normalise” by Coalition politicians in both Houses, it is clear that there was a shift in the enunciation of government policy some time between the announcement of the Intervention in June 2007 and the introduction of the legislation itself in August 2007. Coalition politicians moved from overtly talking about “normalising” Aboriginal communities, to standardising the government’s provision of services, infrastructure and housing to those communities. The government department in charge of implementing the Intervention also adopted this understanding of the term, referring to the “normalisation phase of services and infrastructure” in the Senate Legal and Constitutional Affairs Committee inquiry into the Intervention legislation.²⁵ However, despite the change in the description of the policy objectives of the Intervention, there was no parallel shift in the substance of the legislation or policies giving effect to the Intervention. The Coalition had a majority in both houses of parliament so could pass the legislation notwithstanding opposition by Labor, and in any case, the Labor Party explicitly supported the Intervention on the basis that the “crisis of child abuse in Indigenous communities”

²³ Commonwealth, *Parliamentary Debates*, Senate, 15 August 2007, 29 (Nigel Scullion).

²⁴ Commonwealth, *Parliamentary Debates*, Senate, 13 August 2007, 106 (Senator Egglestone).

²⁵ Responses of the Families, Community Services and Indigenous Affairs Portfolio to Questions on Notice (No. 25 and 26) of Senator Ludwig of the Senate Legal and Constitutional Affairs Committee inquiring into the *Northern Territory National Emergency Response Bill 2007* and Related Bills.

needed to be urgently addressed.²⁶ Thus it seems that the change in the stated policy scope of “normalisation” was principally rhetorical.

It is likely that the Coalition members modified their use of “normalise” in response to criticisms of the policy objective of Aboriginal land tenure reform, and particularly the Intervention. Opponents of Aboriginal land tenure reform outside parliament argued that “normalisation” was pejorative and synonymous with assimilation.²⁷ Some Labor and Greens senators attacked the term on this basis in parliament (although the Labor party did not oppose the substance of the reforms). For example, in relation to the Township Lease reforms, Labor Senator Wortley ridiculed Tollner’s suggestion of what should be considered “normal” for Aboriginal communities, and criticized the use of the term” normalise:

I looked at some of the speeches on this bill made in late June by Coalition members in the House of Representatives. Some of the comments are just proof that there is a serious partition between what is needed for Indigenous Australia and what is being applied. For example, the government’s member for Solomon wants ‘normalisation’ for Indigenous communities and cites Irish theme pubs and McDonalds for incorporation into their lives as his measuring stick for what is normal. The member for Kingsford Smith said at the time, ‘What a joke’ and I say today: what a disgrace.²⁸

Senator Trish Crossin, a Labor senator for the Northern Territory was similarly scathing about the term “normalise” in the context of the Township Lease reforms:

Let us go back at this point and have a bit of history. The history is that, at some point, someone came up with the idea that one way we might be able to improve economic outcomes for Indigenous people – and let us not go into an analysis of this federal government’s absolute neglect of the support needed for that to occur – was to talk about their land: ‘Let’s assimilate and normalise Indigenous people so that their lot in life is to buy a little quarter-acre block with a little house on it and a bit of a fence’. That is so unlike Indigenous people’s view of economic success and economic outcomes. But, nevertheless, this is a government that believes in assimilation for Indigenous people – that is, ‘Let’s make them all like us’ – and not self-determination – that is, ‘Let’s empower them and educate them and provide them with the knowledge and skills to actually determine for themselves where they might want to go with all of this.’²⁹

²⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 June 2007, 73 (Kevin Rudd, Prime Minister).

²⁷ See, for example, the compilation of essays criticising the Intervention in J. Altman and M. Hinkson (eds) *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (Melbourne, Arena Publications, 2007).

²⁸ Commonwealth, *Parliamentary Debates*, Senate, 9 August 2006, 20 (Dana Wortley).

²⁹ Commonwealth, *Parliamentary Debates*, Senate, 15 June 2007, 14 (Trish Crossin).

Both Wortley and Crossin saw the Township Lease reforms as assimilationist in the sense that non-indigenous economic and property concepts, including the importance of private home ownership, were being imposed upon Aboriginal people, seizing upon some of the more extreme elements of Tollner and Brough's "normalisation" rhetoric to make their point.

Greens politicians who openly opposed Township Lease reforms and the Intervention took the same view as Crossin and Wortley about the real target of normalisation. Greens Senator Siewert said in relation to the Township Lease reforms that the Coalition was trying to "progress an objective of so-called normalising Indigenous communities",³⁰ and that Aboriginal people were "being forced into the process of giving up control of their land for very dubious economic circumstances. They are being forced into it because they are being normalised. No-one has actually asked them if they want to be normalised."³¹ Two months later, Greens Senator Milne gave "normalisation" under the Intervention a similar reading: "I believe that for his relentless campaign against Aboriginal culture and land rights and his obsessive desire to 'normalise' Indigenous people the Prime Minister, John Howard, deserves to be cast out of office. But those in the Labor party who vote for this legislation do not deserve office either."³² Siewert and Milne characterised the Coalition's objective as being about forcibly normalising Aboriginal people themselves, even though this was never the Coalition government's explicit policy. This obfuscation of the government's policy agenda was an attempt to cast the Coalition's Aboriginal land tenure reforms as assimilationist, and presumably to force changes to the reforms (although this was ultimately unsuccessful).

³⁰ Commonwealth, *Parliamentary Debates*, Senate, 15 June 2007, 19 (Rachel Siewert).

³¹ Commonwealth, *Parliamentary Debates*, Senate, 15 June 2007, 21 (Rachel Siewert).

³² Commonwealth, *Parliamentary Debates*, Senate, 13 August 2007, 114 (Christine Milne).

In response to these types of attacks about the meaning of the term “normalise”, and bearing in mind a looming federal election in November 2007 where the Coalition’s defeat appeared imminent, it seems likely that Coalition politicians refined the scope of “normalisation” to the standardisation of services and infrastructure.

However, some in the Labor party did not have a problem with using the word “normalise”. In August 2007, Jenny Macklin, who was the shadow minister for Indigenous Affairs at that time, gave a speech in the House of Representatives indicating the Labor Opposition's broad support for the Intervention legislation. In relation to the 5-year Intervention Leases specifically, Macklin said:

The government's intervention plan to reform housing arrangements by establishing market based rents for public housing with normalised tenancy requirements are welcome provided they are accompanied by improved housing stock. Facilitating better housing and infrastructure has been central to the government's argument for needing five-year leases over townships in Aboriginal communities. The government has argued that taking on the responsibility as the effective town landlord is necessary to quickly improve vital infrastructure in these communities - which is necessary for better housing and improved economic development... Temporary intervention is proposed to repair and improve infrastructure for Indigenous people in these communities. This intervention is required because governments from both sides of politics have consistently failed to invest for many years. The government promises that years of underinvestment will now be replaced by a period of rapid upgrades and new construction. It needs to be.³³

Chris Evans in the Senate gave the same speech the next day, reiterating Labor's support for "normalised tenancy requirements".³⁴ Labor’s interpretation of normalisation under the Intervention was quite different to the Coalition's. Instead of private home ownership and business enterprise through Township Leases, it was public housing tenancy agreements which were being facilitated and "normalised" on Aboriginal land. Macklin and Evans' use of the term foreshadowed the future Labor government’s 40-year Housing Lease policy described in Chapter 2, whereby a “normal” public housing model would be implemented in Aboriginal communities.

³³ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007 (Jenny Macklin, Shadow Minister for Indigenous Affairs).

³⁴ Commonwealth, *Parliamentary Debates*, Senate, 8 August 2007, 39-40 (Chris Evans).

The Labor party only used the term “normalise” once more. On 15 August 2007, Evans gave strong support to the 5-year Intervention Leases following an amendment by the Democrats to remove them from the proposed Intervention legislation:

However Labor accepts that there is some need to interfere with the leasing arrangements in order to facilitate measures aimed at addressing the chronic failure in housing and infrastructure in those communities. You will not deal with child abuse merely by providing education, more police and some of the other measures. They are all important, but, in the end, you have to deal with the poverty. It is about 20 people living in one house and their children being unable to get to sleep at night because of the pressure from the number of people living there and because of the breakdown in social norms. This is where I do agree with Noel Pearson: there are fundamental problems with alcohol and drugs that have actually broken down Aboriginal social norms. This is not Aboriginal behaviour, this is the effect of alcohol, drugs and the loss of the social norms in Indigenous communities. Many Indigenous communities function perfectly well and their children are safe because there are established social norms. The relationships and controls in the communities that are normalised allow people to live in peace, not to be fearful or subject to violence and child abuse. It is in those communities where the social norms have broken down that the problems exist. They also exist in European communities where alcohol and drugs are rife. We get more incident of violence and child abuse in non-Aboriginal communities where the social norms are broken down.³⁵

Evans went much further in describing the scope of normalisation than he had done previously, contrasting "normalised communities" with those where "social norms have broken down".

Normalised communities, according to Evans, "function perfectly well", keep their children safe, have "established social norms" and "allow people to live in peace". By comparison, other communities have "fundamental problems with alcohol and drugs that have actually broken down Aboriginal social norms", where people are "fearful or subject to violence or child abuse". Evans repeatedly asserted that "social norms" had broken down in these communities, without stating what these norms were. And while he was careful to say that not all indigenous communities were so afflicted, he did speak in fairly absolute terms about the unqualified loss of social norms in some communities - some communities had social norms, others had none at all.

Evans' call for communities affected by the scourge of abuse and with no social norms to become "normalised" echoed Brough's rhetoric at the introduction of the Intervention that "the conditions that currently prevail where people are living in overcrowded houses, where there are no

³⁵ Commonwealth, *Parliamentary Debates*, Senate, 15 August 2007, 23 (Chris Evans).

norms and where all of the abuse can take place can stop".³⁶ His characterisation of the scope of “normalisation” here was at odds with the more careful call for “normalised tenancy requirements” that he and Macklin adopted only a week before, and also differed from the Coalition’s newly refined policy position of normalising services and infrastructure. Its use in this context by Evans is significant, indicating that despite the modification of the official rhetoric around normalisation, the word still retained associations of the societal transformation of Aboriginal communities in the Northern Territory.

In sum, Labor was divided about the meaning of the word "normalise", and indeed about whether it should be used at all. Senators Crossin, Wortley and Stephens found the term and its connotations offensive: Evans adopted it with some vigour. And there was no consensus about what the Coalition's objective of normalisation meant in the context of the Township Lease reforms and the Intervention. Labor politicians variously saw the target of "normalisation" as services and infrastructure, public housing tenancy arrangements, Aboriginal communities and even Aboriginal people themselves. The obvious tensions about the use of the term may have been responsible for its abandonment by Labor politicians in parliament after it took government in November 2007. The word “normalise” was not used in parliament when the Labor Government introduced the third Aboriginal land tenure reform, 40-year Housing Leases, in April 2008, and in ongoing discussion about the Aboriginal land tenure reform in the Northern Territory.

Within parliamentary debate, the scope of normalisation shifted in the two years from mid-2006 until early 2008, when it appears to have been completely abandoned. When it first appeared as a policy objective of Aboriginal land tenure reform in 2006, federal Coalition politicians such as Mal Brough and David Tollner defined its target as communities (and sometimes the behaviours of

³⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 June 2007, 77 (Mal Brough, Minister for Indigenous Affairs).

those in communities). However, shortly after the introduction of the second Aboriginal land tenure reform (the 5-year Intervention Leases), the scope of normalisation was pared back to standardising services and infrastructure supplied to Aboriginal communities, and indeed the term was abandoned altogether shortly after the Labor party took government at the end of 2007. However, despite changes to the express scope of “normalisation”, another aspect of the Coalition and Labor party’s rhetoric remained strikingly consistent – the description of Aboriginal communities in the Northern Territory which were the target of Aboriginal land tenure reform.

3.3.2 The construction of Aboriginal space – from “communist enclaves” to “existential despair”

In the analysis following, I argue that the way that Aboriginal communities were described in the textual record by those calling for “normalisation” reveals more than a literal reading of what its purported target is. In particular, despite the paring back of the scope of normalisation to services and infrastructure in Commonwealth parliament, the way that Aboriginal people, communities and behaviours within those communities were described remained consistent while the term was used between 2006 and early 2008. Throughout this period, politicians regularly depicted Aboriginal communities and town camps as having particular negative traits. They were devoid of economic activity, rife with sexual and physical violence, and absent any social norms, and these characteristics were generally tied together as part of evocative rhetoric suggesting that Aboriginal communities were “locked” away from the rest of Australian society. This was the case even with politicians who spoke about an ostensibly narrower policy objective of normalising services and infrastructure. Before turning to this analysis, I reiterate that I have only considered depictions of Aboriginal communities by those politicians who used the word “normalise” in parliament, confining myself to analysing the same “text” in which the term “normalise” appears.

When the Township Lease reforms were introduced, Coalition politicians in the Commonwealth Parliament focused on the alleged lack of economic activity in Aboriginal communities, by reference to what they considered “normal” in wider Australian society. Brough described Aboriginal communities as “devoid of economic opportunity”,³⁷ and Tollner decried that businesses such as market gardens, butchers, abattoirs, bakeries, hairdressers, clothing stores, McDonald’s and Irish theme pubs did not exist in any community in the Northern Territory.³⁸ If Brough and his colleagues conceded the existence of any economic movement within Aboriginal communities, this was designated as “communist” and retrograde. Because they were “locked out” of owning their own homes and businesses by the communal land-owning arrangements in the *Land Rights Act*, Brough claimed that Aboriginal people were “living in what many people would now recognise as little communist enclaves”, a description which was endorsed by some other politicians.³⁹

The description of Aboriginal communities as economically stagnant was often linked to a particular conception of “traditional” Aboriginal culture. According to this rhetoric, the *Land Rights Act* (and those who had designed it) perpetuated anachronistic Aboriginal customs and traditions, including communal land-holding arrangements. Aboriginal people were, through the design of white law-makers, locked into their traditional past, and needed to break free from the yoke of Aboriginal culture, and to embrace individual property rights, capitalism and economic liberalism. Tollner in particular pressed this view, quoting author Shiva Naipaul, who during a visit to the Northern Territory was reportedly:

³⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 31 May 2006, 5 (Mal Brough, Minister for Indigenous Affairs).

³⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 19 June 2006, 93 (David Tollner).

³⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 19 June 2006, 31 (Mal Brough, Minister for Indigenous Affairs). See also David Tollner at 94, Bob Katter at 107 agreeing with the characterisation of Aboriginal communities as “communist enclaves”.

...appalled by what he described as the ‘confining of the Aborigine in his aboriginality – the escape into an adventure playground of timelessness, of goannas and kangaroos and red earth. The running off into a world of unalterable Aboriginal essences is a condescending and profoundly flawed prescription for regeneration.’⁴⁰

Tollner saw the *Land Rights Act* as responsible for perpetuating the “confinement of the Aborigine in his aboriginality”, claiming that the original legislation was about the “preservation of culture, the locking of the gates and defending Aboriginal people and their land from the intrusions of outsiders”⁴¹ and that it established “a sanctuary, a preserve of living prehistory within modern Australia.”⁴² Moreover, the preservation of Aboriginal culture through the *Land Rights Act* was viewed as avowedly anti-economic by Tollner – “It was thought that Aborigines would be able to return to hunting and foraging on their newly acquired land. Why would they need to make a dollar?”⁴³

Not only were Aboriginal communities described as anti-economic cultural sanctuaries during debate about the Township Lease reforms, they also allegedly harboured the very worst type of social dysfunction. Indeed, although the reforms were ostensibly about stimulating economic development, Brough and Tollner often seemed to focus more on the alleged abuse, violence and lack of “social norms” in Aboriginal communities. In the second reading speech for the legislation introducing the Township Lease reforms, Brough described communities as unsafe, violent and without hope, saying that Aboriginal people were:

...marooned in unsafe settlements devoid of economic opportunity and hope for the future... The appalling levels of violence and abuse in many of these communities are a stark reminder of the failed policies of the past. The government has called for restoration of basic law and order in these townships.⁴⁴

In debate about amendments to the Township Lease scheme a year later, Tollner claimed that it was:

⁴⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 19 June 2006, 93 (David Tollner).

⁴¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 19 June 2006, 91 (David Tollner).

⁴² Commonwealth, *Parliamentary Debates*, House of Representatives, 19 June 2006, 92 (David Tollner).

⁴³ Commonwealth, *Parliamentary Debates*, House of Representatives, 19 June 2006, 91 (David Tollner).

⁴⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 31 May 2006, 5 (Mal Brough, Minister for Indigenous Affairs).

...difficult to find a functional Aboriginal community anywhere. The federal Indigenous affairs minister has highlighted this problem in the past year or so. Sexual assault, domestic violence and other violence, antisocial behavior and drunkenness are all too common today in many communities.⁴⁵

Although not related to the Township Lease reforms, Tollner also spoke about town camps, which he singled out as especially dysfunctional “ghettoes of despair”, “associated with Third World living conditions, poor hygiene, extreme violence and alcohol and child sex abuse.”⁴⁶

Over in the Senate, politicians (including Coalition politicians) who used the word “normalise” did not tend to employ the same extravagant prose when describing Aboriginal communities in the context of the Township Lease reforms.⁴⁷ In discussing the objective of “normalisation” in Aboriginal communities, Scullion was more inclined to focus on the dire need for services and resources such as health and education in communities, rather than portraying them as violent, anti-economic cultural sanctuaries like his colleagues:

I know what Indigenous Territorians have told me throughout time. They are like every other Australian. There is no difference at all. They simply want to be able to buy their own home and have a good education. They want some safety in their communities. They want some employment. Also again, there is the fundamental issue of simply having some hope.⁴⁸

Senator Chris Evans of the Labor party used similar language when he called for “normalisation” in the context of the Township Lease reforms:

I have not yet met an Aboriginal person in the Northern Territory or elsewhere who has said to me they are not in favour of economic development. In fact, they always tell me quite the opposite... People understand that they need economic develop to help their communities prosper. They want jobs, they want services, they want a decent supermarket in town and they want a mechanic where they can get their car fixed. They want all those services ... But the question is about what then happens to the property rights of those landowners.⁴⁹

Evans had earlier been scathing of Brough’s description of Aboriginal communities as “communist enclaves” in the House of Representatives, asking “Have you ever heard anything more politically

⁴⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 June 2007, 6 (David Tollner).

⁴⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 June 2007, 4 (David Tollner).

⁴⁷ With the exception of Senator Helen Coonan, tasked with reading the second reading speech of the *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006* (Cth) and accordingly using the same language as Brough in the House of Representatives. See Commonwealth, *Parliamentary Debates*, Senate, 20 June 2006, 64 (Helen Coonan).

⁴⁸ Commonwealth, *Parliamentary Debates*, Senate, 19 June 2006, 63 (Nigel Scullion).

⁴⁹ Commonwealth, *Parliamentary Debates*, Senate, 9 August 2006, 38 (Chris Evans).

charged and more designed to denigrate those people who live there?”⁵⁰ But Evans’ and Scullion’s portrayal of Aboriginal communities would perceptibly transform with the introduction of the Intervention, as would the rhetoric of many other politicians in Commonwealth parliament.

On the day that the Intervention was announced, Brough spoke about Aboriginal communities in terms similar to those he used during debate about the Township Lease reforms. Aboriginal communities were wild, uncontrollable places, rife with the abuse of children, pornography, alcohol and marijuana and where “there are no norms”.⁵¹ Although not explicit, Aboriginal adult men were portrayed implicitly as perpetrators of the most terrible kind of abuse, with women and children their victims. It was women who were tasked with stemming the flow of alcohol, pornography, marijuana and abuse, Brough “quoting” an unnamed Aboriginal woman from Wadeye as saying:

Please stop the cash flowing into these communities because they are buying grog, they are buying gunga and they are then destroying our children, and this is money that we need to have.⁵²

When he introduced the Intervention legislation six weeks later, Brough’s language was similarly extreme. He again asserted that Aboriginal communities lacked social norms⁵³ and were “dangerous and unhealthy places” where access to alcohol and pornography was unfettered:

[w]e need to dry up the rivers of grog. We need to stop the free flow of pornography.⁵⁴

⁵⁰ Commonwealth, *Parliamentary Debates*, Senate, 19 June 2006, 66 (Chris Evans).

⁵¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 June 2006 (Mal Brough, Minister for Indigenous Affairs).

⁵² Commonwealth, *Parliamentary Debates*, House of Representatives, 21 June 2007, 77 (Mal Brough, Minister for Indigenous Affairs).

⁵³ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 6 (Mal Brough, Minister for Indigenous Affairs).

⁵⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 11 (Mal Brough, Minister for Indigenous Affairs).

Brough also returned to the alleged economic void in Aboriginal communities, claiming that “[i]n a place where there is no natural social order of production and distribution, grog, pornography and gambling often fill the void.”⁵⁵ To Brough, it was the permit system, as well as land communal land tenure arrangements under the *Land Rights Act*, which were responsible for the effective closure of Aboriginal communities from economic opportunities and from scrutiny:

closed towns have made it easier for abuse and dysfunction to stay hidden. Closed towns also prevent the free flow of visitors and tourists that can help to stimulate economic opportunities and create job opportunities.⁵⁶

The prevailing image left by Brough’s description of Aboriginal communities in the Northern Territory is one of societal devastation. These were places which were not just dysfunctional, but apparently devoid of any social norms at all. Although Brough did not explicitly claim that all Aboriginal communities were so afflicted, nor did he acknowledge the existence of any “functional” communities and his language was for the most part unqualified.

Like Brough, Tollner continued the rhetoric describing Aboriginal communities which he used during the Township Lease reforms. In particular, he returned to the economic failures of Aboriginal communities in debate about the Intervention legislation, but also spoke about the sinister criminal elements allegedly pervading them:

After 30 years, the permit system has not stopped the carpetbaggers, the drug pushers, the grog runners, the abusers and the corrupt. We can no longer allow the situation where children are being abused and where crimes are being perpetrated on people who have little or no protection. We should not segregate one part of Australia from another just because of a person’s skin colour.⁵⁷

Tollner saw the permit system in particular as creating racial segregation, and allowing the very worst type of people and behaviours to flourish in Aboriginal communities, a recurring theme in debate about the Intervention.

⁵⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 11 (Mal Brough, Minister for Indigenous Affairs).

⁵⁶ *Ibid.*

⁵⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 95 (David Tollner).

Other Coalition politicians adopted similarly vivid terminology to describe Aboriginal communities during debate about the Intervention measures. Scullion's rhetoric changed markedly from that employed by him during the Township Lease reforms, describing Aboriginal communities as being battered by a "cyclone of child abuse",⁵⁸ and adopting Brough's metaphor of the "rivers of alcohol that run into Indigenous communities"⁵⁹ in the Northern Territory. Scullion singled out town camps as being particularly degraded, describing them as "dark places completely different from the surrounding suburbs".⁶⁰ Senator Adams blamed the permit system as "one of the culprits in hiding an ever-worsening situation of child abuse from the public gaze".⁶¹ Senator Egglestone also adhered to the view that Aboriginal communities were segregated by the permit system from wider Australia, and viewed Aboriginal people as trapped in the past, and Aboriginal culture as being a root cause of dysfunction:

I believe that Indigenous culture has been used to throw a cloak over these problems and that, in this day and age, it is time for the cloak to be removed and for the Indigenous people of Australia as a whole to be brought into the world of contemporary Australia.⁶²

The Coalition's rhetoric about Aboriginal communities continued after it lost government. When the new Labor government proposed to reintroduce the permit system in Aboriginal communities in the Northern Territory, Brendan Nelson (then Leader of the Opposition) referred to the lives of "existential despair" in communities, blaming the permit system for this state of affairs:

One reason that that has continued is that the permit system has not allowed engagement with the outside world and calibration of what is unacceptable in these communities with what, by any other standard in any other part of the country, is evidence of a caring, developed and sophisticated society.⁶³

⁵⁸ Commonwealth, *Parliamentary Debates*, Senate, 21 June 2007, 74 (Nigel Scullion).

⁵⁹ *Ibid.*

⁶⁰ Commonwealth, *Parliamentary Debates*, Senate, 15 August 2007, 37 (Nigel Scullion).

⁶¹ Commonwealth, *Parliamentary Debates*, Senate, 14 August 2007, 56 (Senator Adams).

⁶² Commonwealth, *Parliamentary Debates*, Senate, 13 August 2007, 106 (Senator Egglestone).

⁶³ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 246 (Brendan Nelson, Leader of the Opposition).

Nelson also viewed the permit system as emblematic of a misplaced and overwrought sensitivity to Aboriginal culture: “in the name of cultural sensitivity we reached the conclusion that in some way it would diminish the self-esteem of remote Aboriginal Australians if their circumstances went into the lounge rooms of everyday Australia.”⁶⁴ A month later, Coalition politician Dr Sharman Stone (the last person to use the word “normalise” in this context in the House of Representatives) spoke of the “worst prevalence of criminal behaviour of any communities in the world”⁶⁵ in Aboriginal communities, and claimed that the permit system constituted a “veil of silence”⁶⁶ which gave the “purveyors of grog, drugs and pornography” an “open field” to engage in immoral and criminal activities.⁶⁷

On the whole, the language used by politicians from other parties during debate about the Intervention was not so extreme. These politicians, particularly those who were explicitly critical of “normalisation” as a policy objective, were less likely to make broad generalisations about the alleged depraved state of Aboriginal communities, often focusing on the need for services, infrastructure and the protection of children in Aboriginal communities. However, bipartisan support for the Intervention indicated broad acceptance of the Coalition’s portrayal of communities as rampant with alcoholism, child abuse and violence. And there was an increasing tendency to use vivid and negative terminology to describe Aboriginal communities as debate wore on – Macklin adopted Brough’s metaphor of the “rivers of grog” in communities,⁶⁸ Greens senator Rachel Siewert spoke of the

⁶⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 247 (Brendan Nelson, Leader of the Opposition).

⁶⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 20 March 2008, 2411 (Sharman Stone) .

⁶⁶ *Ibid.*

⁶⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 20 March 2008, 2412 (Sharman Stone).

⁶⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 68 (Jenny Macklin).

“artificial” and “alienating” nature of Aboriginal communities,⁶⁹ and Labor senator Stephens referred to some of them as being “profoundly broken”.

Most notable was the marked change in Labor senator Chris Evans’ language. He moved from castigating Brough for the “categorising of Indigenous people as child molesters and perpetrators of violence”⁷⁰ during debate about the Township Lease reforms, to language which mirrored Brough’s in some respects. Mentioning “social norms” six times, Evans compared “normalised” Indigenous communities, with those where social norms had broken down and which were subject to violence and child abuse.⁷¹ This language reinforced the Coalition’s negative depiction of Aboriginal communities as places rife with addiction, child abuse and violence and devoid of “normal” behaviours.

But this was not the only aspect of the Coalition’s rhetoric about communities which was being reinforced. Since the other parties opposed the removal of the permit system in Aboriginal communities, they did not tend to engage in the same vivid rhetoric as the Coalition about the permit system “closing” communities and harbouring dysfunction. However, it was evident that Labor and Greens politicians who used the term “normalise” shared the Coalition’s view that Aboriginal communities were segregated from wider Australian society, although this imagery was used to support different political ends. These politicians viewed the permit system as a form of protection for Aboriginal people, a policing tool which could be used to stop criminals from penetrating Aboriginal communities. For example, Macklin spoke of Labor’s opposition to the removal of the permit system in communities:

⁶⁹ Commonwealth, *Parliamentary Debates*, Senate, 15 June 2007, 19 (Rachel Siewert).

⁷⁰ Commonwealth, *Parliamentary Debates*, Senate, 19 June 2006, 67 (Chris Evans).

⁷¹ Commonwealth, *Parliamentary Debates*, Senate, 15 August 2007, 23 (Chris Evans).

We believe that the safety of children in these communities will be reduced if the government's measures proceed, as they will allow for greater access by sly-grog and drug runners and by paedophiles.⁷²

Bound up in this was the idea that Aboriginal people needed additional protection than the wider community from these threats, with the permit system a benevolent, if paternalistic, device to lock out the evils of the outside world. Thus, both major parties were to some extent drawing on the same imagery of Aboriginal communities as separate and in need of protection, with the permit system forming a kind of physical barrier from the outside world.

There are a number of recurring themes in the vivid descriptions of Aboriginal communities by Commonwealth politicians who used the term “normalise” in the context of Aboriginal land tenure reform in the Northern Territory from 2006 to 2008. They were consistently described as economically stagnant places which hid horrific violence, abuse and depraved behaviours, and where social norms were either different from those in wider Australian society or absent completely. Often, it was Aboriginal culture itself (or its preservation through the communal land holding arrangements and permit system in the *Land Rights Act*) which was seen as at least partly responsible for the situation in Aboriginal communities. And (certainly during the Intervention) very few politicians qualified their accounts of Aboriginal communities in the Northern Territory, describing in absolute terms their allegedly depraved character.

Perhaps the most striking part of parliamentary rhetoric about Aboriginal communities was the repeated assertion that they were physically, culturally and socially isolated from the rest of Australian society, with the *Land Rights Act* (and particularly the permit system) seen as causing or perpetuating this segregation. Thus, the depiction of Aboriginal communities had a distinct spatial element, where “the organization, and meaning of space is a product of social translation,

⁷² Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 70 (Jenny Macklin).

transformation and experience”.⁷³ Aboriginal people and communities were “closed”, “marooned”, “hidden”, “locked out” from the rest of Australia by a “veil of silence”, “cloak”, even an “apartheid system”. In these “preserves of living prehistory” dysfunction, violence, abuse and addiction remained hidden and were able to flourish, economic activity was stymied and the norms of Australian society were not able to penetrate.

The language used by Commonwealth parliamentarians between 2006 and 2008 powerfully objectified Aboriginal “space” as extraordinarily dysfunctional and entirely separate in every sense from “normal” Australian society. Moreover, it was the inherent “Aboriginality” of the tenure underlying Aboriginal communities which was often seen as a causal factor – the communal form of landholding in the *Land Rights Act*, coupled with the permit system, enshrined traditional Aboriginal culture and perpetuated the segregation of Aboriginal “space” from wider Australian society. The construction of Aboriginal space as socially deprived and segregated from wider society gathered increasing force. By the time the term “normalise” had been abandoned in mid 2008, this was how Aboriginal communities in the Northern Territory were predominantly spoken about by those talking about “normalisation”.

It is significant that many of those politicians who described Aboriginal communities in these terms were also those who modified the ostensible scope of “normalisation” from communities to services and infrastructure. Indeed, as Coalition politicians started to talk about normalising services and infrastructure, the language used to describe Aboriginal communities and the behaviours occurring within them seemed to become more inflammatory. From August 2007, Coalition politicians such as Tollner, Scullion, Egglestone and Nelson spoke about an objective of normalising services and infrastructure rather than communities themselves, yet this was always

⁷³ E.W. Soja, *Postmodern geographies: the reassertion of space in critical social theory* (London, Verso, 1989) at 79-80.

accompanied by dire depictions of those communities which suggested that they were the real target of “normalisation”. Even Labor senator Chris Evans slipped into similar rhetoric about the need to normalise communities during the Intervention. While “normalisation” rhetoric may have changed, the principal characteristic of normalisation discourse remained the transformation of “abnormal” communities and behaviours within them rather than simply standardising services and infrastructure.

There are some evident parallels between the “normalisation discourse” in Commonwealth Parliament, and elements of the colonial property regime in Australia, and the Northern Territory specifically. In Chapter 2, I described how the assertion of sovereignty in Australia and the subsequent grant of private property interests were dependent upon a particular construction of Aboriginal people as not possessing the requisite degree of “civilization” to own the land. Banner suggested that British observers singled out Aboriginal people in Australia as being at the bottom of the hierarchy of civilization when compared with indigenous peoples in other parts of the world – “they were ‘far behind other savages’, ‘the lowest link in the connection of the human races’, ‘the lowest of the nations in the order of civilization’.”⁷⁴ This representation or construction of Aboriginal culture and people became a type of knowledge which informed and legitimated the appropriation of land in Australia through the legal assertion of sovereignty, and subsequent grant of private property interests.

Normalisation discourse, while not subscribing to the same Lockean view of progress from a “savage” to “civilised” state, also represented Aboriginal communities and culture in the Northern Territory in consistently negative terms. As I have demonstrated above, the Commonwealth parliamentary record reveals that normalisation discourse was predicated on a dichotomised view of

S. Banner, “Why terra nullius? Anthropology and Property Law in Early Australia” (2005) 23 *Law and History Review* 95 at 108.

Aboriginal “space” in the Northern Territory as almost universally dysfunctional, abnormal, wild, and locked away with wider Australian society. The separation of Aboriginal space from that of wider "normal" (or normalised) Australian society was a crucial characteristic of this view, and objectified Aboriginal communities in the Northern Territory as places to be "fixed" or infiltrated in some way by the proposed land tenure reforms.

As in colonial times in the Northern Territory, it was the inherent "Aboriginality" of communities which was considered responsible in part responsible for their inferior and "abnormal" state. While in the nineteenth century Northern Territory, the characterisation of Aboriginal society as one of hunting designated it as "uncivilised," "savage" and inferior, normalisation discourse viewed the property regime enshrined in the *Land Rights Act*, including communal land holding and the permit system, as harmful expressions of anachronistic Aboriginal tradition, serving to lock away Aboriginal society from wider society.

By representing Aboriginal communities as isolated places of economic despair, child abuse, and neglect, normalisation discourse produced "knowledge" about Aboriginal people in the Northern Territory. This knowledge about Aboriginal space in the Northern Territory became more powerful during the heated debate about the Intervention, as Commonwealth politicians appeared to increasingly accept the characterisation of Aboriginal communities as harbouring the worst type of dysfunction, and served to legitimate and justify the first two Aboriginal land tenure reforms in the Northern Territory, the Township Lease reforms and the 5-year Intervention Leases.

3.4 “Normalisation” in the Northern Territory Legislative Assembly

Hansard from the Northern Territory Legislative Assembly tells an entirely different story from the Commonwealth parliamentary record. Members of the Northern Territory Legislative Assembly (MLAs) used “normalise” sporadically between early 2007 and early 2008, and then stopped for approximately a year. However, and in direct contrast with the Commonwealth Parliament (where it was abandoned from early 2008), it reappeared in June 2009 and was used with increasing frequency for the next year. Its resurgence roughly coincided with the Northern Territory's Working Future Policy, which involved the transformation of 20 larger Aboriginal communities in the Northern Territory into "growth towns". This would be accomplished in part by negotiating 40-year Housing Leases in most of those centres.⁷⁵ Nevertheless, and despite its increased use by Northern Territory politicians, “normalise” appeared only 18 times in the Northern Territory parliamentary record compared with 53 times in the Commonwealth hansard.

Apart from the patterns and frequency in the use of the term, there are a number of other notable points of departure from its use in Commonwealth Parliament hansard. First, Northern Territory politicians became progressively more comfortable talking about a policy objective of normalising Aboriginal communities and town camps, compared with Commonwealth politicians' trend towards reducing its scope to the mere standardisation of services and infrastructure. Second, although the term "normalise" was consistently used in the context of discussion about Aboriginal communities and town camps in the Northern Territory, Northern Territory MLAs broadened its application to policies other than Aboriginal land tenure reform (including town camps policy and the Working Future Policy). Further, and despite Northern Territory politicians' relative comfort in

⁷⁵ P. Henderson, Chief Minister of the Northern Territory, “A Working Future: Real Towns, Real Jobs, Real Opportunities”, Media Release, 20 May 2009.

describing the target of normalisation as Aboriginal communities, their depictions of Aboriginal communities were far less inflammatory and negative than in the Commonwealth Parliament, with the emphasis usually upon poor infrastructure, housing and services in those communities.

In 2007 when the word "normalise" first came to be used in the Northern Territory Legislative Assembly, some Northern Territory politicians were clearly uncomfortable with "normalisation" as a policy platform for the Commonwealth government's recently introduced Township Lease reforms and Intervention policies. Indigenous MLA Alison Anderson (then with the Labor Party) described Brough's obsession with "populism and rhetoric", and spoke of the unique dynamics of the Northern Territory, including the landscape, Aboriginal people and their culture, before saying:

Understanding these dynamics is important, but it can never be fully appreciated. We can only begin to grasp the true impact this dynamic creates, but it is an important aspect to consider in formulating and shaping policy. To borrow a word from a federal counterpart, considering this point gives some context to the five second media grab: normalisation.⁷⁶

Although she did not expressly mention the Township Lease reforms, Anderson was clearly critical of the rhetoric surrounding this Commonwealth initiative, and the term "normalisation" itself, describing the federal government's motivations as "punitive".

A few months later, after the Intervention had been announced, Independent Lorraine Braham also criticised the Coalition's normalisation agenda:

We talk about protection and care of our young people being the priority. I know Mal Brough, the federal minister, has used the phrase 'we need to normalise communities'. I do not know whether we need to do what the Prime Minister has said a about mainstreaming everyone because, in any society, there are different groups who have different ideals and ambitions. I wonder what is 'normal'?⁷⁷

Braham took a similar view to federal politicians Wortley, Crossin, Siewert and Milne of the scope of "normalisation" – for her the intention was to normalise Aboriginal communities themselves, an objective about which she was critical.

⁷⁶ Northern Territory, *Parliamentary Debates*, Northern Territory Legislative Assembly, 19 April 2007 (Alison Anderson).

⁷⁷ Northern Territory, *Parliamentary Debates*, Northern Territory Legislative Assembly, 29 August 2007 (Lorraine Braham).

Despite these early hesitations about the Commonwealth's use of the term and its real agenda in the context of Aboriginal land tenure reform, "normalisation" was a term which the Northern Territory Labor government seemed reasonably content to apply in relation to its own policies regarding town camps. In February 2007, Indigenous Labor MLA Karl Hampton spoke about the Northern Territory's objective of the "normalisation of town camps ... [to] deliver equitable and appropriate levels of municipal services in Alice Springs."⁷⁸ The "normalisation" of town camps remained a consistent theme in the Northern Territory Legislative Assembly – indeed, 11 of the 18 uses of the term over the four year period examined in this thesis were in relation to the normalisation of town camps.⁷⁹ It is significant that the "normalisation" of town camps was not directly related to the Aboriginal land tenure reforms introduced by the Commonwealth. Town camps were located on leasehold tenure in urban areas and thus unaffected by the Township Lease reforms, the 5-year Intervention Leases and the 40-year Housing Leases. Unlike in the Commonwealth parliament, Northern Territory politicians used "normalisation" to describe policy objectives other than Aboriginal land tenure reform relating to Aboriginal communities in the Northern Territory.

Despite her earlier misgivings about the term "normalisation" in the context of the Township Lease reforms, in May 2008 indigenous MLA Alison Anderson adopted the term in relation to town camps in the context of discussion about the recently announced SIHIP project, which involved the negotiation of 40-year Housing Leases (and the construction of new houses) in 16 major communities on Aboriginal land. As discussed in Chapter 2, unlike the first two land tenure reforms in the Northern Territory (Township Leases and the 5-year Intervention Leases), The Commonwealth Labor government transferred responsibility for negotiating, implementing and

⁷⁸ Northern Territory, *Parliamentary Debates*, Northern Territory Legislative Assembly, 20 February 2007 (Karl Hampton).

⁷⁹ Northern Territory, *Parliamentary Debates*, Northern Territory Legislative Assembly, 10 June 2009 and 12 October 2009 (Adam Giles), 15 October 2009 (Paul Henderson, Chief Minister of the Northern Territory).

administering the 40-year Housing Leases to the Northern Territory. The SIHIP project did not only involve providing housing on Aboriginal land – housing and infrastructure was also to be constructed in town camps in major urban centres of the Northern Territory, and it was in this context that Anderson spoke of her government’s own “normalisation” agenda:

Also in this package is town camps, which I will comment on. Town camps have been in the media for years. This package embraces the town camps; it seeks to solve the crises of town camps and to normalise and mainstream them into our towns so that, as the member for Nelson said, we no longer refer to them as ‘town camps’, but as just another part of the society of Darwin or Alice Springs. That is the way it should be.⁸⁰

Thus, according to Anderson, it was town camps specifically which were to be “mainstreamed” until they were not objectively different from other suburbs in Northern Territory towns.

Anderson came to be increasingly disenchanted with the Northern Territory Labor government of which she was a member, including the slow delivery of and other problems besetting the SIHIP project. In August 2008, Anderson resigned from the Australian Labor Party and became an Independent.⁸¹ As an Independent, Anderson was critical of many policies of the Northern Territory government, but she continued her support for reform of town camps and for a policy objective of their "normalisation":

Because the town camps are so low in repairs and maintenance and behaviour, people who come in expect to behave and live in that standard of accommodation. I believe we have to be brave enough in this House to talk and take action, and normalise the behaviour and conditions these people are living in.⁸²

From 2009, Northern Territory politicians widened the scope of “normalisation” beyond town camps to Aboriginal communities generally, and the frequency with which the term appeared in Hansard also increased. Between June 2008 and June 2009, it was not used at all in the Northern Territory Legislative Assembly, but it appeared once in June 2009, three times in October 2009, once in February 2010, and in May 2010 it appeared four times. Its increasing use followed the

⁸⁰ Northern Territory, *Parliamentary Debates*, Northern Territory Legislative Assembly, 6 May 2008 (Alison Anderson).

⁸¹ T. Ravens, "Government in crisis as pollie quits Labor", 4 August 2009.

⁸² Northern Territory, *Parliamentary Debates*, Northern Territory Legislative Assembly, 5 May 2010 (Alison Anderson).

announcement in May 2009 of the Northern Territory's Working Future Policy. As discussed in Chapter 2, pursuant to this policy, 20 larger Aboriginal communities in the Northern Territory were to be relabelled "growth towns", which would have "proper town plans, private investment, targeted Government infrastructure and commercial centres" and would thus become "towns like anywhere else in Australia". While the measures adopted under the Working Future Policy included more than Aboriginal land tenure reform, there was considerable coincidence between the 20 growth towns and the 16 communities targeted for 40-year Housing Leases under the SIHIP project; all of the communities targeted for 40-year Housing Leases bar one (Milyakburra) were now identified as "growth towns".⁸³ After the introduction of the Working Future Policy, Northern Territory politicians of all political persuasions began to speak about "normalising" communities (or growth towns) with some comfort.

Indigenous Labor MLA, Marion Scrymgour, saw "normalisation" as synonymous with increased leasing in communities generally. Speaking about the progress of leasing in Maningrida, one of the "growth towns" for which a 40-year Housing Lease had been negotiated in principle, Scrymgour said:

The involvement of traditional owners in terms of leasing has been really pleasing. Now that traditional owners have that control, they are looking at working with the land council to develop other industries to come to the community such as a bakery. With the growth of Maningrida, a normalisation process is happening.⁸⁴

In February 2010, Scrymgour again referred to the "normalisation process" occurring in growth towns through 40-year Housing Leases and the sub-leases or tenancy agreements negotiated under them, arguing that housing standards should be equal in urban and remote areas.⁸⁵

⁸³ The remaining "growth towns" were generally not located on Aboriginal land, and accordingly not targeted for 40-year Housing Leases under SIHIP.

⁸⁴ Northern Territory, *Parliamentary Debates*, Northern Territory Legislative Assembly, 15 October 2009 (Marion Scrymgour).

⁸⁵ Northern Territory, *Parliamentary Debates*, Northern Territory Legislative Assembly, 24 February 2010 (Marion Scrymgour).

Other Northern Territory politicians did not confine the scope of “normalisation” to increased leasing in Aboriginal communities like Scrymgour (although they considered increased leasing in those communities to be an integral part of the process). They viewed the transformation of communities into growth towns under the Working Future Policy as synonymous with the “normalisation” of those towns. Labor politician, Rob Knight, spoke in May 2010 about the transformation of communities into growth towns as part of the Working Future Policy, and described this process as “normalising” towns:

This is vitally needed other infrastructure required to normalise these towns. Once that is achieved, you can expect normal behavior and treatment of women, and normal treatment of women, and normal opportunities for women to participate in the labour market.⁸⁶

For Knight, one of the flow on effects of normalising towns, was the creation of “normal” behaviours, hinting that societal transformation was an integral part of the policy.

Independent Gerry Wood (who held the balance of power at that time in the Northern Territory Legislative Assembly) also saw the government’s Working Future Policy as being about normalising Aboriginal communities, claiming that there was a range of issues which needed to be considered “if the government’s concept of growth towns is the normalisation of towns”.⁸⁷ And Country Liberal Party MLA Willem Westra Van Holthe also thus characterised the Working Future Policy, arguing that the continued existence of the permit system defeated the purpose of “normalising” communities under that policy:

It really defeats the entire purpose of the original intent of the intervention in respect to opening up Aboriginal communities and lands to normalise them. That is a term I am sure I have heard the other side of the House use as well. They were looking, through their Growth Towns Strategy, to normalise Aboriginal communities. You cannot normalise any place if you make it different from what is considered the norm, or the mainstream, in the Northern Territory.⁸⁸

⁸⁶ Northern Territory, *Parliamentary Debates*, Northern Territory Legislative Assembly, 5 May 2010 (Rob Knight).

⁸⁷ Northern Territory, *Parliamentary Debates*, Northern Territory Legislative Assembly, 10 June 2010 (Gerry Wood).

⁸⁸ Northern Territory, *Parliamentary Debates*, Northern Territory Legislative Assembly, 28 April 2010 (Willem Westra van Holthe).

Thus, by early to mid 2010, there seemed to be bipartisan agreement that the Working Future Policy entailed the “normalisation” of Aboriginal communities, and that that was a good thing. In addition, and separately from the Working Future Policy, the Northern Territory government was actively pursuing an objective of normalising town camps in urban centres. In stark contrast with the Commonwealth Parliament, where the term was narrowed to a focus on the normalisation of services and infrastructure and then eventually abandoned, Northern Territory politicians were quite happy to define as its target larger Aboriginal communities, town camps and the behaviours occurring within them.

However, despite the broad target of normalisation, Northern Territory politicians described Aboriginal communities and town camps very differently than Commonwealth politicians. Indeed, the parliamentary record of the Northern Territory Assembly makes dull reading in comparison with the florid prose used by Commonwealth politicians. In general, politicians who used the term “normalise” did not speak in absolute terms about social and economic dysfunction in Aboriginal communities, nor did they rely on vivid imagery of those communities being locked away from wider Australian society. Instead, their principal emphasis was on the lack of leasing, housing, services and other infrastructure in Aboriginal communities, which was to be remedied through various policies including the Working Future Policy.

For example, indigenous MLA Marion Scrymgour spoke of the lower standards for public housing in remote communities arguing that normalisation should involve landlords being subject to the same responsibilities as in urban areas.⁸⁹ Rob Knight emphasised the improved provision of housing, land servicing, essential services and other infrastructure through the Working Future

⁸⁹ Northern Territory, *Parliamentary Debates*, Northern Territory Legislative Assembly, 24 February 2010 (Marion Scrymgour).

policy, which would “normalise” Aboriginal communities.⁹⁰ And Gerry Wood saw leases, the gazetting of roads and other services as critical for the normalisation of growth towns.⁹¹

That said, for some politicians the improvement of “behaviours” in Aboriginal communities was an explicit objective. Indigenous MLA Alison Anderson saw improved housing and infrastructure as inextricably linked with improving behaviours in town camps and communities: “because the town camps are so low in repairs and maintenance and behaviour, people who come in expect to behave and live in that standard of accommodation.”⁹² On the same day, Labor MLA Rob Knight said that once infrastructure had been improved and communities thus normalised, “you can expect normal behavior and treatment of women, and normal opportunities for women to participate in the labour market.”⁹³ However, acknowledging that there were social problems in some Aboriginal communities was a far cry from the terminology used by Commonwealth politicians. Further, the clear emphasis of these politicians was to improve sub-standard infrastructure, housing, and other services on Aboriginal land. This was the reverse of the trend in the Commonwealth parliament, where politicians would explicitly state that their aim was to normalise services and infrastructure, but through repeatedly focusing on the alleged horrific social dysfunction in Aboriginal communities made it clear that their real objective was to socially transform these communities.

The differences in the way that “normalisation” was used between the Commonwealth and Northern Territory parliaments suggests that normalisation discourse perceptibly changed over the four year period between 2006 and 2010. While it is beyond the scope of this thesis to definitively ascertain the reasons for this shift, it seems reasonable to infer that the presence of indigenous

⁹⁰ Northern Territory, *Parliamentary Debates*, Northern Territory Legislative Assembly, 5 May 2010 (Rob Knight).

⁹¹ Northern Territory, *Parliamentary Debates*, Northern Territory Legislative Assembly, 10 June 2010 (Gerry Wood).

⁹² Northern Territory, *Parliamentary Debates*, Northern Territory Legislative Assembly, 5 May 2010 (Alison Anderson).

⁹³ Northern Territory, *Parliamentary Debates*, Northern Territory Legislative Assembly, 5 May 2010 (Rob Knight).

parliamentarians in the Northern Territory Legislative Assembly may have had some impact on the way that the term "normalise" was used there, including the way that Aboriginal people and communities were described. The Northern Territory parliament has much higher indigenous representation than any other state or territory. During the four year period examined, there were between four and five indigenous MLAs in the Northern Territory Legislative Assembly, out of a total of twenty five. Between June 2005 and August 2008 (the tenth assembly of the Northern Territory Legislative Assembly), there were five indigenous members, all from the Australian Labor Party: Alison Anderson, Matthew Bonson, Elliot McAdam, Malarndirri McCarthy and Marion Scrymgour. After the November 2008 election, indigenous representation decreased to four - Alison Anderson, Karl Hampton, Malarndirri McCarthy and Marion Scrymgour - all again from Labor although Anderson became an Independent in August 2009. By comparison, in February 2009 there were no indigenous politicians in the Commonwealth Parliament, and only four in total in other Australian states and territories.⁹⁴

Of these Northern Territory indigenous politicians, Anderson, Scrymgour and Hampton all spoke favourably of a policy objective to "normalise" Aboriginal communities and/or town camps. Malarndirri McCarthy later expressed support for normalisation of "leasing" in Aboriginal communities, although her comments in parliament fell outside the four year period studied.⁹⁵ However, while these MLAs were happy to adopt the word "normalise", they did not engage in the same extreme rhetoric as Commonwealth parliamentarians about the alleged depraved state of Aboriginal communities. Instead, they focused on the historic failures of government to provide essential services, housing and infrastructure in those communities and town camps, and the need to

⁹⁴ B. Lloyd, "Dedicated Indigenous Representation in the Australian Parliament", Research Paper No 23 of 2008-2009, Australian Parliamentary Library, 18 March 2009.

⁹⁵ "Normalising arrangements involves accepting and recognising a fair payment may be required for the use of land for government assets." Northern Territory, *Parliamentary Debates*, Northern Territory Legislative Assembly, 23 February 2011 (Malarndirri McCarthy).

rectify these failures. It seems likely that the strong contingent of indigenous politicians may have affected discourse around Aboriginal land tenure reform in the Northern Territory Legislative Assembly, including the way that “normalise” was used there.

Whatever the explanation, the absence of this consistently inflammatory and negative rhetoric about Aboriginal communities in the Northern Territory Legislative Assembly record meant that normalisation discourse as manifested there appeared to lack a key component evident in the Commonwealth parliament.

In particular, and as described above in sub-chapter 3.3.2, during the introduction and implementation of the Township Leases and 5-year Intervention Leases by the Commonwealth government, normalisation discourse as manifested in the Commonwealth Parliament did possess some distinctly “colonial” attributes shared with the nineteenth century Northern Territory property regime, including a dichotomised view of Aboriginal communities as dysfunctional, abnormal, wild, and locked away, and an individual property rights regime imposed to transform these elements of Aboriginal society.

However, since the introduction of the 40-year Housing Leases, and the transfer of responsibility for their implementation to the Northern Territory, these characteristics have become far less prominent in debate about Aboriginal land tenure reform in the Northern Territory Legislative Assembly. Indeed, more recently, the explicit focus of “normalisation” has not been so much on changing the alleged socially aberrant elements of Aboriginal communities through private property, but on correcting the government’s decades-old failure to secure appropriate tenure on Aboriginal land and standardising basic services and infrastructure in communities. One of the key reasons for this shift may be the presence of a significant number of indigenous politicians in the

Northern Territory Legislative Assembly, some of whom have adopted the term with vigour but use it in a different way than their Commonwealth counterparts did previously.

4. Conclusion - the reforms as a reflection of normalisation discourse

In a relatively short period of time, the *Land Rights Act*, the high water mark of indigenous land legislation in Australia, has undergone an unprecedented transformation. Cumulatively, the three major reforms introduced since 2006 – Township Leases, 5-year Intervention Leases and 40-year Housing Leases – have radically altered tenure arrangements on Aboriginal land in the Northern Territory owned under the *Land Rights Act*, with considerable implications for over 70% of the Northern Territory's indigenous population who reside on Aboriginal-owned land in settlements or communities in the Northern Territory.¹

Most legal scholarship to date has focused on the previous Coalition government's policy rationale for these reforms, that is, that existing land-owning arrangements under the *Land Rights Act* are a barrier to the economic and social development of Aboriginal communities in the Northern Territory and that a new individual rights property framework is required to facilitate such development. These commentators have, generally, attempted to demonstrate the failure of the reforms to achieve their stated policy objectives, often claiming that other hidden agendas lie behind the reforms.²

¹ J. Taylor, *Indigenous economic futures in the Northern Territory: The demographic and socioeconomic background*, Discussion Paper No 246, Centre for Aboriginal Economic Policy Research, ANU, Canberra, 2003 at 5.

² For example, see J. Altman, C. Linkhorn and J. Clark, *Land Rights and Development Reform in Remote Australia*, Discussion Paper No. 276, Centre for Aboriginal Economic Policy Research, ANU, Canberra, 2005, D. Dalrymple, "The Abnormalisation of Land Tenure" in J. Altman and M. Hinkson (eds), *Coercive Reconciliation: Stabilise, normalise, exit Aboriginal Australia* (Melbourne, Arena Publications, 2007), S. Hepburn, "Transforming Customary Title to Individual Title: Revisiting the Cathedral", in (2006) 11:1 *Deakin Law Review* 63, M. Stephenson, "To lease or not to lease? The leasing of indigenous statutory lands in Australia: lessons from Canada", (2009) 35:3 *Commonwealth Law Bulletin* 545, S. Brennan, "Modernising the Land Rights Act or the Same Old Same Old?" (2006) *Australian Indigenous Law Reporter* 65, L. Terrill, "The Days of the Failed Collective: Communal Ownership, Individual Ownership and Township Leasing in Aboriginal Communities in the Northern Territory", (2009) 32:3 *UNSW Law Journal* 814.

In this thesis, I have taken a different approach, analysing how the social and economic issues identified by policy-makers as associated with or even caused by the *Land Rights Act* have been formulated by wider discourse in relation to Aboriginal land tenure reform in the Northern Territory, and how the laws used to implement the reforms are themselves a product of this discourse. In examining the way the legal reforms are a product of wider discourse I have focused on the use of the term “normalisation” - said by policy-makers to be a fundamental objective of Aboriginal land tenure reform in the Northern Territory - and on the way that “normalisation discourse” has found expression in the legal landscape of the reforms. In particular, I have examined whether policy-makers are evincing an intention to normalise Aboriginal communities premised upon a construction of Aboriginal people which is suggestive of the Northern Territory’s colonial history and whether and how the characteristics of normalisation discourse have shifted over time.

In trying to answer these questions, I have adopted a combination of methodological approaches. In Chapter 2, I identified some of the features of colonial land legislation which made the Northern Territory’s property map so distinctive, focusing on a key statute -- the *Northern Territory Waste Lands Act* -- which created the basis for the alienation of land in the Northern Territory in the nineteenth century. Relying on insights from historical sources and postcolonial theory, I elucidated some of the colonial features of this legislation, including the construction of Aboriginal people and “space” in a particular way, which then legitimated and informed the alienation of land in the Northern Territory pursuant to the colonial property regime.

I then considered the operation of the *Land Rights Act* and the substance of recent reforms to Aboriginal land owned under the legislation. Contrary to existing scholarship which has viewed the three reforms as nearly identical in legal structure, my analysis revealed key differences between the Township Leases and the 5-year Intervention Leases on the one hand, and the 40-year Housing

Leases on the other. In particular, the Township Lease reforms and the 5-year Intervention Leases involve the grant of leases over entire communities to a Commonwealth government entity which has broad discretion to grant sub-leases and other dependent interests for generations. By contrast, 40-year Housing Leases involve the grant of leases to a Northern Territory government entity over smaller parcels of land within communities for specific public housing purposes, with Aboriginal owners retaining the power to negotiate leases and other forms of tenure over other land within the community.

In Chapter 3, I described the key characteristics of “normalisation discourse” through a qualitative analysis of the word “normalise” in parliamentary Hansard and policy documents. I found that the term shifted in meaning during the four year period studied, particularly between its use in the Commonwealth Parliament and its use in the Northern Territory Legislative Assembly.

In the Commonwealth Parliament, there were increases in the use of the term “normalise” during the introduction of the Township Lease reforms and the 5-year Intervention Leases, but it was abandoned by politicians from approximately early 2008. The way that Commonwealth politicians described the target of normalisation changed during the period of its use, probably deliberately, from an objective of normalising Aboriginal communities themselves to standardising services and infrastructure in those communities. However, and despite the paring back of the explicit target of Aboriginal land tenure reform, Commonwealth parliamentary rhetoric describing Aboriginal communities in the Northern Territory remained strikingly consistent during this period. There were a number of recurring themes in the way that Aboriginal communities were described by Commonwealth politicians. In particular, they were portrayed as economically stagnant places which hid horrific violence, abuse and depraved behaviours, and where social norms were either different from those in wider Australian society or absent completely. Further, Commonwealth

politicians repeatedly asserted that Aboriginal communities were physically, culturally and socially isolated from the rest of Australian society, with Aboriginal culture and the *Land Rights Act* (and particularly the permit system) seen as causing or perpetuating this segregation. Thus, while “normalisation” rhetoric may have changed, the principal characteristic of normalisation discourse remained the transformation of “abnormal” communities and behaviours within them rather than simply standardising services and infrastructure.

There are parallels between the “normalisation discourse” evidenced in Commonwealth Parliament, and elements of the colonial property regime in the Northern Territory. In Chapter 2, I described how the assertion of sovereignty in Australia and the subsequent grant of private property interests were dependent upon a particular construction of Aboriginal people as not possessing the requisite degree of “civilization” to own the land. This representation or construction of Aboriginal culture and people became a type of knowledge which informed and legitimated the appropriation of land in Australia through the legal assertion of sovereignty, and subsequent grant of private property interests.

Similarly, my analysis in Chapter 3 revealed that normalisation discourse was predicated on a dichotomised view of Aboriginal “space” in the Northern Territory. The separation of Aboriginal space from that of wider “normal” Australian society was a crucial characteristic of this view, and objectified Aboriginal communities in the Northern Territory as places to be “fixed” by the proposed land tenure reforms. As in colonial times in the Northern Territory, it was the inherent “Aboriginality” of communities which was considered in part responsible for their inferior and “abnormal” state. Normalisation discourse viewed the property regime enshrined in the *Land Rights Act*, including communal land holding and the permit system, as harmful expressions of anachronistic Aboriginal tradition, serving to lock away Aboriginal society from wider society. This

“knowledge” about Aboriginal space in the Northern Territory became more powerful during the heated debate about the Intervention, as Commonwealth politicians appeared to increasingly accept the characterisation of Aboriginal communities as harbouring the worst type of dysfunction, and served to legitimate and justify the first two Aboriginal land tenure reforms in the Northern Territory, the Township Lease reforms and the 5-year Intervention Leases.

The Northern Territory Legislative Assembly parliamentary record is markedly different. In contrast with the Commonwealth parliament, use of the term increased over the 4 year period studied. Further, and in contrast to the Commonwealth parliamentary record, Northern Territory politicians became progressively more comfortable talking about a policy objective of normalising Aboriginal communities and town camps, compared with Commonwealth politicians’ trend towards reducing its scope to the mere standardisation of services and infrastructure. However, despite Northern Territory politicians’ relative comfort in describing the target of normalisation as Aboriginal communities, their depictions of Aboriginal communities were far less negative than in the Commonwealth Parliament, with the emphasis generally upon poor infrastructure, housing and services in those communities and the government’s decades-old failure to obtain leases on Aboriginal land. The absence of this rhetoric about Aboriginal communities in the Northern Territory Legislative Assembly record meant that normalisation discourse as manifested there appeared to lack the distinctly “colonial” attributes evident in Commonwealth harsard. I have suggested that one reason for the changes in normalisation discourse may be the presence of a significant number of indigenous politicians in the Northern Territory Legislative Assembly, some of whom have adopted the term with enthusiasm but use it in a different way than their Commonwealth counterparts did previously.

I now explore how changes in the key features of normalisation discourse identified in Chapter 3 have found expression in the law. I contend that the shifts in normalisation discourse have indeed informed the way that recent Aboriginal land tenure reform has developed since 2006, and these changes are reflected by a parallel shift in the legal structure of the reforms. Specifically, the change in the legal structure of the reforms identified in Chapter 2 reflected the changes in parliamentary rhetoric about the reforms explored in Chapter 3. The first two reforms (Township Leases and 5-year Intervention Leases) exhibit some parallels with the Northern Territory's colonial property regime. However, the 40-year Housing Leases do not appear to possess the same characteristics and in fact may result in traditional Aboriginal owners of land in the Northern Territory exercising greater legal and economic control over their land.

In reaching this view, it is significant that Commonwealth parliamentary debate focused on the first two reforms, the Township Leases and 5-year Intervention Leases, whereas in the Northern Territory Legislative Assembly attention was directed towards the 40-year Housing Leases (and the related Working Future Policy). My analysis of the reforms in Chapter 2 revealed that, while there are structural similarities between Township Leases, 5-year Intervention Leases and the 40-year Housing Leases,³ there are significant differences in the legal structure, practical effect and policy intent of the reforms pursued by the Commonwealth (the Township Lease and 5-year Intervention Lease reforms) and the 40-year Housing Lease reforms pursued by the Northern Territory.

Township Leases and 5-year Intervention Leases grant exclusive rights over entire communities to the Commonwealth government or a Commonwealth government entity. It is the Commonwealth, rather than traditional Aboriginal owners, which is then able to deal with the land in communities as it sees fit, including granting sub-leases to businesses and individuals for a wide

³ For example, they each involve the grant of a "head-lease" to a government entity, which then has the power to grant dependent interests to other persons, without further reference to traditional Aboriginal owners.

range of purposes. Traditional Aboriginal owners are given little opportunity to negotiate meaningfully about the terms and conditions of these leases. In relation to Township Leases, lease terms are constrained by s19A of the *Land Rights Act* and the “standard” terms dictated by Commonwealth policy,⁴ and in relation to the 5-year Intervention Leases, the leases were compulsorily acquired and the terms and conditions unilaterally imposed by legislation. Further, there is little provision for traditional Aboriginal-owner governance or decision-making in respect of land subject to Township Leases (where these functions are supplanted entirely by the Executive Director for Township Leasing), while in the case of 5-year Intervention Leases traditional Aboriginal owners are able only to grant leases (and not other forms of tenure) with the consent of the Commonwealth Minister.⁵ Thus, the purpose and effect of Township Leases and the 5-year Intervention Leases is to supplant traditional Aboriginal owner control of communities with government control.

However, the structure, operation and intent of the 40-year Housing Leases are quite different. Rather than leasing all the land in a community to a government entity with practically unfettered discretion over granting sub-leases and other dependent interests, 40-year Housing Leases are granted pursuant to the existing section 19 of the *Land Rights Act* to a Northern Territory government entity over smaller “blocks” within communities for defined public housing purposes. In other words, 40-year Housing Leases are granted to secure government assets and implement a public housing tenancy model over limited land within communities, rather than to substitute a government landlord for traditional Aboriginal owners in entire communities. Thus, 40-year Housing Leases go some way to correcting the decades-old failure of governments to negotiate tenure for their assets on Aboriginal land. Further, the decision-making and governance structures

⁴ Office of Township Leasing, Fact Sheet entitled “Whole-of-township leases: standard terms”, at <http://www.otl.gov.au/userfiles/file/factsheet_6.PDF>.

⁵ *Northern Territory Emergency Response Act 2007* (Cth), ss36(6) and 52.

established by the *Land Rights Act* remain intact in respect of the remainder of Aboriginal land in a community. Accordingly, traditional Aboriginal owners retain the ability to negotiate directly with proponents seeking to obtain tenure on Aboriginal land within communities, including both government and private interests. Given the recent Northern Territory policy of securing leases and paying rental for tenure for all government infrastructure on Aboriginal land, this is a significant commercial opportunity for traditional Aboriginal owners of communities.

This shift in the legal structure of Aboriginal land tenure reform accompanied the shift in normalisation discourse described in Chapter 3. In particular, Commonwealth parliamentary rhetoric about the Township Lease reforms and the 5-year Intervention Leases possessed distinctly “colonial” characteristics, predicated on the construction of Aboriginal communities in the Northern Territory as morally depraved, socially dysfunctional and anti-economic, which needed to be transformed or “normalised” by the land tenure reforms. The legal structure of the first two reforms, which effectively involved the supplanting of traditional Aboriginal control of communities with Commonwealth government control, reflected the socially transformative objectives of these reforms in Commonwealth parliamentary discourse. By contrast, debate in the Northern Territory Legislative Assembly about the 40-year Housing Leases did not objectify Aboriginal space in the same way, instead focusing on the need for secure tenure for government assets such as housing, services and essential infrastructure. The legal structure of the 40-year Housing Lease reforms reflected the narrower, more moderate focus of normalisation discourse at this time on securing tenure for government assets in communities and standardising services and infrastructure.

It is also arguable that the legal structure of the first two reforms exhibited some of the same characteristics evident in colonial land legislation in the Northern Territory in the nineteenth century, which attributes were not present (or were present to a lesser extent) in the 40-year Housing

Leases. The Township Leases and the 5-year Intervention Leases both involved the acquisition or (re-acquisition) of property by the Crown for the purpose of granting individual property rights for a relatively unrestricted range of purposes. Thus, Township Leases and 5-year Intervention leases “effectively take as a model the position of vacant crown land as the natural starting point for the development of individual tenure”, although head-leases to government entities are the actual “substructure on which normalised tenure arrangements could be established.”⁶ This reflects the basic premise of early land settlement legislation in Australia, including the *Northern Territory Waste Lands Act* (discussed in Chapter 2). There, vacant crown land was also the starting point from which individual property rights, including the grant of freehold and pastoral leases, could be granted.

Of course, there are some significant differences between the relatively simple process by which land was appropriated and granted in colonial times in the Northern Territory, and the sheer complexity of the property rights created by the three land tenure reforms. First, in all three reforms, the underlying tenure remains Aboriginal land owned under the *Land Rights Act*, and accordingly Aboriginal ownership has been suppressed rather than removed. Second, Aboriginal people retain certain rights and interests in the area subject to the head-lease. These rights and interests vary depending on the type of lease granted. For example, in both Township Leases and the 5-year Intervention Leases (and presumably the 40-year Housing Leases, although the lease terms are not yet public), traditional Aboriginal rights of access are preserved notwithstanding the exclusive nature of the leasehold title,⁷ and within the 5-year Intervention Lease areas land trusts retain the right to grant leases.⁸ Finally, despite the preservation of some rights, in other ways the leases go far beyond the usual subject of leasehold title. For example, in 5-year Intervention Leases the Commonwealth

⁶ L. Terrill, *Supra* note 2 at 825.

⁷ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 19A(10), *Northern Territory Emergency Response Act 2007* (Cth), s 34.

⁸ *Northern Territory Emergency Response Act 2007* (Cth), s 36(6) and s 52.

acquired the power to terminate existing rights and interests,⁹ and can unilaterally vary the terms and conditions of those rights and interests.¹⁰ If these tenurial quirks were not difficult enough to comprehend on their own, the intention of both levels of government seems to be that all three forms of leasehold title introduced by the reforms will eventually apply in the major “growth” communities.¹¹ Thus, in communities where multiple cumulative forms of leasehold tenure will apply, a bewildering mélange of rights and interests may arise.

The confusing and complex nature of the tenure created by the reforms may appear to confound attempts to draw parallels with the colonial appropriation of land in the Northern Territory. However, the property rights granted in the colonial Northern Territory were also complex, with varying hierarchies of property interests which were not always predicated on the absolute legal exclusion of Aboriginal people from the property landscape. The pastoral lease was one example. It constituted a non-exclusive private property interest, with the rights of the pastoralist co-existing with Aboriginal rights and interests under Australian law.¹² As with the pastoral lease in the Northern Territory, the leasehold title created by recent Aboriginal land tenure reforms also preserves continuing Aboriginal rights of access and use through the mechanism in section 71 of the *Land Rights Act*. However, also similarly to the pastoral lease, these rights and interests are carefully expressed to be subject to the superior rights of government. For example, notwithstanding the right of land trusts to grant leases within the 5-year Intervention Lease areas, such leases cannot be granted without the consent of the Minister and lesser forms of tenure

⁹ *Northern Territory Emergency Response Act 2007* (Cth), s 37.

¹⁰ *Northern Territory Emergency Response Act 2007* (Cth), s 35(2).

¹¹ *Remote Service Delivery Bilateral Plan – Plan Period: 2009-2014 – Implementation Plan for National Partnership Agreement on Remote Service Delivery* between the Northern Territory and Commonwealth states that Township Leases are to be negotiated in 15 identified growth communities, but that negotiations should occur “with Traditional Owners for interim block lease arrangements over new government infrastructure pending agreement to whole of township lease arrangements” at <http://cgris.gov.au/userfiles/file/NT_RSD_NP_BIP.pdf>.

¹² *Wik Peoples v Queensland* (1996) 187 CLR 1.

(including licences) cannot be granted at all by land trusts.¹³ And although traditional rights of access are preserved, the government entity is granted an exclusive lease which enables it to grant dependent interests.¹⁴ Thus, the complexity of the legal structure of land tenure reforms in the Northern Territory, with its creation of hierarchies of rights and interests, was also characteristic of colonial land legislation in the Northern Territory.

While the first two reforms are clearly distinguishable from the 40-year Housing Leases in the parliamentary discourse and legal structure, the maligned objective of “normalisation” in the context of the 40-year Housing Leases and the accompanying Working Future Policy may nevertheless exhibit some colonial characteristics. In particular, the implementation of the Northern Territory’s planning regime in Aboriginal communities, and with it the increasing paramountcy of the survey on Aboriginal land, represents a significant legal and practical incursion on traditional owner control and administration of Aboriginal land upon which communities are located.

The *Planning Act* (NT) provides for a single and integrated planning scheme across the Northern Territory, including a process for the zoning, subdivision and surveying of land for particular uses. The legislation is triggered in two principal circumstances: when a proponent (whether landowner, lessee or other land user) applies to use land which has been “zoned” (or allocated particular permitted uses) for a different use, and when trying to effect a “subdivision” of land, regardless of whether that land is zoned for a particular use, which is defined to include the granting of a lease for a period of 12 years or more. Critically, for a subdivision to be lawful, it must be effected in accordance with an approved survey.¹⁵

¹³ *Northern Territory Emergency Response Act 2007* (Cth), ss36(6) and 52.

¹⁴ In relation to Township Leases, see *Land Rights Act*, s19A(14) and in relation to 5-year Intervention Leases, see *Northern Territory Emergency Response Act 2007* (Cth), s35(1).

¹⁵ *Planning Act* (NT), s 61.

While the *Planning Act* (NT) has always applied in theory on Aboriginal land, it had limited practical application prior to the introduction of the 40-year Housing Leases and the Working Future Policy. Due perhaps to the government's longstanding policy not to obtain tenure on Aboriginal land, Aboriginal communities were not zoned and thus there were no restrictions on the use of the land. Further, by generally granting leases for a term of less than 12 years (longer terms were rarely required, particularly given the government's historical failure to obtain tenure on Aboriginal land), land trusts could avoid the planning legislation altogether. As a consequence, surveys of parcels of Aboriginal land within communities took place largely on an *ad hoc* basis when lease terms exceeded 12 years, and land trusts had complete discretion as to the purposes for which leases and other interests could be granted.

However, as discussed in Chapter 2, the 40-year Housing Leases and the associated Working Future Policy represented a significant shift in policy around government tenure on Aboriginal land. Under the Working Future Policy, larger Aboriginal communities in the Northern Territory have been identified as “growth towns”, which will have “proper town plans, private investment, targeted Government infrastructure and commercial centres” and will be “towns like anywhere else in Australia”.¹⁶ It is Northern Territory policy to obtain 40-year Housing Leases for public housing in the majority of these growth towns,¹⁷ and indeed tenure must be secured for *all* government-funded or constructed infrastructure on Aboriginal land.¹⁸ Since leases for government infrastructure (including the 40-year Housing Leases) are generally sought for periods longer than 12 years,

¹⁶ P. Henderson, Chief Minister of the Northern Territory, “A Working Future: Real Towns, Real Jobs, Real Opportunities”, Media Release, 20 May 2009.

¹⁷ J. Macklin, P. Henderson and W. Snowdon, “Landmark Housing Projects for NT Indigenous Communities”, Media Release, 12 April 2008.

¹⁸ *National Partnership Agreement on Remote Service Delivery and Remote Service Delivery Bilateral Plan – Plan Period: 2009-2014 – Implementation Plan for National Partnership Agreement on Remote Service Delivery* at <http://cgris.gov.au/userfiles/file/NT_RSD_NP_BIP.pdf>.

approved surveys of these subdivisions are thus required in accordance with the requirements of the *Planning Act (NT)*.

The Northern Territory government has responded quickly to the increased demand for planning on Aboriginal land. The newly-established Indigenous Land Use Planning unit within the Northern Territory Department of Lands has recently published guidelines outlining the planning processes applying to communities on Aboriginal land,¹⁹ and the Aboriginal Community Surveys unit within the same department is tasked specifically with the burden of surveying land for leases and sub-leases in Aboriginal communities under the *Land Rights Act*,²⁰ and further to develop Northern Territory “growth towns” by enhancing the Territory’s cadastral and geodetic infrastructure through the project management of surveys, verification of the co-ordinated reference marks and by geo-referencing the lease and sublease boundaries”.²¹ Moreover, the Northern Territory appears to be in the process of zoning all “growth towns”, and zoning plans for 6 communities have already been finalised, each with an intricate and colourful grid of lots and permitted uses.²² These changes are significant in the context of the administration of Aboriginal land. The application of planning laws in Aboriginal communities circumscribes the way that traditional Aboriginal owners can deal with their land, since leases and other interests can only be granted in accordance with these zones and surveys, and adds another level of bureaucracy to property dealings in communities on Aboriginal land.

¹⁹ *Planning Guidelines for Growth Towns and Indigenous Communities in the Northern Territory* at <http://www.nt.gov.au/lands/planning/scheme/documents/Guidelines_Growth_Towns_and_Indigenous_Communities.pdf>.

²⁰ *Surveyor General Direction 2010/01 – Survey Requirements and Guidelines for the issue of Section 19 (ALRA) Leases and Section 19A (ALRA) Headleases and Subleases for Aboriginal Communities*.

²¹ Northern Territory Lands Group – Aboriginal Community Surveys, see <<http://www.nt.gov.au/lands/lis/survey/aboriginalcommunitysurvey/index.shtml>>.

²² Umbakumba, Milyakburra, Angurugu, Ngukurr, Hermannsburg, Wurrumiyanga, see <<http://www.nt.gov.au/lands/planning/scheme/zoningmaps.shtml#gtmaps>>.

The increasing application of Northern Territory planning laws on Aboriginal land, and specifically the rising importance of the survey, could be viewed as reflecting a key element of early “waste lands” legislation in Australia, including the *Northern Territory Waste Lands Act*. As discussed in Chapter 2, it was a precondition to the disposition of “waste lands” by grant of freehold title or a term of years that the land in question be surveyed.²³ The zoning and surveying of Aboriginal communities into clearly defined and subdivided parcels of land might also be understood as the “taming” of communal title held under the *Land Rights Act* through the orderly grids of the survey and the attendant grant of individual title. Agamben’s comments about the colonial frontier thus may still resonate in the context of the most recent manifestation of Aboriginal land tenure reform in the Northern Territory:

Inside the frontier lie secure tenure, fee simple ownership, and state-guaranteed rights to property. Outside lie uncertain and undeveloped entitlements, communal claims, and the absence of state guarantees to property. Inside lies stability and order, outside disorder, violence and ‘bare life’.²⁴

The acquisition of long-term leasehold tenure by government and attendant surveying of major Aboriginal communities might be similarly considered part of a modern march of the frontier into Aboriginal communities, imposing surveyed order on the “disorder, violence and ‘bare life’”.

While these parallels with the colonial property regime in the Northern Territory may be suggestive, it is important not to overstate their significance. Northern Territory planning laws, including the requirements for surveys, already applied as a matter of law in the Northern Territory. Thus, although recent Aboriginal land tenure reform has increased the practical significance of these laws, the legal requirement for surveys to effect property transactions existed well in advance of the reforms and in fact was characteristic of the property regime imported to Australia with the

²³ See, for example, section 5 of the *Australian Waste Lands Act* 1855 (Imp) and sections 2-7 of the *Northern Territory Waste Lands Act*.

²⁴ G. Agamben, *Homo sacer: Sovereign power and bare life* (Stanford, Stanford University Press, 1998) quoted in N. Blomley “Law, Property and the Geography of Violence: The Frontier, the Survey, and the Grid” in (2003) 93:1 *Annals of the Association of American Geographers* 121 at 124.

acquisition of sovereignty. Put another way, planning and surveying were and are an integral part of the Northern Territory's property framework notwithstanding recent Aboriginal land tenure reform in the Northern Territory, and are an inevitable outcome of increased property transactions on Aboriginal land as a result of the Northern Territory and Commonwealth's policy decision to obtain secure tenure for assets on Aboriginal land.

Since the introduction of the first Aboriginal land tenure reform in 2006, there has been a transformation in the way that Aboriginal land in the Northern Territory is dealt with and administered. However, this transformation has probably not occurred in the way that the original architects of the Township Lease reforms or the 5-year Intervention Leases envisaged. Even though it is government policy to pursue Township Leases in the same communities where 40-year Housing Leases have been negotiated, Township Lease negotiations have largely stagnated, with only two leases granted to date. Further, the 5-year Intervention Leases are due to expire in July 2012, and it is government policy that following this date all government assets must be secured with appropriate tenure, negotiated with traditional Aboriginal owners and paid for at market rates. Thus, the 40-year Housing Leases (and associated policies such as the Working Future Policy) are the culmination of recent Aboriginal land tenure reform, rather than an interim measure or an extension of the earlier reforms.

Perhaps paradoxically, given scholarly criticism of the earlier reforms and their parallels with the Northern Territory's colonial property regime, the practical effect of 40-year Housing Leases may be to increase the traditional owners' governance and control of land in communities by correcting the decades-old failure of governments to negotiate tenure for their assets and stimulating property transactions on Aboriginal land in accordance with the existing leasing provisions of the *Land Rights Act*. The change in the meaning of the term "normalisation" in parliamentary discourse

reflects the changes in Aboriginal land tenure reform since 2006. Instead of the colonially-reminiscent “normalisation” of allegedly socially dysfunctional Aboriginal communities, what is now occurring is the normalisation of the Northern Territory and Commonwealth governments’ approaches to property dealings on Aboriginal land - in short, traditional Aboriginal owners are finally being treated by government as the owners of land in fee simple under the *Land Rights Act*.

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