



**CENTRAL LAND COUNCIL**

# **Land Reform in the Northern Territory: evidence not ideology**

**October 2013**

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## Executive summary

Historically there has been a poor correlation between stated government policy objectives in relation to land tenure reform in the Northern Territory and the measures devised in pursuit of them. Over the last decade, advocates of legislative reform of the ALRA and those seeking to demonise 'communal title' have tended to:

- deliberately mischaracterise the efficacy of existing ALRA provisions;
- ignore the intended beneficiaries, the Aboriginal land owners, in devising tenure 'solutions';
- overemphasise the likely outcomes of major legislative reform; and, more recently,
- ignore the significant extent to which the formalisation of land tenure on Aboriginal communities in the Northern Territory, by means of leasing, is now well advanced.

As we move forward into the fourth decade of land rights in the Northern Territory, it is critical that governments focus on how to facilitate thriving and sustainable Aboriginal communities in the Northern Territory and respond by devising effective policy and reforms based on the evidence.

This paper looks back over the last seven years of land tenure reform with a view to capturing its impact and demonstrating that the underlying policies were ideological rather than evidence based. The last part of the paper looks forward and highlights that with land tenure formalisation within communities almost completed, there remains three major challenges to facilitating development on Aboriginal land in Aboriginal communities: regularising and expanding the delivery of infrastructure; ensuring that there is access to finance for economic development; and, in some communities, formalising negotiated settlements between residents and traditional owners.

### *Looking back: ideology not evidence based land reform*

In 2006 the Australian Government embraced an emerging generalised critique of communal ownership. This critique characterised individual property rights as necessary for economic development, and communal title as inevitably inhibiting such development. This characterisation was relied on to justify amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA). The amendments provided, among other things, for the leasing of whole remote Aboriginal townships to a government entity for ninety-nine years. Since 2006 the Australian Government has developed a range of further

land reform policies that are characterised as being directed towards promoting economic development and individual home ownership.

The proponents of tenure reform need to consider the extent to which leasing has now been advanced using existing provisions of the ALRA that do not involve whole of township leases. This is particularly the case in the larger remote communities that are a primary focus for governments. The CLC has now processed 478 leases, including 23 forty year housing leases. In addition, the CLC has received 511 applications for leases and licences which will require consultations during 2013–2014. The large volume of leases executed over the past three years has not occurred due to major legislative change, nor as a result of new economic development opportunities, but because parties who previously did not seek leases are now applying for them. The CLC's process for the grant of leases on ALRA title is efficient, clear and accessible to third parties seeking to formalise an interest in land.

Two case studies are presented in this paper to demonstrate the full extent of the implementation of the 'secure tenure' policy in remote communities in the NT: Lajamanu and Alekarenge (Ali Curung).

- A recent internal CLC audit of leases consented to at Lajamanu indicates that more than 81% of available serviced lots in the community are now leased, with further applications currently being processed which, if approved, would see this figure increase to 94%.
- Similarly, 71% of all available serviced lots in Alekarenge are now leased, with further applications currently being processed which, if approved, would see this figure increase to 82%.

*Looking forward: development requires focus on the difficult issues*

Focusing solely on tenure and communal title as the key barrier to economic development and individual home ownership has distracted focus from the other critical factors requiring urgent attention. The most pressing and ubiquitous barriers to economic development and home ownership on remote communities in the Northern Territory continue to be neglected. These include major power, water and sewerage constraints and serious limitations on available serviced land. They also include the high cost of construction, the quality of infrastructure, low average incomes, the caution of mortgage lenders and a range of other market factors. These are the same barriers that exist in other primarily Aboriginal towns in the CLC region which are on ordinary Northern Territory freehold title, where the tenure system does offer private ownership. These include

Aputula (Finke) and Kalkarindji, where economic development and private home ownership are no further advanced than in communities situated on Aboriginal land.

These case studies also highlight the urgent need for significant investment in essential service infrastructure and capital works to address the severe scarcity of vacant serviced land in remote communities across the CLC region.

The remaining issues and challenges outlined include the need for improved investment in land administration systems and institutional infrastructure relating to land use; improved roads; substantial support for local enterprise; and Aboriginal land owners, lenders, Land Councils and governments working collaboratively to develop a range of commercial lease templates that will support Aboriginal people's aspirations in economic development and private home ownership.

A further issue outlined in the paper relates to the identified need in some communities to negotiate a settlement in relation to future land use that acknowledges the interests of long-term Aboriginal residents in addition to those of the traditional owners of that community.

The collaborative effort of all interested parties, and in particular Aboriginal land owners themselves, is required to address these matters. Achieving this will require a commitment to evidence not ideology.

## Introduction

Since 2004 there has been considerable debate around Indigenous communal land ownership at the national level.<sup>1</sup> Policy proposals in response to this debate have ranged from minor amendments to land rights legislation aimed at better facilitating the grant of individual leasehold interests, to outright abolition of communal title in favour of individual titling.

In 2006 the Howard government embraced an emerging generalised critique of communal ownership to move amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA). Those amendments provided, among other things, for the leasing of whole remote Aboriginal townships to a government entity for ninety-nine years.<sup>2</sup> The amendments were characterised as heralding an end to the ‘days of the failed collective.’<sup>3</sup> Then minister for Indigenous Affairs Mal Brough said the changes would facilitate economic development and increase private home ownership. Since 2006 the Australian Government has developed a range of further land reform policies that are represented as being directed towards promoting the same objectives.<sup>4</sup>

*There has often been a poor correlation between stated policy objectives and measures devised in pursuit of them.*

This paper considers the 2006 ALRA amendments and subsequent Australian Government policies in the context of the debate around communal title, economic development, home ownership and ‘security of tenure’. From the perspective of the Central Land Council (CLC), there has often been a poor correlation between stated policy objectives and measures devised in pursuit of them. It is often asserted that the proposed measures will better facilitate economic development or home ownership without sufficient articulation of precisely how, and without

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<sup>1</sup> The debate was probably at its height between 2004 and 2007. There was considerably less public debate from 2008 to 2012 but there has been a recent upsurge in disappointing commentary on this issue. See e.g. A Anderson, ‘New measure brings us home’ *Northern Territory News* (26 January 2013); N Rothwell, ‘The great unmentionables of remote life’, *The Australian* (6 February 2013); H and M Hughes, ‘With apologies, PM, home ownership is the key’, *The Australian* (15 February 2013).

<sup>2</sup> The terms township and community are used interchangeably in this paper. Community is the term Aboriginal residents most commonly use, whereas township is the term used in the 2006 amendments and the debates surrounding them.

<sup>3</sup> Second Reading Speech, Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 (Cth), House of Representatives, 31 May 2006, 4 (Brough).

<sup>4</sup> See e.g. s 30A of the *Northern Territory National Emergency Response Act 2007* (Cth), inserted into that legislation by the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth); *Stronger Futures in the Northern Territory Act 2012* (Cth), s 33(b); [Indigenous Economic Development Strategy 2011–2018](#), 6–63.

complementary initiatives to overcome non-tenure-related barriers. Significantly, technocratic land tenure 'solutions' are largely developed without the input of their would-be beneficiaries: the Aboriginal land owners.<sup>5</sup>

Advocates of legislative reform have tended to mischaracterise the efficacy of existing ALRA provisions, overemphasise the likely outcomes of major legislative reform and, more recently, ignore the significant extent to which leasing of land in communities is now advanced. At the same time inadequate attention is paid to investing in addressing the most pressing and ubiquitous barriers to economic development and home ownership on remote communities in the Northern Territory. These include major power, water and sewerage constraints and serious limitations on available serviced land. They also include the high cost of construction, the quality of infrastructure, low average incomes, the caution of mortgage lenders and a range of other market factors. These are the same barriers that exist in other primarily Aboriginal towns in the CLC region which are on ordinary Northern Territory freehold title, where the tenure system does offer private ownership. These include Aputula (Finke) and Kalkarindji, where economic development and private home ownership are no further advanced. Evidence based policy should lead politicians and others to conclude that land tenure is not the primary inhibitor of economic development on Aboriginal land.

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Nonetheless, as the occupancy of ALRA land by both tiers of government and other parties is comprehensively formalised through voluntary leasing,<sup>6</sup> some benefits are beginning to flow. Some of these benefits are tangible, for instance land owners receiving regular rents,<sup>7</sup> and a clearer allocation of responsibility for certain assets. Some are less tangible

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<sup>5</sup> In a [submission](#) to the Senate Standing Committee, *Inquiry into the Stronger Futures in the Northern Territory Bill 2011 and Two related Bills*, Leon Terrill notes that 'In 2008, the Australian Government released a two volume report called *Making Land Work*, in an attempt to better understand the complex issues affecting customary land reform in the Pacific. The report drew on the input of around 80 experts and practitioners in land reform and development... During the same period the Australian Government began its involvement in Aboriginal land reform in the Northern Territory. It did not commission a detailed report, nor call on the advice of experts. It did not establish a steering group, it did not even prepare or publish a land reform policy. It simply implemented a series of reforms as if the task were self-evident... The result has been an ad hoc, confused, expensive and at times contradictory approach to the implementation of land reform. On the whole, the outcome of these reforms has been very poor.' It is beyond the scope of this paper to fully consider the policy rationale for recent reforms but this comparison is demonstrative.

<sup>6</sup> In the CLC region leasing has proceeded under the existing mechanism provided for in section 19 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Since the ALRA was passed in 1976 it has been possible for individual leasehold interests to be granted to third parties. For more information on the process for the grant of leases under section 19 of the ALRA see '[Leasing Aboriginal Land](#)' on the Central Land Council website.

<sup>7</sup> In the CLC region such rents are increasingly being used for community development projects.

*The process for the grant of leases on ALRA title is efficient, clear and accessible to third parties seeking or wishing to formalise an interest in land.*

but nonetheless important, such as the recognition of traditional Aboriginal ownership through such transactions and of the need to seek permission of land owners. The latter is significant in the wake of the Northern Territory National Emergency Response (NTNER – or Intervention as it was widely known).<sup>8</sup> The formalisation of land use on Aboriginal land in large communities<sup>9</sup> is now advanced to the extent that certainty has been achieved by most third parties concerned about security of tenure.<sup>10</sup> The process for the grant of leases on ALRA title is efficient, clear and accessible to third parties seeking or wishing to formalise an interest in land.

The significant increase in voluntary leasing strongly indicates that communal title is not the main barrier to economic development and that the grant of formal interests alone is not a solution. This paper shows that while issues relating to land administration and leasing still require some work, the disproportionate focus on perceived problems with ALRA title distracts attention from other critical issues.

## Communal land ownership, individual title and economic development

*The successful uptake of voluntary leasing demonstrates that communal title is not the main barrier to economic development.*

Hernan de Soto's *The Mystery of Capital* was central to much local and international debate around land reform.<sup>11</sup> In it de Soto argues that in order to unlock the full potential of land as an asset for wealth creation, formal legal title is essential. De Soto highlights the importance of efficient institutional arrangements which ensure land ownership is adequately recorded and certain so as to minimise transaction costs in land dealings. Such institutional arrangements, de Soto argues, allow the 'parallel life of assets' to be unlocked for wealth generation. This is how prosperity was secured in the West, he argues, and a similar path is

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<sup>8</sup> See, however, the discussion below on the need to consider mechanisms for negotiated settlement between long-term Aboriginal residents of remote communities and non-resident traditional owners.

<sup>9</sup> Large communities are considered to be those with a population of more than 150.

<sup>10</sup> CLC data suggests that around 90% of all available serviced land in some larger communities (as defined above) is now either under lease or under application and being processed.

<sup>11</sup> H de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Black Swan Publishing, 2000).

essential to the economic development and advancement of developing and post-communist countries. De Soto focuses on urban fringe contexts where populations are dense and commercial activity is high despite a lack of formal title to land:

Walk down most roads in the Middle East, the former Soviet Union, or Latin America, and you will see many things...parcels of land being tilled, sowed, and harvested...merchandise being bought and sold.

Assets in developing and former communist countries primarily serve these immediate physical purposes. In the West, however, the same assets...can be used to put in motion more production by securing the interests of other parties as 'collateral' for a mortgage...Why can't buildings and land elsewhere in the world also lead this parallel life? <sup>12</sup>

De Soto argues that, elsewhere, people hold land resources in 'defective forms'. For example, houses are built on land for which ownership is not clearly recorded. De Soto argues that in the absence of clarity on ownership, such assets 'cannot readily be turned into capital...cannot be used as collateral for a loan.'<sup>13</sup>

Although the context differs dramatically from that of remote Aboriginal communities in the Northern Territory, there are aspects of de Soto's thesis on the potential benefits of formalisation that warrant examination.<sup>14</sup> Yet, in Australia, his ideas were drawn on to critique communally held Aboriginal land and its imputed role as *the* major impediment to economic development.<sup>15</sup> Hughes and Warin, for example, inaccurately cite de Soto's work in support of their assertion that communal ownership 'impedes the productive use of land, employment creation and economic development worldwide.'<sup>16</sup> In so mischaracterising de Soto's writing, such commentators failed to note the primary feature

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<sup>12</sup> Ibid, 36–7.

<sup>13</sup> Ibid, 6.

<sup>14</sup> ALRA land has been leveraged to make use of what de Soto refers to as the 'parallel life of assets': The example of Alice Springs to Darwin railway project leases illustrates how a commercial lease can be developed under ALRA which can by itself, or through sub-leases, be used as security to finance the overall commercial enterprise. The head lease between the Land Trust and the Austral Railway Corporation allows for transfer of the interest to a mortgagee and provides that the lessor may mortgage any sub-lease granted under the head lease without any further requirement of consent.

<sup>15</sup> See e.g. H Hughes and J Warin, 'A New Deal for Aborigines and Torres Strait Islanders in Remote Communities' (2005) *Centre for Independent Studies*; Christopher Pearson, 'Case to put lands right', *Weekend Australian*, 11 December 2004. Commentators such as Gary Johns and Sarah Hudson have also contributed to this generalised critique of communally held title. Vanstone, Brough, Howard, Tollner and Elferink drew on such commentary in the critiques they adopted.

<sup>16</sup> H Hughes and J Warin, 'A New Deal for Aborigines and Torres Strait Islanders in Remote Communities' (2005) *Centre for Independent Studies*, 4.



of his thesis is not the need for individualised title in place of communal title; rather, his primary assertion is the need for a formalised land administration system.<sup>17</sup>

Tom Calma observed that the critique of communal title in Australia largely took place without reference to specific locations or land administration regimes, which vary considerably by State and Territory:

Much of the debate talked about Indigenous land with little regard for whether or not the land in question was native title land, land rights land, purchased land or simply whether the land in question was reserved for the benefit of indigenous peoples.<sup>18</sup>

Critics assumed that ‘individual property rights *necessarily* lead to economic development which communal titles inevitably inhibit’ (emphasis in original).<sup>19</sup> There was a failure to adequately interrogate to what extent – under a specific Aboriginal land regime – communal title is the main cause of a lack of economic development in remote Aboriginal communities.<sup>20</sup> This is exemplified in the following assertion, again from Hughes and Warin, that ‘[c]ommunal ownership of land, royalties and other resources is *the principal cause* of the lack of economic development in remote areas.’<sup>21</sup> The Howard government rather uncritically adopted such a characterisation in the lead up to the 2006 amendments to the ALRA.

## The impact of land tenure reform in the Northern Territory

Since the end of 2004 the Australian Government has participated in the debate around communal title and has devised a range of ‘land reform’ policies, ostensibly in response to

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<sup>17</sup> For example, Tehan observes that ‘de Soto’s work is largely with people who have no title or informal titles rather than access to a communal title’: M Tehan in L Godden and M Tehan (Eds), *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Routledge, 2010) 363.

<sup>18</sup> T Calma, *Ibid*, 49.

<sup>19</sup> M Tehan, *Ibid*, 366. At the same time as this debate began to gather momentum in Australia, the approach of international organisations like the World Bank had begun to change. While still advocating strongly for formal, secure and fungible interests in land, a [2003 report for the World Bank](#) concluded that ‘[w]hether it is more appropriate to give property rights to individuals or to a group will depend largely on the nature of the resource and on existing social arrangements.’ In [their submission](#) to the Senate Standing Committee on Community Affairs, *Inquiry into Aboriginal Land Rights (Northern Territory) Amendment Bill 2006*, Godden and Tehan note that the change of approach occurred because ‘the move towards individual title and a market based land systems has not produced the outcome of land markets as an instrument for addressing poverty.’

<sup>20</sup> Noel Pearson took a more nuanced approach, rejecting the characterisation of the problem as one of communal versus individual ownership, arguing that ‘what is needed is an intelligent compromise, informed by an awareness that cultural preservation and integration into the mainstream economy are not immutably opposing forces.’ See N Pearson and L Kostakidos-Lianos ‘Building Indigenous Capital: Removing obstacles to participation in the real economy’ (2004) *Easter Australian Prospect* 1–10, 1.

<sup>21</sup> H Hughes and J Warin, above n 14, 15.

this debate.<sup>22</sup> Then minister for Indigenous Affairs Amanda Vanstone, and Mal Brough after her, relied on criticism of communal title to justify amendments to the ALRA which passed in 2006.<sup>23</sup>

### *2006 amendments*

Introducing the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 (the Bill), then minister for Indigenous Affairs Mal Brough asserted that it would:

provide more choices in life for Aboriginal people in the Northern Territory... [by providing] for a new tenure system for townships on Aboriginal land that will allow individuals to have property rights. It is individual property rights that drive economic development. The days of the failed collective are over.<sup>24</sup>

Minister Brough noted that ‘many of the proposed amendments come from a joint submission by the Northern Territory government and land councils.’<sup>25</sup> Those amendments that the NT Government and the Land Councils had jointly proposed were directed toward addressing technical aspects of the ALRA that had been acknowledged as increasing transaction costs and impeding, to some extent, the fungibility of ALRA land.<sup>26</sup>

Under the jointly agreed amendments, leasing for up to 40 years would be permissible without federal Ministerial consent (previously this was 10 or 21 years depending on the purpose). Further, Ministerial consent would only be required where \$1m or more was to be paid or received on behalf of a Land Trust (previously such consent was required for transactions in excess of \$100,000). Another jointly proposed amendment clarified that, in order for leased land to be used as a security, land-owner consent could be provided

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<sup>22</sup> Including through its Indigenous advisory body, the National Indigenous Council, appointed after the abolition of ATSIC. See in particular the early contributions of Warren Mundine, e.g. ‘Indigenous groups debate role of land ownership’ (6 December 2004) <http://www.abc.net.au/pm/content/2004/s1259072.htm> accessed 11 June 2013.

<sup>23</sup> It should be noted, however, that though framed in response to the communal title debate, many of the 2006 amendments go back to earlier discussions emerging out of the John Reeves QC report, *Building on Land Rights for the Next Generation. Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976* (1998); House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs [response to Reeves’ report](#); and an earlier Options Paper by Phillip Ruddock as minister for Indigenous Affairs, *Reform of the Aboriginal Land Rights (Northern Territory) Act 1976* that was critical of the role of the Land Councils and points to the failure of the ALRA to deliver economic development and, in particular, better facilitate mining. However, leasing and recommendations for tenure reform did not feature prominently in Reeves’ recommendations. Reeves appeared to be more focused on addressing the development interests of non-Aboriginal people on Aboriginal land.

<sup>24</sup> Second Reading Speech, Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 (Cth), House of Representatives, 31 May 2006 (Brough), 3–4.

<sup>25</sup> *Ibid.*, 4.

<sup>26</sup> See NTG, ALC, NLC, CLC, TLC, *Detailed Joint Submission to the Commonwealth – Workability Reforms of the Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA)*, 2003.

upfront for the transfer of the leasehold interest by a mortgagee. The existing drafting of the relevant provision was considered by some to restrict a mortgagee's ability to enforce their mortgage over an ALRA lease.<sup>27</sup> The jointly proposed amendments were directed towards ensuring the existing ALRA regime facilitated:

long term leasing, security transactions and the use of equity capital to promote both home ownership and businesses...without undermining the role of traditional owners in the enjoyment and management of their traditional lands or effecting a transfer of institutional and power relationships at play in those lands.<sup>28</sup>

From the CLC's perspective, a sensible approach would have been for the Australian Government to monitor the extent to which these jointly proposed amendments achieved their purpose of making the ALRA more 'workable' before introducing more radical land reform initiatives. As it happened, the amendments were introduced alongside the whole of township leasing provisions, which did not come from this joint submission, had not been subject to consultation with the Land Councils,<sup>29</sup> were light on detail (which was largely left to regulations) and were premised on the alleged failure of the existing ALRA leasing provisions.

*Aboriginal communities and traditional owners in the CLC region consistently rejected leasing whole communities to the federal government.*

*Whole of township leasing*

The 2006 amendments introduced section 19A into the ALRA, which provided that a Land Trust may lease an entire 'township' to an NT or Australian entity. Though a voluntary option, the CLC and the NLC were concerned by apparent pressure applied in negotiations with the Tiwi Islanders and others to sign up to the township model in exchange for delivery of basic services.<sup>30</sup>

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<sup>27</sup> That is, transfer would be possible 'subject to the terms and conditions on which the initial grant of the estate or interest was made.' Commentators included Neville Jones, then director of the NT Government's Office of Aboriginal Development, who highlighted what he considered a problem with s 19(8) for prospective financiers in his paper *Commercial Use of Aboriginal Land in the Territory* (1998), Office of Aboriginal Development (Unpublished). The paper incorporated concerns expressed by the Australian Bankers Association. A version of this paper formed the basis of chapters 17 and 18 of the Northern Territory Government submission to the Reeves review.

<sup>28</sup> M Tehan in Godden and Tehan (Eds), above n 15, 367.

<sup>29</sup> See CLC evidence to Senate Standing Committee on Community Affairs, *Inquiry into Aboriginal Land Rights (Northern Territory) Amendment Bill 2006* (21 July 2006) [transcript of evidence](#), 24.

<sup>30</sup> ABC News Online. Brough 'bullying' Wadeye into signing 99-year lease. Available at: <http://www.abc.net.au/news/2006-11-17/brough-bullying-wadeye-into-signing-99-year-lease/1312246> accessed 11 June 2013; evidence of the NLC to Senate Committee re Elcho Island, transcript p 17.

*The expectation that traditional owners would forgo their right to engage in commercial development over large areas of vacant land for ninety-nine years in return for a rental determined by valuation rather than negotiation was unreasonable.*

While inalienability of title would be legally preserved under the new township leasing provision, the Land Councils considered that the practical effect of such an agreement was to negate some of the primary benefits of land ownership, including rights that a lessor would ordinarily retain. Maureen Tehan described entering into a whole of township lease as effectively resulting in the '[passage] of control of the land from traditional owners to the entity which will control all land dealings within the township for [99 years] and will be empowered to sublease portions of the land.'<sup>31</sup>

The amendments prohibited inclusion of any provision in the lease requiring the consent of traditional owners to the grant of a sub-lease by the 'entity'. This meant that traditional owners would have no final say over the grant of sub-leases in townships and no ability to prevent sub-leases to enterprises or business people that they might consider unwelcome. In relation to this issue, Sean Brennan noted that:<sup>32</sup>

There is understandable concern amongst Aboriginal people and organisations about what kind of unwanted commercial activity might be [allowed] by sublease in the next 99 years, by a government entity about which people know nothing. In the absence of a negotiation process over the proposed amendments, these substantive issues were left largely unaddressed.

Both the CLC and the NLC were critical of the township leasing provisions, arguing that:<sup>33</sup>

- They are unnecessary. The outcomes sought can be achieved through leases under section 19.
- They restrict the freedom of traditional owners to bargain commercially, through legislative restrictions on what may be provided for in the head lease.<sup>34</sup>

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<sup>31</sup> M Tehan in Godden and Tehan (Eds), above n 14, 367. For a more comprehensive consideration of the nature of the section 19A provisions see L Terrill, '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. For the operation of whole of township leases in practice see L Terrill, '5 years on: Confusion, illusion and township leasing on Aboriginal Land', (2011) 1 *Property Law Review* 160.

<sup>32</sup> S Brennan, 'Economic Development and Land Council Power: Modernising the Land Rights Act or Same Old Same Old?' (2006) 10(4) *Indigenous Law Bulletin*, 17–18.

<sup>33</sup> Senate Standing Committee on Community Affairs, *Inquiry into Aboriginal Land Rights (Northern Territory) Amendment Bill 2006*, respective [CLC](#) and [NLC](#) submissions.

<sup>34</sup> As Brennan notes in [his submission](#) to the Senate Standing Committee on Community Affairs, *Inquiry into Aboriginal Land Rights (Northern Territory) Amendment Bill 2006*, this constrains traditional owners' ordinary bargaining position under the ALRA.

- The expectation that traditional owners would forgo their right to engage in commercial development over large areas of vacant land for ninety-nine years in return for a rental determined by valuation rather than negotiation was unreasonable.
- They promote private investment in housing and entrepreneurship by community residents while denying such investment and entrepreneurship to non-resident traditional owners.<sup>35</sup>

Tehan observed that in the development and discussion of the township leasing amendments 'little serious argument was made to support the assumptions underlying the changes – that [they] will inevitably produce economic, social and political development as an antidote to the social and economic alienation of Indigenous peoples within Australia.'<sup>36</sup> Moreover, despite free market rhetoric having been used to promote the township leasing model, it has been argued that in practice the effect of the model 'is to introduce a higher level of government control over private decision making.'<sup>37</sup>

*The Australian Government's approach to land reform in the Northern Territory has been disappointingly simplistic and 'characterised by a tendency to jump directly from debate at a fairly ideological level to implementation of the reforms.*

Terrill considers that, commencing with the whole of township amendments, the Australian Government's approach to land reform in the Northern Territory has been disappointingly simplistic and 'characterised by a tendency to jump directly from debate at a fairly ideological level to implementation of the reforms.'<sup>38</sup> The Australian Government missed the important step of clarifying the aims of its reform and has not necessarily devised policy in a way that directly responds to the debate:

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<sup>35</sup> Though the township leasing scheme appeared, on the face of the legislation, to marginalise traditional owners, Terrill notes that in practice the Wurrumiyanga/Nguiu township lease 'has been promoted, and apparently also been received, as a vehicle for giving traditional owners greater input into land-use decisions. This is because, previously, [informal] decision-making about land use tended to occur at the community level, and at times traditional owners have been excluded from that process. The Wurrumiyanga township lease has increased the authority of traditional owners. This sits awkwardly with earlier arguments by the Australian Government that township leasing would allow non-traditional owner residents to escape the "feudal" control of traditional owners.' L Terrill, '5 years on: Confusion, illusion and township leasing on Aboriginal Land' (2011) 1 *Property Law Review* 160, 173.

<sup>36</sup> M Tehan in Godden and Tehan (Eds), *Comparative perspectives on communal lands and individual ownership: sustainable futures*, 355.

<sup>37</sup> L Terrill, '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, 816.

<sup>38</sup> L Terrill, Indigenous land reform: what is the real aim of reforms? Presentation by the author at the 2010 National Native Title Conference (Unpublished), 9.

While the public debate in Australia has been dominated by references to economic development and home ownership, government practice has instead focussed on implementing a new decision making structure.<sup>39</sup>

Such a practice was evident in the next iteration of land reform policy in the Northern Territory: the compulsory acquisition of five year leases under the NTNER.

### *Compulsory five year leases*

#### *The compulsory acquisition of five year leases damaged relations between the Australian Government and Aboriginal people in remote communities in the Northern Territory.*

Under the *Northern Territory National Emergency Response Act 2007* (Cth), the Australian Government compulsorily acquired five year 'leases' over sixty-four communities across the Northern Territory. Thirty-one of these are in the Central Land Council region and twenty are on ALRA land.<sup>40</sup>

Minister Brough described the acquisition of the leases as 'crucial to removing barriers so that living conditions can be changed for the better in these communities in the shortest possible time frame.'<sup>41</sup>

The leases would 'give the government the unconditional access to land and assets required to facilitate the early repair of buildings and infrastructure.'<sup>42</sup> The provisions went further than this, giving the Australian Government control over entire communities. No leases were negotiated. There were no rights noted in favour of residents or traditional owners except to the extent that interests were conferred under an earlier lease.<sup>43</sup> The leases gave the Australian Government rights

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<sup>39</sup> Ibid, 9.

<sup>40</sup> Of the remaining eleven, one is on 'vacant crown land' under a land claim and the other ten are on Community Living Area (CLA) title, a form of NT Freehold excised from pastoral leases and held by an Aboriginal association or corporation. Though beyond the scope of this paper, the NT legislation that regulates the use of CLA title is far more restrictive than the ALRA regime and the CLC's efforts over the past decade to convince the Northern Territory Government to amend these laws have been unsuccessful. The Northern Territory could address these barriers to leasing which do not exist under the ALRA at any time but due to their inaction the Commonwealth Government is currently considering using regulation-making powers under the *Stronger Futures in the Northern Territory Act 2012* to amend these laws. For further information see the [CLC submission to the Community Living Area Land Reform Discussion](#) paper.

<sup>41</sup> Commonwealth of Australia, House of Representatives, Parliamentary Debates, 7 August 2007 (Second Reading Speech, 13 (Brough).

<sup>42</sup> Commonwealth of Australia, House of Representatives Parliamentary Debates, 7 August 2007 (Second Reading Speech), 8 (Brough).

<sup>43</sup> *Northern Territory National Emergency Response Act 2007* (Cth), s 31. There were initial concerns that traditional Aboriginal owners and residents might be able to be evicted from their communities. However, in *Wurridjal*, the statutory entitlement under section 71 of the ALRA for Aboriginals to enter Aboriginal land and use or occupy it in accordance with Aboriginal tradition was held to be an existing 'interest in land' that was preserved. *Wurridjal v The Commonwealth* (2009) 83 ALJR 399 [109]–[112] per French CJ, [151]–[157], [160]–[162] per Gummow and Hayne JJ, [408], [411] per Crennan J, [455] per Kiefel J.

to exclusive possession, to repair, demolish or replace any existing buildings and infrastructure, and to unilaterally terminate the lease at any time.

Dalrymple suggests that Howard and Brough were more interested in social and political control of communities and their residents. Brough was on the record as 'indicating his desire to use the five-year compulsory lease period as an opportunity to persuade the traditional owners of as many [communities] as possible to consent to the granting of ninety-nine year section 19A 'headleases.'<sup>44</sup>

Despite a change in government in 2007, compulsory five year leases were retained with only minor changes. Significantly, however, the new Labor Government agreed to begin negotiations for the payment of rent and compensation for this compulsory acquisition. Further, they committed to voluntary lease negotiations at the expiry of the five year leases.<sup>45</sup>

*The Australian Government's compulsory acquisition of five year leases stalled the formalisation of tenure in communities and tainted the signification of leasing.*

The compulsory acquisition of five year leases damaged relations between the Australian Government and Aboriginal people in remote communities in the Northern Territory. It stalled the formalisation of tenure in communities and tainted the signification of leasing in communities placed under five year lease.<sup>46</sup> Five year leases ended in August 2012 and protracted negotiations between the Central and Northern Land Councils and the Australian Government over valuation methodologies for the payment of fair rent and compensation are finally complete. Negotiations for voluntary leases under the pre-existing provisions of the ALRA, rather than through township leasing, are now advanced throughout the CLC region (see below).

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<sup>44</sup> Dalrymple, 'Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia' (2007) *Arena*, 214.

<sup>45</sup> Despite this welcome commitment, the Australian Government's preferred model for securing voluntary leases remained that of whole of township leases (see below).

<sup>46</sup> The [Australian Government's own evaluation of the NT Emergency Response](#) (at page 11) recognised the problems caused by the compulsory acquisition of five year leases:

Compulsory five-year leases were not well explained to the affected people and 'added to their distrust of the government's intentions'... Compulsory leases may have slowed the introduction of longer term leases by adding an additional requirement for ministerial approval and creating tenure without the need to negotiate with owners; however, some longer term leases have been entered into.



## Secure Tenure

*It is largely unknown and unacknowledged that, until recently, governments routinely built infrastructure on Aboriginal land not only without a lease but sometimes without permission or consultation.*

It is largely unknown and unacknowledged that, until recently, governments routinely built infrastructure on Aboriginal land not only without a lease but sometimes without permission or consultation. It is therefore unsurprising that ownership of a building, defining who has an interest in it and the responsibility for its ongoing maintenance has often been unclear. Under the *Strategic Indigenous Housing and Infrastructure Program* (SIHIP), sixteen of the sixty-four communities then under compulsory five year lease were allocated funds for new housing (three in the CLC region – Hermannsburg/Ntaria, Lajamanu and Yuendumu). This time Australian Government policy required that before SIHIP funding would be released, some form of long-term lease be in place over community housing lots. This was effectively the first manifestation of a new ‘secure tenure’ policy.<sup>47</sup>

In practice, the ‘secure tenure’ policy is a policy for formalisation of tenure arrangements. The Australian Government wants to see every building in an Aboriginal community covered by a lease so that it is clear who is responsible for that building. To this end the government now insists that any entity that it is proposing to fund, and all government occupiers, seek leases over their assets, or over land on which assets are to be built. An important aspect of this requirement is that service providers make adequate provision for the costs associated with leasing and maintenance. This is also now a policy of the NT Government. The Central Land Council supports the policy to the extent that it is concerned with formalising occupancy and clarifying the responsibilities of third parties, and the payment of rent to land owners.<sup>48</sup>

*The CLC supports the formalisation of land tenure on Aboriginal land.*

<sup>47</sup> L Terrill, ‘Indigenous Land Reform: An economic or bureaucratic reform?’ (2010) 7(17) *Indigenous Law Bulletin*, 5.

<sup>48</sup> In the context of housing precinct leases, the CLC has been concerned by the transfer of housing from community housing organisations to Territory Housing that occurred under compulsory five year leases. In negotiating subsequent voluntary leases the CLC negotiated to prevent complete institutionalisation of government ownership and responsibility for housing through leases to the Executive Director of Township Leasing (EDTL – a Commonwealth statutory entity) rather than directly to Territory Housing. In all cases Territory Housing has been granted a shorter-term sub-lease and the EDTL can grant subsequent sub-leases to ‘any appropriate body.’ The agreed lease provides oversight through performance reviews of any sub-lessee (including Territory Housing). It is hoped that, following the dissolution of Indigenous Community Housing Organisations, this will provide Indigenous organisations with the time and opportunity to develop sustainable models in order to re-enter the housing sphere as housing managers following the first sub-lease to Territory Housing.



It has been widely acknowledged that the informal arrangements that had previously prevailed in communities gave rise to some significant issues including:<sup>49</sup>

- That traditional owners of the land didn't receive rent or an opportunity to set the terms of the occupancy.
- The absence of clear arrangements between traditional owners and non-traditional owner residents of a community.
- Land couldn't be legally treated as an asset and so couldn't be used to raise equity through mortgage or sale.
- That occupiers were perhaps uncertain about their rights (which may have affected their willingness to invest in infrastructure).
- Confusion about how responsibilities were shared between occupant, local government and service providers (e.g. who was responsible for maintenance).

However, the characterisation of Australian Government policy as being directed towards 'secure tenure' rather than tenure formalisation tends to convey the notion that prior to the NTNER there was insecurity of tenure on Aboriginal land. While it is unorthodox for assets to be built without the asset owner having either a lease or other interest in land, this was previously widespread in the Northern Territory. If there had been actual, as opposed to theoretical, risks to organisations, who built, occupied and maintained buildings in Aboriginal communities, it is surprising that government agencies and organisations did not systematically apply for leases in the decades before 2007.

*Security of tenure can only be the solution to problems in Aboriginal communities if 'insecurity of tenure' was in fact the key causal problem.*

Further, while supportive of the formalisation of occupation and land use on Aboriginal land, the CLC considers it problematic that governments sometimes characterise 'secure tenure' as somehow representing a solution to the problems of Aboriginal communities. Security of tenure can only be the solution to problems in Aboriginal communities if 'insecurity of tenure' was in fact the key causal problem. There is no evidence to suggest that this was – or is – the case. It is also not clear how formalisation of existing

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<sup>49</sup> L Terrill, above n 35, 820–1.

government and commercial occupation and leasing of lots for future construction will itself lead to widespread economic development or home ownership.<sup>50</sup>

The Australian Government's preferred approach to tenure formalisation continues to be through whole of township leasing to the Executive Director of Township Leasing (EDTL) – the Australian Government entity set up following the township leasing amendments. The Australian Government approached the three communities in the Central Land Council region that were allocated new housing funds under the SIHIP to consider whole of township leasing. All three rejected this option and agreed to enter into a lease over housing only; they have since considered further leasing applications on a case by case basis. Leasing in communities in the CLC region is now proceeding on an unprecedented scale under the pre-existing provisions of the ALRA (section 19).

### **'Secure tenure' – significantly advanced**

*The CLC has now processed 478 leases, including 23 forty year housing leases. 511 further leasing and licensing applications are currently being processed.*

Now that five year leases have ended, the 'secure tenure' policy is in practical effect. The CLC is dealing with an enormous workload processing leasing applications that governments departments, service providers and other parties (such as local store and art centre corporations) have submitted. Most such applications pertain to existing interests in the thirty communities that were previously under compulsory five year lease.<sup>51</sup> The CLC has now processed 478 leases, including 23 forty year housing leases. In addition, the CLC has received 511 applications for leases and licences which will require consultations during 2013–2014.

The case studies of Lajamanu and Alekarenge in the boxes below highlight the extent to which the formalisation of tenure through leasing is now advanced. The large volume of leases executed over the past three years has not occurred due to major legislative change; rather, it is because parties who previously did not seek leases are now applying for them,<sup>52</sup> third parties are gaining a better understanding of the existing mechanisms for

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<sup>50</sup> In larger communities it will certainly provide some economic stimulus but whether this leads to widespread economic development will depend on further factors such as the extent to which infrastructure constraints are addressed and roads are improved ([see Remaining Issues and challenges below](#)).

<sup>51</sup> At the time of writing traditional owners have consented to leases over around 1500 lots within communities on ALRA and CLA title. This number will increase significantly throughout 2013–2014.

<sup>52</sup> This is because under the 'secure tenure policy' the Australian and NT governments have committed their departments to seeking leases and paying rent and have instructed their funding bodies to follow suit (see discussion of secure tenure above) .

seeking a lease under the ALRA,<sup>53</sup> and governments aren't providing funding to organisations to build infrastructure unless they have a lease. In addition the CLC now has better resources to assist in processing lease applications. The case studies also highlight the urgent need for significant investment in essential service infrastructure and capital works to address the severe scarcity of vacant serviced land in remote communities across the CLC region. Without such investment, any future land reform measures that are directed towards economic development or private home ownership will be fruitless.

*Case Study 1: Lajamanu 'Priority Community' and 'Major Remote Town'*

Lajamanu is a remote settlement 560 kilometres south-west of Katherine with a population of 656.<sup>54</sup> Together with Hermannsburg and Yuendumu it is one of the three communities in the Central Land Council region that received new housing under the SIHIP program. The Australian Government has also designated Lajamanu as a 'priority remote community' under the National Partnership Agreement on Remote Service Delivery.<sup>55</sup> In addition, it is one of six communities in the CLC region that the Northern Territory Government has designated as a 'Major Remote Town', and as such is to be developed to 'provide services to all people living in that region, just like regional centres elsewhere in Australia.'<sup>56</sup>

A recent internal CLC audit of leases consented to at Lajamanu indicates that **more than 81% of available serviced lots in the community are now leased**.<sup>57</sup> Further applications are currently being processed, which, if all were consented to, would see 94% of all available serviced lots in the community under lease.<sup>58</sup> Prior to 2009, leases had been applied for and granted over only five lots (four of which had since expired).<sup>59</sup> This means that leases over around 80% of available serviced lots, both with existing assets and vacant, have been agreed to and processed over the past four years under section 19 of the ALRA.

<sup>53</sup> Leases sought over housing and government infrastructure are generally for forty years, lease applications from non-government entities range from two to twenty years.

<sup>54</sup> According to the [2011 Census](#).

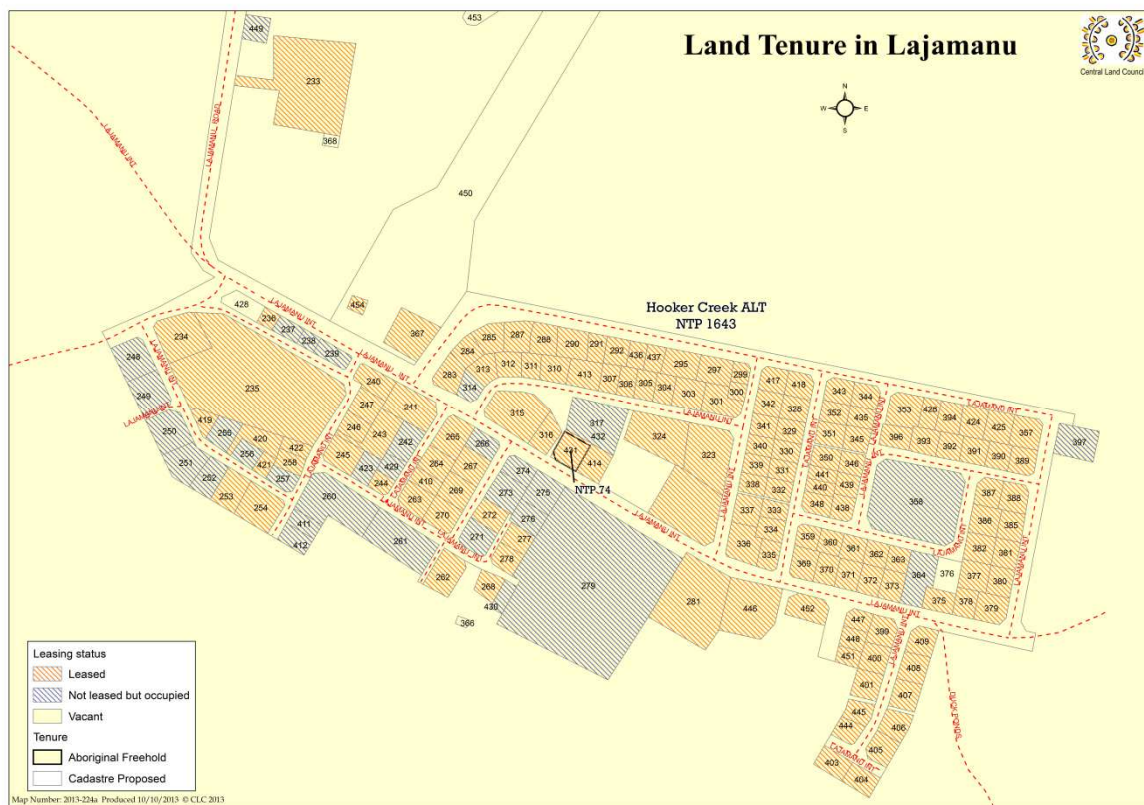
<sup>55</sup> According to FaHCSIA an element of the National Partnership Agreement on Remote Service Delivery 'is a commitment by governments to work with Indigenous communities to improve the delivery of services...to the standard provided to other Australians living in communities of similar size and location.' See [National Partnership Agreement on Remote Service Delivery](#).

<sup>56</sup> These were known as Territory Growth Towns under the former Territory Labor government; for further explanation of this policy see the website of the [NT Department for Regional Development](#).

<sup>57</sup> Traditional owners have approved all of these in accordance with section 19 of the ALRA and they have been executed. This figure includes all lots within the community that have been allocated a lot number (whether vacant or with built infrastructure) and are serviced and reticulated.

<sup>58</sup> Only around 14% of total lease applications are from parties other than the Australian, Northern Territory and local governments. Only about 6% are related to commercial enterprise, being for the store, art centre and storage and accommodation related to these businesses.

<sup>59</sup> Only two of these were paid greater than peppercorn rent, which involved single up-front payments.



Of the remaining serviced lots not under lease, all have existing built infrastructure.<sup>60</sup>

Advice from the Department of Lands, Planning and Environment indicates that there is not a single lot of available vacant serviced land in the community. The current airstrip will eventually be moved north in order to provide for the possibility of future growth. Significant investment in head-works will be needed in order to have power, water and sewerage infrastructure in place for any future development on new subdivisions.

At present the 'secure tenure' policy is almost fully implemented at Lajamanu without a whole of township lease having been entered into.<sup>61</sup> Should any local Aboriginal person wish to open a business or build their own home, they would readily be able to apply for and negotiate a lease under section 19 of the ALRA. However, at present, that person would have to incur significant additional land servicing costs on top of asset construction so as to provide power, water and sewerage delivery to the lot. The average small business or home owner elsewhere in Australia does not incur such costs. The focus on Lajamanu as a priority community for government services and public housing investment, while

<sup>60</sup> This includes two churches and church residences which, if in existence since the community was a mission, have a statutory right to ongoing occupation under section 18 of the ALRA without a lease. Other built infrastructure, a mere nine lots, appears to be occupied by non-government parties who have not yet sought leases.

<sup>61</sup> Reference is to a township lease to the EDTL under section 19A of the ALRA ([See above](#)).

absolutely welcomed, has strained existing infrastructure and serviced land availability. No investment has been made to date in improving the general availability of serviced land.<sup>62</sup> Such investment is urgently needed and this is acknowledged as necessary in both the National Partnership Agreement on Remote Service Delivery and the Northern Territory Government 'Major Remote Towns' policy. These constraints represent the major barrier to economic development in a town that is at capacity in terms of available serviced land.<sup>63</sup>

Similar issues are emerging at the 'priority communities'/'Major Remote Towns' of Hermannsburg and Yuendumu, which each have almost no vacant serviced land to accommodate future growth. Both need major infrastructure upgrades to sewerage and water respectively. Despite the apparent priority status of these communities, the CLC has been advised that neither government has allocated any funding to address these major infrastructure constraints under their respective 2013–2014 budgets.<sup>64</sup>

#### *Case Study 2: Alekarenge – 'Major Remote Town'*

Alekarenge is a remote settlement 170 kilometres south of Tennant Creek, with a population of 535.<sup>65</sup> It is not a 'priority remote community' for the Australian Government and did not receive new housing under SIHIP. The Northern Territory Government has, however, designated it as a 'Major Remote Community'.

A recent internal CLC audit indicates that 71% per cent of all available serviced lots in the community are now leased.<sup>66</sup> Further applications are currently being processed, which, if all were approved, would see 82% of all available serviced lots in the community under

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<sup>62</sup> Though it must be acknowledged that investment has been made in servicing land for new public housing on previously greenfield areas leased as part of the housing precinct lease.

<sup>63</sup> The Department of Regional Development acknowledges on its website that 'In order to have services like any other country town, remote towns will need proper infrastructure – including water, sewerage, electricity and community facilities.' No funding or plan for the delivery of such infrastructure is identified in 'Major Remote Towns' brochures or fact sheets. For more information see [http://www.drda.nt.gov.au/regional\\_services/major\\_remote\\_towns](http://www.drda.nt.gov.au/regional_services/major_remote_towns).

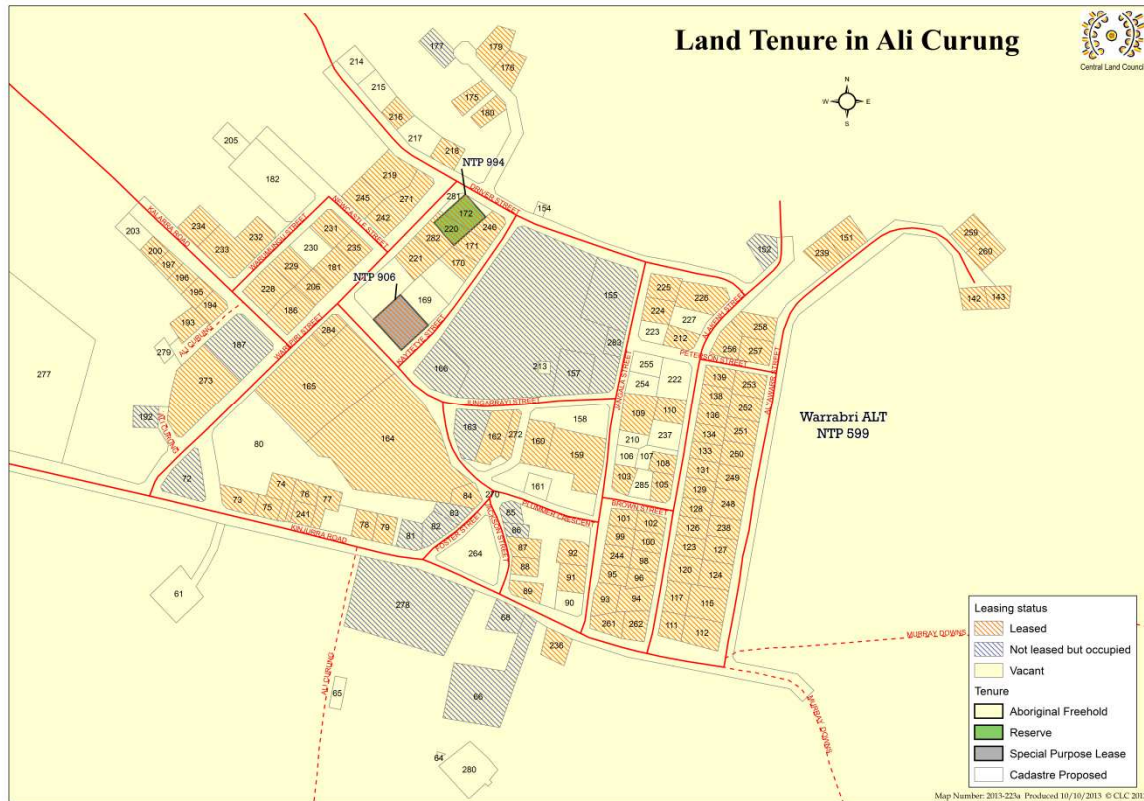
<sup>64</sup> According to correspondence from the Power and Water Corporation, neither the Northern Territory Government nor the Australian Government has allocated any funding for servicing land or infrastructure upgrades at any remote communities under its 2013–2014 Budget. A total of \$2m Territory-wide is allocated specifically for Government Employee Housing related land servicing. The Power and Water Corporation determines its own capital investment program, and has an allocation of \$217 million in the 2013–2014 budget; significant projects totalling \$192.2 million of this allocation are listed. The CLC has been advised that officers of the Power and Water Corporation proposed a capital program of works including the needs identified above but funding has not been allocated. A further \$32m across the Territory is budgeted for infrastructure grants comprising Indigenous essential services. See <http://www.treasury.nt.gov.au/PMS/Publications/BudgetFinance/BudgetPapers/I-BP04-1314.pdf>

<sup>65</sup> According to the [2011 Census](#).

<sup>66</sup> Traditional owners have approved all of these in accordance with section 19 of the ALRA and they have been executed.



lease.<sup>67</sup> Prior to 2010, no leases had been applied for or granted at Alekarengge.<sup>68</sup> This means that leases over more than 70% of available serviced lots, both with existing built assets and vacant, have been agreed to and processed over the past three years.



Despite close to 9% of serviced lots being vacant, the Northern Territory Department of Lands, Planning and Environment has advised that sewerage is at absolute capacity. No further development is possible until this is fixed. The CLC understands that a major sewerage upgrade is scheduled to begin soon but will not be completed for two years. Should any local Aboriginal person, wish to open a business or build their own home they would readily be able to negotiate a lease under the ALRA; however, at present they would not be able to construct anything until the sewerage constraints are addressed.

The CLC recently fielded an enquiry from someone who works close by to Alekarengge and was seeking a long-term lease to build a home in the community. The CLC recommended that he talk to the Department of Lands, Planning and Environment first and explained that a lease application could be made and processed under the ALRA should a suitable

<sup>67</sup> Only 4% of total lease applications are from parties other than the Australian, Northern Territory and local governments. These relate to a store, bakery and art centre and associated accommodation.

<sup>68</sup> However, one special purpose lease that pre-existed that grant of Aboriginal land was in place.

vacant serviced lot be identified. Having been informed by the Department of the incapacity for any development due to the sewerage constraints and the timeframe for resolution of this issue, that person has chosen to pursue an option outside of the community.

A similar issue is apparent at the only other Northern Territory Government 'Major Remote Town' on Aboriginal land in the CLC region not yet mentioned: Papunya.<sup>69</sup> The Department of Lands, Planning and Environment has advised that the existing water infrastructure is at capacity and will cost approximately \$1m to fix. Sewerage infrastructure is also reported to be fragile. [Major expensive upgrades of water and sewerage infrastructure are urgently needed in order to accommodate any future growth.](#)

The Northern Territory Government's 'Major Remote Towns' policy states that '[i]n order to have services like any other country town, remote towns will need proper infrastructure – including water, sewerage, electricity and community facilities.' Neither the Northern Territory nor the Australian Government has made any funding available in 2013–2014 for such upgrades in order to address this major infrastructure constraint at Papunya.<sup>70</sup>

## Remaining issues and challenges

### *Essential services infrastructure*

In addition to the major essential services infrastructure constraints outlined in the case studies above, the CLC understands that power and sewerage infrastructure as well as sustainable potable water sources at many other remote communities across the region are currently at or close to capacity and in need of upgrade. This is recognised in an independent review of the National Partnership Agreement on Remote Indigenous Housing (NPARIH) program, which notes that:<sup>71</sup>

significant need remains for reliable infrastructure and essential services in many communities. The infrastructure gap will grow without further investment in capital works for asset replacement and upgrades...Already, in some locations, infrastructure in remote Indigenous communities is at capacity.<sup>72</sup>

<sup>69</sup> CLC data indicates that 73% of all available serviced lots at Papunya are under lease and that further applications are currently being processed which, if approved, would see 89% of existing lots in the community under lease (any future development being contingent on infrastructure upgrades).

<sup>70</sup> See above n 57.

<sup>71</sup> [National Partnership on Remote Indigenous Housing – Progress Review](#) (2008–2013), 10.

<sup>72</sup> [National Partnership on Remote Indigenous Housing – Progress Review](#) (2008–2013), 10.

*Aboriginal communities urgently need infrastructure planning and funding to develop into thriving and sustainable communities.*

The CLC understands neither government has allocated any money in their 2013–2014 budgets to address these infrastructure constraints at any of the communities previously under five year lease. With the exception of the sewerage upgrade scheduled for Alekarenge, not even the ‘priority communities’ and ‘Major Remote Towns’ are being allocated funding to address these significant problems, which are an immediate and considerable barrier to economic development and home ownership.

*Institutional infrastructure*

A genuine commitment to formalising tenure and facilitating the grant of individual interests will require a range of further matters to be comprehensively addressed (and funded). These include what the World Bank refers to as the ‘institutional infrastructure’ necessary to underpin the recognition of formal leasehold interests:

The establishment of secure property rights, that is, rights that are defined with sufficient precision and can be enforced at low cost so as to instil confidence in economic agents, requires considerable investment in both technical infrastructure, such as boundary demarcation and generation and maintenance of maps and land records, and social infrastructure, such as courts and conflict resolution mechanisms.<sup>73</sup>

*Traditional owners can’t grant leases over 12 years to anyone but the Australian Government until cadastral surveys are completed.*

A relevant example of the current dearth of such institutional infrastructure for remote communities on Aboriginal land is the absence of whole of community cadastral surveys. The *Planning Act (NT)* treats any lease for twelve years or more as a subdivision, which in turn requires a survey in registrable form. Given the considerable expense involved in the surveying of individual lots, this has often led to the grant of leases of less

than twelve years; to imprecise definition of boundaries; to delays in formalising interests; and to attempts to get around planning requirements.<sup>74</sup> It has also led to many leases not being registered, which can be an impediment to the visibility and enforcement of

<sup>73</sup> K Deininger, *Land Policies for Growth and Poverty Reduction*, World Bank Research Report (Oxford University Press, 2003), 25.

<sup>74</sup> Under section 19A whole of township leases the Minister has excluded the operation of NT planning laws and other regulations for the EDTL. Problematically, this means the EDTL enjoys an exemption in NT legislation that, arguably, works against the ‘establishment of secure property rights’.



leasehold interests and, as a consequence, to access to finance. Elsewhere in Australia governments provide such institutional infrastructure. Dalrymple highlighted this concern in 2007 and opined that ‘what should have happened many years ago was the one-off funding of such surveys for every community on ALRA land in the Territory.’<sup>75</sup>

Only recently have governments recognised that carrying out whole of community surveys is an important issue in the context of tenure formalisation. The Australian and Northern Territory governments have recently provided funding to undertake whole of community cadastral surveys in all ‘Major Remote Towns’. The CLC understands that funding for surveys in all other communities previously under five year lease has now been made available. This investment is welcomed and will improve land administration within communities.<sup>76</sup> The roll-out of community surveys on all Aboriginal communities will go some way to government finally performing what Dillon and Westbury refer to as ‘their primary task of putting in place the institutional framework necessary for the economic, social and cultural development of their citizens.’<sup>77</sup> However, the characterisation of whole of community cadastral surveys by officers of the Northern Territory Government as the ‘biggest shake up of land tenure since the Aboriginal Land Rights Act or 1976’ is probably a slight exaggeration.<sup>78</sup>

Importantly the World Bank notes that the provision of such institutional infrastructure:

provides a necessary, *though by no means sufficient*, condition for participation in a modern economy through mechanisms such as mortgaging and the associated development of financial markets.<sup>79</sup>

Once cadastral boundaries of individual lots are adequately defined, an update of the Northern Territory Land Title system is needed to allow proper visibility of the registered interests granted over discrete lots (administrative lots) within communities. These two features, if coupled with significant investment in essential service infrastructure, improved roads and adequate support for local enterprise, would provide a much stronger foundation for economic development. However, it should not be assumed that land markets will automatically flow from such developments.

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<sup>75</sup> D Dalrymple, above n 41, 216.

<sup>76</sup> ‘NT Laws Altered in Historic Tenure Move’, *Northern Territory News* (27 February 2013).

<sup>77</sup> M Dillon and N Westbury, *Beyond Humbug: Transforming Government Engagement with Indigenous Australia* (Seaview Press, 2007), 132.

<sup>78</sup> Ibid.

<sup>79</sup> K Deininger, 2003.

*Access to finance, home ownership and economic development*

*Major Australian banks have stated that there are no major legislative impediments to providing finance on Aboriginal land through the leasing provisions of section 19.*

In late 2011 the Northern Territory Government convened a forum in Darwin considering 'Access to Finance on Aboriginal land'. It looked specifically at ALRA title and involved participants from all the major banks, from Land Councils, the Northern Territory and Australian governments and Indigenous Business Australia (IBA). At the forum, representatives of the major banks generally expressed the view that there were no major legislative impediments to providing finance on Aboriginal land through the leasing provisions of section 19. Bankers stated that they are used to dealing with diverse legislative and planning regimes with complex consent and approval processes (some far more complex than those under the ALRA).

According to a Northern Territory Government account of the forum:

A consensus emerged that appropriate land tenure arrangements, though important, are not a 'golden ticket' to resolving the barriers to private home and commercial property ownership on Aboriginal land.

Bankers noted that issues such as remoteness, low demand, the high cost of construction and risk profile are significant. The representatives of the banks highlighted that there is a gap between the cost of building and what people can afford to repay (and therefore realistically borrow), whether for private home ownership or enterprise development. Financiers emphasised that it is not their role to bridge this gap and also expressed concern about the retention of value in built infrastructure in remote communities. Such matters are major barriers to commercial lending and combine with infrastructure constraints to make finance for home ownership under standard commercial arrangements problematic. In turn, these matters indicate that the scope for borrowing against a home in order to access finance to start a business may be limited.

Bankers expressed a further concern about public relations should they ever need to enforce their rights of foreclosure under a mortgage. It was stated, frankly, that it would be a public relations nightmare for a bank to be on the news for evicting an elderly remote Aboriginal person from their first home due to default on a bank loan. These concerns mean that banks may be reluctant to lend on a traditional 'one on one' basis and would be

more comfortable if there was, for example, government guarantees or other assurances provided. The CLC is not aware of any response by the Australian or Northern Territory Government to these suggestions.

The CLC is concerned that, on initial evidence, resale prices are likely to be lower than the amount a remote Aboriginal person or family would need to lend from a bank. This factor is seriously problematic for prospective home owners, for the creation of a market for private home ownership in remote areas and it renders the quality of 'parallel life' such assets might enjoy questionable. For land assets to be leveraged as capital in the way de Soto speaks of, they need to be both subject to a formal land administration system and desirable to the market as property– not only to entice lessees or purchasers, but also to convince financial institutions that the land is valuable as collateral for a loan (i.e. that the interest may be sold for a good price if the loan is defaulted on). Even where a land market emerges, there are also potentially significant implications for the make-up of a remote Aboriginal community should a bank wish to foreclose on a mortgage and sell their interest in land to an outsider.<sup>80</sup>

*The CLC agrees that tenure plays a role in facilitating home ownership and recognises that access to finance will require transferable and marketable leases to be developed to meet a range of aims.*

It is evident that all parties need to undertake more detailed work to address the range of barriers to economic development and home ownership that are particularly apparent in remote communities throughout the CLC region. The CLC agrees that tenure plays a role and that access to finance will require transferable and marketable leases to be developed to meet a range of aims. Some templates that permit transfer and assignment have been developed and utilised in the CLC region. However, the CLC would welcome the opportunity to work with lenders and governments to develop a range of commercial lease templates that all parties agree would support Aboriginal aspirations for economic development on Aboriginal land. Such work must, however, be accompanied by complementary initiatives. For example, in relation to business, governments could lead the way by identifying the infrastructure needs of aspiring entrepreneurs in Aboriginal communities and put in place a plan to assist in providing such infrastructure. This may require governments to build or subsidise the

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<sup>80</sup> Issues around transferability of leases for home ownership and consideration of open and closed markets require further consideration that is beyond the scope of this paper. The CLC proposes to consider this and other issues in relation to access to finance and home ownership in a forthcoming paper.

building of retail spaces which could then be leased out cheaply to locals to enable them to set up a business.<sup>81</sup>

Further, while there is some interest in home ownership in central Australia, under ordinary commercial arrangements it is seriously doubtful that it will be a feasible option for the majority of remote Aboriginal people at present, much less a solution to housing shortages.<sup>82</sup> Altman et al, echoing some of the concerns the bankers raised, makes the observation that 'unless income levels increase dramatically in remote Indigenous communities, a push to private ownership will not result in private financing of the construction of a significant number of new dwellings...primarily because the cost of constructing housing is far higher than the likely value of the land.'<sup>83</sup>

There are a range of home ownership models on Indigenous lands that have been developed in New Zealand, Canada and the USA that might be considered and learnt from in the context of the Northern Territory.<sup>84</sup> The CLC hopes to contribute further to proper consideration of these matters so that the issues highlighted above might be better understood and responded to based on careful analysis and evidence.<sup>85</sup>

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<sup>81</sup> The [Interim Review of IBA's Approach to Developing Small Businesses in East Arnhem Land](#), for example, revealed a 'lack of infrastructure and availability of basic resources to support economic development and participation' p 23. The provision of such retail spaces was mooted as a possible part of the former [Northern Territory government's plans](#) to establish Government Business Centres in all 'Major Remote Towns' (then known as Territory Growth Towns) – none were built and the CLP Government does not appear to have pursued this. While the Northern Territory Government has an [Indigenous Business Development program](#), the program's \$600,000 per annum Northern Territory wide budget is unlikely to enable infrastructure issues to be addressed. The Northern Territory [Draft Indigenous Economic Development Strategy 2013-2020](#) includes supporting 'pathways to business development' which ought to encompass funding and subsidies for construction of retail spaces in remote communities. The Indigenous Business Australia [Business Development and Assistance Program](#) does not extend to the systematic subsidy or construction of service infrastructure or retail spaces in remote Aboriginal communities; however, IBA could usefully develop such a program. The [Indigenous Capital Assistance Scheme](#) eligibility criteria require that 'Indigenous businesses must comply with the participating financial institution's lending criteria'.

<sup>82</sup> Costs to service land will be additional to high construction costs unless governments address the availability of serviced land. In the alternative, rent to buy schemes or outright purchase of social housing would require Territory Housing and the Australian Government to develop some kind of policy for the sale of remote housing stock and would also necessitate the variation of housing precinct leases to accommodate this option, as all community housing is now under a public housing model. The CLC considers that while purchase of existing housing is likely to be more feasible in remote communities, there is a danger that it will result in a decrease in available social housing unless there is a commitment to building further social housing where existing stock is sold.

<sup>83</sup> J Altman et al, [Land Rights and Development Reform in Remote Australia](#), Centre for Aboriginal Economic Policy Research Discussion Paper No. 276 (2005), 14.

<sup>84</sup> See e.g. Ibid, 24, P Memmot et al, *Indigenous Home Ownership on Communal Title Lands*, AHURI Positioning Paper No. 112, 14–16; B Livesay, [Housing development on Māori land – Two case studies in developing and retaining Māori land](#) (2012) *Maori Law Review*.

<sup>85</sup> Those long-term leases issued to support private home ownership on the Tiwi Islands, with finance from Indigenous Business Australia, will provide an important case study in relation to many of the relevant considerations.

*A mechanism for negotiated settlement between residents and traditional owners*

Beyond the more obvious aspects of land administration and reform there is a further matter that the CLC considers a priority for future land policy relating to communities on Aboriginal land. Together with the demise of community government councils, the formalisation of tenure in remote Aboriginal communities has brought into sharper definition the need to develop mechanisms to clarify the relationship between long-term Aboriginal residents of remote communities who are not recognised as traditional owners and recognised traditional owners who are not residents of those communities.<sup>86</sup> The informal arrangements for land use which previously prevailed in remote communities in the Northern Territory gave a level of de-facto land use decision-making power to Aboriginal residents through community government councils. In 2008 these councils were amalgamated into shires that operate regionally.

Under the provisions of the ALRA, affected communities have an opportunity to express their views about proposed dealings in land, but it is ultimately traditional owners who are the decision makers. Accordingly, the distinction between those who fall within the definition of traditional owners under the ALRA and those who do not has begun to have more impact on community-level decision making than was previously the case. The fact that traditional owners rather than residents are entitled to rental payments for community land use has also had an impact.

In performing its functions under the ALRA in relation to land use in communities, the CLC strives to ensure an appropriate balance between the interests of non-resident traditional owners and all community residents. Such a balance is

important to facilitate good relations and minimise the potential for disputes. To an extent, the CLC's role in ensuring that this balance is appropriately negotiated without

*It is the CLC's statutory duty (s 19) to ensure that the interests of traditional owners and long-term community residents are appropriately negotiated without giving rise to ongoing disputes.*

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<sup>86</sup> As noted above, n 33, Terrill has identified that despite the Australian Government arguing that 'township leasing would allow non-traditional owner residents to escape the "feudal" control of traditional owners', in practice, at least on the Tiwi islands, township leasing 'has been promoted, and apparently also been received, as a vehicle for giving traditional owners greater input into land-use decisions' such that it 'has increased the authority of traditional owners.' The CLC considers that the section 19A whole of township leasing model does not provide the scope to reach a negotiated settlement between residents and non-resident traditional owners in the way that the CLC model discussed in the following pages would.

giving rise to ongoing disputes is a role that is prescribed in section 19 itself.<sup>87</sup> This work is becoming increasingly complex and has led to the consideration of alternative negotiated arrangements for decision making on community land. In 2010 the CLC submitted an alternative proposal for voluntary whole of community leasing to the Australian Government which responds to the need for clarification of the above issues while also delivering other land use efficiencies.<sup>88</sup> It should be noted that the proposal is premised on the strong view that the ALRA scheme works very well in recognising and giving legal effect to traditional Aboriginal ownership and decision making on Aboriginal land generally. It is directed toward the very small proportion of Aboriginal land comprising larger Aboriginal communities. Key features of the proposal are as follows:

- Each large community establish a community land corporation for the purpose of holding leasehold title to the land within the community boundaries.<sup>89</sup>

*In some communities a community land corporation model may be useful to clarify the relationship between long-term Aboriginal residents and traditional owners and to prevent disputes about community development and leasing issues.*

- The relevant Land Council would provide administrative and legal support in relation to a range of land use matters such as sub-leasing, licensing and the granting of permissions.

The model is distinct from section 19A (whole of township) leasing in two key respects:

- a) The lease would only be for 40 years; and
- b) The corporation that held the community lease would be a decision-making body comprising Aboriginal *residents* (both traditional owner residents and other Aboriginal residents).

The structure of community land corporations would need to be examined further on a case by case basis and tailored to suit a given community, but the CLC proposed that:

- The members be elected by the community;
- The membership be limited to Aboriginal residents; and

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<sup>87</sup> Section 25 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) also confers a duty upon Land Councils to attempt conciliation of disputes relating to land.

<sup>88</sup> [CLC Paper – Community Leasing – an Alternative Proposal](#). It should be noted that this model was developed to promote discussion and the Council has endorsed it for this purpose. It is not a model on which there has been any specific community consultations to date, although a similar scheme is being considered in relation to Mutitjulu.

<sup>89</sup> Existing leases would be recognised and incorporated within the model.

- The powers of the corporation should be limited to making land-related decisions within the community and decisions related to expending certain rent monies received by the Land Council.

The ongoing administrative and legal support the Land Council provided the corporation would be entrenched in both the head lease and rules of the community land corporation. The model provides a delegated and expedited process for the formalisation or creation of individual leasehold interests by shifting decision making from an often dispersed group of traditional owners to Aboriginal community residents. Contrary to the section 19A model, it would achieve this while retaining maximum Aboriginal control over the future development of communities, and would ensure that both traditional owners and community residents benefit from land reform. The ongoing role of the relevant Land Council in supporting the community land corporations would provide land users with certainty with respect to the processing of land-use applications.

The implementation of such a model would require a detailed negotiated settlement between traditional owners and community residents and the free prior and informed consent of traditional owners in accordance with the ALRA. Such a model will not be necessary or desirable for all communities but could provide an important opportunity to address the issues raised above while also providing a mechanism for responding to the 'stress on traditional decision making processes that community issues, such as planning, can cause.'<sup>90</sup>

## Conclusion

Voluntary negotiated leases are now being processed and agreed to (and in some cases rejected) throughout the CLC region at a rapid rate. Voluntary leasing is a welcome development for Aboriginal land owners, particularly after the recent experience of compulsory acquisition of community land and the historic lack of negotiation about terms of occupancy. While these leases formalise land tenure arrangements resulting in greater clarity about ownership and responsibility for assets and infrastructure in remote Aboriginal communities in the Northern Territory, they do not necessarily lead to greater economic development or private home ownership.

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<sup>90</sup> M Dillon and N Westbury, above n 67, 130–6. Many of the other concerns Dillon and Westbury raised have now been addressed through formalisation of tenure under section 19 of the ALRA.

Significant barriers to economic development and home ownership on ALRA land remain. A genuine effort to break down such barriers will require the Australian and Northern Territory governments to fund major infrastructure adequately to address infrastructure constraints and the lack of vacant serviced lots in remote communities. It will also require all parties to work together with Aboriginal land owners to develop innovative ways to improve access to finance, as well as considered models for home ownership and support for nascent Aboriginal enterprise initiatives. Such a collaborative effort will require a commitment to evidence not ideology, acknowledging the extent of the barriers and the hard work and enduring commitment that will be required to address them.