

TWO SIDES OF THE SAME COIN: OUTSTATIONS POLICY AND LAND TENURE REFORM

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I Introduction

This article deals with the Northern Territory where the Commonwealth's role in respect of Indigenous policy is clearest, and its influence strongest. This allows for a focus on the Commonwealth's land tenure reform and related policies without having to account for the role of the states. Whilst the role of the Northern Territory Government in Indigenous affairs is very important, ultimately the Commonwealth has power and, as in the Northern Territory Emergency Response of 2007 ('NTER') has demonstrated, a willingness to exercise it unilaterally.¹ Despite the achievement of Self-Government in 1978, the Northern Territory legislature remains subordinate to the Commonwealth Parliament.

As well, under Commonwealth legislation – the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('ALRA') – almost 50 per cent of the land mass of the Northern Territory is held as Aboriginal land.² Other Aboriginal land holdings, such as Community Living Areas excised from pastoral leases and national parks, are held under Northern Territory legislation.³ The original impact of land tenure reform in the Northern Territory was on medium to large-sized communities on ALRA land. Subsequently the Land Reform provisions in Part 3 of the Commonwealth's *Stronger Futures in the Northern Territory Act 2012* (Cth) ('*Stronger Futures*') have also brought Community Living Areas and town camps within the purview of the Commonwealth's land tenure reform policy.

Over the past decade, the Commonwealth's Indigenous policy, with respect to remote discrete Aboriginal communities,⁴ has emphasised land tenure reform. With relatively minor differences, land tenure reform has been a common policy objective of both Labor and the Coalition Federal Governments. It has been endorsed by the Council

of Australian Governments ('COAG') under the *National Indigenous Reform Agreement* ('NIRA'),⁵ the overarching agreement to give effect to the Closing the Gap policy objective. Land tenure reform has been a high profile component of the Indigenous policy reform agenda.

In the Northern Territory the 'flagship' component of tenure reform has been 'whole-of-township' leases, whereby traditional owners lease back ALRA land to a government entity for periods of 40 to 99 years. Township leases in turn are encompassed by the 'secure tenure' policy affecting a wider range of communities. New houses, housing related infrastructure and major housing refurbishments are contingent on secure tenure arrangements (which may be leases for a specific area rather than a whole township) being entered into.

In contrast, policy in respect of outstations, homelands and similar small to medium-sized communities has not figured prominently in policy discussion and formulations, especially at the Commonwealth level, and is barely mentioned in COAG documents. Outstations and homelands are, quite simply, absent from the Closing the Gap policy agenda. In the welter of contention over the NTER of 2007, the *Stronger Futures* legislation of 2012, and land tenure reform; policy in respect of outstations and homelands has drawn much less attention.

Over the past decade however, policy settings in respect of outstations and homelands have become hostile to the continued viability, growth and development of these communities. Resource allocations have greatly favoured larger communities. Although a Commonwealth policy animus against outstations and similar small communities has never been made explicit, the policy bias against these

communities can clearly be discerned by a close interrogation of bilateral and COAG agreements and of relevant programs. This article endeavours to undertake such an interrogation.

Whilst at the Commonwealth level outstations and homelands policy today is barely on the public record, at the Northern Territory level support for outstations and homelands continues to be a live political issue. However, outside of the Northern Territory, outstations and homelands policy settings are little understood, have had relatively little visibility and consequently have not significantly impacted on the national policy discourse. There has, though, been an underlying negative critique of outstations and homelands over the past decade. For example, in 2005 the then Minister for Indigenous Affairs, Senator Amanda Vanstone, queried the viability of such communities, referred to 'cultural museums', and signalled that a reduction of support was likely:

[W]e need to think about the large numbers of very small settlements or homelands. There are around 1, 000 communities with less than 100 people, and of those, more than 80 per cent have less than 50 people. Despite the higher rate of population growth of Aboriginal people, it is unlikely that many of these homelands will grow to become viable towns...Perhaps we need to explicitly draw a line on the level of service that can be provided to homeland settlements.⁶

A negative critique by some conservative commentators appears to have reinforced a trend in policy hostility towards outstations and homelands. As discussed below, this negative commentary served to delegitimise Aboriginal aspirations to live on country.

II Policy Linkage – Two Sides of the Same Coin

Outstations and homelands policy is, however, of critical importance to Aboriginal Territorians who have endeavoured to bring their concerns before Parliament and the wider public.⁷ These concerns were given some consideration in a series of reports by the Senate Committee on Regional and Remote Indigenous Communities beginning in 2008.⁸ There are just a few statements from Commonwealth Ministers in respect of outstations and homelands (discussed below). Despite the efforts of Aboriginal residents of outstations and homelands to have their concerns addressed, at a national level the question of outstations and homelands remains largely on the margin of public discourse about Indigenous affairs.

Thus we have two arms of policy, one which has a high profile, that is land tenure reform, and one which has stayed marginal, that is outstations and homelands. Land tenure reform, associated with major housing, infrastructure and other investment, and the dedication of significant bureaucratic resources, has been integral to the Closing the Gap agenda. Outstations and homelands have been starved of funds. There would not seem to be much connection between these two apparently disparate areas, one characterised by intense effort, large investment and parliamentary and media scrutiny,⁹ and one suffering from, at best, benign neglect.

However, policy relating to outstations and homelands, and policy relating to land tenure reform are not disparate or unconnected. They are in fact two arms of the same policy agenda and are more closely linked than might appear to be the case. As this article argues, outstations and homelands policy does not stand alone, nor is it actually a policy of benign neglect. It is instead a central part of the main policy game. It is the other half of land tenure reform. Land tenure meets certain policy objectives in respect of major townships and medium sized communities on Aboriginal land. Outstations policy meets the same objectives on that part of Aboriginal land that lies outside the major townships and communities. A policy animus against outstations has been integral to, and an essential complement of, the suite of policies around land tenure reform. The implications of this linkage are significant, and a proper understanding of either of these policy arms requires an appreciation of this linkage.

The two aspects, that is the animus evident against outstations and homelands, and land tenure reform, are two sides of the same coin. Together they represent a policy agenda seeking the radical transformation of the distinctive nature of Aboriginal society, a society shaped by tradition. That tradition is seen as an obstacle to Aboriginal progress, to Closing the Gap. In particular, the traditional system of authority, of decision-making about land, recognised and enshrined in the informed consent provisions of the *ALRA*, is seen by policy makers as constituting a significant, if not key, obstacle to Aboriginal advancement. In this policy perspective, many of the problems facing Aboriginal society are located within that society itself. Traditional Aboriginal society is seen as inherently incapable of adapting to modern life. The policy imperative then is to obviate the hold of tradition on Aboriginal society.

III Outstations

The first side of the policy coin is outstations. Broadly speaking, such communities can be characterised as being small to medium-sized (typically up to 100 residents), family or clan based, and located on or near land to which the communities have traditional affiliation. A 1987 House of Representatives Standing Committee on Aboriginal Affairs Report, *Return to Country – The Aboriginal Homelands Movement in Australia* (*Blanchard Report*), defined outstations as:

small, relatively permanent, decentralised communities consisting of closely related individuals which have been established by Aboriginal people with a strong traditional orientation.¹⁰

This definition reflects the situation at the time and there have been developments over the following decades. It does not capture the range and diversity of outstations that have developed, and new roles in areas such as substance abuse harm reduction, juvenile diversionary programs and land management that have emerged as constructive responses to negative social trends and emerging environmental problems. The term 'outstation' itself is not universally accepted or used for such communities, and in some areas the term 'homeland' is preferred. The terms 'outstations' and 'homelands' are largely interchangeable and are used interchangeably in this article.

The term 'decentralised' within the *Blanchard* definition appropriately captured the dynamic element of the outstations movement of the 1970s and 1980s, whereby Aboriginal groups moved away from the stresses, tensions and social dysfunction characteristic of the major communities which had been established under the assimilation policy.¹¹ Rowse notes that '[b]etween 1937 and 1968, the Northern Territory Administration set up a network of settlements in which to train Indigenous people for citizenship'.¹² The homelands or outstation movement represented purposeful decentralisation and was very much an Aboriginal initiative, although supported by government from 1973. Downing describes:

a movement of people out from large centres, from government settlements and from church missions, to more remote areas where they established much smaller communities, generally of the clan or extended

family group. This became known as the Outstation or Homelands Centres movement.¹³

However, the description of 'decentralised' does not fit all situations, and so itself can be misleading. Some people had never left their traditional country, and some outstations had been established much earlier. In particular, the small communities living on land excised from pastoral properties and national parks ('Community Living Areas' or 'CLAs'), that often have the characteristics of outstations and homelands, can only be described as 'decentralised' where people moved back to their country from urban fringes with the granting of an excision. For a number of excision communities, however, there has been no 'decentralisation' as such. These are communities that have in fact never left their land. Indeed the *Blanchard Report* noted that 'many excision communities could be regarded as homeland centres'.¹⁴

Most outstations and homelands are located on Aboriginal land granted under the *ALRA*, and a number are on CLAs. The population of outstation and homeland communities is significant with approximately 10 000 people living on more than 500 such communities, representing approximately 25 per cent of the Aboriginal population of the Northern Territory living outside urban areas.¹⁵ Whilst there are clusters of outstations, often as a result of access constraints with varying land tenure types; outstations and homelands are a Territory-wide phenomenon. A number of today's outstations have been in continuous existence for 30 years or longer and have a substantial built infrastructure. Some outstations and excision communities have developed into medium-sized communities in their own right, with 'second generation' outstations established from, and serviced by, them.¹⁶

A Policy Reversal

Outstations and homelands represent an established and preferred settlement mode for a significant proportion of the Northern Territory Aboriginal population. They are not simply a scattering of ad hoc small communities, they also represent a sizeable sunk investment on the part of the Commonwealth in housing and infrastructure. The *Blanchard Report* noted that support to the homelands movement had been provided by the Commonwealth Department of Aboriginal Affairs from the early 1970s and recommended that, subject to certain criteria and conditions and appropriate

to the circumstances, governments, both Commonwealth and state and territory, continue to support homelands in respect of seed funding, essential services, housing, infrastructure and services such as education and health.¹⁷ Successive Commonwealth Governments, both Labor and Coalition, continued a policy of support for outstations and homelands for 40 years through programs such as the Community Housing and Infrastructure Program ('CHIP') and the Community Development Employment Program ('CDEP').

However, over the past decade much of this support has evaporated. This has particularly been the case at the Commonwealth level, although it has been echoed at Territory level. Small communities now have the lowest priority for government support. COAG's *NIRA* identifies a handful of communities across Australia as 'priority locations' for government investment.¹⁸ These 'growth centres' are the focus of major investment efforts under the Closing the Gap initiative. Outstations and homelands are the 'poor relations', receiving little more than limited funding for municipal and essential services. This relative priority between the large growth centres and outstations and homelands is outlined in *NIRA*:

Priority for enhanced infrastructure support and service provision should be to larger and more economically sustainable communities where secure land tenure exists, allowing for services outreach to and access by smaller surrounding communities, including:

- Recognising Indigenous peoples' cultural connections to homelands (whether on a visiting or permanent basis) but avoiding expectations of major investment in service provision where there are few economic or educational opportunities; and
- Facilitating voluntary mobility by individuals and families to areas where better education and job opportunities exist, with higher standards of services.¹⁹

Whilst this wording does not exclude outstations and homelands from investment, the prioritisation is clear, and this indeed is how it has transpired. The 'facilitating voluntary mobility' option, which can also be found in the recommendations of the *Living in a Sunburnt Country* Report,²⁰ are part of a long-term vision for centralising the remote Aboriginal population into the major Aboriginal

communities or townships²¹ and into urban areas such as Alice Springs, Tennant Creek and Katherine.

By 2006, the then Minister for Indigenous Affairs, Mal Brough, was signalling a hard line on support for outstations and homelands:

However, if people choose to move beyond the reach of education and health services noting that they are free to do so, the government's investment package will not follow them. Let me be specific – if a person wants to move to a homeland that precludes regular school attendance, for example, I wouldn't support it. If a person wants to move away from health services, so be it – but don't ask the taxpayer to pay for a house to facilitate that choice.²²

The movement in policy against outstations and homelands represented a radical shift from policy settings that had prevailed for decades. This change started to be seen about 2004 and was entrenched by 2007 with the signing of the *Memorandum of Understanding Between the Australian Government and the Northern Territory Government on Indigenous Housing, Accommodation and Related Services September 2007* ('MOU').²³ With the MOU the Commonwealth abrogated its responsibility for outstations and homelands, transferred this responsibility to the Northern Territory and, significantly, completely excluded outstations from future Commonwealth funding for housing and related infrastructure regardless of circumstances or need.²⁴ In this MOU, discussed below, the Commonwealth had clearly signalled that its vision for Closing the Gap for remote Aboriginal communities did not encompass outstations and homelands – for these communities there was to be no growth and no development. The key question is why, and what policy linkages exist to land tenure reform?

B Self-Government 1978

It is necessary first to trace the origins of the somewhat arcane division of responsibilities for Aboriginal communities that has prevailed in the Northern Territory. The early Commonwealth support for outstations and homelands noted by the *Blanchard Report* was confirmed in the arrangements for Self-Government in 1978.²⁵ The specific arrangements for Aboriginal communities were elaborated in correspondence between the then Northern Territory Chief Minister, Paul Everingham, and the then Commonwealth Minister for Aboriginal Affairs, Senator Fred Chaney, during

1979. Senator Chaney agreed to the transfer of finances and responsibility for municipal and local government services for Aboriginal townships to the Northern Territory. However, the Commonwealth retained responsibility for the provision of services to small communities:

For a number of reasons, I would not at this stage wish to consider the transfer to your Government of funds used for grants in support of the small communities ('outstations' or 'homeland centres') on Aboriginal land and on pastoral properties.²⁶

Mr Everingham had wanted responsibility for all Aboriginal communities. Senator Chaney was not confident that the Northern Territory Government had the capability to take on responsibility for outstations and homelands. These arrangements set up a bifurcated or dual system of administration in respect of discrete Aboriginal communities that was to remain in place, with some overlap in service provision, in the Northern Territory until 2008. The Northern Territory had primary responsibility for the large (at that time 42) communities, administered through local government councils, and the Commonwealth retained responsibility for the approximately 500 other communities, of varied sizes and types, loosely grouped under the generic title of 'outstations'; normally administered through specific purpose outstation resource centres. The 500 communities that remained with the Commonwealth represented a spectrum of small to medium-sized settlement types. Many outstations and homelands, as discussed, grew over three decades and a number had 'graduated' into communities large enough to move from Commonwealth to Northern Territory responsibility. The major communities for which the Northern Territory Government had responsibility had grown to over 70 by 2007. This was the basis for the 73 'prescribed communities' covered by the NTER of June 2007.

C ATSIC, Homelands and CHIP

Following the abolition of the Department of Aboriginal Affairs, outstations became the responsibility of the Aboriginal and Torres Strait Islander Commission ('ATSIC'). ATSIC continued to fund new housing and infrastructure for outstations and homelands through the CHIP program. However at its November 1994 meeting, the Ministerial Council for Aboriginal and Torres Strait Islander Affairs

('MCATSIA'), comprising the relevant federal and state ministers, decided that ATSIC should have responsibility, jointly with the three tiers of government, for developing a national policy on the provision and maintenance of community infrastructure on homelands. According to the MCATSIA decision, such a policy should provide for a balance between the needs of larger established communities and smaller emerging ones. In response, ATSIC instituted an *interim* moratorium on support for *new* outstations whilst it developed stringent funding guidelines, promulgated in 2000, for such proposed new outstations.²⁷

With the abolition of ATSIC in 2004 and the transfer of CHIP to mainstream departments, a moratorium was placed on CHIP funding in respect of *any* new housing and infrastructure on outstations and homelands, including existing outstations. This moratorium reflected a developing policy ambivalence about outstations and homelands, and is to be distinguished from ATSIC's earlier interim moratorium on new homelands and outstations. The CHIP Funding Guidelines for 2006-07 became the basis of outstations and homelands policy which was to be maintained unflinchingly by both Coalition and Labor administrations through to the present. The Guidelines stated there would be no funding for *new outstations*, and no funding for new housing or related infrastructure *on existing outstations*. Funding would only be provided to maintain and repair existing housing, infrastructure and essential services.²⁸ In February 2007 the recommendations of the *Living in the Sunburnt Country* review of CHIP effectively confirmed the moratorium.²⁹

This prohibition on new housing has contributed significantly to the increasingly dilapidated and over-crowded state of outstation and homelands housing and infrastructure which confronts these communities today.³⁰ In fact, there has been virtually no funding for new, rebuilt or refurbished housing for outstation and homelands communities since 2004-05.

D The 2007 Memorandum

In 2007 the bifurcated arrangements for supporting Aboriginal communities in the Northern Territory were brought to an end. Discussions between the Commonwealth and the Northern Territory had commenced in 2005 in respect of the planning, co-ordination and provision of services to the smaller Northern Territory Aboriginal communities, other than the 70-plus major communities already under the responsibility of the Northern Territory. This dialogue

was undertaken in the context of the COAG objective of addressing jurisdictional overlap and rationalising government interaction with Indigenous communities.³¹

Negotiations, however, were soon derailed by the somewhat unexpected attack on outstations and homelands by conservative commentators, echoed at political levels. Quite quickly policy scepticism about outstations and homelands became policy hostility. By September 2007 this development was reflected in the *Memorandum of Understanding between the Australian Government and the Northern Territory Government on Indigenous Housing, Accommodation and Related Services 2007* ('2007 MOU').³² The 2007 MOU is a key document. It bookends the 1978 *Self Government-Memorandum*.

The 2007 MOU set up the arrangements for major investment (\$793 million over four years) by the Commonwealth in Aboriginal housing and infrastructure in the Northern Territory. It set out the 'principles regarding the funding and delivery of Indigenous housing, accommodation and related services in the Northern Territory'³³ by the Commonwealth through what became the Strategic Indigenous Housing and Infrastructure Program ('SIHIP') (incorporating CHIP and other housing money). A key proviso of the Commonwealth's offer to the Northern Territory under the 2007 MOU was that the Northern Territory Government agrees to take over responsibility for outstations and town camps from the Commonwealth.³⁴

The 2007 MOU identified levels or types of communities, and the priority and funding parameters attaching to each level:

- first order priority – main urban centres and larger/strategically placed growth communities: funding for repairs and upgrades of existing housing stock and new housing to meet existing demand and future growth;
- second order priority – smaller communities: repairs and upgrade will be possible, and new housing on a case-by-case basis as negotiated and agreed; and
- third order priority – 'other communities' (around 500 plus outstations): No Australian Government funding to construct housing on outstations/homelands.³⁵

The stipulation that no Commonwealth funds would be used for 'outstations/homelands' is key from the perspective of outstations policy. The animus in policy settings against outstations is clear. The 2007 MOU not only overturned the

division of responsibilities for these communities under the Self-Government arrangements, but by explicitly excluding outstations and homelands from Commonwealth funding for housing it radically overturned the support for these communities that had been established policy for over 30 years. This was all done without any Aboriginal input or consultation.

The arrangements in the 2007 MOU remain in place and have been rolled into the current COAG Indigenous housing iteration, the *National Partnership Agreement on Remote Indigenous Housing* ('NPARIH').³⁶ As a 2009 review of Commonwealth housing funding in the Northern Territory noted: 'in effect the National Partnership subsumed the arrangements made under the MOU and SIHIP'.³⁷ Certainly the ban on funding outstation and homelands housing and related infrastructure remains in place.

It was recognised from the start that these arrangements sat alongside, and complemented, the NTER. Thus, 'the 2007 MOU was pursued in parallel with activity under the Australian Government's Northern Territory Emergency Response but was not a part of that response'.³⁸ Notably, the 2007 MOU also incorporated land tenure reform into its provisions. The MOU also 'required long term leases to be negotiated with land owners to underpin major investment in larger communities comprising new housing and refurbishment work'.³⁹

That is to say, the 2007 MOU makes clear that outstations and homelands policy is wrapped together with the NTER and with land tenure reform. These apparently disparate elements in fact form a single policy package aimed at facilitating social and cultural change.

IV The Current Situation

Since 2007 the Commonwealth has had little to say in respect of outstations and homelands, instead focussing investment on the 15 Northern Territory priority communities.⁴⁰ With the extension of the NTER under the 2012 *Stronger Futures* legislation, a further five year funding program (\$280.219 million) has been provided for 52 medium-sized and large communities for housing refurbishment and asbestos remediation.⁴¹ These communities are apparently the 'second order priority' communities identified in the 2007 MOU. This funding complements the capital works program already underway with the first order 'growth' communities.

These additional communities, now designated as 'Target Communities', are not eligible for new housing, just upgrades. Nevertheless, the secure tenure policy is to apply.⁴² The extension of housing and associated works beyond the 15 growth centres is to be welcomed. However, outstations and homelands remain excluded. The 2007 *MOU* stipulation prohibiting Commonwealth funding for housing on outstations and homelands remains firmly in place and, as far as housing goes, outstations and homelands remain outside the Closing the Gap agenda, including its latest iteration in *Stronger Futures*. If anything, the additional funding under *Stronger Futures* emphasises the 'orphan' status of outstations and homelands.

A The Commonwealth's Position Today

To a large extent the Commonwealth has endeavoured to eschew any responsibility for outstations and homelands. Perhaps the closest we get to an articulated Commonwealth policy position is in the Commonwealth announcement of March 2012 that it would provide a total of \$206 million for 10 years to the Northern Territory Government for basic outstation and homelands essential and municipal services.⁴³ This was in fact a continuation of the original three year transitional funding of \$20 million a year (see above). The Northern Territory is to add \$15 million bringing the total package to \$221 million. The contribution from the Northern Territory is obviously minor, meaning that the funding responsibility for outstations and homeland communities for these services is to stay largely with the Commonwealth, until at least 2022.

This new funding was presented as part of the *Stronger Futures* package. It represented, to a degree, a reversal on the part of the Commonwealth of the 2007 attempt to walk away from any responsibility for outstations and homelands. Tellingly, the media release for the announcement noted that 'Aboriginal people have told the Government that small communities need our continued support'.⁴⁴ The use of the word 'our' here is an oblique reference to the Commonwealth vis-à-vis the Northern Territory Government. It is an implicit recognition that the 2007 unilateral decision of the Commonwealth to abrogate its long standing responsibility towards these communities was in error and unacceptable to Aboriginal people. Aboriginal communities had certainly argued strongly that they could not simply be dumped onto the Northern Territory Government, given its limited funds and capacity. For example, the Laynhapuy Homelands

Association, representing 19 homelands in North East Arnhem Land, in a submission to a Senate Committee in 2008, was highly critical of the impact of the suite of policies encompassed by the NTER, including the transfer of responsibility for outstations and homeland communities. As Laynhapuy noted, the 2007 *MOU*:

...essentially prevents homeland communities from benefiting from any of the Australian and Northern Territory Government investment in new [I]ndigenous housing. ... The intervention has condemned homeland residents to ongoing overcrowded and sub-standard housing conditions.⁴⁵

Consequently, Laynhapuy called for 'this *MOU* to be urgently reconsidered and re-negotiated to ensure the housing needs of homelands are addressed'.⁴⁶

The 2012 Commonwealth decision to extend basic essential and municipal services funding does not solve the challenges facing these communities. In fact, the extended funding is, in real terms, a reduction in the level of funding provided through the transitional period, as it is not indexed. As the funding has a finite time period, it could be seen as an extension of a transition, rather than a commitment to long term growth and sustainability. This extension of recurrent funding for essential municipal services represents a minimal shift in the basic policy indifference or hostility towards these communities. Notably, the media release made no mention of support for housing and related infrastructure, leaving that aspect of outstations and homelands support unaddressed.

The prohibition on funding for outstation and homelands housing has been defended with a degree of rigour. An example is to be found in the attempts by Aboriginal people of the West Arnhem Land Plateau, from about 2002, to return to live on their traditional country, the *warddewarddeor* 'stone country'. This large region had been empty of its people since the late 1960s. Peter Cooke, an adviser to these people, noted the difficult timing of their attempt to establish a homelands community in terms of shifting policy. This return to country was happening:

after government policy became overtly anti-outstation. *While not always openly expressed*, this change in policy permeated the interface between government and Indigenous organisations.⁴⁷

The campaign to get a house on this land for the highly respected leader of this group was unsuccessful. Cooke notes that '[w]hile many aspects of the government's policies towards outstations remain ambiguous or even schizophrenic, money for new housing is "just not on".⁴⁸ The group nevertheless established an outstation at Kabulwarnamyo, using tents, which serves as both an outstation for the clan and a hub for the administration of an Aboriginal owned conservation and development business. Funding for an airstrip at Kabulwarnamyo for the local Warddeken Ranger group was provided only after a written assurance that the airstrip was not primarily aimed at supporting an outstation.⁴⁹

B The Northern Territory Government's Policy

Since 2007, when it inherited responsibility for outstations and homelands, the Northern Territory Government has fallen into line with the Commonwealth's approach of excluding these communities from investment in housing and infrastructure. It probably has had little choice, in that COAG had mandated a restrictive approach to these communities and the Commonwealth had precluded these communities from Commonwealth housing funds. In these circumstances, arguably, there was not a lot of room for an independent position for the Territory even if it had wanted to develop one. Announcing the 2007 Intervention, then Prime Minister John Howard made clear the Commonwealth's authority:

[I]t [the NTER] is interventionist, it does push aside the role of the Territory to some degree, I accept that, but what matters more: the constitutional niceties or the care and protection of young children? We believe the latter is overwhelmingly more important. We hope that the Northern Territory Government will cooperate and see the wisdom of working with the Commonwealth Government, but our resolve to implement these measures is firm and we intend to set about them from the time of this announcement.⁵⁰

Just a few months later the 2007 *MOU* was signed in the same atmosphere of Commonwealth intervention and authority. The Northern Territory had to accept the offer of housing funds under SIHIP on the conditions imposed by the Commonwealth, even though the Territory had reservations. The Chief Minister, Claire Martin, noted in correspondence to Prime Minister Howard that: 'the Territory is *required* to accept responsibility for outstations that rested previously with your Government'.⁵¹

The Northern Territory's 'Territory Growth Towns' (now renamed 'Major Remote Towns') investment policy consequently mirrors the COAG prioritisation approach.⁵² The Territory concentrates its resources and services in 21 Major Remote Towns or 'hubs' which largely overlap with the COAG-mandated 15 priority Territory Aboriginal communities. In fact, the fit between COAG policy and the Northern Territory's policy is very close in respect both of community prioritisation and insistence on secure tenure.⁵³ As has been observed, Northern Territory policy:

dovetails with the Council of Australian Government's (COAG) *National Indigenous Reform Agreement* in shifting the basis of remote service delivery towards a hub and spoke model of Aboriginal communities in the NT.⁵⁴

The Northern Territory provides no support to *establish* new outstations and no support for new housing and related infrastructure on *existing* outstations. That is, COAG/ Commonwealth *and* Northern Territory policy exclude outstations from government-sourced investment. The existing housing stock is all that will be provided, and that will not be refurbished or rebuilt. Even with maintenance funding, this housing stock will inevitably deteriorate over time, especially given chronic over-crowding. However, the Northern Territory is providing \$14 million over four years commencing 2012-13 through the Homelands Extra Allowance for the repair and maintenance of outstation homes, albeit on quite restrictive criteria.⁵⁵ Even with this modicum (given the parlous state of outstation housing) of additional support, outstations and homelands remain at the bottom of the community priority chain, where they have been for a decade.

Rhetoric, though, is now less negative about homelands than it was perhaps 10 years ago. Thus the Northern Territory, as per its Homelands Policy, maintains that it supports Aboriginal people living in outstations and homelands:

The Northern Territory Government acknowledges the importance of Aboriginal people's cultural connections to their traditional lands, and the contribution that homelands and outstations make to the economic, social and cultural life of the Northern Territory. The government is committed to improving services and living conditions on homelands.⁵⁶

Support is provided to existing outstations and homelands for repairs, maintenance and upgrades of municipal and

essential services, predominantly with Commonwealth money under the *Stronger Futures Agreement*.⁵⁷ The crunch point is the housing stock. The Northern Territory Homelands Policy steps deftly around the issue of new housing. It acknowledges that traditional owners may wish to establish new homelands or build new dwellings.⁵⁸ However, it disclaims responsibility: '[t]he Northern Territory Government has no immediate plans to build new houses on homelands or establish new homelands.'⁵⁹ Instead, the Government attempts to put responsibility directly onto the outstation residents themselves. As the Policy highlights: '[it is] the primary responsibility of residents to independently manage, maintain and develop their homeland infrastructure.'⁶⁰ The message is clear. Outstation and homelands residents are on their own when it comes to new housing and related infrastructure, and have access to minimal funding below depreciation and replacement levels.

Aboriginal communities have expressed frustration with the Northern Territory Homelands Policy. For example, the 2012 Maningrida Statement of the Yolgnu Assembly states:

We want equal funding for all communities, whether they are small homelands or bigger ex-mission towns. We want the "National Partnership Agreement on Remote Indigenous Service Delivery" that underpins the hub-town model to be scrapped. All communities are viable, when they are given the funding to grow and develop. Homelands have been neglected for decades, and they must not be thrown aside...We want housing for all communities, including homelands.⁶¹

C The Influence of Conservative Commentators

The abrupt shift in outstations and homelands policy from around 2005 reflected a shift in sentiment. The shift in sentiment about Indigenous affairs was wider than the issue of outstations. Nevertheless, there was a focus on these small communities as they were seen as emblematic of the wider problems arising from the perceived failure of the 1970s policy of self-determination.

In this shift in sentiment, the role played by conservative commentators appears to account for, or alternatively to have reinforced, the animus against outstations. These were commentators who rejected a rights-based approach to Indigenous policy. In particular, they opposed communal rights. They saw support for outstations and homelands as an

unfortunate legacy of 1970s' policies. It is in the work of these commentators that the ideological underpinnings of the shift in outstations and homelands policy can be discerned. Their pessimism about self-determination reflected a negative view of aspects of Aboriginal tradition and mores. Policy prescriptions resonant of earlier assimilationist policies were promoted. As Jeff McMullen observed: 'We frequently heard the demand that Indigenous Culture be "modernised" from Roger Sandall, Ron Brunton, Keith Windschuttle, Gary Johns, and Helen Hughes.'⁶²

Helen Hughes was a prominent and seemingly influential commentator.⁶³ Her work provides context to a discussion of outstations and homelands policy. Her book *Lands of Shame – Aboriginal and Torres Strait 'Homelands' in Transition*⁶⁴ was published in 2007, the year that the Commonwealth divested itself of responsibility for outstations and homelands in the Northern Territory. Hughes was highly critical of what she termed 'homeland' communities. Whilst she did not provide a clear definition of the term 'homelands', it appears that 'homelands' were *all* those remote communities that were located on land, where Indigenous Australians held property rights, under statutory regimes or native title. In this regard her use of the term 'homelands' is somewhat different from general usage and includes small communities, medium-sized communities and large communities. In effect, she was referring to the total Aboriginal population living on remote Aboriginal lands. She noted estimates of this population as being from 90 000 to 120 000 in perhaps 1200 settlements.⁶⁵

Hughes saw the situation of these 'homelands' as grim. For Hughes, residents of the homelands were the most deprived of the total Australian Aboriginal population.⁶⁶ She blamed these outcomes on past policies that 'were designed for the "homelands" and were the principal cause of their deprivation', including communal title and the recognition of customary law.⁶⁷ Asserting that 1200 remote homelands communities throughout Australia were too many to be supported 'because of diseconomies of scale';⁶⁸ Hughes' central policy proposal was to concentrate the remote Aboriginal population into a small number of large communities. There was to be an initial investment focus on perhaps a dozen or so such settlements. She added more communities to this dozen 'to ensure that most families with children can move to settlements with a decent school and access to decent medical facilities.'⁶⁹ It appears that under Hughes' proposal there were to be about 100 core communities receiving government support nation-wide,

but with a handful of this hundred as a first order priority for resourcing. That is, we were to go from 1200 communities across remote Australia to about a dozen high priority and 100 in sum. These were to be 'core centres'.⁷⁰

This policy prescription broadly accords with the prioritisation of communities under COAG and, allowing for a degree of vagueness in her prescription, Hughes' position was not that far in concept from the COAG's 29 high priority communities Australia-wide. Hughes made explicit what the COAG policy either implied or alluded to, that is, that the policy was about concentrating the Aboriginal population into a few large communities. She in fact called this a 'core population concentration policy'.⁷¹ The remaining countryside, held under a form of Aboriginal title, was, it seems, to be largely depopulated over time. Hughes suggested, almost as an afterthought at the end of her book, that connections to country could be maintained by visiting or other arrangements without necessarily living on country.⁷²

Hughes proposed that housing would *only* be provided in townships with 99 year head leases.⁷³ However, the role of the 100 or so centralised communities proposed by Hughes is not clear. Were they to be permanent settlements, or transitional staging places where Aboriginal people would receive adequate education and learn the values of private house ownership before moving into the mainstream in regional and urban centres? Her propositions seem to echo the transitional role of remote settlements under the assimilation policy. Thus the policy wheel appears to have turned full circle. There appears to be a degree of resonance between objectives for Aboriginal settlements of the 1950s and 1960s assimilation policy, with all its inherent contradictions,⁷⁴ and the policy proposals canvassed by Hughes. If so, this is unfortunate given the history of the settlements.⁷⁵

(i) Communal Rights

Underlying her policy prescriptions was a dark critique of Aboriginal society. Communal title is a key problem in this perspective, 'locking up' the potential value of the land. Hughes, with Warin, claimed that 'nowhere in the world has communal land ownership ever led to economic development.'⁷⁶ Hughes and Warin accordingly called for policy reform:

An 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.⁷⁷

She believed that communal property rights inevitably lead to violence,⁷⁸ that problems are 'exacerbated by out of date social values',⁷⁹ and that education 'has failed to introduce rules of reasoning and causal sequences'⁸⁰ thereby making the Aboriginal communities vulnerable to 'fears of malignant spirits and sorcerers'.⁸¹ Here we see the classic charge of irrationalism against Indigenous societies. This accusation, often linked to the charge of 'barbarism', has persisted since the beginnings of European colonisation of the New World in the 16th century.⁸² The modernising project leaves little room for tradition.

(ii) Lands of Shame

Lands of Shame has been trenchantly criticised.⁸³ The relevant issue here, however, is that such views may well have influenced policy, and possibly continue to do so. Tim Rowse noted the similarity in Hughes' position to the policy directions taken by the Howard Government and endorsed by the then Rudd Opposition:

Many of the Howard Government's recent policy innovations (endorsed by the Rudd Opposition in August 2007), such as limiting the application of communal land tenure and abolishing many Community Development Employment Projects, are consistent with Hughes' ideas.⁸⁴

Boyd Hunter, writing in 2008, asserted that Hughes's ideas were influential within the government: 'Her book *Lands of Shame* is, by any measure, an extraordinary work that has already influenced government policy.'⁸⁵

D Concluding Observations on Outstations and Homelands

After visiting Australia in 2009, the United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Professor James Anaya, summed up the situation:

The Special Rapporteur observed the profound connection that many Aboriginal people in Australia have to their homelands, many of which began to be repopulated in the 1970s when [E]lders took their people back to ancestral

lands from larger communities run by missions, and the importance of these lands to the lives and culture of Australia's Aboriginal people. Further, homelands are widely understood to have lower levels of social problems, such as domestic violence and substance abuse, than more populated communities. According to reports, the health of [I]ndigenous people living on homelands is significantly better than of those living in larger communities, with the death rate among [I]ndigenous peoples living in homelands being 40 to 50 per cent lower than the Northern Territory average for [I]ndigenous adults. Homelands are also used effectively as part of substance abuse and other programmes for at-risk Aboriginal youth living in more populated or urban centres.⁸⁶

Professor Anaya reported that, despite assurances that he had received from the Commonwealth Government: '[M]embers of homeland communities visited by the Special Rapporteur and other sources indicated weakening support from the Commonwealth Government for the homelands in practice.'⁸⁷ And, in respect of the Northern Territory Government's 'hub' or 'growth towns':

This 'hub approach' to service delivery has caused concern among many [I]ndigenous people, who fear that communities that do not fall within one of these key priority or growth areas, in particular sparsely-populated homeland communities, will be forced to move to larger communities to receive basic services.⁸⁸

Little has happened since to assuage these fears. Underlying current policy is an assumption that a process of attrition will lead to the eventual depopulation of Aboriginal land, except for the larger townships, and that younger people will move to the large communities or to urban centres such as Alice Springs and Katherine. Older people will be left to see out their days in the bush. This attitude is reflected in the 2006 comment by the then Minister, Mal Brough:

[S]ome people won't be equipped to take up opportunities elsewhere. It is not sensible to take somebody who is not adequately equipped due to age, health or lack of education and dump them in cities or large regional towns.⁸⁹

The drift of population to urban areas has already exacerbated overcrowding in town camps and suburban housing.⁹⁰ The policy hostility toward homelands is not without subtlety as there is no direct coercion to move

people from homelands. Rather, the government plays a waiting game. Resources are focused on the growth towns, the hubs.

Professor Anaya recommended that Australian governments adopt a long term policy to support homelands and outstations:

The Commonwealth Government and state governments should embrace a long-term vision for social and economic development of homeland communities, especially bearing in mind the practical, social and cultural benefits that the homelands provide to Aboriginal and Torres Strait Islander peoples, as well as to the society at large.⁹¹

This recommendation appears to have been ignored.⁹² Whether current policy in respect of outstations and homelands is consistent with Australia's international human rights obligations is a moot point.

V The Linkage of Land Tenure Reform to Outstation and Homelands Policy

Outstation and homelands policy sends a clear signal to Aboriginal society: regardless of Aboriginal priorities, family or clan-based communities located on or near traditional estates are not part of the Closing the Gap agenda – and Closing the Gap is the focus of government policy and programs. Because of Aboriginal persistence such communities may be tolerated by government, and minimal support provided for essential and municipal services and repairs and maintenance, but homelands are not the direction that government prefers for Aboriginal society. The government project is what I term 'the modernity project'. The locus of that project is in the larger communities (townships) and urban areas.

In this view, Aboriginal tradition and social arrangements are the problem. Aboriginal society is viewed as fundamentally undemocratic and hence anachronistic. It is a society that needs 'renovating'. The main obstacles to such a modernising project are seen as the communal nature of the society, the very strong attachment to land, and the decision-making role of traditional owners. The policy challenge therefore is to attenuate the communal attachment to land by individualising land ownership and to displace the decision-making role over that land currently exercised by the traditional owners.

By limiting resources and services provided to outstations and homelands and concentrating resources and services in major 'hub' towns and urban areas, one goal can be achieved: lessening attachment by getting people off their land, especially younger generations. This lessens direct control and management of land by Aboriginal people. People living on country are people with *effective* day-to-day responsibility for, and say over, that country. Consequently, outstation and homelands policy is not just one of benign neglect. It is a necessary adjunct of the more direct assault on Aboriginal traditional mores and processes contained in the land tenure reform policy agenda.

Government rhetoric is generally supportive of Aboriginal traditional culture and attachment to land.⁹³ However, the gap between rhetoric and reality is significant. This has been discerned and articulated by Aboriginal Territorians who have drawn a link between outstations and homelands policy and an attack on the traditional basis of Aboriginal life. The Laynhapuy Association has drawn, and rejected, the link between homelands policy and 'the modernity project':

[I]t needs to be understood that the majority of Yolngu do not wish to be 'assimilated' or 'mainstreamed'. They strongly value their culture and law and links to country, and do not regard the fact of their physical/locational or cultural separateness from the mainstream as equating to being 'disadvantaged'. They are however, very frustrated, at the failure of government to respect this choice, and to appropriately support their aspirations for separate development through the provision of appropriate infrastructure and services to develop local capacity... Their aspirations and efforts over the past 30 years to build their homelands as self-managing communities have been completely discounted and disregarded by Government policy leading up to and since the intervention.⁹⁴

VI Land Tenure Reform

The other side of the policy coin, land tenure reform, is about the Northern Territory Aboriginal communities, other than outstations and homelands. Leon Terrill has noted that:

In the course of the recent reforms, the Australian Government identified 73 remote settlements as generally having a population of greater than 100. Together with town camps, it is these larger remote communities (rather than

outstations or homelands) that have been the focus of recent land reforms.⁹⁵

Thus it seems that the two issues, homelands and tenure reform, are largely unrelated. Despite appearances, however, the two areas are intertwined in the same policy agenda.

The *NPARIH*, by which the Commonwealth provides housing funding for remote Aboriginal communities, is premised on land tenure reform.⁹⁶ Land tenure reform has become a *sine qua non* of government investment in Aboriginal communities:

It is Australian Government policy that all significant capital investment on Indigenous land is underpinned by secure tenure prior to the provision of funding and commencement of a capital works project.⁹⁷

The Australian Government is committed to pursuing land reform for townships on Indigenous land.⁹⁸

The Minister for Indigenous Affairs, Senator Nigel Scullion, has expressed the high hopes attaching to the Indigenous land tenure reform policy:

Land tenure reform is not about benefiting government and it is not about giving government control of the land. It is about giving Aboriginal people the same opportunities and responsibilities as other Australians to own their own homes, and leverage their land assets to generate wealth for the benefit of themselves, their families and their community.⁹⁹

A Development of Land Tenure Reform

The Howard Government had been concerned that the *ALRA* had not resulted in sufficient economic and social advancement for the Aboriginal people of the Northern Territory. Accordingly, the government announced a comprehensive review of the Act in 1997. The report of that review, conducted by John Reeves QC ('*Reeves Review*'),¹⁰⁰ discussed below, was completed in 1998. As it turned out, the far-reaching recommendations of the *Reeves Review* were not acted upon.

Communal inalienable title had been identified as a major obstacle to Aboriginal development and the informal arrangements whereby many government assets were built

on Aboriginal land without leases were seen as risky.¹⁰¹ The Commonwealth came to see tenure reform as a key driver of improved outcomes for Aboriginal Territorians and important to the Closing the Gap agenda.

Some years after the *Reeves Review* the Commonwealth Government returned to the reform of the *ALRA* in 2005. Then Prime Minister, John Howard, stated:

I believe there is a case for reviewing the whole issue of Aboriginal land title, in the sense of looking towards private recognition. ... I certainly believe that all Australians should be able to aspire to owning their own home and having their own business. Having the title to something is the key to your sense of individuality; it's the key to your capacity to achieve, and to care for your family and I don't believe that [I]ndigenous Australians should be treated any differently in this respect.¹⁰²

The Commonwealth amended the *ALRA* in August 2006 to allow, inter alia, for Land Trusts to lease whole townships on *ALRA* land to the Commonwealth (section 19A). It is not the purpose here to provide a detailed account of the land tenure reforms beginning in 2006, as this has been done by other writers.¹⁰³ Nevertheless, a summary account is required for this analysis.

Although it had been possible for leases to be established under the *ALRA*, this new form of lease allowed for a Land Trust to grant a long term head lease over a township to an approved government entity, which in turn was able to sub-lease and licence individual sections of the township.¹⁰⁴ Township leases are for a period of 40 to 99 years.¹⁰⁵ The Executive Director of Township Leasing ('EDTL') holds the township leases on behalf of the Commonwealth Government.¹⁰⁶ Sub-leases and licences arrangements can be entered into by the Executive Director, rather than by the Land Trust, as was the situation prior to 2006. Probably the key aspect of the whole-of-township leasing model is that the traditional owners, perforce of the legislation, exercise limited, if any, control over sub-leases and licences entered into by the Executive Director. This means that once the terms of a township lease have been agreed, traditional owners, whilst still owning the underlying title, are largely locked out of the management and control of their land for the duration of the lease, potentially up to 99 years. They become marginalised bystanders. Terrill has observed that '[r]estricting the level of traditional

owner-control over subleases is one of the key elements of the township leasing model.'¹⁰⁷

The website of the EDTL poses the question of whether traditional owners have a say in how their land is used.¹⁰⁸ The answer provided is that the lease agreement sets out the terms and conditions which binds the parties. Once those terms and conditions are set, the traditional owners 'have the opportunity to work with the Office of Township Leasing in managing issues which emerge through participation in the Consultative Forum.'¹⁰⁹ The Consultative Forum is a consultative body comprising representatives of the relevant Land Council (nominees of the Land Trust) and of the Executive Director which meets regularly to advise the Executive Director about issues affecting the township. This Forum has no power, and whilst the Executive Director must generally 'have due regard' for recommendations from a Consultative Forum, he or she is not required to adopt them. So, the advice provided by a Consultative Forum is just that, it does not have to be acted upon.¹¹⁰ Although circumstances may vary over time and according to the personnel involved, essentially once the lease is signed, traditional owners have lost most enforceable rights and can be largely ignored. That is, 'it is the EDTL who ultimately determines to whom subleases are granted, for how long they are granted, and (as a result of section 19A(15) of the *ALRA*) the amount of rent.'¹¹¹

More broadly put:

These arrangements provide for no local Aboriginal responsibility or accountability, only an avenue for traditional Aboriginal owners to 'provide advice' and keep the EDTL 'aware of emerging issues within the township.'¹¹²

B What Has Driven Land Tenure Reform?

The 2007 override of the Northern Territory Government and Aboriginal communities by the Commonwealth in the dramatic events of the NTER was, arguably and despite claims at the time, not simply an ad hoc response to child abuse.¹¹³ Rather, it was the logical outcome of a trend in policy towards unilateral intervention in the affairs of Indigenous communities. Indeed, the 2006 Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, had drawn attention to this trend, warning that this approach would marginalise Aboriginal communities. He referred to the government's move towards what it termed 'strategic' or 'intensive' interventions, and commented

that ‘the federal government is moving towards a *bilateral interventionist model*’ and that ‘“strategic intervention” in fact means “restricted [I]ndigenous participation” at a governmental and priority-setting level.’¹¹⁴

The land reform legislation of 2006 can be seen as a significant step in unilateral intervention in Aboriginal communities in the Northern Territory and as a part of a suite of policy changes intended to radically shift Indigenous policy settings. Minister Brough referred in 2006 to these changes as the ‘Blueprint for Action in Indigenous Affairs’. The linkages are seen in Mr Brough’s statement: ‘We are beginning to identify ‘priority communities’ for intensive intervention strategies coordinated by my department.’¹¹⁵

The ‘Blueprint’ included land tenure reform, just as it included prioritising of communities:

Land tenure changes will be progressively introduced, subject to the agreement of traditional owners, to allow for home ownership and the normal economic activity you would expect in other Australian towns.¹¹⁶

(i) Individualising Title

A negative critique of communal land ownership, the type of title held under the *ALRA*, was basic to the reform agenda. As discussed above, communal title was seen as a barrier to Aboriginal progress and hostile to individual responsibility and initiative. In particular, apparent difficulties with obtaining leases and licences on Aboriginal land were conflated with issues of communal title and seen as inhibiting economic activity and holding Aboriginal land outside the economic mainstream. The Social Justice Commissioner commented in his 2006 Native Title Report, in light of the introduction that year of township leasing, that it was an attempt to strike at the communal nature of *ALRA* land:

The 99 year leasing provision of section 19A of the *ALRA* has the practical effect of ‘alienating’ [I]ndigenous communal land. While a lease is not an alienation in fact, it will have the same effect in practice. Ninety nine years is at least four generations. With potential to create back-to-back leases, there is a high probability that the leases will continue in perpetuity.¹¹⁷

He also expressed strong reservations, based on recent international experience, that individualising Indigenous

titles was an appropriate and effective approach.¹¹⁸ Ironically, in the Northern Territory the land tenure reforms have not led, at least until now, to a break up of *ALRA* title into individually held parcels, nor to any significant degree of home ownership.¹¹⁹ This is despite Minister Brough’s rationale for reforming tenure arrangements as explained in introducing the legislation:

The bill provides 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.¹²⁰

The attack on communal title was also linked to the generalised attack on ‘self-determination’. The land tenure reforms appear to reflect the negative critique of the time of Aboriginal culture. They were part, it is argued, of the wider attempt in Indigenous policy to remediate perceived failings in that culture. As Terrill has observed:

From the beginning, debate about land reform was also a debate about culture. The introduction of ‘individual ownership’ was presented as a means of enabling a shift away from a separate or traditional culture, towards a more economically integrated or ‘entrepreneurial culture’. Debate about land reform was also understood as forming part of a broader debate about the direction of Indigenous policy.¹²¹

(ii) Role of Traditional Owners

The 1998 *Reeves Report* into the *ALRA* identified the role of traditional owners as a major constraint to *ALRA* land delivering beneficial economic and social outcomes. The *Report* is significant in that it shows that there is more to land tenure reform than attacking the communal nature of the title. In fact Reeves accepted the communal inalienable nature of the title.¹²²

Decisions taken about *ALRA* land involve a three-way system. One component is the traditional owners. No decisions can be made in respect of *ALRA* land without the informed consent of the traditional owners – this is intended to be the crux of the Act. As the then Minister, Ian Viner, noted in his second reading speech in 1976:

[W]e are committed to ensure that they [the Land Councils] act on the advice *and with the consent of* the traditional

owners so that *primary control* over Aboriginal land lies with the traditional owners.¹²³

The Land Councils are the second component. They have the role of ascertaining the views and decisions of the traditional owners. A Land Council cannot take any action unless it is satisfied that the traditional owners *understand* the nature and purpose of the proposed action and as a group *consent* to it. Having ascertained the decision of the traditional owners, and having consulted with any other Aboriginal community or group affected, the Land Council then conveys appropriate instructions to the third component, the Aboriginal Land Trust. The Aboriginal Land Trust holds the title to an area of land for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of the land concerned. As then Minister, Ian Viner explained: 'The trusts will be title holding bodies whose actions will be directed by the traditional owners through Land Councils.'¹²⁴

Reeves did not accept this arrangement. He felt that the Act had produced negative results as well as positive, and that the most fundamental source of these negative outcomes in the *ALRA* was 'the linking of Aboriginal tradition with statutory controls over, and benefits flowing from, Aboriginal land, through a statutory definition of "traditional Aboriginal owners".'¹²⁵

Reeves disagreed with the central role of traditional owners. His solution was to remove the role of traditional owners, as defined in the *ALRA*, and replace the Act's central decision-making provisions with a system of representative Regional Land Councils (he proposed 18 such bodies).¹²⁶ These Regional Land Councils would be autonomous and each would make decisions in respect of Aboriginal Land in its area. Each Regional Land Council would 'adopt the decision-making process that it considers most accurately accords with Aboriginal traditional processes.'¹²⁷ Legal title to the land was to be transferred from the Land Trusts to these new Regional Land Councils.¹²⁸ In effect, informed consent of the traditional owners would no longer be part of the land rights scheme.

This was a radical transformation of the Act, and was recognised as such by the 1999 review of the *Reeves Report* by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs ('HORSCATSIA').¹²⁹ HORSCATSIA rejected Reeves' proposal for Regional Land Councils,¹³⁰ noting evidence

strongly supporting the central role of traditional owners in making decisions about Aboriginal land.¹³¹ The Committee endorsed not only the informed consent and consultation provisions in the Act itself, but, tellingly, affirmed that any changes to the *ALRA* also required informed consent. This position is set out clearly in the Foreword to the Committee's Report, which states '[t]he overriding principle [of the Report] was that traditional owners and other Aboriginal people affected by the Act should be involved in any decisions to amend the Act.'¹³²

In the end, the Government, presumably in the light of the HORSCATSIA Report and likely difficulties in the Parliament, did not proceed with the changes to the Act proposed by Reeves. When it did return to reform of the *ALRA* in 2006, the HORSCATSIA recommendation that such legislative change required informed consent was ignored. The key point to be taken from the *Reeves Report* was that the role of traditional owners in the scheme of the Act had been identified by Reeves as in error, counter-productive and needing radical change. This was the agenda that was to re-emerge in the land tenure reform project. Various rationalisations for the land reform agenda, including individualising titles and home ownership, secure tenure for government assets, and protecting the position of non-traditional residents in communities, were, it is argued here, subsidiary to the prime objective: that is the radical transformation of the scheme of the *ALRA* with the intent of removing or restricting the role of the traditional owners in decision-making.

The rejection of the Reeves approach had shown that such a transformation could not politically be achieved front-on by direct legislative change to the basic architecture of the *ALRA*. Referring to 'the prolonged period the *Reeves Report* spent in suspended political animation',¹³³ Sean Brennan noted that the Government had never given up entirely on the Reeves agenda:

Despite the hail of negative criticism that greeted the Reeves Report and the rejection of many of its central recommendations by a government-chaired, bi-partisan parliamentary committee, the Federal Government always kept its options open. Newspaper reports suggested that then Aboriginal Affairs Minister, Senator Herron, took a submission to Cabinet in 2000 incorporating Reeves Report recommendations but it appears to have been set aside, presumably because the numbers in the Senate (and perhaps the staging of the Sydney Olympic Games) made a

confrontational approach to such iconic legislation politically questionable. During that period, however, the Prime Minister offered warm endorsement of Reeves and his work in Parliament and the Government conspicuously has never delivered a formal response to the HORCATSIA's implicitly critical report (a departure from standard practice).¹³⁴

Brennan also notes that in the 2006 amendments there is no ostensible change in the role of traditional owners under the *ALRA*: 'The basic requirement that things happen on Aboriginal land only with the informed consent of traditional owners was not explicitly disturbed in the 2006 Amendment Act.'¹³⁵ However, he notes that the result of the section 19A leases is that 'traditional owners [are] reduced to a one-off exercise of control over what will happen over that extremely long duration.'¹³⁶

Indeed, the 2006 amendments do not replicate the Reeves recommendations in a number of respects. However, the significant weakening of the position of traditional owners is, indirectly, achieved by these amendments. The informed consent provisions are simply put in limbo, potentially for very long periods, by township leases – exactly where the majority of Aboriginal people live and where Government sees the future of Aboriginal society being made. Brennan concludes that the 2006 amendments are on the path of 'the achievement of long-standing ideological aims.'¹³⁷

Terrill has described the same outcomes, but in terms of governance arrangements:

Currently, a number of government policies take a negative view of local Aboriginal governance and almost reflexively respond by increasing centralised government control. Township leasing reflects this view, and institutionalises it for a period of up to 99 years, by transferring responsibility for land use decision-making to a government entity.¹³⁸

VII Conclusion

Because the Commonwealth has had little success in achieving its objective of township leasing under section 19A (with only three township leases signed to date), this does not mean the issue of township leasing is insignificant. The Coalition Government elected in 2013 has signalled its intent to encourage major remote Aboriginal communities to sign these leases, and is pursuing this goal with some vigour.¹³⁹ As well, there is pressure for 40 year leases to be lengthened

to a minimum of 80 years.¹⁴⁰ Lastly, where compromise arrangements for precinct leases have been agreed to allow housing to be built, communities are being encouraged by the EDTL to convert the precinct leases into whole-of-township leases.¹⁴¹

In respect of outstations and homelands, the Northern Territory Government does not accept responsibility for assets, does not provide new housing and infrastructure and the secure tenure policy does not apply. The Commonwealth has excluded these communities from its Indigenous housing funding. From the perspective of the Australian legal system and government policy it would appear that land tenure reform is a distinct area of policy activity restricted to the larger communities and not generally relevant to the areas where outstations and homelands are located.

However, as argued, the two policy arms are in fact closely linked and complementary. Aboriginal people have identified a connection, and expressed concern about it. From the Aboriginal perspective, there is a four decades old understanding, or compact, between the Aboriginal peoples of the Northern Territory and the wider or mainstream Australian society as represented by the Commonwealth Government. That understanding was forged through the Woodward Commission of Inquiry into Land Rights in 1973 and 1974, the resultant *ALRA* in 1976, and support for outstations and homelands commencing in the 1970s. Four decades ago the *ALRA* and the homelands movement were closely tied together, virtually seamless in policy terms. The two current policies, township leasing and withdrawing support for homelands, together are seen as undoing that compact. As Bill Fogarty has noted in respect of the outstation movement in the Maningrida region: It is important to remember that people moved back to their clan estates *with the support of the state*, and with an expectation that they would have ongoing access to education and health services.¹⁴²

In the period from May 2007 to May 2009, in association with the Tjuwanpa Outstation Resource Centre, Annie Kennedy sought to ascertain the response of Western Arrente outstation residents to key aspects of the Intervention.¹⁴³ This included the five year compulsory lease of the township of Ntaria. The outstations are located on the former Hermannsburg mission lease. Ntaria is the main community, or 'hub', and is in fact a COAG-selected 'priority' community. The outstation residents' view that the five year compulsory township lease, apparently quite unrelated to the situation of the outstations,

in fact constituted a direct threat to them, comes out clearly in Kennedy's account. Kennedy observes that:

The leases were also seen as a change in the Australian Government's recognition of Aboriginal relationship to country. Thatha¹⁴⁴ was the first to express the view that after more than 30 years of government support for the homelands movement, outstations no longer mattered.¹⁴⁵

This is the key. When Kennedy tried to argue that there was no connection between the township lease and the situation of outstations she was rebuffed:

Annie [Kennedy]: From what I can see it [the Ntaria lease] doesn't affect the outstations.

Orgki:¹⁴⁶ But it does affect it eh! You know, leases ... Not only the five-year leases, the actual lease!¹⁴⁷

The 'actual lease' is the entire former Hermannsburg lease, now ALRA land. Kennedy interprets the above statement this way:

But recognising that government was in fact taking over Aboriginal land [the five year compulsory lease], Orgki felt betrayed. Government was reneging on its agreement with Aboriginal peoples in the Northern Territory as expressed through the 1976 *Northern Territory Aboriginal Land Rights Act* – or as Orgki calls this, 'the actual lease'.¹⁴⁸

In fact, the vesting of title for the Hermannsburg mission lease had involved extensive negotiation with the government in the period following the passage of the ALRA. That negotiation encompassed the settlement pattern of the area – the central township *and* the outstations. The result was that on becoming ALRA land the mission lease was divided into five separate land trusts. That negotiated arrangement was, from the Aboriginal perspective, being pulled apart by the NTER and the associated land tenure reform, even though that tenure reform ostensibly applied *only* to the township area itself.

Apparently different policies hang together, viz leases for major housing works ('secure tenure'), categorising communities with a focus on key 'priority' or 'growth' centres, and terminating Commonwealth housing funding to outstations and homelands. The elements of these policies in the Northern Territory context were articulated in one document in the 2007 MOU.

The policy package has remained largely in place to today. The modernity project has not gone away. This is the essential link. Secure tenure and township leases give the government expanded control and marginalise traditional owners. Leases undermine Aboriginal law in relation to the land in question. Outstation policy vitiates life circumstances in the bush. This is the essential goal of Aboriginal policy settings in the Northern Territory – sidelining traditional ownership of the townships, slowly emptying the countryside of the myriad of small to medium sized communities referred to as outstations and homelands. If it were to succeed, the aspirations of Aboriginal people to remain the 'true owners' of their country as an effective lived experience will have been thwarted. The modernity project deems that Aboriginal people will become urban people, living in so-called 'normal' townships or in regional centres. Outstations and homelands policy and land tenure reform are two sides of the same coin.

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1 The Commonwealth's constitutional basis for Indigenous policy in the Northern Territory rests on the 'territories power' (*Australian Constitution* s 122), and on the 'races power' (*Australian Constitution* s 51(xxvi)) which applies generally in Australia.

2 See Jon Altman, Geoff Buchanan and Libby Larsen, 'The Environmental Significance of the Indigenous Estate: Natural Resource Management as Economic Development in Remote Australia' (Discussion Paper No. 286/2007, Centre for Aboriginal Economic Policy Research, 2007) 6.

3 *Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act 1989* (NT).

4 As this article is restricted to events in the Northern Territory, the term 'Aboriginal' is used rather than 'Indigenous' when referring to remote communities.

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- 10 House of Representatives Standing Committee on Aboriginal Affairs, *Return to Country – the Aboriginal Homelands Movement in Australia* (Canberra, 1987) 4 (*Blanchard Report*).
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- 14 *Blanchard Report*, above n 10, 6 [1.14].
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- 17 *Blanchard Report*, above n 10, xvi –xxix.
- 18 *NIRA*, above n 5, A-24.
- 19 Ibid ‘Box 2 – National Principles for Investments in Remote Locations’ (c), Schedule A, 23; also at Schedule E, E1 (c), 70 (emphasis added).
- 20 Commonwealth Department of Families, Community Services and Indigenous Affairs (‘FaCSIA’), *Living in the Sunburnt Country* (Review of the CHIP Program, February 2007) Recommendation 19, 24.
- 21 The usual term for discrete Aboriginal settlements in the Northern Territory has been ‘communities’, which are then distinguished by size, eg, ‘major communities’. More recently government preference for major communities has been the term ‘township’, as this reflects a policy objective of ‘mainstreaming’ or ‘normalising’ Aboriginal communities. I have used both terms in this article depending on context, but favour ‘communities’ as this is the established usage in the Northern Territory.
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- 23 Australian Government and Northern Territory Government, *Memorandum of Understanding – Indigenous Housing, Accommodation and Related Services September 2007* (‘MOU’) [6]. See Laynhapuy Homelands Association Inc, Submission No. 28, Attachment 8 to Senate Select Committee on Regional and Remote Indigenous Communities <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/indig/submissions/sublist>.
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- 28 FaCSIA, *Community Housing and Infrastructure Program* (‘CHIP’) (E-sub program guidelines 2006-07). Copy on file with the author.
- 29 FaCSIA, above n 20, Recommendation 18.
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- 31 See Australian Government and Northern Territory Government, *Overarching Agreement on Indigenous Affairs between the Commonwealth of Australia and the Northern Territory of Australia* (6 April 2005) <<http://www.atns.net.au/agreement.asp?EntityID=2565>> .
- 32 *MOU*, above n 23.
- 33 Ibid.
- 34 Ibid [5]. The Commonwealth also provided \$20 million a year for three years as transitional funding for municipal and essential services for outstation and homeland communities, but again stressing that ‘...full responsibility for outstations now rests with the Northern Territory’: at [24].

- 35 Ibid [15], [17].
- 36 COAG, *National Partnership Agreement on Remote Indigenous Housing ('NPAHIH')* (2008) <http://www.federalfinancialrelations.gov.au/content/npa/housing/remote_indigenous_housing/national_partnership.pdf>.
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- 39 Ibid, 14. See also *MOU*, above n 23, [18].
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- 104 *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* (Cth) sch 1.
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- 106 *Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Act 2007* (Cth). Note that the role of the Executive Director has later been expanded to include holding leases over any area of *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) land and over Community Living Area ('CLA') land and subleases in respect of town camps. See *Indigenous Affairs Legislation Amendment Act 2008* (Cth).
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- 109 Ibid.
- 110 There are a couple of relatively minor exceptions in the leases so far entered into, including height of buildings, the proportion of non-Tiwi residents allowed in the two relevant leases, and, possibly, transferability of sub-leases. See Terrill, above n 95, 174-176.
- 111 Ibid 176.
- 112 Terrill, 'The days of the Failed Collective', above n 103, 387.
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