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LEASING REFORMS ON ABORIGINAL LAND IN THE NORTHERN TERRITORY: IMPACTS ON LAND RIGHTS AND REMOTE COMMUNITY GOVERNANCE

J. WEEPERS

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Professor Tony Dreise
Director, CAEPR
Research School of Social Sciences
College of Arts & Social Sciences
Australian National University, June 2021

Artist's statement

The Southern Cross is known by some First Nations people as Mirrabooka, Ginan or Birubi – a body of stars that encompasses celestial stories deriving from creation-forming ancient knowledges that transcend time and space. These aided our Ancestors with navigation and as seasonal indicators, and symbolise an important relationship between people, land, sea and sky. A symbol that is as vitally significant today, that we still uniquely and collectively identify with in memory, story, art and song. This artwork is the embodiment of my style and my connection to manay (stars), interpreting the night sky using cool and dark tones. The inner space between the stars is to draw the viewer in and symbolise the powerful force within and between these bodies of stars. Our old people not only gazed upon the stars, but most importantly they looked at what lies within and surrounding those dark places in the above.

Krystal Hurst, Worimi Nation, Creative Director, Gillawarra Arts.

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Centre for Aboriginal Economic Policy Research
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Front cover image: Krystal Hurst, *Reclaiming the Southern Cross*, 2019. Acrylic on paper.

See also artist's statement, previous page.

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Leasing reforms on Aboriginal land in the Northern Territory: Impacts on land rights and remote community governance

J. Weepers

Jayne Weepers is a Research Fellow at the Centre for Aboriginal Economic Policy Research (CAEPR), Research School of Social Sciences, College of Arts & Social Sciences, Australian National University. She is undertaking a PhD in the Faculty of Law & Justice at the University of New South Wales, where she is a recipient of a Scientia scholarship. Before commencing her PhD she was the Manager of Policy and Research at the Central Land Council from 1999 to 2017, based in Alice Springs. She has recently been working as a contractor with the National Indigenous Australians Agency on land rights matters.

Abstract

Since 2006, Aboriginal land in the Northern Territory (NT) has been subject to a range of land tenure reforms, mostly government-initiated. The most momentous are three different leasing regimes that apply to remote communities – s. 19 leasing over individual lots, and two different forms of township leasing over whole communities. These reforms have modified the rights of Aboriginal traditional owners and reframed their relationship to community residents; impacted on the role and jurisdiction of the land councils and created and funded new land rights institutions; and resulted in a significant new rental stream for Aboriginal landowners.

This paper examines the extensive and varied impacts of these three leasing models on the governance of the land rights system and remote communities, and the changing governance dynamic between traditional owners and community residents. These governance impacts are invisible in official discourse, as are the voices of Aboriginal people themselves.

This paper first summarises the external governance environment that shaped the reforms, demonstrating that land tenure reform in the NT since 2006 has largely been a tool of government, not a tool for Aboriginal landowners. However, the most recent of the three leasing reforms – community-entity township leasing – represents a departure from this unilateral approach by government as it was initiated by Aboriginal interests and appears to be a welcome option for some traditional owners and community residents. The paper comments on both the process of the tenure reforms as well as their outcomes.

Keywords: NT land rights, land governance, land tenure reform

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Acronyms

ABA	Aboriginals Benefit Account
ALRA	Aboriginal Land Rights (Northern Territory) Act 1976
ALC	Anindilyakwa Land Council
ANU	Australian National University
CAEPR	Centre for Aboriginal Economic Policy Research
CLC	Central Land Council
CLP	Country Liberal Party
CLA	Community Living Area
EDTL	Executive Director of Township Leasing
ICGP	Indigenous Community Governance Project
MoU	Memorandum of Understanding
NLC	Northern Land Council
NT	Northern Territory
NTER	Northern Territory Emergency Response
TLC	Tiwi Land Council

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Introduction

> *Land reform is absolutely critical if we are going to support better outcomes for Indigenous communities. Whether you want to get a job, you want it to own your own house or you want to get into a business, just like everyone else, land reform is critical (Commonwealth Parliamentary Debates, Minister for Indigenous Affairs, Nigel Scullion, 2017).*

The *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) is the most far-reaching of Australian land rights statutes. Around 50% of the landmass and 85% of the coastline[1] of the Northern Territory (NT) are now granted as inalienable communal title pursuant to this Act (referred to here as ALRA land). It is unsurprising, therefore, that CAEPR has produced a significant volume of literature regarding the land rights regime in the NT.

Much of CAEPR's early research explored the critical intersection of this legislation with Aboriginal modes of social, territorial and economic organisation. A common subject was the rights and interests of the new category of Aboriginal landowners – traditional owners – created under ALRA. CAEPR has also played a valuable role at critical junctures in the life of the ALRA, particularly in response to the controversial Reeves Review of the ALRA in 1998. In addition, CAEPR has published extensively in related Indigenous policy areas, including Indigenous governance and local government in the NT, economic development, and the use and management of income from mining agreements.

Given this long-standing involvement with the NT land rights regime, it is striking that CAEPR has undertaken considerably less critical analysis of these issues in the last 10 years – the period of implementation of leasing reforms which are, arguably, some of the most significant since ALRA's enactment. This hiatus means that significant contemporary issues associated with these reforms are under-examined.[2] This paper seeks to address that gap.

Since 2006, ALRA land in the NT has been subject to a series of important government-initiated land tenure reforms, many of which target remote communities rather than broadacre[3] Aboriginal land.[4] Of these, the leasing reforms considered here are the most significant because they have such widespread application; are intergenerational in nature; and impact on the governance of the land rights system and remote communities, including by modifying the authority of traditional owners and creating new institutions. They have also resulted in a substantial new rental income stream for traditional owners.

There are three leasing models[5] that now apply to remote communities on ALRA land. First is s. 19 leasing, whereby leases are considered and granted by traditional owners on a lot by lot basis for infrastructure and services within communities. While s. 19 leasing has always been possible under the ALRA, a change in Australian government policy resulted in a dramatic increase in applications for these leases from around 2008. Second is a model of township leasing, originally promoted in 2006, involving a whole of community lease being held by an Australian government entity with subsequent authority to allocate subleases without further consent

[1] See NLC website at https://www.nlc.org.au/our-land-sea/sea-country-rights
[2] The work of Terrill (2016), and associated publications, is a notable exception to this hiatus.
[3] The term 'broadacre' is used here to refer to the vast areas of Aboriginal land that have no permanent dwellings, to differentiate it from residential communities and homelands located on Aboriginal land.
[4] The tenure reforms targeting remote communities include: the reduced application of the permits system inside communities, creation of two forms of township leasing and the roll-out of s. 19 leasing, reforms to CLA tenure to remove restrictions on leasing, and the compulsory acquisition of five-year leases as part of the NTER. In addition, an important 2006 tenure reform that could, potentially, impact on both communities and broadacre Aboriginal land, was the insertion of a provision into the ALRA providing for a delegation of land council functions to an Aboriginal corporation at the discretion of the Minister.
[5] The five-year leases over 65 remote communities that were compulsorily acquired as part of the Northern Territory Emergency Response are discussed in this paper but are not considered one of the three leasing reforms as they were temporary. The five-year leases expired in 2012.

from Aboriginal landowners. Third is a more recent model involving a whole of community lease being held by an Aboriginal corporation, possibilities for which emerged from around 2015.

These different leasing models have significant impacts on rights within the NT land rights system and on the governance of remote communities, creating changed relationships between the state and Aboriginal people, and between Aboriginal people themselves. Of importance here is the relationship between Aboriginal *ownership* of land, and *residence* on that land (Martin, 1999, p. 157). What were the objectives of these leasing reforms and what have they achieved? How have the reforms impacted upon the authority of traditional owners of the land, and their relationship with community residents? What lessons can be learnt from the reform process and how could it be improved? These questions are explored through a close examination of the emergence and consequences of the leasing reforms that took place between 2006 and 2020, with a particular focus on the relationship between the ALRA and the governance of remote communities situated on ALRA land.

The paper first provides a brief description of the critical elements of the land rights system and remote communities in the NT that provide necessary context for the leasing reforms, before summarising the 'governance environment'[6] that influenced and shaped them. The nature and widespread application of the three leasing models is then described followed by an analysis of the impacts of these reforms. Importantly, a focus on governance[7] highlights the significant impacts of these leasing reforms on issues of power, control, choice and authority (Hunt & Smith, 2006, p. 5), both between Aboriginal people and the state and between Aboriginal people themselves in relation to land and land-use decisions in remote communities. Recognising that governance is 'as much about people, relationships and processes, as it is about formal structures and corporate technicalities' (Hunt & Smith, 2006, p. 5), the different impacts of the three leasing models are compared through an analysis of: **who** gets to be included and has the authority to make decisions relating to land; institutional arrangements supporting **how** decisions are made; the **financing** of the institutional arrangements; and the governance of **rent.** This paper is concerned with the *process* and not just the *outcomes* of the reforms.[8]

Where possible the paper focuses on the impact of reforms in central Australia in the southern half of the NT, reflecting the experience of the author working in this region. This paper forms part of a larger research project being conducted in partnership with the Central Land Council (CLC) that aims to document the experience of traditional owners and community residents in central Australia with these reforms. This paper, with its additional focus on CAEPR's 30-year contribution regarding the land rights system and Aboriginal governance in the NT, is the analytical precursor to that larger empirical body of work.

The Aboriginal land rights system in the NT: Establishment and architecture

Aboriginal people have inhabited the NT for at least 65 000 years,[9] and were, and continue to be, governed by their own laws, systems and customs. These customary laws have been significantly and variously impacted by colonisation but, nevertheless, remain central to Aboriginal group organisation and systems for land ownership and land use in the NT. The ALRA was the first attempt to recognise Aboriginal decision-making processes and systems of land ownership and management in accordance with these existing Aboriginal customary laws

[6] CAEPR's Indigenous Community Governance Project (ICGP) first developed this term to describe the complex array of systems, structures, forms of capital, players, conditions, resources, networks, and webs of relationships that impact on the governance of Indigenous communities and organisations (Hunt & Smith, 2006, p. 39–42).
[7] CAEPR's ICGP defined governance as 'the dynamic processes, relationships, institutions and structures by which a group of people, community or society organises to collectively represent themselves, negotiate their rights and interests and make decisions' (Smith, 2005, p. 13).
[8] Palmer et al. (2009, p. 9) argue that a land governance approach values the *process* of reform as well as the *content* of the reform.
[9] See https://www.theguardian.com/australia-news/2017/jul/19/dig-finds-evidence-of-aboriginal-habitation-up-to-80000-years-ago

(Northern Land Council (NLC), 1999, p. 100). It provides the institutional framework for enshrining the rights and processes of Aboriginal customary law within the legislative framework of Australian law (Terrill, 2016a, p. 81). Its architecture arose from the extensive inquiry into the recognition of land rights in the NT which was commissioned by the Whitlam centre-left Labor government in 1973 and conducted by Justice Woodward (Woodward, 1973, p. iii; Terrill, 2016a, p. 2). [10] The ALRA is now widely acknowledged as the highwater mark of land rights legislation in Australia (Altman et al., 2005, p. 28; Brennan, 2006, p. 1; Tehan, 2010, p. 358). Its passage reflected the emergence of federal bipartisan support for the recognition of land rights,[11] however, it was also very much a product of the unique characteristics of the NT.

The NT's status as a territory rather than a state facilitated Commonwealth intervention. Further, the NT had the highest proportion of Aboriginal people as a percentage of its population and had vast areas of vacant Crown land, making it:

> *more feasible to legislate for Aboriginal land rights… (or impose them, as many white Territorians have seen it), than it would have been to establish a land-rights regime with such significant redistributive effects anywhere else in Australia (Merlan, 1998, p. 164–5).*

This unilateral imposition of the land rights scheme by the Commonwealth has had significant implications for its operation, including the process of developing future tenure reforms. It resulted in 30 years of bitter opposition to land rights by the conservative NT Government,[12] with Shain et al. (2006, p. 189) describing the early land rights political context as a 'pressure cooker environment of Territory-Government sponsored opposition to all manifestations of indigenous identity and self-determination'. It remains an ongoing source of tension between the two levels of government.

ALRA land is not the only form of Aboriginal land in the NT to be recognised under Australian law. The ALRA land claim process excluded areas already subject to pastoral leases,[13] and the land needs of Aboriginal people whose country was alienated by pastoral leases was left to the NT Government to address (Terrill, 2016a, pp. 78–79). Ultimately, the NT Government created processes that enabled some Aboriginal people with historical connection to pastoral leases to obtain a small excision from the lease, called a Community Living Area (CLA).[14] There are also important Aboriginal housing areas, often called 'town camps', on the fringes of the main urban centres in the NT. The underlying tenure, and tenure reform process, for CLAs and town camps are quite different to that of the ALRA and are not the focus here. This paper is concerned with the tenure reforms that targeted remote communities situated on ALRA land.

There are three critical elements of the ALRA that provide necessary context for understanding the Aboriginal governance dynamic in remote communities, and the governance impacts of the leasing reforms. These are: the definition and role of traditional owners, including their relationship with Aboriginal community residents; the role of the land councils; and the financial framework of the ALRA, particularly land-use payments.

[10] Woodward produced two reports, the second of which included drafting instructions for legislation.
[11] The Bill to implement Woodward's scheme was introduced by the centre-left Whitlam government in 1975 but was not passed before the sacking of Gough Whitlam as Prime Minister on 11 November that year. The succeeding conservative government, led by Malcolm Fraser, was ultimately responsible for the passage of the Bill.
[12] The conservative CLP which held government in the NT from self-government in 1978 was vehemently opposed to the imposition of the Commonwealth's land rights regime and employed various tactics to thwart land claims (Edmunds, 1995, p. 28–29; Rowland, 1980, p. 24).
[13] ALRA land claims were largely confined to vacant crown land, however, pastoral leases that were owned by Aboriginal people were available for claim pursuant to ALRA s. 50(1). Woodward also suggested that there be a process for needs-based land claims, however this was not included in the final form of the ALRA.
[14] CLAs do not have a 'tripartite' structure like the ALRA. Instead, title is held by a local Aboriginal organisation incorporated under either NT or Australian Government legislation, and members may be those with a historical connection to the area and/or traditional owners, depending on the rules of the corporation (Terrill, 2016, p. 82). The term CLA land is used in this paper to describe this form of Aboriginal land.

The ALRA creates a 'tripartite structure' (Brennan, 2009, p. 960) that separates land *ownership* from land *use* decision-making while still maintaining the important relationship between the two (Morphy, 1999b, p. 14). This involves: Aboriginal Land Trusts to formally hold title to the land; traditional owners to make decisions, as a group, regarding their land; and, Aboriginal land councils to provide political representation, manage collective land governance processes and act as the interface between traditional owners and outside parties. Aboriginal Land Trusts hold the legal title to land, but cannot act autonomously[15] (Altman et al., 2005, p. 5). It is the second two parts of the tripartite system – traditional owners as primary decision makers and the land councils providing political representation and management of the consent process – that are the critical active components of the scheme. As Rowse (2002, p. 111) correctly observed, land rights legislation 'concerns not only land tenure, but the design of effective forms of Indigenous political authority over that land.'

Reflecting Aboriginal traditional relationships to land and concepts of authority and decision-making (Finlayson, 1999, p. 2), under the ALRA traditional owners are the primary decision-makers for any proposals concerning their land, including land over which a residential community is situated. Traditional owners are defined as a local descent group of Aboriginal owners with 'primary spiritual responsibility for that land' and who are entitled to forage as of right over that land.[16] Identification as a traditional owner 'amounts to a formal and legal recognition of one's connection to country, and therefore carries powerful symbolic and practical weight' (Munster, 1997, p. 189). Not only are traditional owners empowered to make land-use decisions through the informed consent provisions of the ALRA,[17] they also decide how income from such proposals (such as rent from leasing) is treated.[18] The ALRA provides that affected communities or groups can express a view about a land-use proposal, however, it is the traditional owners who ultimately give or withhold consent. The considerable body of literature regarding the ALRA definition and privileging of traditional owners is testament to the fact that this is one of the most examined aspects of the ALRA (Hiatt, 1984a, p. 2; Morphy, 1999a, p. 189).[19] Indeed, Woodward initially favoured a model which would empower community residents rather than traditional owners[20] but was persuaded through the course of the inquiry that giving primary authority to traditional owners was more in keeping with Aboriginal social organisation (Woodward, 1974, p. 13, 70–71). From the start, there was considerable debate about how to balance the interests of those with traditional, inherited connections to land (of which there are various complementary rights) and those who used the land, including those with residential, historical connections to land.

The relationship between traditional owners and community residents, or those with historical association, has been widely discussed, including by several key CAEPR research publications (Altman & Smith, 1994; Martin, 1999; Smith & Finlayson, 1997) in both the land rights and native title context.[21] Sutton states that,

> *Aboriginal tradition usually makes a clear and quite profound distinction between traditional affiliations to countries and residential associations with settlements and districts. While there are complex actual and potential relationships between the two, they do not, separately, grant equivalent rights and interests to land (Sutton, 1999, p. 41).*

Martin (1999, p. 157) concurs, stating that 'Aboriginal systems universally give precedence to rights arising under customary law over those arising from historical occupation.' He also notes that these traditional rights are complex and layered rather than clearly bounded, (1999, p. 157) and 'identities can be stressed differentially according to context, and the groups in terms of which they are expressed are not bounded and solid entities'

[15] See ALRA s. 5(2)(a).
[16] See ALRA s. 3.
[17] See ALRA s. 23(3) and s. 77A.
[18] See ALRA s. 35(4).
[19] An excellent sample of these early debates is found in Hiatt's monograph (1984b). See also Gumbert (1984) and Toohey (1983, p. 37–39).
[20] This was not just for remote communities but also for surrounding areas of land.
[21] For example: Edelman, 2009; Holcombe, 2004b; Martin, 1997.

(1997, p. 156). Holcombe (2004a, p. 164) observes that 'Relations to land and associated ritual are highly politicised' and Jagger (2011, p. 54) finds that, at least in some contexts, the 'traditional/historical differences can as often be rejected or massaged, especially in larger communities'. These dynamics vary according to the region, local histories and experience of colonisation, however these issues are not simply a matter of historical anthropological debate but continue to create complex contemporary governance dynamics that emerge and evolve as successive generations are born and raised in remote communities.

The contested nature of defining traditional ownership, the complexity of the relationship between traditional owners and Aboriginal community residents with historical association to a place, and the 'fluidity of Aboriginal authority and the context-related character of group identity' (Smith, 1997, p. 102) continue to make the processes of decision-making within many remote communities on ALRA land contested and challenging. The land councils are the institutions that manage these processes with respect to land.

The Woodward Commission recognised that communal title required collective decision-making processes and proposed a ground-breaking system of land councils to manage them. There are four NT land councils established pursuant to the ALRA. The NLC and CLC were established as interim land councils in 1973 to advise the Woodward Commission, and formally established in 1976 with the passage of the ALRA. The Tiwi Islands were originally included in the area of the NLC however the Tiwi Land Council (TLC) was established in 1978 (Altman, 1983, p. 88). Similarly, the Groote Eylandt archipelago was included under the jurisdiction of the NLC but after years of agitation from traditional owners of these islands, the Anindilyakwa Land Council (ALC) was formed in 1991.[22]

The land councils have broad ranging functions,[23] including to ascertain and express the wishes of Aboriginal people living in their area, to protect the interests of traditional owners, assist with land claims, and manage land-use consultation processes. They are governed by a representative 'Council' comprising traditional owners from across their regions (for clarity these governing arms of the land councils are referred to as a 'Council' in this paper). The NLC has 78 'Council' members, as well as five co-opted positions for women[24] and the CLC has 90 members on the 'Council.'[25] The Aboriginal men and women that comprise these four 'Councils' are critical to the land councils' legitimacy and mandate for political representation.

The land councils have been described as the most potent (Hinkson, 1999, p. 13) and most effective Aboriginal organisations in the country (Martin & Finlayson, 1996, p. 10). Given that 'no politicians relish competitors for political power' (Brennan, 2006, p. 5), it is perhaps unsurprising that over the years there have been numerous attempts to constrain the powerful role of the land councils, particularly the Reeves Review and 2006 ALRA amendments, including through reforms to the ALRA financial arrangements.

Under the financial scheme devised by Woodward, the operations of the ALRA are largely financed by the flow of funds from mining on Aboriginal land (Altman & Levitus, 1999, p. 1), with the Commonwealth required to pay an amount equivalent to royalties received for mining into an account called the Aboriginals Benefit Account (ABA). While the Minister has retained strong discretionary powers to approve land council budgets and amounts available for grant, the fact that the NT land rights scheme relies on funds other than Australian Government consolidated revenue has proved to be an important factor in the success of the ALRA.[26] There are three main categories of payments from the ABA: funding for land councils; [27] funding for Aboriginal people

[22] The Tiwi and Anindilyakwa Land Councils were established as new land councils pursuant to s. 21(3) of the ALRA. All other attempts to propose 'breakaway' land councils have been a source of bitter contestation amongst Aboriginal people, and subject to political interference (see Reeves, 1998, p.190–201). Ultimately, they have failed to progress.
[23] ALRA s. 23 (1).
[24] See NLC website at https://www.nlc.org.au/about-us/our-structure/our-people
[25] See CLC website at https://www.clc.org.au/articles/info/the-chairman-the-executive-and-the-council/
[26] Not all commentators supported the linking of the ALRA scheme to mining royalties. Rowland, in his 1980 review proposed that the land councils be funded independent of mining royalties (1980, p.19), however, this was not progressed.
[27] ALRA s. 63 (1).

living in the areas affected by mining (set at 30% of received royalties);[28] and more discretionary funding 'to or for the benefit of Aboriginals living in the Northern Territory' which are now distributed by way of grants.[29] In addition to these statutory payments, the rights of traditional owners to control access to their land has enabled them to negotiate other payments (known as negotiated payments), including the rent from leasing.

Remote communities on Aboriginal land

Characteristics of remote communities

Around 51 000 Aboriginal people (21% of the total NT population) live on discrete geographic Aboriginal communities or smaller homelands in the NT (NT Government, 2018, p. 1). In 2007, the Australian Government identified 73 communities in the NT with a population of more than 100; of these, 16 are CLAs with the remainder situated on ALRA land. Of the 73 communities, 33 are in Central Australia, 10 of which are CLAs. Fig. 1 below shows the major communities and their tenure in the CLC region.

There are also around 600 smaller homelands (NT Government, 2018, p. 1) across the NT.[30] Homelands are smaller than remote communities with less services, and generally occupied by family groups who may move between their homeland and neighbouring communities. Altman and CAEPR have provided valuable contributions to reviews and policy settings relating to the homeland movement[31] which was aimed at reducing crowding and tensions within existing communities and enabling people to live on or close to their traditional country. Importantly, homelands have not been the target of the tenure reforms discussed in this paper (though they have been the target of government policy aimed at reducing their number).

Remote communities are small residential service centres, often surrounded by vast tracts of Aboriginal land. Some Top End communities have substantial populations,[32] however, the arid environment and patterns of settlement in central Australia resulted in more numerous small communities. Each community has its own unique history, with some established as government ration depots or church missions, still others as homelands that grew into larger communities. Most remote communities in central Australia offer a similar level of services.[33] While generally referred to as 'communities',[34] given the history of missions, reserves and forced settlement, this does not imply homogeneity nor a 'sense of "community" beyond one's close kin' (Campbell & Hunt, 2013, p. 209; Sutton, 2001, p. 46).[35] This point was registered in the earliest days of the land rights movement, when the Woodward Commission noted that remote communities vary considerably in 'homogeneity, maintenance of traditions and degree of attachment to surrounding land' (Woodward, 1973, p. 11). Sutton (2001, p. 46) captures the richness of remote geographic communities,

> *Such a community is at once a place, a population of residents (in some cases frequently shifting about, in other cases very sedentary), a structured set of ethnic, territorial and other subgroups, a focal concentration point in a regional system of overlapping egocentric social networks, a local cultural milieu,*

[28] ALRA s. 64 (3)
[29] ALRA s. 64 (4)
[30] A 2016 report on homelands by the Centre for Appropriate Technology notes there are 630 homelands.
[31] For example, Altman, 1987, 2006; Altman et al., 2008; Kerins, 2010; Taylor, 1991.
[32] The 2016 ABS Census data reports that in the Top End the community of Wadeye has a population of 3000 and Galiwinku has a population of 2453. By contrast the two largest communities in Central Australia are Hermannsburg (711) and Yuendumu (892).
[33] These services include: community housing, basic municipal services, primary school, health clinic, community store, arts centre, youth programs and aged-care facilities.
[34] The terms 'community', 'settlement' and 'township' are all used to refer to the remote residential communities. In the NT, the term 'community' is preferred, and is used here. The Australian Government adopted the term 'township' in the 2006 ALRA amendments, suggesting that remote communities need to be 'normalised' by becoming townships with the same characteristics as other small towns.
[35] In this paper the term 'communities' refers to geographically-defined places of residence, but the term is also to describe other forms of 'community.' See Smith & Hunt (2008, p.10) for a useful discussion of the term 'community'.

a mini-economy, a rallying badge of identity in competitive and combative contexts such as football and fighting, a political unit both formally and informally, and a unit of local governance.'

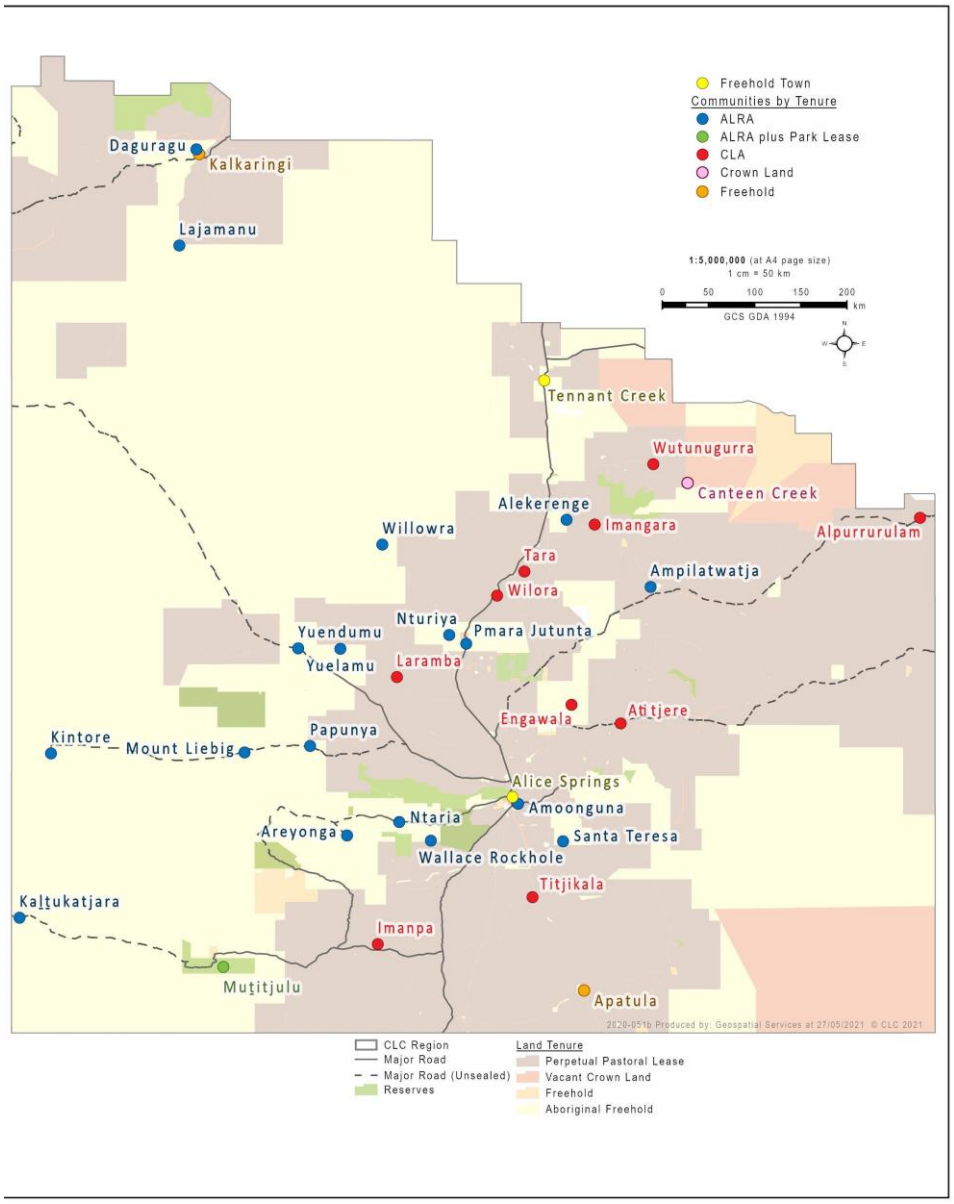

Figure 1 CLC region: Land tenure and main communities

Data sources: This map incorporates data which is © Central Land Council. Commonwealth of Australia – Geoscience Australia 2006. Northern Territory Government. (DRLM, DLPE).

This complexity is reflected in the contemporary composition of remote communities, with many comprising mainly Aboriginal residents who are not the traditional owners of the land on which the community is situated (Reeves, 1998, p. 498) but may be traditional owners for other areas of land in the NT.[36] In central Australia the majority of residents in every community are not traditional owners (CLC, 2010, p. 9) and in some cases communities comprising predominantly one language group were established on the country of a different language group, for example at Lajamanu and Areyonga (Terrill, 2016, p. 97). To put this simply (and

[36] Reasons for this include historical forced relocations, inter-marriage between family and language groups, or access to employment, health and other services.

acknowledging that these categories can be blurred and fluid), remote communities comprise a mix of resident traditional owners and Aboriginal residents who are not traditional owners for that community, some of whom may hold contingent or secondary rights. In addition, when the processes under the ALRA are applied, land-use decision-making inside communities may also require the involvement of traditional owners who are not resident in that community. This is a critical aspect of the governance dynamic of these communities.

Populations in these communities often fluctuate as Aboriginal people in the NT 'reside as much in an "area" as in a single place' (Taylor & Bell, 1994, p. 5) and are highly mobile (Hunter & Smith, 2000, p. 10; Moran et al., 2007, p. XII; Taylor, 1996, p. 2–3). This 'short-term and often circular' movement of Aboriginal people (Taylor, 1996, p. 3) between communities, homelands and larger regional centres results from the uneven distribution of economic opportunities and services (Pleshet, 2006; Taylor, 2004, p. 6) and the need to maintain cultural, social and family networks and responsibilities (Taylor, 1996, p. 3; Young & Doohan, 1989). While most remote Aboriginal communities have a strong historical, social, and/or cultural rationale for existing, they are generally far from established industries or sources of employment, with limited options to become economically self-sustaining.[37] 'The state looms large in remote and regional Australia' (Altman, 2004, p. 528; Smith, 2008, p. 80) and remote communities are almost entirely reliant on government investment for infrastructure and social services, with those resource flows being beyond local control (Moran et al, 2007, p. XII). Services are delivered either by government, particularly local government, or by Aboriginal or non-government organisations, many of which are funded to deliver government programs.

CAEPR, particularly Sanders, has carefully analysed the local government arrangements in remote communities over many years (Sanders, 1996, 2005, 2008, 2012, 2013). One of the first actions of the new NT Government after gaining self-government in 1978, was the introduction of the *Local Government Act* in 1979 which provided for local community councils (Sanders, 2013, p. 476). There was sustained opposition from the NT land councils to the expansion of local government arrangements in remote communities on Aboriginal land (Sanders, 1996, p. 168). Westbury and Sanders (2000, p. 3) observed that land councils and the NT Government were each 'trying to marginalise the other in favour of its own structure as the single most appropriate organisation for the representation of local Aboriginal interests and the delivery of local services'. In fact, remote communities generally do not have one 'unified, centralised sovereignty' (Rowse, 1992, p. 89) but are instead characterised by a network of 'dispersed governance' (Sanders, 2005, p. 56–57; Wolfe, 1989, p. 70). This has also been described as 'networked governance' (Hunt and Smith, 2007, p. vii, 14–23), which emphasises the layered and interconnected nature of this network of formal and informal governance arrangements that exist in remote communities. However, in relation to land-use decisions in communities it was the local community councils that played a critical role until they were unilaterally abolished by the NT Government in 2008 and replaced with regional shires (Sanders, 2013). A move which obliterated a central, if imperfect and constrained, mechanism for the expression of local leadership and authority (Peterson, 2013, p. 341), stymied fledgling Aboriginal-led efforts to consider regional governance arrangements on their own terms (Ivory, 2008, p. 246; Smith, 2008), and had a significant impact on land-use decision-making.

Land-use decisions inside communities prior to 2007

Woodward anticipated that leases would be used in communities (Altman et al., 2005, p. 8; Woodward, 1974, p. 16 [97]) and from inception the ALRA included a s. 19 providing for the granting of voluntary leases on ALRA land.[38] However, prior to 2007 all levels of government simply built infrastructure on Aboriginal land after consulting with local councils. It was not common practice for third parties, particularly governments, to apply for

[37] See Altman's body of work regarding the nature of Indigenous engagement with the market economy and the state, and the need to recognise the importance of the customary economy (Altman 2001; Altman, 2007, p. 316–317).
[38] There are two checks and balances built into the ALRA s. 19(5)(c) provides that the land council must be satisfied that the 'the terms and conditions on which the grant is to be made are reasonable', while s. 19(7) provides that the consent of the Minister is required for any grant greater than 40 years.

leases in remote communities, resulting in what Terrill (2016a, p. 113) describes as widespread 'informal tenure arrangements'. For example, the CLC (2013b, p. 19) reported that, prior to 2009, leases were granted over only five lots (four of which had expired) in Lajamanu,[39] while in Alekerenge[40] not a single lease had been applied for or granted prior to 2010 (CLC, 2013b, p. 22). With no lease application, there was no trigger for traditional owner consultation or consent under the ALRA.[41] Community land-use decisions were, in practice therefore, generally made by residents (whether traditional owners or not) through their local community councils. The way in which community councils accommodated traditional owner interests was not formalised and varied widely according to local dynamics and politics, as well as council capacity and effectiveness. In some cases, traditional owners, or those with related cultural authority[42] could assert themselves in the council or other community forums, however, their 'claims would compete with other claims to authority both formal and informal' (Terrill, 2016a, p. 114). Under this regime, lots were allocated for use by third parties for infrastructure development without any formal tenure process at all.

The fact that the NT Government, for a period of more than 30 years, did not seek leases for its infrastructure in remote communities on ALRA land was a reflection of both the utility of the informal arrangements and the 'adversarial political culture' (Westbury & Sanders, 2000, p. 2) that existed in the NT during this period. Dillon and Westbury (2007, p. 132) provided additional insights in 2007 as to why the NT Government did not seek leases, revealing internal NT Government views that negotiating leases would delay the provision of community services, and that if communities wanted basic services then the land should be provided for free (Dillon & Westbury, 2007, p. 132). This was soon to change.

Impetus for leasing reform: From Reeves 1998 to government-entity township leasing 2006

The momentous tenure reforms which are the focus of this paper commenced in 2006, but the impetus for the reforms started much earlier. Two notable influences on the shape of the 2006 tenure reforms were the Reeves Review and the national land tenure debate which commenced around 2004. As the ALRA is Commonwealth legislation these developments were primarily initiatives of the Australian Government. However, the role of the NT Government intersected with these national initiatives and formed part of a wider governance environment in which Aboriginal people found it increasingly challenging to exercise the governing roles and powers over land and waters which they had secured under ALRA.

The Reeves Review

Altman (2009, p. 23) observed that from 1996 successive Howard Australian Governments fostered a narrative that Indigenous policies of the last 30 years had failed to deliver 'development', and land rights and native title laws[43] were implicated in this failure. The ALRA was a primary target for review and reform because of its iconic status and the strength of the rights, including that of informed consent, which it delivers to traditional owners. Thus, early in its first term the Howard government appointed Darwin barrister, John Reeves QC, to undertake a review of the ALRA, a move supported by the conservative Country Liberal Party (CLP) government in the NT

[39] Lajamanu is located northwest of Alice Springs and is one of the larger communities in central Australia.
[40] Alekerenge is a small community and located northeast of Alice Springs.
[41] Although they might have been involved in processes for protecting sacred sites
[42] One critical aspect of the Aboriginal land tenure system is the system of checks and balances provided by a crucial relationship between land 'owners' and land 'managers' (Morphy, 1999a, p. 197–198). 'Owners' generally belong to a patrilineal descent group, and 'managers' generally gain rights and responsibilities for their mother's land. As the ALRA land claim process progressed, a broader interpretation of 'traditional owner' allowed for both 'owners' and 'managers' to be included as traditional owners, where appropriate (Morphy, 1999a, p. 201).
[43] In the same period as the Reeves Review, the Howard Australian Government amended the *Native Title Act 1993* to diminish the rights of native title holders (Altman, 2009, p. 22–23).

(Brennan, 2006, p. 3)[44] and widely opposed by Aboriginal people and groups. Reeves made far-reaching recommendations to reform the ALRA, including in relation to each of the three critical elements of the ALRA discussed above: the definition and role of traditional owners, and their relationship with Aboriginal community residents; the role of the land councils; and the financial framework of the ALRA, particularly land-use payments.

Most controversial was Reeves' rejection of 'traditional owners' as the correct level of Aboriginal authority in relation to land (Reeves, 1998, p. XVIII) and his proposal to conflate the categories of traditional owner and resident for the purposes of decision making (Sutton, 1999, p. 40). He proposed the creation of 18 small regional councils (plus an overarching Territory-wide Council), comprising *both* Aboriginal residents and traditional owners in the region, to be responsible for land-use decision making across their region (1998, p. 592). These new regional councils, plus a proposed new overarching NT Aboriginal Council, would replace the NLC and the CLC,[45] reflecting Reeves' endorsement of the view promulgated by governments and strategically adopted by some breakaway Aboriginal groups, that the two mainland land councils were too large in scale and were 'bureaucratic, remote, tardy and uninterested in local Aboriginal problems' (1998, p. 117). Through this proposed radical reform to ALRA institutional arrangements he sought to break the so-called 'monopoly' of the land councils (1998, p. VIII) and 'dethrone' traditional owners (Rowse, 2002, p. 114).

In relation to remote communities specifically, Reeves noted that in many situations their residents were not the traditional owners of that land, and acknowledged the problem of disputes between traditional owners and residents of communities on Aboriginal land. Consistent with his desire to de-emphasise the role and power of traditional owners, he urged that they 'not be able to control the way in which these Aboriginal communities operate' (Reeves, 1998, p. 499). Reeves did not specifically propose township leasing, however he did recommend that his proposed new regional land councils should provide communities in their region with a 'rent-free sub-lease for a suitable term' of the land on which the community is situated, to be held by the 'local Community Council or some other suitable body' (Reeves, 1998, p. 500).

Providing a new framework for the management of ALRA moneys was central to Reeves' vision (Levitus, 1999, p. 123). He urged a prohibition on payments to individuals, increased accountability measures to ensure community benefits, and recommended that 'affected areas' monies be paid to his proposed new regional councils (Reeves, 1998, p. 368). As Levitus (1999, p. 125) observed, these proposals represented a significant departure from the intent of the ALRA and its basis in Aboriginal customary law, by separating land-use income from land ownership and instead proposing it be allocated according to social need. These issues are revisited below in relation to the treatment of rent from the three leasing regimes.

The Reeves report and recommendations constituted a massive onslaught against the ALRA, and were widely criticised by land councils and many traditional owner groups. CAEPR played a key role in coordinating a critical analysis. The contributors to CAEPR's influential volume, *Land Rights at Risk? Evaluations of the Reeves Report* (Altman et al., 1999), were overwhelmingly scathing of the recommendations. A bipartisan parliamentary committee inquiry into the Reeves report also rejected the majority of Reeves' recommendations and reaffirmed that proposed amendments to the ALRA should be subject to the informed consent of traditional owners in the NT (House of Representatives Committee, 1999).

A period of 'suspended political animation' (Brennan, 2006, p. 3) followed the parliamentary inquiry, and no visible action was taken to amend the ALRA for several years. However, while the Reeves recommendations

[44] John Reeves QC had been an influential member of the NT Labor party and represented the NT in the House of Representatives in 1983. He failed to hold the seat at the following election and lost ALP pre-selection. His association with the Labor party waned and he became a close friend of Shane Stone, the CLP Chief Minister of the NT. He was the CLP's preferred candidate for undertaking the Review. His appointment was widely criticised by Aboriginal groups across the NT.

[45] The TLC and the ALC were proposed to be two of the 18 regional councils representing their existing regions.

ostensibly remained discredited, politically they remained live issues with the Howard Australian Government and paved the way for some of the key reforms of 2006 and 2007. Two important political developments also enabled the process of land rights reform to follow. First, in 2001 the Labor party won government in the NT, away from the centre-right CLP which had dominated power since self-government in 1978. Second, the Howard Australian Government won a fourth term at a general election in 2004, including (unusually for Australia) winning a majority in both houses of federal Parliament. This, and the prominent national debate concerning Indigenous forms of communal land ownership, set the scene for significant amendments to the ALRA in 2006.

National Indigenous land tenure debate: attack on communal title

Before 2004, debate about Indigenous land tenure in Australia was limited and focused on '*how* Indigenous land should be owned communally, not *whether*' (Terrill, 2016a, p. 129). From late 2004 that changed, and, as Hunt (2008, p. 33) observed, these debates were not solely driven by government, with some Indigenous leaders also promoting policy change. Most influential of these was Noel Pearson from Far North Queensland, who argued that Indigenous communal title should be preserved but required reform to enable 'participation in a transactional economy' (2004, p. 1). His work encompassed a critique of the impact of welfare dependency and 'passive' income on remote communities; views which were quickly and conveniently taken up by the Australian Government to bolster its arguments for why communal tenure was an obstacle to economic development. Many conservative commentators in turn made a direct link between communal land tenure, a lack of economic development and a reliance on welfare and 'royalties' (Howson, 2005, p. 28–29; Hughes & Warin, 2005, p. 15; Johns, 2005), and there was a call for long-term leases to stimulate enterprise development and private home ownership (Cleary, 2005, p. 3; Hughes & Warin, 2005, p. 1).[46] A highly charged tenure debate escalated over the next 12 months as Australian Government commentary increasingly portrayed communal title as a barrier to development, and individual property rights as the foundation for economic development.[47]

This debate and the 2006 amendments soon to follow, reflected the Coalition government's approach to Indigenous policy which emphasised individualisation over collectivism, formal equality rather than differentiated rights, and consequently a 'normalisation' of services and service delivery (Sullivan, 2013, p. 355).[48] Given this governance environment, it is little wonder that the 2006 amendments represent the most significant reform of the ALRA since its enactment in 1976 (Calma, 2010, p. 57).

2006 ALRA amendments

Using its majority in both houses of Parliament, the Howard Australian Government passed amendments to the ALRA in 2006. Some of the amendments had been proposed by an historic joint submission of the land councils and the NT Government.[49] Others, however, were not negotiated with the land councils and reflected the national tenure debate on the need for private ownership of land, and the intent of some of Reeves' recommendations (Brennan, 2006, pp. 19–25). The latter included amendments providing for a forced delegation of land council functions to an Aboriginal corporation; a lowering of the threshold required to create a new land council; changes to land council funding arrangements such that funding levels were less secure; and, to a lesser extent, township leasing. While Reeves' plan to abolish the mainland land councils in favour of

[46] That same year Sue Gordon, the Chairperson of the National Indigenous Council, released a draft set of Indigenous land tenure principles, which stated that 'retaining the land base should not disadvantage individuals by frustrating their aspirations for individual home ownership and wealth creation' (Gordon, 2005).
[47] See Terrill (2016, pp. 132–134).
[48] In this period, we saw the abolition of the elected Aboriginal and Torres Strait Islander Commission (ATSIC) in 2004–2005 and its replacement with the Commonwealth-appointed National Indigenous Council, and the refusal by the Coalition to support the development of the United Nations Declaration on the Rights of Indigenous Peoples.
[49] The election of the ALP in the NT in 2001 was followed by a period of engagement between the land councils and the NT Government, including the negotiation of agreed reforms to the ALRA, which were provided to the Australian Government in 2003.

smaller regionalised bodies was not progressed, the cumulative intent of these amendments was to lessen the power of the land councils.

The new township leasing provisions[50] provided for whole remote communities to be leased to an approved government entity for 99 years. The proposal for township leasing was promoted by the NT Government and quickly adopted by the Australian Government. On introduction, the responsible Minister, the Hon. Mal Brough, stated that the reform provided,

> *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 (Commonwealth Parliamentary Debates, 2006).*

Originally it was envisaged that the NT Government might create the approved entity to hold the leases,[51] but by 2006 the dynamics within the NT Cabinet had changed, resulting in less support for township leasing. The Commonwealth was left to create the entity, the Executive Director of Township Leasing (EDTL). The granting of a government-entity township lease requires the consent of traditional owners but, once granted, the EDTL has the power to grant subleases and licences without seeking further permission. Unlike s. 19 leasing, the government-entity township leasing provisions impose several restrictions on lease terms and conditions (Terrill, 2016a, p. 176).

There was considerable concern expressed about the township leasing amendment (Dodson & McCarthy, 2006), including from land councils and traditional owner groups. The CLC and NLC were vociferously opposed, arguing that the reforms were unnecessary, unreasonably restricted the rights of traditional owners to negotiate commercially and handed control of remote communities to the government for 99 years (CLC, 2015b, p. 11–12). Dillon and Westbury took a more sympathetic view of township leasing,[52] promoting the reform as offering considerable benefits to traditional owners and residents of communities and asserting that land council opposition was based on a 'misplaced desire to control (on behalf of traditional owners) all that happens within communities' (2007, p. 150). The TLC and ALC were also supportive of the concept, and subsequently communities on the two island groups became the first to be subject to government-entity township leases.

Irrespective of different perspectives on the merits of township leasing there is no doubt that the 'rushed and adversarial' process of introducing the reforms and the fact that the government had pursued 'long-standing ideological aims' at the expense of collaboration and bipartisanship (Brennan, 2006, p. 25) informed the nature and stridency of the response. It was, at best, a top-down, unilateral approach to land tenure reform which 'polarised the politics and made cool-headed discussion of the township leasing proposal far more difficult' (Brennan, 2006, p. 17). At worst it was an ideological attack on the foundations of the land rights regime.

Leasing 2007–2012: From the Coalition's NTER to Labor's 'secure tenure' policy

Though township leasing was, arguably, one of the most controversial land reform initiatives of the past decade, it was soon temporarily overshadowed by the Northern Territory Emergency Response (NTER).

[50] s. 19A of the ALRA.
[51] The NT Government developed the original proposal for township leasing.
[52] This is perhaps unsurprising given Michael Dillon was one of the key authors of the NT Government's 2004 township leasing proposal.

The Northern Territory Emergency Response and tenure reforms

On 21 June 2007 the Howard Australian Government used the discourse of a 'national emergency' (Hinkson, 2007, p. 7) to justify taking unprecedented action to control remote communities and the lives of Aboriginal people in the NT, in the name of protecting children.[53] As with the imposition of land rights, the Commonwealth asserted its constitutional powers to intervene in the affairs of the NT (Altman, 2007, p. 314). The NTER comprised a $587 million package of controversial measures (Gray, 2020, p. 9)[54] and provided a new vehicle for the Australian Government to advance a 'long-cherished cultural agenda' to progress individual property rights in place of communal title (Altman, 2007, p. 307; Rundle, 2007, p. 39). Tenure initiatives were a critical part of the package, and were strongly resisted by many Aboriginal people, with one Aboriginal leader labelling them a 'Trojan horse to resume total control of our lands' (Turner & Watson, 2007, p. 205). Indeed, most commentators, Aboriginal people and organisations strenuously opposed most of the NTER measures,[55] and, particularly, the unilateral and punitive manner by which they were imposed (Gaita, 2007, p. 299).

The most audacious of the tenure initiatives was the Australian Government's compulsory acquisition of five-year leases over 65 remote communities. The rationale for these imposed leases changed over time (Brennan, 2009, p. 963) ranging from removing barriers to lifting community living standards and repairing buildings (Commonwealth Parliamentary Debates, 2007) and, later, ensuring 'security of tenure' for government investments in remote communities. This concept of 'secure tenure' in turn became an entrenched policy with the succeeding Labor federal government, resulting in the proliferation of voluntary s. 19 leases discussed below.

There were two critical governance consequences of the five-year leases. First, was the demonstration of the power of the Australian Government to take unilateral action in relation to Aboriginal land and communities, thereby undermining Aboriginal authority under the ALRA and within communities. It was a powerful message that Aboriginal places of 'belonging' could be intruded upon (Keenan, 2013, p. 492–493).[56] The second significant effect was the payment of just terms compensation and fair rent for the compulsory acquisition of the five-year leases and the governance challenge presented by these funds. The land councils were responsible for distributing these funds, which totalled around $20 million (CLC, 2013a, p. 145; CLC, 2014, p. 140; CLC, 2015a, p. 143) for the 33 communities in the CLC region. For many traditional owners, particularly those that had not experienced exploration or mining on their country, this was their first experience of making decisions about income from their land. With 33 communities in the CLC region all allocated such compensation monies at the same time, the process of managing these consultations was difficult for the land councils and challenging for those participating.

Overall, the imposition of the five-year leases damaged the relationship between Aboriginal people and the Australian Government and soured the concept of leasing (CLC, 2015b, p. 13), making implementation of the early phase of s. 19 leasing more difficult than it otherwise would have been.

[53] While Aboriginal organisations in the NT agreed there was a social crisis, there was substantial disagreement about the nature of the response.
[54] Measures included alcohol and pornography restrictions, installation of government officials in remote communities, reform of the Community Development and Employment program, and income quarantining measures.
[55] See for example contributors to Altman & Hinkson (2007). While most Aboriginal people and their organisations were vehemently opposed to the NTER, some prominent Aboriginal leaders and organisations supported the Commonwealth's intervention.
[56] One tangible, local impact of this intrusion was that the five-year leases enabled the Commonwealth to transfer management of remote community housing to the NT Government's public housing system. See Howey (2015) for an analysis of the subsequent negotiation of housing leases.

Labor's 'secure tenure' policy

After 11 years in opposition the centre-left Labor party defeated the Coalition at a general election in November 2007, just months after the imposition of the NTER. Land tenure reform continued under Labor, however the approach was 'less provocative' (Terrill, 2016a, p. 149). There was a decreased focus on township leasing and individual ownership and instead the emphasis was on 'securing' government investment through leases, with an initial focus on housing in remote Aboriginal communities.[57] The 'secure tenure' policy brought about a dramatic change to the land arrangements in remote communities because all government investment in infrastructure and housing became conditional upon a lease being in place.[58] While s. 19 leases were seldom used in communities on ALRA land before 2007, the 'secure tenure' policy of the Labor government changed this, resulting in a dramatic and rapid increase in leases within communities. The governance consequences of this process of formalisation are explored in the second half of this paper.

During this same period, a new community-entity township leasing model was developed by Aboriginal interests, notably the Gumatj in northeast Arnhem land and the CLC, as an alternative to the government-entity model. An agreement was signed between Yolngu leader, Galarrwuy Yunupingu, from northeast Arnhem Land, and Minister Brough in 2007 relating to a possible lease over land at Gunyangara (Commonwealth of Australia & Yunupingu, 2007). It proposed that the 99-year lease be held by an Aboriginal corporation, with a sublease to the Commonwealth over residential areas, community and government facilities and associated infrastructure. The CLC's (2010, p. 6) model for community-entity township leasing proposed that an Aboriginal lease-holding corporation would control land-use decision-making within the community, after obtaining consent from traditional owners. It aimed to 'maximise Aboriginal control over the development of remote communities' and 'clarify the relationship between community residents and traditional owners (where appropriate)'. Despite advocacy by the CLC, the community-entity model was rejected through to 2013 by the federal Labor Minister for Indigenous Affairs, Jenny Macklin, who was adamant that a township lease be held by a government entity. Nor did the Gumatj model progress under Labor.

Return of the Coalition: The emergence of community-entity township leasing

The Coalition regained government at a federal level in 2013 but did not return to the stridency of the previous era of debate (Terrill, 2016a, p. 152). Instead, there was an emphasis on the need for long-term tradeable tenure, and a renewed promotion of township leasing in the NT (Terrill, 2016a, p. 153). While the concept of 'secure tenure' championed by the Labor Party was abandoned, in practice s. 19 leasing continued to be required. From around 2015 then Minister for Indigenous Affairs, Nigel Scullion, came to accept the community-entity model as a legitimate alternative to the government-entity model. In a rare and striking moment of clarity about the value of locally developed solutions, he stated,

> *We are the first government, I think, to properly consider community-controlled leases. I am not saying we have done well, but it is a lesson for everybody. We thought we had the answer. Eventually, when nothing seemed to be working, we said to the community, 'How do you think it will be?' and, remarkably, in different ways and in different places, they have put up the solutions (Commonwealth, Parliamentary Debates, Senate, 28 March 2017, p. 2370).*

[57] 'Secure tenure' is a foundational international land reform concept (Terrill, 2016, p. 32) which can be described as 'the certainty that a person's rights to land will be protected' (Australian Agency for International Development, 2008, p. 129). The Australian Government instead adopted the term to describe a set of policies that essentially resulted in the formalisation of tenure through leasing according to rules set down by the Commonwealth (Terrill, 2016, p. 13, 18, 32).
[58] The National Indigenous Reform Agreement (Council of Australian Governments, 2008) and associated agreements enshrined the principle of 'secure tenure' and the prioritisation of larger communities as service delivery hubs.

This comment can be taken as an admission that the Australian Government process of unilaterally imposing land tenure reforms was flawed and that better outcomes could be achieved by involving Aboriginal people in the design of tenure solutions. Certainly, the uptake of community-entity township leasing indicates it provides a valuable additional option for traditional owners and residents.

The previous sections detail the key developments and external governance environment that shaped the leasing reforms which commenced in 2006. In summary, by 2015 there were three different leasing regimes applicable to remote communities. The first is s. 19 leasing, whereby leases are granted on a lot-by-lot basis within communities. The second is government-entity township leasing where whole communities are leased to a Commonwealth entity, the EDTL, who is then able to issue subleases without further consent of traditional owners. The third is a variation of township leasing, providing for whole communities to be leased to an Aboriginal corporation rather than a government entity. The corporation can then issue subleases without further consent of traditional owners. Taken together these reforms are widespread and long-term with significant intergenerational consequences. They create profound changes to the land rights system and the governance of remote communities.

Three leasing regimes: Applications and some similar outcomes

This section details the extent of leasing across the NT and asks: who are the occupiers getting these leases and subleases?

Remote communities: s. 19 leasing almost complete

The sheer volume of s. 19 leases that have been processed by the land councils in under a decade gives an indication of the enormous changes that have taken place in remote communities. In the CLC region there are now 491 leases over 2478 lots on both ALRA and CLA land. Almost all serviced lots in remote communities are now subject to leases. The situation is similar in the NLC region. Given that the debate surrounding the reforms was based on the need to individualise tenure in remote communities to provide opportunities for home ownership and private enterprise, it is instructive to see who holds these leases (see Table 1).

Table 1 CLC region: Total number of leases and lots granted to end 2019

Category	Lease – ALRA	Lots ALRA	Lease – CLAs	Lots CLAs	Total Lease	Total Lots
Australian Government, includes community housing leases	47	922	18	338	**65**	**1 260**
Figure in brackets is community housing leases only	(15)	(890)	(10)	(331)	(25)	(1 221)
NT Government	85	503	36	90	121	593
Local Government	66	257	37	96	103	353
NGO	190	257	12	15	202	272
TOTAL	**388**	**1939**	**103**	**539**	**491**	**2478**

There are several things to highlight from Table 1. First, all leases in the region are to corporate organisations of one kind or another, with no leases to an individual within a remote community in the CLC region. Second, most of the lots are leased by governments (all three levels), with 289 government leases over 89% of the 2206 leased lots. By contrast, non-government organisations hold only 272 or 11% of leased lots, under 202 leases. In addition, leasing is substantially progressed on the CLAs in addition to ALRA land.

While the township leasing amendments were controversial and attracted much attention, the rapid roll-out of s. 19 leases resulting from the 'secure tenure' policy has in fact had more widespread impact on remote communities in the NT.

Uptake of government-entity township leasing

The first government-entity township lease in the NT was entered into at Wurrumiyanga on the Tiwi Islands in 2007. Two other communities on the Tiwi Islands later followed, as did three communities on Groote Eylandt and Bickerton Island. However, progress in rolling out township leases on the mainland of the NT stalled in the face of sustained opposition from the NLC and CLC and was not a priority of federal Labor governments between 2007 and 2013. The return of the Coalition in 2013 saw a renewed effort to promote township leasing (Howey, 2015, p. 19), but despite Australian Government attempts, inducements, and incentives, not a single township lease was consented to on the mainland in the decade between 2007 and 2017.

As of 2020, there are three government-entity township leases covering six communities on Groote, Bickerton and Tiwi Islands.[59] However, in June 2018 the ALC (the land council responsible for Groote and Bickerton islands) announced plans to transfer their government-entity township leases to community-entity township leases, signalling their desire to regain greater control over their communities.[60] Traditional owners of the existing Tiwi Island government-entity township leases have not publicly indicated any such interest.

Uptake of community-entity township leasing

From 2015, with the new community-entity township leasing model available, traditional owners of three remote communities (Gunyangara in the NLC region, Mutitjulu in the CLC region, and Pirlangimpi in the Tiwi Land Council region) consented to community-entity township leasing arrangements. A fourth community-entity township lease was recently negotiated at Jabiru, and others are currently considering this option.[61] This demonstrates that contemporary land tenure solutions are possible when traditional owners and community residents are given the space, information and control over a process of reform based on their own needs and priorities.

In March 2017, following seven years of negotiation, Mutitjulu became the first community-entity township leasing arrangement.[62] The CLC (2017) welcomed its finalisation, calling it a 'profoundly important settlement between residents and traditional owners – a negotiation about future roles and responsibilities for land use in a community'. Following Mutitjulu, the community of Pirlangimpi on the Tiwi Islands entered a community-entity township lease on June 26, 2017 (Office of Township Leasing website at https://www.otl.gov.au/current-township-leases#). Both Mutitjulu and Pirlangimpi are 'transitional models' of community-entity township leasing, with both leases being held in the first instance by the EDTL, while the new Aboriginal lease-holding corporation

[59] For more details see Office of Township Leasing website at https://www.otl.gov.au/current-township-leases#.
[60] See ALC website at https://www.anindilyakwa.com.au/news/2018/towns-to-come-back-under-community-control.
[61] See https://www.abc.net.au/news/2020-05-13/jabiru-kakadu-township-lease-federal-parliament-coronavirus/12241972. Passage of the *Aboriginal Land Rights (Northern Territory) Amendment (Jabiru) Bill 2020* on 3 September 2020 enables this township lease to proceed. A new traditional owner Aboriginal corporation will be established to hold the lease.
[62] The tenure arrangements at Mutitjulu are unique given it is situated within Uluru Kata-Tjuta National Park, which is subject to a 99-year lease to the Director of National Parks. The Mutitjulu community-entity township model is actually a *sublease* from the Park lease and is not a s. 19A township lease. For simplicity it is referred to here as a township lease.

is created, and capacity built. In both cases the relevant land council determines when the new corporation has sufficient capacity to manage the administration of the township lease thereby triggering a mandatory transfer from the EDTL to the new lease-holding corporation. In both cases, the lease will revert to the EDTL if the corporation fails. While this transitional model may be useful and realistic given the challenge of taking over land-use administration, there is a risk that the leases will never be transferred, leaving them stranded as government-entity township leases.

The third community-entity township lease is that at Gunyangara in northeast Arnhem Land which commenced in November 2017 (10 years after signing the initial MoU with Minister Brough). Drawing on their strong and stable leadership and established Aboriginal institutions (supported by income from mining royalties), the Gumatj traditional owners formed a new corporation to hold their township lease. This is the only one of the three community-entity township leases to be held from the start by an Aboriginal corporation.

Similar outcomes across the three leasing regimes

Each of the three leasing reforms impacts on the land rights system and remote community governance in different ways. Understanding these impacts requires an examination of both the similar and different outcomes achieved by each type of lease. While there are differences between the three, there have been some similar outcomes. First, regardless of the leasing regime, and contrary to government rhetoric, the great majority of the leases or subleases have been to existing occupiers of land, primarily government, but also non-government organisations and, to a lesser extent, commercial enterprises. The formalisation of arrangements has not triggered a rush of applications for leases from new users of land in the CLC region. And despite governments' emphasis on the need for individual rather than communal title, the vast majority of granted leases and subleases have been to government agencies and other organisations, not to individuals (but see Terrill 2013, p. 12 for exceptions).

The leases have also had a negligible effect on the engagement of remote communities with the market economy (which was one of the mooted justifications for the reform). Indeed, Dillon and Westbury (2007, p. 152), who were both senior NT bureaucrats at the time, asserted that the compelling policy rationale for government-entity township leasing was the creation of 'a market in land and housing.' However, as Terrill observes, the roll-out of these leasing regimes has essentially achieved the opposite, and is a clear example of the 'significant disjuncture between language and practice' in the land tenure debate (Terrill, 2016b, p. 200). This is particularly evident in relation to housing. All three leasing models have underpinned the transfer of community houses to the NT Government's public housing system.[63] The one exception has been the small uptake of private home ownership on the Tiwi Islands in 2007, resulting from a heavily promoted and subsidised government program.[64] Rather than reducing the role of government in favour of market forces, the reforms have in fact enhanced and entrenched the role of government.

Fourth, the leasing reforms have been accompanied by significant advances in the land administration machinery of the NT, including the completion of cadastral surveys to allow surveying of lots, and the ability to register leases. The granting of leases allows for local government rates to be charged. While Aboriginal land is not subject to local government rates, the granting of a lease allows the relevant local government (in this case Regional Councils) to charge the occupier rates. This has resulted in increased costs for occupiers, and an important new income stream for the Regional Councils. Finally, the payment of rent, including the process of valuation and calculation of rent based on a percentage of unimproved capital value, has also been common

[63] This dramatic reform of community housing arrangements from 2007–08 was first facilitated by the five-year leases, and by radical reform of the NT Government's local government system which saw the abolition of local councils in favour of large regional shires. The local councils were, prior to 2008, generally the local housing provider.
[64] See Terrill (2016b, p. 197).

across each of the leasing models.[65] Terrill (2016b, p. 198) observes that 'the main economic impact of township leasing has been a significant increase in the amount of rent being paid by occupiers such as enterprises and service providers.' The same can be said of s. 19 leasing. Overall, the cost of doing business on Aboriginal land has increased because of formalisation since 2007. After almost 40 years in which land-use rent inside communities was largely non-existent, this is a significant policy shift.

While the impacts of the NT land reforms are often discussed in terms of tenure attributes, such as individual ownership or transferability, this overlooks the social, cultural and governance impacts of the reforms. Reform of communal land tenures is not just a technical exercise,[66] indeed, this paper suggests that, above all, land tenure reform must be viewed as a governance issue both between Aboriginal people themselves and as 'a site for the unfinished business of post-colonial struggle, which constantly contests and renegotiates the balance of power and relationships between Indigenous Australians and the Australian state' (Smith & Hunt, 2008, p. 11).

Three leasing regimes compared: Consequences for land governance rights and interests

This paper now uses a focus on governance to unpack and analyse the leasing reforms to Aboriginal land tenure in the NT. This affords a unique view into the implications of the reform for Aboriginal people, their lands and the communities in which they live. These impacts are now analysed through an examination of three critical governance elements proposed at the beginning of this paper; namely: who gets to be included and has the authority to make decisions relating to land; institutional arrangements supporting how decisions and rules for decision making are made; and the financing of the institutional arrangements. In this section, I draw together the impacts of the reforms on Aboriginal land governance as exercised through the ALRA.

An emerging body of national and international literature demonstrates the importance of understanding land tenure reforms in terms of their impact on land governance. There are two distinct bodies of land governance literature: that produced in the international development arena, much of which adopts a technical approach to land governance with a focus on efficient land administration (Borras Jnr & Franco, 2010, p. 2; Palmer, 2007) and the use of governance indicators (Palmer, 2007, p. 13) which establish norms and benchmarks of 'good' governance for comparability and assessment (Smith, 2005, p. 8, 11–12); and, over recent decades, a growing body of research on the contemporary Indigenous systems of land governance and the impacts on it of actions by settler colonial, neoliberal nation states (Altman, 2008; Barcham, 2008; Hunt & Smith, 2007; Ivory, 2008; B. Smith, 2008; D. Smith, 2008; Morphy, 2008; Ritsema et al., 2015). While mindful of the international land governance literature, this paper draws primarily on the Indigenous governance literature, a considerable portion of which has been published by CAEPR.[67] This helps to make visible the impacts of government reforms on the governance arrangements of the land rights system and within the complex contemporary governance environments that now operate in remote communities. This is important because the governance impacts of the leasing reforms are almost invisible in official government discourse.

Who has authority over land decisions in remote communities?

The three different leasing regimes impact on who has authority to make land-use decisions in remote communities on ALRA land. As discussed above, s. 19 lease consultations fundamentally affirm and make explicit the rights of traditional owners to make land-use decisions, while community residents are entitled to

[65] A significant exception here is that the Australian Government, and subsequently the NT Government, refused to pay rent for leases over community housing.
[66] A report by the Australian Agency for International Development (2008, p. xv) in relation to customary land in the Pacific urges that, particularly in customary land systems, land tenure reform be viewed as a social issue rather than a technical exercise.
[67] See for example, Hunt & Smith (2005, 2006, 2007); Smith (2005); and contributors to Hunt et al. (2008).

express a view. The formalisation of tenure arrangements within communities through s. 19 leases has significantly reinforced the authority of traditional owners compared to the informal arrangements it replaced.

Government-entity township leasing, on the other hand, removes the legal rights of traditional owners to make land-use decisions, beyond the initial consent process. It must be noted, however, that while the *de jure* rights of traditional owners have been modified, in practice the previous and current EDTLs both agreed to be bound by the Consultative Forum, a committee provided for in the lease rather than legislation. These Consultative Forums comprise traditional owners and are formed to provide advice to the EDTL before land-use decisions, such as the granting of sub leases, are made. While legal decision-making power shifts to the EDTL, which theoretically grants control over Aboriginal land to the government, this is balanced by the current practice which provides traditional owners with a strong, although legally vulnerable, say over land-use decisions.

The Consultative Forums are intriguing because one of the key government rationales for township leasing was the need to decrease the transaction costs associated with the ALRA requirement to obtain the informed consent of traditional owners. The Office of Township Leasing reports (2018, p. 21–22) that one of the main benefits of a township lease is that long term subleases can be granted 'comparatively quickly compared with other forms of leasehold interests on Aboriginal Land'. This assertion is untested given there has been no evaluation of any of the leasing regimes. However, creating the Consultative Forums, has, in effect, replaced one consultation mechanism with another, albeit one that offers less traditional owner control over decisions. It is difficult to see why traditional owners would find this satisfactory, however, it must be remembered that all the existing government-entity township leases were agreed early in the tenure reform period, in 2007–2008. Compared to the informal tenure arrangements in place before 2007, township leasing has likely enhanced the practical expression of traditional owner rights in those communities. In this case the legal authority has shifted to the government, but the *de facto* authority has shifted away from residents generally, in favour of traditional owners (Terrill & Boutilier, 2019, p. 65).

In a further variation, community-entity township leasing shifts land-use decision-making authority to a local Aboriginal corporation. The three community-entity township leases that currently exist have different characteristics, but all represent (or will in the future) a shift from decision-making by traditional owners, as a group, to a prescribed number of Aboriginal people on the board of an Aboriginal corporation. Whoever sits on the board has (or will have) the authority to make land-use decisions. Therefore, defining the membership and composition of the Aboriginal corporation boards are central governance issues. This model potentially allows for a negotiated mix of traditional owners and residents on the board depending on the dynamics of that community. However, in the case of the Ngarrariyal Aboriginal Corporation, that was formed to hold the Gunyangara community-entity township lease, members of the corporation are restricted to Gumatj traditional owners and the board of directors comprises four of these traditional owner members, plus two independent non-member directors (Ngarrariyal Aboriginal Corporation, 2017). The practical effect of this change is significant. Prior to the community lease, traditional owners would have been consulted by the NLC in relation to land-use decisions in their community (assuming there were lease applications), with decisions then ratified at the NLC 'Council'. Now, land-use decisions within the community are made by the board. This constitutes a radical change to the ALRA-recognised governance rights of traditional owners, but, importantly, it was proposed by the traditional owners themselves and endorsed by the NLC.

Each of the three leasing regimes has resulted in a formalisation of land-use decision making processes with consequent impacts on the exercise of authority by traditional owners. However, the shift in *who* is empowered to make land-use decisions is not the only impact of these leasing reforms. They also change the institutional arrangements by which decisions and the rules for decision-making are made.

Institutional change: how are decisions made?

Communal property regimes generally reflect the internal norms of that society (Fitzpatrick, 2006, p. 1028–1029) and require 'mechanisms for collective agreement, monitoring and enforcement' (Fitzpatrick, 2006, p. 1026). This makes the form of the institutional arrangements under any land rights system particularly important. Prior to 2007, the land councils were the only autonomous land rights institutions in the NT, albeit with limited expressed authority within remote communities due to the prevailing informal arrangements. The leasing reforms have modified the role of the land councils by enhancing their practical jurisdiction within communities and established two additional institutional forms: the EDTL and the new lease-holding community corporation. While the land councils are statutory entities (with Aboriginal governance arrangements) pursuant to the ALRA, the EDTL is a statutory office holder (an individual) also pursuant to the ALRA, and community township lease-holding corporations are Aboriginal corporations pursuant to the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). The nature and consequences of these differences in institutional form are discussed below with reference to the level at which Aboriginal decision making occurs, and the diversity of Aboriginal people involved in the decision-making process.

A critical difference between the three institutional arrangements is the level at which Aboriginal decision-making occurs – regional or local. While intense localism is a defining feature of the Aboriginal social and cultural organisation, there is also an 'equally compelling strain towards "collectivism", connectedness and interdependence' (Holcombe, 2004c; Martin & Finlayson, 1996, p. 5; Smith, 2002, p. 7, 1995). Aboriginal governance structures can achieve both localism and regionalism (Hunt & Smith, 2007, p. 14; Sanders, 2008; Smith, 2008), indeed the 'tripartite' design of the NT land rights system incorporates both elements. The land councils are collective regional organisations (Martin & Finlayson, 1996, p. 9), drawing regional representation from their constituency to form the 'Council', while the informed consent provisions are designed to hold the regional land councils accountable to their local constituents (Martin & Finlayson, 1996, p. 10–11; Peterson, 1999, p. 25). Much has been written about the tension in the Aboriginal domain between localism and regionalism and balancing this tension is difficult for the land councils, as evidenced by some 'stringent criticisms' from within the land councils' own constituencies and occasional proposals for 'breakaway' land councils to represent smaller regions (Martin & Finlayson, 1996, p. 10). More recently, and with less political hostility, this tension is reflected in the desire of some traditional owners and residents to enter a community-entity township lease.

On the other hand, both models of township leasing are inherently local. Government-entity township leasing, through the Consultative Forums, provides for local traditional owner input into land-use decisions at the community level. In addition, the small number of township leases, and the favour in which the reform has been held by government, has enabled the EDTL to advocate for the needs of township lease communities and attract support to progress traditional owner priorities at the local level. The community-entity township leasing embodies the subsidiarity principle,[68] as land-use decision-making powers are devolved to the local level. It is significant that currently local groups appear not to be advocating for 'break-away' land councils but are instead choosing to negotiate greater local powers over land-use decisions through a community-entity township lease. The addition of new formal land rights institutions may shift the balance between local and regional in the land rights system.

A further significant difference between the three institutions concerns the diversity of Aboriginal people involved in the land-use decision-making process. In relation to grants of land, the ALRA requires that the land councils involve three groups of Aboriginal people in the process – traditional owners as decision-makers, affected communities expressing a view, and the 'Council' checking and ratifying the decision. This provides for a diversity of Aboriginal views to be canvassed and allows space for Aboriginal people to assert, reinforce and

[68] See Hunt & Smith (2007, p. 14–15) for a discussion about Australian Indigenous governance and the subsidiarity principle.

negotiate their claims and authority, and reach a view about land-use. The EDTL, by contrast, is a statutory position appointed by the Minister, with no Aboriginal governance oversight nor any defined processes for consultation. Government-entity township leases provide for one level of local Aboriginal input to land-use decision making through the advisory Consultative Forums. There is no requirement for either the EDTL or members of the Consultative Forum to consult with the community more broadly, nor any mechanisms for a broader group of residents or traditional owners to hold the EDTL or Forum members to account.

Similarly, community-entity township leasing provides only one level of Aboriginal input to land-use decision-making, through the board of the corporation, with no requirement to consult more broadly. The only formal mechanism for community members to hold the corporation board members accountable is through annual general meetings and election processes. The three-tiered consultation process required of the land councils sets a high benchmark for Aboriginal decision-making, while both models of township leasing provide reduced diversity and less mechanisms for a broader group of Aboriginal people to hold decision-makers to account.

Financing the institutional arrangements

Regardless of their form, each of these formal institutions require funding to undertake their functions, with implications for the draw on the ABA. As described earlier, the land councils are funded from the ABA to perform their ALRA functions. Similarly, s. 64(4A) of the ALRA allows the EDTL and community-entity township lease-holding Aboriginal corporations to seek operational costs from the ABA.[69] Early government-entity township leases provided for the operating costs of the EDTL to be deducted from rental income from subleases, meaning fewer rental returns to traditional owners. However, now it is accepted that the operational costs will come from the ABA, provided that rental income is directed towards community and economic development purposes, a point which is discussed in the section below concerning collective benefits from rent. In a significant shift to the financial framework of the ALRA, the land councils, the EDTL and community-entity township leasing holding corporations now all derive their operational costs from the ABA.

So how do the operational costs compare? In both 2017–2018 and 2018–2019 the operational costs of the EDTL were just over $3 million (Department of the Prime Minister and Cabinet, 2019, p. 211 and 216). By contrast, the draw on the ABA[70] by the CLC for operating expenses was around $18 million for 2017–2018 (CLC, 2018, p. 144) and a little over $19 million for 2018–2019 (CLC, 2019, p. 125). The CLC administers an Aboriginal land area of 417 000 square kilometres (CLC, 2019, p. 7), including 23 communities on ALRA land, and 10 on CLA land. By comparison, the EDTL holds township leases over eight communities,[71] plus a number of Commonwealth housing and other infrastructure leases in remote communities and the Alice Springs towncamps, but has no role in relation to land beyond that subject to the leases. Clearly, township leases are a more expensive option. This additional resourcing has allowed for greater support for the management of community land than is generally able to be provided by the land councils.[72] There is insufficient data to discuss the potential operational costs of community-entity township lease holding corporations. However, to put all of these operational costs in context, as of 30 June 2019, the net assets of the ABA were $1062.3 million (excluding future commitments), following a 30.4% increase from $814.2 million at 30 June 2018 (Department of the Prime Minister and Cabinet, 2019, p. 210). So, township leasing costs are at this stage a relatively small impost on the ABA, but this may change if many more new institutions emerge in the coming decade.

[69] As with land council budgets this is at the discretion of the Minister.
[70] ALRA s. 64(1). It should be noted that the land councils have other sources of funding for various programs in addition to ABA core funding.
[71] These communities are: Wurrumiyanga, Milikapiti and Wurankuwu on the Tiwi Islands. Angurugu, Umbakumba and Milyakburra on Groote Eylandt and Bickerton Island, and the two transitional community-entity township lease communities of Mutitjulu and Pirlangimpi.
[72] The approach to community planning is one such example where the EDTL is able to dedicate more resources to each community, see Office of Township Leasing (2018, p. 13–14).

Increasing income from leasing

Widespread recognition of the right of traditional owners to charge rent for the use of their land from around 2009 has dramatically increased the flow of benefits from Aboriginal land. It has also extended the reach of ALRA's benefit provision to many traditional owners whose country was not previously subject to mining which was the primary source of land-use agreement income prior to leasing. This section examines the quantum of rental income now generated and highlights recent efforts to ensure maximum benefits from these funds.

Rental income: s. 19 and township leasing

Data obtained from the CLC (see Table 2) shows that income from s. 19 leasing inside communities barely existed in 2006–2007, with a total of $17 516 received in rent. However, only six years later, in 2012–2013, the total amount of rent from s. 19 leases in communities had jumped to over $1 million. By 2019–2020 the total rent had more than doubled again to $2.5 million dollars.

Table 2 Annual rental received on s.19 leases in communities in the CLC region

Financial Year	s.19 community lease amount
2006–2007	$17 516
2007–2008	$17 526
2008–2009	$17 535
2009–2010	$17 540
2010–2011	$32 752
2011–2012	$37 050
2012–2013	$1 148 882[73]
2013–2014	$1 686 982
2014–2015	$563 453
2015–2016	$2 102 929
2016–2017	$2 199 254
2017–2018	$1 868 386
2018–2019	$2 002 919
2019–2020	$2 373 655

Data provided by the CLC, June 2020.

As highlighted above, income from s. 19 leasing now represents a significant new income stream for traditional owners, with around $2 million annually received by the CLC for s. 19 leases inside communities on ALRA land.[74]

Unlike s. 19 leases, all township leases, except Mutitjulu,[75] have two rent components: an advance payment used for economic development purposes, provided from the ABA; and an ongoing stream based on the rent received from subleases.[76] These advance payments are required to be repaid to the ABA from the income

[73] While the 'secure tenure' policy was in place from 2008, it took some time for the policy to be implemented, with increased pressure to finalise s. 19 arrangements as the expiry of the five-year leases approached in 2012.
[74] CLC *pers. comm.*, June 25, 2020.
[75] Mutitjulu is an exception because its tenure status within a national park means that its township lease is not granted under s. 19A.
[76] There are no advance payments associated with s. 19 leases.

generated by subleases. The 2007 advance payment for the township lease of Wurrumiyanga of $5 million[77] was recouped by the ABA in 2016 (Office of Township Leasing, 2017, p. 10), five years earlier than anticipated. Similarly, the Groote Eylandt and Bickerton Island township lease advance payment of $4.5 million was fully recouped by the ABA, six years earlier than anticipated in 2017 (Office of Township Leasing, 2018, p. 4). The Pirlangimpi and Gunyagara community-entity township leases included advance payments of $2 million each, with none of the operating expenses of the EDTL to be deducted. As for s. 19 leases, township leasing rent is now a significant annual income stream.

Prior to the township lease in Wurrumiyanga, only $2000 per year was being collected in rent (Terrill, 2016a, p. 184), however in 2017–2018 the rent was $876 749 (Office of Township Leasing, 2018, p. 30). This relatively high rental return may be attributed to the fact that it is a large community of more than 1800 people[78] (the largest community in the CLC region, Yuendumu, is half the size) and it is one of the few communities that has a licensed social club which pays a high commercial rent, and other enterprises including two stores, a café and a motel.[79] Milikapiti is a Tiwi community of around 460 people[80] which is also subject to a township lease. The rent from subleases at Milikapiti was $280 964 in 2017–2018 (Office of Township leasing, 2018, p. 30) while the revenue from the Groote Eylandt township lease covering three different communities was $795 261 (Office of Township Leasing, 2018, p. 30). Based on these figures, the rental returns from s. 19 leases in the CLC region appears to be lower than the returns from government-entity township leases in the northern region. This may be due to the different dynamics and economies of the Top End communities as compared with the desert communities of central Australia, rather than different approaches of the CLC and the EDTL. In the absence of community-specific data it is impossible to determine. The next section is concerned with the governance challenges created by this growing income stream from leases and subleases.

Achieving collective benefits from land-use income: s. 19 and township leases

The governance challenges inherent in managing this new form of income are considerable, and the experience managing mining-related monies provided useful lessons. There is a significant body of literature, much of it produced by CAEPR, detailing the challenges[81] associated with the management of statutory mining monies. In some regions, decisions about who was entitled to receive mining income caused high levels of acrimony and social upheaval (Altman, 1983, p. 149; Altman & Smith, 1994, p. 13) as rights and interests that may otherwise be negotiated and contextual become formalised and linked to economic gain. In some cases, it caused competition between traditional owners and the broader group of residents (Altman & Smith, 1994, p. 6), and between different traditional owner groups, as some landowners sought to ‘reinterpret land-holding boundaries so as to gain financial benefit’ (Stead, 1997, p. 170). Land councils, as the institutions responsible for managing this process, know only too well the potential for benefit distribution decisions to create or exacerbate division between groups and families with potentially serious consequences for community harmony and individual wellbeing.

Cognisant of these impacts, the CLC initiated a community development program in 2005 which did not rely on imposed statutory reform but, instead, worked with traditional owners to encourage the increased allocation of land-use income to community benefit projects rather than individual distribution (CLC, 2016). The NLC has since followed suit. While some individual distributions remain and provide much needed financial relief for families, the community development program has been very successful in seeing land-use income allocated to community projects (Roche & Ensor, 2014). Since 2005, Aboriginal groups in the CLC region have committed

[77] Subsequently reduced to $4 400 000.
[78] According to the 2016 ABS Census and reported at https://bushtel.nt.gov.au/profile/400?tab=demographics
[79] See Terrill (2017, p. 478–481) for details on the annual rent paid by enterprises at Wurrimiyanga as of 2015. Rent review clauses may mean these rents have risen in recent years.
[80] See data at https://nt.gov.au/employ/for-employers-in-nt/skills-existing-and-needed/remote-town-job-profiles/milikapiti
[81] Many of the challenges also resulted from legislative inconsistencies – see Altman, 1983, 1997; Altman & Smith, 1994; Rowse, 2002.

approximately $117 million of their land-use income to community benefit projects (CLC, 2019, p. 78), and in relation to community lease monies specifically, the CLC reports that up to 2018 more than $15 million of community lease money has been directed towards 282 different community benefit projects (CLC, 2019, p. 79).[82] This program is Aboriginal-led and incorporates both regional and local levels of Aboriginal governance.[83] The CLC's program is not just concerned with the effective management of land-use income, but also aims to achieve 'transformational development with social, cultural and economic outcomes' (CLC, 2016). CAEPR has played an important role in documenting and analysing this innovative program.[84]

Ensuring collective benefits from both models of township lease rent (the rent from subleases) has also been a priority of traditional owners, and is achieved through statutory provisions, the terms of the township leases, and in one case, and the rules of the new lease-holding corporation. Township lease rent is provided to the relevant land council to manage and distribute, after any advance payments are repaid to the ABA.[85] Unlike the income from s. 19 leases – which must be paid 'to or for the benefit of' traditional owners – a 2006 provision in the ALRA[86] stipulates that rent from a s. 19A township lease must be paid to an Aboriginal corporation 'for the benefit of' the traditional owners. This prevents a land council from distributing funds directly 'to' individual traditional owners. The rules of the income-receiving corporation, and the requirements in the township leases themselves ensure the corporation must use the funds for collective rather than individual benefit. For example, at Gunyangara the objects of the new corporation prevent the distribution of any income to individual members, and the terms of the township lease require that the corporation use rental income for economic and community development purposes. All the community-entity township leases, and the 2017 variation to the Wurrumiyanga lease,[87] state that rental income must be used for economic and community development purposes.

Clearly, the treatment of rent from leases is evolving. The constraints regarding the use of rent in the more recent township leases have been negotiated with the land councils and consented to by traditional owners. This indicates a desire to invest in community and economic development, and an awareness that individual distributions sometimes fail to achieve maximum benefits and can cause conflict. It also indicates that the *source* of the income, in this case from within remote communities, is a factor in the distribution decisions made by traditional owners. These negotiated and agreed constraints, along with the land councils' actions to promote community development outcomes, represent contemporary agreed attempts to direct the use of rent towards economic, cultural, and social outcomes at a collective rather than individual level.

Conclusion

This paper argues that the leasing reforms considered here represent a significant reform to the land rights system in the NT because they have such widespread application; are intergenerational in nature; and impact on the governance of the land rights system and remote communities. The reforms have reinforced the strong role of government inside communities but, unsurprisingly, done little to attract new investment or stimulate local economies. Indeed, as discussed in this paper, the cost of doing business on Aboriginal land has increased. Nor have the tenure reforms progressed the initial Australian Government agenda of individualisation in home ownership or business development, with most leases being held by organisations or agencies not individuals. Tenure reform alone was never going to transform remote economies, however, there are some positive outcomes from leasing. Occupiers arguably have a higher level of certainty than before 2007 and there is greater clarity about responsibilities for infrastructure maintenance and insurance. The property rights of traditional owners inside remote communities have been formally recognised. The payment of rent has brought

[82] This figure includes rent from the five-year leases as well as s.19 leases in communities on ALRA land and leases on CLAs.
[83] See Jagger (2011).
[84] See Campbell & Hunt (2013); Hunt & Campbell (2015, 2016).
[85] ALRA s. 19A(6) prevents a township lease from making provision for the lessee to make a payment to a person other than the lessor.
[86] ALRA s. 35 (4B).
[87] Department of the Attorney-General and Justice Land Titles Office (2017, clause 5.3).

a significant new income stream for traditional owners. In central Australia alone there are now thousands of leases inside remote communities generating around $2 million annually in rent for Aboriginal landowners, and a strong commitment to maximising collective community benefits from these increased rent monies.

A core aspect of governance, and indeed the foundation of the exercise of Aboriginal self-determination, is the right to exercise genuine decision-making authority. So, the question of who has control over making decisions about the scope of negotiations and agreed tenure reform options is relevant here. These reforms were government-initiated, and implementation was characterised by the interventionist and, at times, coercive approach taken by the Australian Government (Dodson, 2007, p. 23). Successive Australian Governments perpetuated a sense that reform was necessary, indeed urgent, without providing clear objectives, a coherent policy framework or clear and accurate reform terminology. The land tenure reform debate was more 'divisive and ideological' (Terrill, 2016a, p. 50) than necessary, and the reform process failed to include the voices of Aboriginal landowners. Government also exercised power through the strategic use of inducements to drive implementation of their preferred township leasing model. The offer of a 'community benefit package', including funding for economic development initiatives[88] was a significant incentive that was not available to those consenting to s. 19 leases. The use of these incentives, and the policy of withholding infrastructure funding unless leases were in place, exposed the Australian Government to accusations of bullying[89] and 'blackmail' (CLC, 2010, p. 3). Brennan correctly observed that given the level of disadvantage in remote communities 'financial leverage can take the place of legal compulsion' (2006, p. 16).[90] The process of developing and implementing these land tenure reforms resulted in Aboriginal people in the CLC region viewing land tenure reform as a tool for government not a tool for Aboriginal landowners.

Negotiations relating to community-entity township leases since around 2015 have, however, been more Aboriginal-led and collaborative. They were initiated by land council and other Aboriginal interests. This collaborative approach remains in place today and the current period is one of relative calm, with less political interference than has characterised the previous decade. There continues to be support and incentives available for traditional owners and communities wishing to explore the community-entity township leasing option. The requirement for s. 19 leases over new infrastructure remains in place, and after more than ten years is now an accepted part of the funding, infrastructure development and planning dynamic within remote communities. The concept of leasing is significantly less controversial than it was. Indeed, traditional owners have become accustomed to the process and to receiving rent from leasing, while third parties have accepted the need to pay rent. All three institutions – land councils, the EDTL and new community lease holding corporations – promote leasing (or subleasing) as a requirement for constructing or occupying infrastructure on Aboriginal land. This is unlikely to change.

The governance focus in this paper helps to highlight the social, cultural and developmental impacts of the leasing reforms. While the primacy of traditional owners has been the heart of the ALRA since 1976, the practical assertion of this role *inside* remote residential communities has changed over time. Before 2007 informal arrangements operating inside remote communities did not require traditional owner consent to land-use decisions, leaving room for traditional owners in communities to negotiate their role with other community residents. Non-resident traditional owners were generally not involved. This system was by no means perfect, with some traditional owners struggling to have their role recognised, and in other cases, residents feeling disenfranchised. But it did, at least, allow a social space for people and groups to discuss, negotiate and manoeuvre – a process much more akin to Aboriginal cultural modes of coming to collective decisions. The leasing reforms have formalised community land-use decision making processes. In some instances, the

[88] For example, Gunyangara received a $2.5 million Economic Development Fund and a $5.3 million employee housing project (Scullion, 2017).
[89] In 2006, the Thamarrurr Council accused Minister Brough of attempting to 'bully' the community of Wadeye into signing a 99-year township lease (Australian Broadcasting Corporation, 2006).
[90] See Tilmouth (2007) for an account of the negotiation process for leasing in the Alice Springs town camps.

process of formalisation has exacerbated internal tensions in communities between traditional owners and other residents. In many instances, the authority of traditional owners – especially in respect to their direct decision-making powers – has been substantially modified. As Terrill (2016a, p. 47) notes, tenure formalisation

> *is never just a change of form… Particularly on a tenure system that includes customary elements, formal property rights will usually be more exclusive and defined than the informal rights they replace.*

This has certainly been the case in the NT.

In addition to these impacts on the authority to speak for land, the reforms have also resulted in the establishment of two new land rights institutional forms that now operate alongside the existing four land councils. All institutions can access the ABA for operating expenses, and each provides varied mechanisms for Aboriginal land governance. Each achieves different outcomes for the balance between traditional owners and residents, and between Aboriginal people and the Australian Government. These governance models are relatively new and unfolding, particularly the model offered by community-entity township leasing. Pertinent to this discussion are questions of choice and flexibility, as different communities and groups of traditional owners will value different structural forms and have different aspirations, including for local autonomy. The emerging new models of community-entity township leasing may provide an option that suits the dynamics of some communities.

Throughout CAEPR's first 30 years, it has produced significant work on the NT Aboriginal land rights system. This paper at the 30-year mark, revisits some of that work in the light of leasing reforms since 2006. The land tenure reforms of the last 15 years cannot be undone, but their impacts can be carefully evaluated, and future reforms contemplated by Aboriginal people themselves. Ultimately, these reforms of the ALRA must be assessed in terms of the extent to which they undermine or support the Aboriginal exercise of their statutory cultural and political rights and interests in land; that is, their governance. Any future reform of Aboriginal land tenure arrangements should be Aboriginal-led and designed to uphold the integrity of the land rights system, and the customary laws which underpin it, and progress the aspirations and priorities of those who own and live on that land.

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CONTACT US

Centre for Aboriginal Economic Policy Research
Research School of Social Sciences
ANU College of Arts & Social Sciences

Copland Building #24
The Australian National University
Canberra ACT 0200
Australia

T +61 2 6125 0587
W caepr.cass.anu.edu.au

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