

Chapter 4:

Indigenous land tenure reform

.....

4.1 Introduction

During the reporting period, Australian governments continued to develop tenure reform policies for Indigenous land. Governments frequently describe these policies as a means of promoting home ownership and economic development on Indigenous land. The reality is not so simple.

I have previously expressed my concern with arguments that tenure reform is the key to removing impediments to economic development in communities on Indigenous land. I continue to hold this concern. Issues such as remoteness, education, health, job readiness, poor infrastructure and the failure of governments to respect Indigenous forms of ownership, including native title, are substantially more important and have a greater impact on the economic development of communities.

This Chapter reviews tenure reform programs across Australia and reveals that the focus of reforms has been on enabling governments to obtain secure tenure over Indigenous land. However, this focus on secure tenure is not about assisting Indigenous people to make use of their land – it is about governments having control over decision-making.

If the main effect of these reforms is to enable governments to implement policies that impede self-governance and decrease effective control by Indigenous peoples over their lands, then Indigenous people across Australia will feel betrayed and further alienated.

Tenure reform does not have to have this focus. If the aim of tenure reform is to provide clarity of ownership and improved opportunities for development, this can be achieved by quickening processes for the return of land to Indigenous people and supporting them to pursue their right to development. Government policies need to be flexible to accommodate different types of land ownership (for instance, communally-held native title land or freehold land granted under a land rights regime) and to support the distinct development aspirations of specific communities.

To a significant extent, tenure reform of Indigenous land is being directed by the Australian Government, both through its role in the Council of Australian Governments (COAG) and more directly in the case of the Northern Territory. Despite its central role, the Australian Government is yet to provide a clear statement that sets out the aims and parameters of its tenure reform policy and provides Indigenous people with a clearer sense of where they stand.

The purpose of this Chapter is to identify the Australian Government's approach to tenure reform and to highlight developments in the Northern Territory, Queensland, New South Wales, South Australia and Western Australia during the reporting period.

In this Chapter, I first seek to provide a clearer picture of what the Indigenous land reform policies of the Australian Government look like. I provide a number of extracts from government statements and documents and follow this with a discussion of what these mean.

Next, I describe the related policy of delivering services through priority locations. This is an important development for Indigenous communities.

The Chapter then reviews developments in relation to tenure reform in the Northern Territory, and includes an updated discussion of the Northern Territory Emergency Response and of township leasing.

I then focus on tenure reform developments in other states that are participating in the COAG process – Queensland, New South Wales, South Australia and Western Australia.

Finally, I consider the principles that should be followed in implementing any reforms to Indigenous land tenure in Australia.

4.2 Identifying a national Indigenous land reform policy

The Australian Government is yet to publish a comprehensive statement of its tenure reform policy. And yet, tenure reform is being rolled out in many places across Australia.

In this section, I piece together extracts of statements to provide a picture of what the Australian Government's tenure reform policy entails. I also review developments at the COAG level. Finally, I evaluate the features of the Government's policy.

(a) The Australian Government's policy

In 2006, the former Australian Government introduced 'township leasing' through a new s 19A in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA).

Under a s 19A lease, also known as a 'whole of township lease', all of the land in and around a community on Aboriginal land is leased to a government entity for an extended period. The government entity can then issue subleases over parts of the community.

When it was in opposition, the Labor Party expressed concerns regarding the former Coalition Government's approach to Indigenous land tenure reform. On 13 June 2007, Jenny Macklin MP (then Shadow Minister for Indigenous Affairs) told the House of Representatives that the township leasing model 'removed direct control by traditional owners over development on township land'. She went on to say:

The government is arguing that land rights have not delivered economic outcomes, and is therefore seeking to construct a Hobson's choice for Indigenous people.

Choose between your rights to land and your rights to economic development. I do not believe that it is beyond the wit of traditional owners and the government to devise land tenure arrangements which streamline transaction costs without fundamentally undermining Indigenous ownership and control of their land.¹

1 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 June 2007, p 92 (The Hon Jenny Macklin MP, Shadow Minister for Indigenous Affairs). At <http://www.aph.gov.au/hansard/rep/dailys/dr120607.pdf> (viewed 6 September 2009).

Yet, when Jenny Macklin made her first address to the National Press Club as Minister for Families, Housing, Community Services and Indigenous Affairs on 27 February 2008, she said that she considers ‘there are many advantages to whole of township leases’.²

The Minister also told the Press Club that her government had a policy of requiring appropriate security for new housing investment in Indigenous communities across Australia. The Minister explained that this means a lease or other arrangement that:

- ensures clarity of ownership and responsibility for assets
- delivers the effective provision and management of public or community housing
- ensures tenants are required to look after their houses and be held to public tenancy requirements
- encourages and facilitates private sector investment to expand the housing asset base and to encourage private home ownership.³

This speech signalled the new Labor Government’s intention to continue to implement the secure tenure policy that had been taking form under the Howard Government.

The first application of this policy by the new Government was in relation to the Strategic Indigenous Housing and Infrastructure Program (SIHIP), which was announced on 21 April 2008.⁴ Under SIHIP, the Australian Government agreed to contribute \$547 million over four years toward Indigenous housing in the Northern Territory.

Sixteen communities were selected for new housing, on the condition that there was a grant of secure tenure to the government. As the Minister stated:

Security of tenure will be a key element in allocating this funding. Communities receiving capital works under this program will need to enter into a lease for a period of time appropriate to the life of the capital works being funded.⁵

The Minister stated the reasons for this being:

In the past, the absence of secure tenure has meant inferior repairs and maintenance which, exacerbated by overcrowding, has led to houses becoming run down and unliveable.⁶

2 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Closing the Gap – Building an Indigenous Future* (Speech delivered to the National Press Club, Canberra, 27 February 2008). At http://www.jennymacklin.fahcsia.gov.au/Internet/jennymacklin.nsf/content/closing_the_gap_27feb08.htm (viewed 23 October 2009).

3 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Closing the Gap – Building an Indigenous Future* (Speech delivered to the National Press Club, Canberra, 27 February 2008). At http://www.jennymacklin.fahcsia.gov.au/Internet/jennymacklin.nsf/content/closing_the_gap_27feb08.htm (viewed 23 October 2009).

4 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), P Henderson (Northern Territory Chief Minister) & W Snowdon (Member for Lingiari), ‘Landmark Housing Project for NT Indigenous Communities’ (Media Release, 12 April 2008). At http://www.jennymacklin.fahcsia.gov.au/Internet/jennymacklin.nsf/content/landmark_housing_12april08.htm (viewed 7 September 2009).

5 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), P Henderson (Northern Territory Chief Minister) & W Snowdon (Member for Lingiari), ‘Landmark Housing Project for NT Indigenous Communities’ (Media Release, 12 April 2008). At http://www.jennymacklin.fahcsia.gov.au/Internet/jennymacklin.nsf/content/landmark_housing_12april08.htm (viewed 7 September 2009).

6 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), ‘SIHIP upgrades underway in the Territory’ (Media Release, 3 July 2009).

On 26 February 2009, the Prime Minister delivered the Government's 'Closing the Gap Report' to Parliament. He spoke about the Government's commitment to remote Indigenous housing, and said:

This includes making funding for communities conditional on the reform of land tenure arrangements that obstruct new housing investment. Only with clear, well-functioning tenure arrangements will government agencies, housing authorities and private businesses make substantial housing investments in remote communities. We are driving an aggressive land tenure reform agenda, which is necessary to underpin sustainable tenancy management, give tenants the assurance that routine repairs and maintenance will be carried out and lay the foundations for economic development in remote communities.

For the first time, remote Indigenous citizens will have access to mainstream housing arrangements that public housing tenants in cities and towns take for granted. And, over time, remote Indigenous citizens will have a realistic opportunity to own their own homes. In return, Indigenous tenants – like all public housing tenants – will be expected to pay rent on time, to cover the cost of any damage and to not disturb the peace of their neighbours.

- If people fail to pay their rent, action will be taken to deduct it from their accounts automatically as a condition of remaining.
- People who damage their homes will be made to cover the cost of any damage and be required to enter into acceptable behaviour agreements.
- People who allow unacceptable behaviours to occur on their premises will be subject to further action including orders by the Commissioner for Tenancies.
- And people who wilfully fail to meet these commitments will face eviction.⁷

In this speech, and on a number of other occasions, the Australian Government has referred to the issues of tenure reform and secure tenure at the same time. In this case, Prime Minister Rudd raised these issues together also with housing management reform. While this can make it appear that secure tenure and tenure reform policies are the same thing, or have the same aims, this is often not the case. In the event of a conflict between the aims of the two policies, the practice of the Australian Government has been to give preference to the aims of secure tenure. I describe this further below.

In two key speeches in 2009, the Minister for Families, Housing, Community Services and Indigenous Affairs has provided further information about the Australian Government's approach to Indigenous land tenure. In a speech to the NSW Aboriginal Land Council on 5 March 2009, the Minister said:

Over the past year the Government has worked on two parallel paths:

First, we are working to establish the policy foundations required in relation to land tenure and housing reform; and second, we have made unprecedented financial commitments directed to changing the face of Indigenous housing across the nation within a decade. ...

At the heart of Government policy is our respect for cultural connections to land and our respect for communal and traditional land holding systems. This is non-negotiable.

Within that non-negotiable framework, we want to work with Aboriginal people to also provide the secure tenure needed to attract government and commercial investment, to enable better service delivery and facilities, and to drive economic development. ...

⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 February 2009, p 2031 (The Hon K Rudd, Prime Minister). At <http://www.aph.gov.au/Hansard/rep/dailys/dr260209.pdf> (viewed 23 October 2009).

But housing on Aboriginal land has never been put on that secure footing. The consequences of this can be seen across the country. Houses that are unliveable because no-one takes responsibility for repairs and maintenance.

The absence of any incentive to collect the rent to help pay for repairs and maintenance. Poor tenancy management where overcrowding isn't checked and routine inspections are irregular or even non-existent. All conditions which have contributed to a general reluctance to invest in housing.

With secure tenure arrangements in place government is accountable for the ongoing condition and maintenance of public housing. Secure tenure firmly places the responsibility at the feet of each housing authority or community housing organisation to provide a decent level of housing service just as mainstream public housing providers must do in the city.

To put it simply, this is not about taking land away from Aboriginal communities; it's about making sure housing providers do their job.

I have recently written to the New South Wales Housing Minister and to housing ministers elsewhere in Australia to set out the secure tenure requirements which will underpin our major COAG investment.

There are three requirements.

First, the government must have long term control over and access to public housing – and therefore responsibility – subject to the privacy of tenants. Governments will be able delegate this control and responsibility to community housing organisations which have the capacity to manage housing assets at public housing standards.

Second, we must be able to put housing management reforms into place – better repairs and maintenance and ordinary tenancy agreements which protect tenants and clarify responsibilities.

And third, any native title issues need to be resolved to ensure that construction and refurbishment can proceed as quickly as possible.⁸

These three requirements relate to the two COAG agreements which are discussed in the next section. In relation to the negotiation of leases, the Minister said:

This approach means that governments must treat Aboriginal land owners like any other land owners. If we want to build public housing on your land, we must negotiate a lease to do it. And you have the opportunity to negotiate the terms of those leases including boundaries, the restriction of development in special places and to require that any new investment proceeds in places where a lease has been agreed.⁹

It is misleading to suggest that all terms of a lease are open for negotiation. The Australian Government has imposed clear rules about what it will allow a lease to contain, and in the case of township leases some of those rules are contained in s 19A of the ALRA itself. As I will discuss further in this Chapter, the Australian Government will not pay rent for housing leases and has refused to recognise local Indigenous decision-making authority in the terms of leases.

8 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Address to the NSW Aboriginal Land Council* (Speech to the NSW Aboriginal Land Council, Cessnock, 5 March 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/aboriginal_land_council_5mar09.htm (viewed 7 September 2009).

9 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Address to the NSW Aboriginal Land Council* (Speech to the NSW Aboriginal Land Council, Cessnock, 5 March 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/aboriginal_land_council_5mar09.htm (viewed 7 September 2009).

Indigenous communities are in desperate need of housing.¹⁰ As the provision of housing is conditional upon agreeing to a lease, Indigenous land owners may be negotiating at a disadvantage and under duress.

The Minister also went on to refer to the possibility of home ownership:

We recognise that home ownership can bring important social and economic benefits. Greater financial security. Greater independence. A more stable environment for raising children. And greater confidence in engaging with the employment market.

One of the advantages of moving to put secure tenure arrangements in place on land council land is that home ownership will become an option for those tenants who wish to move in that direction.¹¹

In a further speech on 21 April 2009, the Minister referred to the Australian Government's total funding commitment for remote Indigenous housing of \$5.5 billion over ten years. The Minister made further statements in relation to the reasons for the Australian Government's secure tenure policy:

As a pre-condition to new housing investment, the Commonwealth requires security of tenure. This is essential to protect assets and establish with absolute clarity who is responsible for tenancy management and ongoing repairs and maintenance.

In the past, the absence of secure, long-term tenure has meant inferior repairs and maintenance which, exacerbated by overcrowding, has meant houses become unliveable well before they should.

Over the past year, the Government has resolutely pursued long overdue reforms to put security of tenure at the centre of Indigenous housing policy – in exactly the same way that it underpins the private and social housing markets around the country.

We are working closely with Indigenous interests and traditional owners, recognising that differing circumstances across jurisdictions will require different pathways forward in different places. ...

The length of the leases varies. ... Essentially we are looking for leases that reflect the life of the asset we are building.¹²

The length of leases has varied, although this does not appear to be connected to the life of the asset. One of the aims of the National Partnership Agreement on Remote Indigenous Housing (the Remote Indigenous Housing Agreement), discussed in the next section, is to '[increase] the life cycle of remote Indigenous housing from seven years to a public housing-like lifecycle of up to 30 years'.¹³ The Australian Government has said that it requires a lease of at least 40 years for new housing under that agreement.

10 See Human Rights and Equal Opportunity Commission, *Submission of the Human Rights and Equal Opportunity Commission (HREOC) to the Green Paper on Homelessness – Which Way Home?* (4 July 2008), pp 23–25. At http://www.humanrights.gov.au/legal/submissions/2008/20080704_homelessness.pdf (viewed 7 September 2009). For an analysis of the Indigenous housing need across Australia, see also N Biddle, *The Scale and Composition of Indigenous Housing Need, 2001–06*, Centre for Aboriginal Economic Policy Research, CAEPR Working Paper No. 47/2008 (2008). At <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP47.pdf> (viewed 11 November 2009).

11 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Address to the NSW Aboriginal Land Council* (Speech to the NSW Aboriginal Land Council, Cessnock, 5 March 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/aboriginal_land_council_5mar09.htm (viewed 7 September 2009).

12 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Speech to the John Curtin Institute of Public Policy* (Speech delivered to the John Curtin Institute of Public Policy, Perth, 21 April 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/john_curtis_21april09.htm (viewed 7 September 2009).

13 Council of Australian Governments, *National Partnership Agreement on Remote Indigenous Housing*, cl 13(c). At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_indigenous_housing.pdf (viewed 7 September 2009).

(b) COAG reform processes

The Australian Government is also implementing its Indigenous land tenure policies through its role in COAG.

Following the November 2008 meeting of COAG, the Australian governments entered into a number of National Partnership Agreements in relation to remote Indigenous communities. Two of these agreements refer to Indigenous land tenure – the National Partnership Agreement on Remote Service Delivery (the Remote Service Delivery Agreement)¹⁴ and the Remote Indigenous Housing Agreement.

(i) National Partnership Agreement on Remote Service Delivery

The Remote Service Delivery Agreement concerns the development of coordinated service delivery in select communities. One important aspect of this agreement is its reference to 26 priority communities, which I discuss in section 4.3 of this Chapter.

The Remote Service Delivery Agreement refers to Indigenous land tenure in two contexts. Firstly, it states that the objectives and outcomes of the Agreement will be achieved by ‘changes to land tenure and administration to enable the development of commercial properties and service hubs’.¹⁵

The Agreement states that delivering ‘the land tenure component’ is the responsibility of each of the states.¹⁶

The second reference to tenure is in relation to the ‘national principles for investments in remote locations’. These principles relate to decisions about which communities will receive government investment. Included in the principles is a statement that:

priority for enhanced infrastructure support and service provision should be to larger and more economically sustainable communities where secure land tenure exists, allowing for services outreach to and access by smaller surrounding communities.¹⁷

The Agreement does not clarify what ‘changes to land tenure’ and ‘secure land tenure’ means. I asked for further information about this, and was advised that these references are connected to the Australian Government’s three requirements for secure tenure, which I describe in the next section.¹⁸ Those requirements relate only to providing secure tenure for governments, rather than implementing tenure reform.

14 Council of Australian Governments, *National Partnership Agreement on Remote Service Delivery*. At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_service_delivery_with_amended_schedule.pdf (viewed 7 September 2009).

15 Council of Australian Governments, *National Partnership Agreement on Remote Service Delivery*, cl 17(l). At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_service_delivery_with_amended_schedule.pdf (viewed 7 September 2009).

16 Council of Australian Governments, *National Partnership Agreement on Remote Service Delivery*, cl 20(d). At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_service_delivery_with_amended_schedule.pdf (viewed 7 September 2009).

17 Council of Australian Governments, *National Partnership Agreement on Remote Service Delivery*, sch A. At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_service_delivery_with_amended_schedule.pdf (viewed 7 September 2009).

18 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 August 2009.

The Minister for Families, Housing, Community Services and Indigenous Affairs has said that another aim of the reforms is to provide 'greater economic opportunities (business investment and home ownership) as a result of resolution of land tenure and land administration issues'.¹⁹

(ii) *National Partnership Agreement on Remote Indigenous Housing*

Under the Remote Indigenous Housing Agreement, the Australian Government has committed to provide a total of \$4.75 billion over a ten-year period for the states and the Northern Territory to deliver improved remote Indigenous housing.²⁰

One of the outputs that the Agreement seeks to achieve is:

[the] progressive resolution of land tenure on remote community-titled land in order to secure government and commercial investment, economic development opportunities and home ownership possibilities in economically sustainable communities.²¹

As with the Remote Service Delivery Agreement, tenure reform under the Remote Housing Agreement is the obligation of the states, who have responsibility for:

developing and implementing land tenure arrangements to facilitate effective asset management, essential services and economic development opportunities.²²

The obligation of the Australian Government to provide the housing funding is expressed as being 'conditional on secure land tenure being settled'.²³

The Minister has since written to each of the state ministers responsible for housing advising them of three key requirements that determine whether secure land tenure has been settled:

1. The government must have access to and control of the land on which construction will proceed for a minimum period of 40 years. A longer period has additional advantages.
2. Tenure arrangements must support the implementation of tenancy management reforms including the issue of individual tenancy management agreements between the state housing authority and the tenant without requiring further consent from the underlying land owner. This capacity must also permit replacement of the housing service provider if required.
3. Native title issues must also have been resolved, in that any applicable process required by the Native Title Act has been conducted.²⁴

19 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), '\$1.3 billion towards closing the gap' (Media Release, 12 May 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/1.3billion_closing_gap_12may2009.htm (viewed 7 September 2009).

20 Council of Australian Governments, *National Partnership Agreement on Remote Indigenous Housing*. At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_indigenous_housing.pdf (viewed 7 September 2009).

21 Council of Australian Governments, *National Partnership Agreement on Remote Indigenous Housing*, cl 13(g). At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_indigenous_housing.pdf (viewed 7 September 2009).

22 Council of Australian Governments, *National Partnership Agreement on Remote Indigenous Housing*, cl 16(c). At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_indigenous_housing.pdf (viewed 7 September 2009).

23 Council of Australian Governments, *National Partnership Agreement on Remote Indigenous Housing*, cl 15(a). At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_indigenous_housing.pdf (viewed 7 September 2009).

24 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 August 2009.

These three requirements are important. State governments have been making changes to their laws in order to be able to comply with these requirements.

(c) Assessing the elements of the Australian Government's policy

Although there is no comprehensive federal policy document on tenure reform, several themes have emerged from government statements, including:

- the relationship between tenure reform and obtaining secure tenure
- clarity of ownership of land and infrastructure
- providing clear housing management relationships
- encouraging public sector investment
- encouraging private sector investment
- encouraging private home ownership
- the negotiation of leases on Aboriginal land
- resolving native title issues.

I consider these aspects of the Australian Government's approach to tenure reform below.

(i) The relationship between tenure reform and obtaining secure tenure

It is important to make clear the distinction between tenure reform and secure tenure policies.

The term 'tenure reform' generally refers to changing the way in which land is owned or how interests in land (such as leases) can be granted. This can be done in a number of ways. While there is some confusion about the aims of Indigenous land tenure reform, a common theme is the aim of making it easier for Indigenous land owners to make use, including commercial use, of their land.

On the other hand, references to obtaining 'secure tenure' in statements of the current Australian Government are concerned with providing governments with some form of secure interest over land and infrastructure, often in the form of a lease. The main aim of secure tenure policies is to provide governments with authority and control, often at the expense of the Indigenous owners.

At times there is an overlap between tenure reform and secure tenure, such as when reforms to land tenure make it easier to grant a lease to the government.

This does not mean that the two policies are complementary, and at times, the aims are in conflict. There are a number of examples of this, such as the five-year leases in the Northern Territory. These leases provide the Australian Government with control over land use decision-making in communities, but inhibit the ability of Aboriginal land owners to make use of their land.

At times references by governments to Indigenous land tenure blur the distinction between the two policies. This can give the impression that by obtaining secure tenure, governments will be helping Indigenous land owners to make better use of their land.

While the Australian Government appears to have both a tenure reform policy and a secure tenure policy, it is clear that its main focus has been obtaining secure tenure. Where tenure reform has been introduced, it is mostly being used as a mechanism for the Government to obtain secure tenure.

(ii) *Clarity of ownership of land and infrastructure*

There is also a difference between providing clarity of ownership and providing governments with clear ownership.

Many parties have a legal interest in Indigenous peoples' lands. There can be confusion about rights and responsibilities of each party and uncertainty about how decisions should be made. Providing clarity of ownership can be a legitimate aim of tenure reform. It can be done in a number of ways.

There is a history across Australia of governments relying on informal title when providing infrastructure in Indigenous communities – that is, they have frequently built infrastructure without obtaining a lease or other type of formal permission. There is also a history of governments failing to provide the planning and survey work required to clarify the rights of occupants of individual blocks. In both cases, the main reason that this was done was to save money or to make limited funding go further.

For example, in the Northern Territory, governments have rarely made provision for leases when installing infrastructure (such as schools, police stations, administrative centres, sewerage ponds or social housing) in communities on Aboriginal land. By instead relying on informal arrangements, they have avoided the costs of obtaining surveys, negotiating and administering land use agreements and even paying rent.²⁵

While this has enabled governments to provide infrastructure more cheaply, it has also meant that some of the things that are normally dealt with in a lease – such as the rights of the occupier and a description of each parties' responsibilities – are now unclear.

Reforms to rectify this and improve clarity of ownership and the rights and responsibilities of each party must not be unilaterally imposed or result in the devaluing of Indigenous land. In particular, such reforms should not simply result in the transfer of land, or decision-making about land, to governments. I continue to hold the view that the current Minister for Families, Housing, Community Services and Indigenous Affairs previously expressed, that it is not 'beyond the wit of traditional owners and the government to devise land tenure arrangements which streamline transactions costs without fundamentally undermining Indigenous ownership and control of their land'.²⁶

A reform process should instead aim to provide long-term clarity through changes that deliver improved Indigenous land ownership, support the development of local governance and allow communities to meet their development needs. This requires consultation and negotiation at the local level, rather than bilateral consultation at the COAG level.

(iii) *Providing clear housing management arrangements*

In addition to providing a significant amount of funding for new housing and housing upgrades, the Australian Government is also pursuing reform of remote Indigenous housing management.

25 See M C Dillon & N D Westbury, *Beyond Humbug: Transforming government engagement with Indigenous Australia* (2007), p 131.

26 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 June 2007, pp 92–93 (The Hon Jenny Macklin MP, Shadow Minister for Indigenous Affairs). At <http://www.aph.gov.au/Hansard/reps/dailys/dr120607.pdf> (viewed 23 October 2009).

This housing management reform is being implemented through its secure tenure policy. By obtaining long-term leases over housing areas, governments will have long-term control over housing-related decision-making and responsibility for its management of housing.

As I have said, this is not tenure reform, although tenure reforms have been introduced to enable some states, such as Western Australia and Queensland, to comply with the Australian Government's requirements.

The housing reform policies of the Australian Government promote the extension of mainstream public housing to remote Indigenous communities. This policy rests on an assumption that public housing will deliver better outcomes in all remote Indigenous settings. This runs contrary to the Government's general housing reform policy for non-Indigenous communities. In relation to its general housing policy, the Minister for Families, Housing, Community Services and Indigenous Affairs said:

In 2007, community housing organisations held 34,700 properties nationally. This compares with 340,000 held by public housing authorities.

For the most part, community housing organisations are relatively small organisations that manage properties but do not own them.

There are about 1,000 providers nationally – some managing as few as 10 properties – others who themselves have developed and own over 1,000 properties.

Overall, they are very good at tenancy management. Often they have lower rates of rental arrears and better track records at maintenance than state housing authorities.

...

The centrepiece of the Government's reform agenda is to facilitate the growth of a number of sophisticated not for profit housing organisations that will operate alongside existing state-run housing authorities.²⁷

While the Australian Government's general housing reforms support the growth of community housing organisations, its Indigenous housing reforms promote management by state-run, public housing authorities.

Providing clear management arrangements should not necessarily mean providing clear government management arrangements. While some communities welcome the government taking more responsibility for the delivery of housing, others are concerned that public housing authorities have failed to deliver for Indigenous people and believe a community housing organisation can better meet their needs.

I discuss this further in section 4.4(a)(iii) of this Chapter.

(iv) *Encouraging public sector investment*

The Australian Government has stated that one of the reasons for tenure reform is to 'provide the secure tenure needed to attract government and commercial investment'.²⁸

27 T Plibersek (Minister for Housing), *Room for more: boosting providers of social housing* (Speech to the Sydney Institute, Sydney, 19 March 2009). At http://www.tanyaplibersek.fahcsia.gov.au/internet/tanyaplibersek.nsf/content/social_housing_19mar09.htm (viewed 23 October 2009).

28 See, for example, J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Address to the NSW Aboriginal Land Council* (Speech to the NSW Aboriginal Land Council, Cessnock, 5 March 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/aboriginal_land_council_5mar09.htm (viewed 7 September 2009).

Secure tenure does not of itself attract government investment. Government policies may prevent investment where certain tenure requirements are not met, but this is at the discretion of governments. There can be benefits in governments providing for clear and secure tenure arrangements. However, the imposition of policies that require secure tenure for the provision of government services can impede effective service delivery.

Government policies should target investment at those locations where it can do the most good. This is determined by the level of need and the effectiveness of programs. While the Australian Government has committed itself to an evidence based approach to policy implementation,²⁹ there is no evidence that secure land tenure for governments is a key determinant of the effectiveness of programs. Making secure tenure a precondition elevates this above other factors that will determine whether or not a program will be successful.

This does not mean that governments should not pursue policies to resolve problems with tenure where they exist. However, this should not result in delays in providing government investment. Government investment should instead be determined by strategies that reduce Indigenous disadvantage in the shortest possible time frame, in accordance with the *Close the Gap* principles.³⁰ That is, a human rights-based approach to development.³¹

In section 4.5(a) of this Chapter, I describe how the Australian Government's secure tenure policy is being implemented in Queensland. In my view, this policy has diverted attention from long-term tenure reform to finding ways to comply with the Australian Government's requirements. The Australian Government and state governments should instead be providing increased support for programs that lead to long-term resolution of tenure and native title.

Linking government investment to tenure reform can also create confusion and resentment at a community level. Rather than having the opportunity to be proactively involved in fixing any problems, Indigenous communities are instead presented with a set of requirements that they must comply with in order to receive services.

In some circumstances, these requirements relate not just to the land on which the service will be delivered, but also to other areas of land. The rules for new housing under the SIHIP in the Northern Territory are an example of this. The Australian Government requires a lease over not just the new housing areas, but over all housing, including existing and proposed housing areas, or over the entire community.³²

As the Director of the Central Land Council, David Ross, has stated, the Australian Government's lease requirements have created confusion in central Australian communities, who feel pressured into agreeing to the leases.³³

29 See, for example, J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Macklin Meets Northern Territory Emergency Taskforce' (Media Release, 17 January 2008). At http://www.jennymacklin.fahcsia.gov.au/Internet/jennymacklin.nsf/content/ntetaskforce_17jan08.htm (viewed 7 September 2009).

30 *Close the Gap Statement of Intent* (signed at the Indigenous Health Equality Summit, Canberra, 20 March 2008). At www.humanrights.gov.au/social_justice/health/statement_intent.html (viewed 3 November 2009).

31 *United Nations Declaration on the Right to Development*, GA Resolution 41/128 (Annex), UN Doc A/RES/41/128 (1986). At <http://www.un.org/documents/ga/res/41/a41r128.htm> (viewed 30 October 2009).

32 For further detail, see section 4.4(c) of this Chapter.

33 Central Land Council, 'Community confusion over leases' (Media Release, 5 June 2009). At <http://www.clc.org.au/Media/releases/2009/hermannsburg.html> (viewed 7 September 2009).

(v) *Encouraging private sector investment*

One of the main reasons for tenure reform is to make Indigenous land available to attract ‘commercial investment’, including ‘private sector investment to expand the housing asset base’.³⁴

I support improved economic opportunities for Indigenous people. However, in my view, it has not always been clearly explained how tenure reform will be used to deliver economic development. Clear information must be provided about the exact nature of proposed reforms, and how they will attract commercial investment, before Indigenous communities and landowners are asked to agree to them.

An effective way of giving Indigenous people more opportunities for economic development is to provide them with improved forms of Indigenous land ownership, particularly in those parts of Australia where Indigenous land is held under inferior forms of title. Yet, this approach is not reflected in tenure reform policies.

The Australian Government first implemented its tenure reform policies in the Northern Territory, initially through township leases and then as part of the Northern Territory Emergency Response. Previously, Aboriginal land in the Northern Territory was one of the most secure forms of Indigenous land ownership in Australia. The result of the Government’s reforms has been to weaken that security.

While five-year leases are a clear example of this, I am also concerned about the impact of township leases. As the Northern Land Council said in its submission to the Senate inquiry into the legislation which introduced township leasing, ‘traditional owners are expected to forgo their right to engage in commercial development over large areas of vacant land for 99 years’.³⁵ I share the Land Council’s concerns, and do not accept that opportunities to attract commercial investment are improved by bringing land under the control of a government entity.

I have also previously said that one of the key factors that determines whether an economic development project will be successful is whether there is Indigenous control over decision-making.³⁶ I support reforms to land tenure that deliver improved forms of Indigenous land ownership and improved control over decision-making.

However, it is not true that all tenure reform will deliver improved economic opportunities for Indigenous people. For example, the long-term legacy of tenure reform may be negative if it results in commercially valuable areas of Indigenous land being effectively sold off.

Reforms to land tenure for the purpose of attracting commercial investment will be experienced differently by diverse Indigenous communities across Australia. I would like to see Indigenous communities provided with clear information about how particular reforms will operate before they are called upon to engage in those reforms. Principles for engagement and consultation are set out in Appendix 3 to this Report.

34 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Closing the Gap – Building an Indigenous Future* (Speech delivered to the National Press Club, Canberra, 27 February 2008). At http://www.jennymacklin.fahcsia.gov.au/Internet/jennymacklin.nsf/content/closing_the_gap_27feb08.htm (viewed 23 October 2009).

35 Northern Land Council, *Submission to Senate Community Affairs Committee Inquiry into Aboriginal Land Rights (Northern Territory) Amendment Bill 2006* (21 July 2006), p 13. At http://www.aph.gov.au/senate/committee/clac_ctte/completed_inquiries/2004-07/aborig_land_rights/submissions/sub13.pdf (viewed 7 September 2009).

36 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), ch 2. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/index.html (viewed 29 October 2009).

(vi) *Encouraging private home ownership*

In 2006, the former Minister for Indigenous Affairs, Mal Brough, stated that reforms to Aboriginal land tenure in the Northern Territory to introduce township leasing would 'allow Aboriginal Australians in parts of the Northern Territory who have been denied rights for many years to be able to own their own home'.³⁷

The current Government has been more considered in its references to home ownership, saying instead that as a result of tenure reform 'over time, remote Indigenous citizens will have a realistic opportunity to own their own homes'.³⁸

As many Australians know, there can be significant benefits in home ownership. The Minister for Families, Housing, Community Services and Indigenous Affairs has recognised:

that home ownership can bring important social and economic benefits. Greater financial security. Greater independence. A more stable environment for raising children. And greater confidence in engaging with the employment market.

One of the advantages of moving to put secure tenure arrangements in place on land council land is that home ownership will become an option for those tenants who wish to move in that direction.³⁹

For home ownership to provide social and economic benefits, a number of things must be present. For example, the financial circumstances of the owner must support the requirements of home ownership, including the costs of providing repairs. There must be a market, and the purchase price must be appropriate to both the market and the financial circumstances of the purchaser. There must be a low risk of mortgage default. The house must be suitable for the needs of the purchaser and able to retain its value. The obligations and risks must be clearly understood and agreed upon and the scheme must be appropriate to the cultural needs of the residents.

The cost of housing construction in remote communities presents a significant challenge for any home ownership scheme. These costs have increased dramatically over the last decade.⁴⁰ While this Report was being written, the Australian Government announced that the cost of constructing houses under the SIHIP in the Northern Territory would be between \$450 000 and \$550 000 per house.⁴¹ That is well beyond the financial reach of remote Indigenous community residents and indeed of many people in other parts of Australia.

It also needs to be remembered that the existence of a housing market in remote Indigenous communities cannot be assumed.

37 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 June 2006, p 121 (The Hon Mal Brough MP, Minister for Indigenous Affairs). At http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2006-06-19/0163/hansard_frag.pdf;fileType%3Dapplication%2Fpdf (viewed 7 September 2009).

38 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 February 2009, p 2031 (The Hon K Rudd, Prime Minister). At <http://www.aph.gov.au/Hansard/rep/dailys/dr260209.pdf> (viewed 23 October 2009).

39 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Address to the NSW Aboriginal Land Council* (Speech to the NSW Aboriginal Land Council, Cessnock, 5 March 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/aboriginal_land_council_5mar09.htm (viewed 7 September 2009).

40 See A Szava et al, *The Cost of Housing in remote Indigenous Communities: Views from the Northern Territory Construction Industry* (2007). At <http://www.icat.org.au/media/Research/housing/Cost-of-housing-construction-industry-views.pdf> (viewed 7 September 2009).

41 See J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Improving Indigenous housing in the NT' (Media Release, 31 August 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/sihip_31aug09.htm (viewed 7 September 2009).

An important issue for residents in Indigenous communities is whether a housing market should be open or closed. A closed market will ensure that housing remains in local Aboriginal ownership but may mean lower prices. An open market will mean outsiders have the opportunity to buy into the community. Given that the status of Indigenous lands across Australia will vary from communally owned land to freehold and to special purpose leased land, a one-size-fits-all approach is neither appropriate nor desirable.

These, and a number of other factors, make ownership in remote Indigenous communities a complicated matter. Encouraging residents to take on home ownership, with an associated housing loan / mortgage, may put them in a vulnerable position.

Any home ownership scheme needs to have a clear set of aims. Aims can include providing economic security and independence and a greater sense of ownership.

For a scheme to be effective, the aims must be determined by the participants themselves and the rules about the scheme must be consistent with these aims. Where the aims are not realistic, or ignore certain risks, these need to be reconsidered before a scheme is implemented. Setting out the aims of a scheme will also assist in reviewing its effectiveness, so that other communities can learn about the risks and opportunities of home ownership.

In section 4.6 of this Chapter I set out some principles that should underpin the introduction of any land tenure reforms or home ownership schemes. This includes providing the community and participants with clear and appropriate information, such as economic modelling, reports on the condition of houses, financial planning and legal advice. The central principle is free, prior and informed consent, both at an individual and community level.

(vii) *The negotiation of leases on Aboriginal land*

The Minister for Families, Housing, Community Services and Indigenous Affairs has stated that the approach of the Australian Government to housing and tenure ‘means that government must treat Aboriginal land owners like any other land owners. If we want to build public housing on your land, we must negotiate a lease to do it’.⁴²

However, when the Australian Government will not provide services such as housing, education or health facilities unless a lease is granted, it is clearly in the stronger position during lease negotiations. To a significant extent, government policy determines how much is open for negotiation. The payment of rent and control of decision-making are two examples of this.

The Australian Government appears to still be developing its policy in relation to rent for leases on Indigenous land. For long-term housing leases, it has not provided for the payment of rent ‘in recognition of the significant government investment in housing set to follow’ the grant of the lease.⁴³

42 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Address to the NSW Aboriginal Land Council* (Speech to the NSW Aboriginal Land Council, Cessnock, 5 March 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/aboriginal_land_council_5mar09.htm (viewed 7 September 2009).

43 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 August 2009.

However for other leases, the Australian Government agrees that rent should be paid, and says that an important part of land reform is to see land users, including government agencies, pay for the cost of doing business on Aboriginal land as they would elsewhere in Australia.⁴⁴

I consider that Aboriginal and Torres Strait Islander land owners should have the same rights as other land owners when leasing their land to governments, including the right to receive rent.

I am aware that in many cases Aboriginal and Torres Strait Islander land owners have agreed not to charge rent for leases on their land, particularly when the lease is to a local Indigenous organisation or is for the delivery of a community service.⁴⁵ One of the problems with township leases is that it is a government entity, rather than the traditional owners, who decide whether or not organisations pay rent on subleases. And, this government entity is funded from the Northern Territory Aboriginal peoples' future fund – the Aboriginals Benefit Account.⁴⁶

In the Northern Territory, the Australian Government has also used the offer of rent to try and obtain the form of lease that it prefers, as I describe in section 4.4(c). While it will not pay rent for a housing precinct lease, the Australian Government agrees to provide an upfront rental payment as well as a community benefits package on the grant of a township lease. This does not reflect a commercial distinction, rather the use of incentives to encourage traditional owners to grant the form of lease which the Australian Government prefers.

In relation to decision-making, the Australian Government will not accept a term that requires the consent of the Indigenous land owners for certain key decisions.⁴⁷ However, this is at odds with the Government's recognition, in relation to Closing the Gap, that:

Another important aim – and the basis for any sustainable improvement – is to strengthen Indigenous leadership and governance and increase economic and social participation.⁴⁸

This aim needs to be reflected in the terms of leases, which should support local Indigenous decision-making and build Indigenous capacity for self-governance.

(viii) *Resolving native title issues*

As I have commented above, Australian governments have not always obtained formal permission when building infrastructure and have instead relied on informal title. At times, this attitude has extended to native title, with some governments not complying with the *Native Title Act 1993* (Cth) (Native Title Act), or interpreting it in such a way that it is not necessary for the government to comply with any of the Act's procedures. This attitude has often meant that the impact of any works

44 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 August 2009.

45 See, for example, Central Land Council, *Policy Paper: Communal Title and Economic Development* (2005), p 21. At http://www.clc.org.au/Media/papers/CLC_%20tenure_paper.pdf (viewed 9 November 2009).

46 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 64(4A). See also Australian Government, Office of Township Leasing, *Annual Report 2008–2009* (2009), p 13. At http://www.otl.gov.au/docs/annual_report_0809.pdf (viewed 23 November 2009).

47 See further section 4.4(b)(i), below.

48 Commonwealth Government, *Budget 2009–2010 Ministerial Statement on Closing the Gap between Indigenous and non-Indigenous Australians*. At http://www.aph.gov.au/Budget/2009-10/content/ministerial_statements/indigenous/html/ms_indigenous-03.htm (viewed 7 September 2009).

on native title, and any consequent implications for compensation or validity of the works, are uncertain.

However, the Minister for Families, Housing, Community Services and Indigenous Affairs has now stated that one requirement for Australian Government funding under the COAG agreement is that ‘any native title issues need to be resolved to ensure that construction and refurbishment can proceed as quickly as possible’.⁴⁹

There are two regimes within the native title system that governments can use to achieve resolution of native title issues as required by the Australian Government.

The Native Title Act creates the procedures for parties to reach an Indigenous Land Use Agreement (ILUA), which is an agreement between a native title group and others about the use and management of land and waters. ILUAs can be negotiated as part of a native title determination, or settled separately from a native title claim. They are flexible and can cover a wide range of topics including how native title holders can agree to a future development, how native title rights coexist with the rights of other people, access to an area, extinguishment of native title and compensation.⁵⁰ The ILUA process can already be used to negotiate for the building of houses in Indigenous communities.

However, when the ILUA process is not being utilised (usually because governments consider it to be too resource intensive and time consuming), governments turn to the future acts regime to ensure their actions comply with the Native Title Act and are valid.

The future acts regime establishes a procedural framework that parties must comply with before undertaking any activity which may affect native title.

The Native Title Act sets out different processes that apply when a party wants to undertake different types of future acts. These processes vary, from simply requiring that a native title party be notified, to requiring that negotiations be conducted with the native title party. The future acts regime also provides for other implications such as whether compensation is payable and what the long-term impact on native title will be.

However, none of the existing future acts processes apply specifically to the building of public housing in Indigenous communities, and there is confusion over whether any of the existing processes apply at all. Governments consider that this uncertainty is a factor which contributes to delays in building infrastructure.⁵¹

For this reason, the Australian Government released a discussion paper on possible amendments to the future acts regime that would insert a new process which deals specifically with building of housing, and possibly other public infrastructure, in Indigenous communities.⁵²

49 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Address to the NSW Aboriginal Land Council* (Speech to the NSW Aboriginal Land Council, Cessnock, 5 March 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/aboriginal_land_council_5mar09.htm (viewed 7 September 2009).

50 See National Native Title Tribunal, *About indigenous land use agreements*, http://www.nntt.gov.au/Indigenous-Land-Use-Agreements/Pages/About_iluas.aspx (viewed 28 October 2009).

51 Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs, *Discussion Paper: Possible housing and infrastructure native title amendments* (2009), p 4. At http://www.fahcsia.gov.au/sa/indigenous/pubs/land/Pages/NativeTitleAmendments_DiscussionPaper.aspx (viewed 7 September 2009).

52 Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs, *Discussion Paper: Possible housing and infrastructure native title amendments* (2009). At http://www.fahcsia.gov.au/sa/indigenous/pubs/land/Pages/NativeTitleAmendments_DiscussionPaper.aspx (viewed 7 September 2009). At the time of writing, consultations on the discussion paper were ongoing.

I made a submission in response to the discussion paper in which I emphasised the benefits of governments reaching ILUAs rather than applying any future acts process. These include that ILUAs can provide certainty for all parties, including certainty around future developments and the long-term relationship between the parties. An ILUA can be tailored to the circumstances of the specific community and can be holistic, covering a range of issues that the parties want to address. As ILUAs require *agreement* between the parties, not simply consultation, they are also consistent with Australia's international human rights obligations, in particular the rights affirmed by the *United Nations Declaration on the Rights of Indigenous Peoples* (Declaration on the Rights of Indigenous Peoples).⁵³

Nonetheless, the proposed new future acts process could impose greater procedural requirements than many other existing future acts processes. That is, it may require that governments undertake 'genuine consultation' as opposed to simply notify and receive comments on the proposal. Because of the requirement for 'genuine consultation', the proposal in the discussion paper could be an improvement on many of the existing future acts processes, but in any case it is not preferable to the parties reaching an ILUA.

4.3 Priority locations

The development of tenure reform policies has been accompanied by a new policy of identifying priority communities. There has been a strong connection between the two policies, particularly in relation to the 26 priority locations selected under the COAG National Partnership Agreements, but also under the Northern Territory's 'A Working Future' policy.

While the policy of identifying priority locations has not received much attention, it is a significant development, particularly for Indigenous people who do not live in or near a priority community and who wonder what will happen to services in their community over time.

On the one hand, the new policy is just a way of approaching service delivery. It utilises a 'hub and spoke' model where outreach services are delivered from identified regional centres.⁵⁴ It is not clear in all circumstances how this will work. Some services (such as housing) cannot be delivered through a hub and spoke model. Many remote communities will be hundreds of kilometres from the nearest service hub, making access difficult.

The priority location policy also represents a shift in the way in which services will be allocated. Communities that are selected as priority locations will receive a higher level of support than other communities. One anticipated outcome of the policy is the 'voluntary mobility' of individuals and families towards certain areas.⁵⁵

In this section, I describe the development of policies related to priority locations, initially in relation to housing in the Northern Territory and then more broadly.

53 GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007). At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 23 November 2009).

54 See further T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009*, Australian Human Rights Commission (2009), ch 4.

55 Council of Australian Governments, *National Partnership Agreement on Remote Service Delivery*, sch A. At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_service_delivery_with_amended_schedule.pdf (viewed 7 September 2009).

(a) The Australian Government's priority locations: Northern Territory

In September 2007, a memorandum of understanding between the Australian Government and Northern Territory Governments in relation to Indigenous housing described Indigenous communities in the Northern Territory as falling into three levels of priority.⁵⁶

First priority communities are main urban centres (including town camps) and 'larger / strategically placed growth communities'. Second priority communities are described as 'smaller communities', third priority communities as other communities and homelands.⁵⁷ Under the agreement, first priority communities will receive new housing to meet existing demand and future growth and the Australian Government would seek to negotiate township leases over the communities. Second priority communities would, for the most part, receive only repairs and upgrades with new housing provided on 'a case by case basis'. Third priority communities would receive no Australian Government funding for housing construction.

The SIHIP, which was announced by the new Australian Government on 21 April 2008, implements the principles set out in the memorandum of understanding.⁵⁸

Under SIHIP, the Australian Government has identified 73 significant Indigenous communities in the Northern Territory, being those communities which generally have a population of more than 100 people. Of these 73 communities, only 16 are eligible to receive new housing while the remaining 57 communities will receive only housing upgrades. There is no provision for those remaining communities to receive new housing, regardless of levels of housing stress. Homelands and other smaller Indigenous communities do not receive any assistance under SIHIP.

(b) COAG processes

The Australian Government is extending its focus on priority locations beyond the Northern Territory through its role in COAG, and in particular through the two National Partnership Agreements that I described in section 4.2(b).

The Remote Service Delivery Agreement describes 26 proposed locations for initial implementation of a new approach to remote Indigenous service delivery:

- a) the 15 larger major works communities in the Northern Territory already identified for significant housing and infrastructure investment under the Strategic Indigenous Housing and Infrastructure Program;⁵⁹
- b) 4 locations in the Cape York and Gulf regions in Queensland;
- c) 3 locations in Western Australia, with at least 2 locations in the Kimberley;

56 *Memorandum of understanding between the Australian Government and the Northern Territory Government: Indigenous Housing, Accommodation and Related Services September 2007* (2007). At http://www.aph.gov.au/senate/committee/indig_ctte/submissions/sub28_attachment_8.pdf (viewed 7 September 2009).

57 *Memorandum of understanding between the Australian Government and the Northern Territory Government: Indigenous Housing, Accommodation and Related Services September 2007* (2007), cl 17. At http://www.aph.gov.au/senate/committee/indig_ctte/submissions/sub28_attachment_8.pdf (viewed 7 September 2009).

58 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), P Henderson (Northern Territory Chief Minister) & W Snowdon (Member for Lingiari), 'Landmark Housing Project for NT Indigenous Communities' (Media Release, 12 April 2008). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/landmark_housing_12april08.htm (viewed 7 September 2009).

59 The SIHIP program provides for new housing in 16 select communities. However, the community of Milyakburra has been removed from this list for the purpose of the National Partnership Agreements, and the number of NT communities has been reduced to 15.

Native Title Report 2009

- d) 2 locations in the Anangu Pitjantjatjara Yankunytjatjara Lands in South Australia; and
- e) 2 remote locations in the Murdi Paaki region in Western New South Wales.⁶⁰

The communities outside of the Northern Territory were not identified at the time.

The second of these COAG agreements, the Remote Indigenous Housing Agreement, did not itself refer to the 26 priority locations. However on 23 March 2009, the Australian Government announced that 'initial housing investment' under that Agreement 'will focus on these 26 larger communities which have the potential for economic development'.⁶¹

The identity of the remaining priority locations was announced by the Minister for Families, Housing, Community Services and Indigenous Affairs in a speech on 21 April 2009:

Today I can announce the priority locations across Australia.

In Western Australia, we will implement the Remote Service Delivery Strategy in towns and communities around Fitzroy Crossing, Halls Creek and on the Dampier Peninsula, including the communities of Ardyaloon and Beagle Bay.

In the Northern Territory: Galiwinku, Gapuwiyak, Gunbalanya, Hermannsburg, Lajamanu, Maningrida, Milingimbi, Nguui, Ngukurr, Numbulwar, Wadeye, Yirrkala, Yuendumu, Angurugu and Umbakumba.

In Queensland: Mornington Island, Doomadgee, Hope Vale and Aurukun (together with continuing work in Mossman Gorge and Coen which are also part of the Cape York Welfare Reform).

In South Australia: Amata and Mimili.

And in New South Wales: Walgett and Wilcannia.⁶²

A table of these communities, including a brief description of the land ownership, is provided at Appendix 5 to this Report.

(c) How priority locations are selected

I have asked the Government how the number of 26 locations was decided upon, rather than a greater or smaller number. I have been told only that it was decided upon through the COAG Working Group on Indigenous Reform, following bilateral discussions with each jurisdiction.⁶³

60 Council of Australian Governments, *National Partnership Agreement on Remote Service Delivery*, cl 13. At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_service_delivery_with_amended_schedule.pdf (viewed 7 September 2009). The 26 communities are named in Appendix 5 to this Report.

61 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Remote Indigenous housing investment' (Media Release, 23 March 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/remote_indigenous_housing_23mar2009.htm (viewed 7 September 2009).

62 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Speech to the John Curtin Institute of Public Policy* (Speech delivered to the John Curtin Institute of Public Policy, Perth, 21 April 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/john_curtis_21april09.htm (viewed 7 September 2009).

63 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 August 2009.

In relation to the process for selecting the locations, the Remote Service Delivery Agreement includes some general information. The Agreement attaches a set of principles called the 'Principles taken into account in deciding sequencing', which says:

The following principles will be taken into account in deciding sequencing:

- (a) areas where we have already applied significant reform effort that can be readily built upon (see below):
 - (i) that is, locations where communities have demonstrated a willingness to actively participate in the change process, supported by strong leadership;
- (b) preparedness to participate in steps to rebuild social norms – for example, welfare reform and alcohol management;
- (c) labour market opportunities and potential for corporate investment/partnerships and business development;
- (d) capacity to be developed and utilised as a service hub (including transport) with linkages with smaller communities/homelands; and
- (e) capacity of service supply needs to be met – including consideration of capacity of existing local service providers and capacity of the location to support incoming services (for example, availability of built facilities and staff housing for staff).⁶⁴

The Agreement also states that:

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

- (i) recognising Indigenous peoples' cultural connections to homelands (whether on a visiting or permanent basis) but avoiding expectations of major investment in service provision where there are few economic or educational opportunities; and
- (ii) facilitating voluntary mobility by individuals and families to areas where better education and job opportunities exist, with higher standards of services.⁶⁵

In addition to these principles, the following criteria were also taken into consideration in deciding on the specific locations:

- significant concentration of population
- anticipated demographic trends and pressures
- the potential for economic development and employment
- the extent of pre-existing shortfalls in government investment in infrastructure and services.⁶⁶

64 Council of Australian Governments, *National Partnership Agreement on Remote Service Delivery*, sch B. At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_service_delivery_with_amended_schedule.pdf (viewed 7 September 2009).

65 Council of Australian Governments, *National Partnership Agreement on Remote Service Delivery*, sch A. At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_service_delivery_with_amended_schedule.pdf (viewed 7 September 2009).

66 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 August 2009.

Consideration was also given to the locations where the Australian Government was already engaged in significant projects – such as in the Northern Territory and Cape York – and in the case of the Dampier Peninsula, to the opportunities presented by the Browse Basin LNG Project and the involvement of several communities in that area in leadership work.⁶⁷

The selection of specific locations by the COAG Working Group on Indigenous Reform followed only bilateral discussions with each jurisdiction.⁶⁸ There was no process for consultation with Indigenous people or organisations or with the general public. No details have been provided about the material that was relied on, such as demographic or population data, or the tools used to assess economic viability or preparedness to participate in reforms.

Under this policy, further communities may be selected as priority locations. The criteria described above will be used to determine those further locations.⁶⁹ An Implementation Plan includes some information about how this will take place in the Northern Territory:

Once the strategy is established in the first fifteen locations [in the Northern Territory], consideration will be given to expanding the approach to additional locations, including those identified as Territory Growth Towns under the Northern Territory Government's A Working Future policy framework [see below for a description of this policy].

This process will be consistent with the principles outlined in the *Principles Taken into Account in Deciding Sequencing* at Schedule B of the Agreement and with the *Coordinator-General for Remote Indigenous Services Act 2009*, which provides that the Australian Government Minister for Indigenous Affairs must consult with the relevant Northern Territory Minister prior to specifying new remote locations under the Act.⁷⁰

As with the locations that have already been selected, the process for selecting new locations requires only bilateral consultation with the relevant state or territory Minister. It does not require consultation with the affected Indigenous communities or organisations or with the general public.

As I have repeatedly said, for reforms to be effective they must be made with the full participation of the Indigenous people whose lives are affected by them. In relation to such a significant policy, it is not sufficient for governments to consult only with themselves.

67 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 August 2009. See also J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Speech to the John Curtin Institute of Public Policy* (Speech delivered to the John Curtin Institute of Public Policy, Perth, 21 April 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/john_curtis_21april09.htm (viewed 7 September 2009).

68 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 August 2009.

69 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Speech to the John Curtin Institute of Public Policy* (Speech delivered to the John Curtin Institute of Public Policy, Perth, 21 April 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/john_curtis_21april09.htm (viewed 7 September 2009).

70 Commonwealth of Australia and the Northern Territory, *Implementation Plan for National Partnership Agreement on Remote Service Delivery*. At http://www.workingfuture.nt.gov.au/download/NT_RSD_Bilat_Imp_Plan.pdf (viewed 7 September 2009).

(d) What the priority location policy means

While it has been described as marking a new approach to remote Indigenous service delivery, there is no policy document that describes what the new priority location policy will mean for Indigenous communities, especially for non-priority communities.

In part, the policy of identifying priority communities is a new way of structuring service delivery. The Australian Government has recognised that the old ‘scattergun’ approach did not work, and claims that the new approach will provide for more targeted service delivery:

Our new model for remote service delivery will initially concentrate resources in priority locations across Australia.

So that in just a few years we can build a critical mass of support and assistance to bring services and conditions in remote Indigenous communities up to the same standard as comparably sized communities elsewhere in Australia. ...

Of course, other communities and townships will continue to receive government support and services.

This will include access to new housing construction and upgrades, employment programs and CDEP, and the range of normal funding arrangements across the whole of government.

But, the intention is to maximise the role of priority communities as service hubs.⁷¹

I sought clarification from the Australian Government on what services will be affected by this new model, and was advised that governments will work together to improve access to services ‘including early childhood, health, housing and welfare services’.⁷² I was also referred to the Local Implementation Plans that will be developed in each priority location under the Remote Service Delivery Agreement.

The first step in the preparation of Local Implementation Plans is baseline mapping of social and economic indicators, current government services and gaps in those services. When these are completed, Local Implementation Plans will be developed in consultation with local community members and other parties, for example, non-government organisations and business / industry partners.⁷³

One of the functions of the new Coordinator-General for Remote Indigenous Services is to monitor the implementation of Local Implementation Plans.⁷⁴

It is hoped that this model will deliver better coordinated and better managed services in communities that have been selected to be priority locations. Local Implementation Plans will be public documents. When they are completed, Indigenous residents of those communities should have a clearer picture of how this new model will work.

71 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Speech to the John Curtin Institute of Public Policy* (Speech delivered to the John Curtin Institute of Public Policy, Perth, 21 April 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/john_curtis_21april09.htm (viewed 7 September 2009).

72 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 August 2009.

73 Council of Australian Governments, *National Partnership Agreement on Remote Service Delivery*, cl 12(d). At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_service_delivery_with_amended_schedule.rtf (viewed 9 September 2009).

74 *Coordinator-General for Remote Indigenous Services Act 2009* (Cth), s 14.

However, as I said above, the policy of identifying priority locations is not just a new service delivery model. It is also a policy of providing higher levels of support to select communities. The provision of housing in the Northern Territory is an example of this.

The principles that determine sequencing, which are set out above, are not designed to identify the communities with the greatest need. While need and the adequacy of existing services are considered, the focus of the principles is on identifying those communities that meet government-set criteria for sustainability or growth. This includes economic sustainability, but also preparedness to participate in reforms and willingness to provide secure tenure to the government.

This policy anticipates supporting the growth of select locations ahead of other communities and its principles include 'facilitating voluntary mobility by individuals and families to areas where better education and job opportunities exist, with higher standards of services'.⁷⁵

This aspect of the policy needs to be made clearer to residents of remote Indigenous communities. In the course of preparing this Report, I spoke to remote community members and it was clear that there is a very low level of awareness of the priority location policy. This was the case even in those communities that have been selected as priority locations.

(e) Extension of the priority location policy

Though less publicised, the Western Australian Government has stated that it is also developing a priority location policy:

Essentially, services are provided to large settlements who in turn service the small, satellite communities on an outreach basis. This model was endorsed in the COAG Remote Service Delivery National Partnership Agreement in Western Australia. ...

The State targets housing resources to communities that are assessed as being sustainable using specified criteria such as the quantity and quality of water; risk of flooding; access to services; and access to employment and enterprise opportunities.⁷⁶

As with the Australian Government policy, this describes both a hub and spoke service delivery model and a policy of providing a higher level of support for select communities and less support for other communities. Further details of this policy have not yet been announced.

75 Council of Australian Governments, *National Partnership Agreement on Remote Service Delivery*. At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_service_delivery_with_amended_schedule.rtf (viewed 9 September 2009).

76 Department of Indigenous Affairs, Government of Western Australia, *Submission to the Senate Select Committee on Regional and Remote Indigenous Communities* (27 May 2009), p 6.

(f) Northern Territory – A Working Future

Consistent with the principles developed by the Australian Government, on 20 March 2009 the Northern Territory Government announced a policy called ‘A Working Future’.⁷⁷ ‘A Working Future’ includes both a new policy on homelands and the identification of 20 growth towns.⁷⁸

(i) Policy on homelands

Under the memorandum of understanding between the Australian and Northern Territory Governments of September 2007, which I described earlier, the Northern Territory Government was also required to assume full responsibility for municipal and essential service delivery to homelands from 1 July 2008. The Australian Government agreed to contribute \$20 million per year for the first three years, which the Northern Territory Government was concerned would be ‘insufficient to fund adequate services to outstations’.⁷⁹

As a result, the Northern Territory Government was required to develop a new policy. It released a discussion paper and engaged Pat Dodson to conduct community consultations in relation to the development of the policy.⁸⁰ A report on the outcome of those consultations was delivered in January 2009.⁸¹

The report, which recommended the use of the term ‘homeland’ in place of ‘outstation’, stated that the starting point should be comprehensive economic modelling to determine the costs of investing in homelands (at different levels of service) and to provide a cost / benefit analysis of the implications of not investing.

This recommendation was not implemented. ‘A Working Future’ instead sets out new rules for when a homeland can receive funding and new limits on what that funding can include. As part of this, there will be no financial support for new homelands or for further housing on existing homelands. Services to existing housing will move towards a user-pay system.⁸²

77 Northern Territory Government, ‘A Working Future: Real Towns, Real Jobs, Real Opportunities’ (Media Release, 20 May 2009). At <http://newsroom.nt.gov.au/index.cfm?fuseaction=printRelease&ID=5584> (viewed 23 October 2009).

78 In its Headline Policy Statement, the Northern Territory Government uses ‘outstations / homelands’ as a generic description, and uses homelands or outstations interchangeably as appropriate to each location. See Northern Territory Government, *Working Future: Fresh Ideas/ Real Results – Headline Policy Statement* (2009). At http://www.workingfuture.nt.gov.au/download/Headline_Policy_Statement.pdf (viewed 17 September 2009). This Report will use the term ‘homelands’, except for where the specific community uses the term ‘outstation’ or where the Report quotes other sources or cites existing documents.

79 *Memorandum of understanding between the Australian Government and the Northern Territory Government: Indigenous Housing, Accommodation and Related Services September 2007* (2007). At http://www.aph.gov.au/senate/committee/indig_ctte/submissions/sub28_attachment_8.pdf (viewed 7 September 2009).

80 Northern Territory Government, ‘Outstations Consultations to Continue’ (Media Release, 2 December 2008). At <http://newsroom.nt.gov.au/index.cfm?fuseaction=printRelease&ID=4854> (viewed 23 October 2009).

81 Socom + Dodson Lane, *NTG Outstations Policy: Community Engagement Report* (2009). At http://www.workingfuture.nt.gov.au/download/Community_Engagement_Report.pdf (viewed 7 September 2009).

82 See Northern Territory Government, *Working Future: Fresh Ideas/ Real Results – Headline Policy Statement* (2009). At http://www.workingfuture.nt.gov.au/download/Headline_Policy_Statement.pdf (viewed 17 September 2009).

Dodson was critical of this policy for ignoring the recommendations in his report and failing to recognise the positive attributes of homelands, stating:

Australia has not learned anything from the history of destabilising Indigenous people if this policy is allowed to stand and homelands people are forced to co-locate in these major towns against their wishes.⁸³

(ii) *Twenty growth towns*

'A Working Future' also identifies 20 Aboriginal communities that will be developed into what are described as 'growth towns' or 'service hubs'. The communities selected are the 15 priority communities for the Northern Territory under the National Partnership Agreements described above, together with the communities of Borroloola, Ramingining, Daguragu / Kalkarindji, Papunya, Elliott and Ali Curung.⁸⁴

As with the Australian Government policy, the implications of the Northern Territory's policy for service delivery in other Aboriginal communities is not yet clear. The Northern Territory Government states that it will not take money away from other communities to build up the 20 growth towns⁸⁵ but has been criticised for not providing details about what the reforms will mean for community services.⁸⁶

The Northern Territory Government has also connected the growth town policy to tenure reform, stating:

Many of our remote towns are built on Aboriginal land.

The Territory Government will work with the land owners in towns to get secure leases for private investment. To be successful at attracting private investment it is critical that security and certainty can be provided to investors.

With secure leases in place, new businesses will be created and new investments will flow. That will mean more jobs and opportunities for local people. It will break the welfare cycle.⁸⁷

In 'A Working Future', the Government does not specify the type of lease contemplated by this policy. However, the Australian Government and the Northern Territory Government have committed to try to negotiate s 19A township leases with the 15 communities that are also covered by the Remote Service Delivery Agreement.⁸⁸

83 S Everingham, 'Killing us softly: Dodson slams outstations plan', *ABC News Online*, 2 June 2009, <http://www.abc.net.au/news/stories/2009/06/02/2587462.htm> (viewed 7 September 2009).

84 Northern Territory Government, *Working Future: Territory Growth Towns*, http://www.workingfuture.nt.gov.au/growth_towns.html (viewed 7 September 2009). While the policy refers to 20 growth towns, there are in fact 22 communities named in the policy. The communities of Daguragu and Kalkarindji are referred to as one growth town, as are the communities of Angurugu and Umbakumba.

85 Northern Territory Government, *Working Future: Frequently asked questions*, <http://www.workingfuture.nt.gov.au/download/FAQ.pdf> (viewed 7 September 2009).

86 Central Land Council, 'Working Future – No detail, no timeline, no track record' (Media Release, 21 May 2009). At http://www.clc.org.au/Media/releases/2009/Working_Future.html (viewed 23 October 2009).

87 Northern Territory Government, *Working Future: Employment and Economic Development*, <http://www.workingfuture.nt.gov.au/employment.html> (viewed 7 September 2009).

88 Commonwealth of Australia and the Northern Territory, *Implementation Plan for National Partnership Agreement on Remote Service Delivery*. At http://www.workingfuture.nt.gov.au/download/NT_RSD_Bilat_Imp_Plan.pdf (viewed 7 September 2009).

4.4 Land reforms in the Northern Territory

The Northern Territory was the place where the Australian Government first started implementing its Indigenous land reform programs. Indigenous people in other parts of Australia have been looking at what has happened in the Northern Territory and wondering how it will affect them. This section provides an update in relation to land reforms in the Northern Territory. The first part of this section provides an update on the Northern Territory Emergency Response, the second part provides an update on township leases and the third part looks at the lease requirements for new houses.

It has become clearer over time that the focus of these policies has been on giving governments greater control over Indigenous land.

(a) Northern Territory Emergency Response

On 21 June 2007, the Australian Government announced a series of measures to combat child sex abuse in Aboriginal communities in the Northern Territory, which became known as the ‘intervention’ or the ‘Northern Territory Emergency Response’.

The impact of the Northern Territory intervention on Aboriginal land is described in detail in Chapter 9 of my *Native Title Report 2007*.⁸⁹

In this Chapter, I provide an update on three measures which form part of the intervention and which impact on Aboriginal land tenure: the compulsory five-year leases, statutory rights and the power to compulsorily acquire town camp land.

(i) Five-year leases

One of the reforms introduced under the intervention was the compulsory acquisition of five-year leases over 64 communities.

The five-year leases are created under s 31 of the *Northern Territory National Emergency Response Act 2007* (Cth) (the NTNER Act). Leases normally contain negotiated terms. While interests acquired under the NTNER Act are described as leases, the interests were acquired compulsorily and the terms and conditions were determined by the Australian Government and not negotiated.

The Australian Government also determined the area of the five-year leases. This was done broadly, with reference to latitude and longitude points set out in the Schedule to the NTNER Act. Commonly, the leases included large areas of land around communities, including air strips, quarries, rubbish dumps, cattle yards, nearby homelands and areas of vacant land.

On 27 February 2009, the Australian Government announced that it had reassessed the boundaries for the five-year leases. Commencing from 1 April 2009, the total area covered by five-year leases was more than halved.⁹⁰

89 T Calma, Aboriginal and Torres Strait Islander Social Justice Commission, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008). At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 29 October 2009).

90 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), ‘Government finalises five-year lease boundaries in NT Indigenous communities’ (Media Release, 27 February 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/lease_boundaries_27feb09.htm (viewed 7 September 2009).

Normal process for compulsory acquisition of property by the Commonwealth

Section 51(xxxi) of the Constitution of Australia gives the federal Parliament the power to acquire property 'on just terms'. The *Lands Acquisition Act 1989* (Cth) (Lands Acquisition Act) sets out a process that the Government must follow to use this power and rules for how compensation should be determined.

Normally, the Australian Government must first make a declaration about its intention to acquire property. The declaration includes information about the public purpose for the acquisition, details about what the land will be used for and the reason why the land appears to be suitable for the proposed use. In addition to the declaration, each person who will be affected is entitled to a statement setting out a summary of their rights under the Lands Acquisition Act.⁹¹

Where there is an 'urgent necessity', the Minister may avoid the need for a declaration but must instead lodge a certificate with Parliament and the land owners.⁹² The Lands Acquisition Act then provides a mechanism for negotiations to achieve an acquisition by agreement or by compulsory acquisition.⁹³

The Lands Acquisition Act also states that compensation must be provided and sets out rules for determining what amounts to just terms compensation.⁹⁴ Where land is acquired under the Lands Acquisition Act, land owners have a clear right to compensation with procedures and rules based on what is fair and workable.

This process was not followed for the intervention. The NTNER Act excludes the Lands Acquisition Act in relation to the five-year leases,⁹⁵ meaning that land owners are denied the usual rights in relation to how land is acquired and compensated and must instead rely on the NTNER Act itself.

Acquisition under the NTNER Act

The NTNER Act gives land owners almost no procedural rights. Five-year leases are created by the legislation itself, and there are no procedures for the provision of notice or reasons and no opportunities for negotiation or review.

The NTNER Act also avoids saying that land owners have a right to compensation, instead saying that the Australian Government is only required to pay compensation if it is obliged to do so under the Constitution.⁹⁶ At the time the NTNER Act was passed, there was some uncertainty about whether the Australian Government was required to pay just terms compensation for an acquisition of property in the Northern Territory.

The former Minister for Indigenous Affairs told Parliament that 'compensation when required by the Constitution will be paid'.⁹⁷ However, the Coalition Government took no action to assess or pay compensation.

91 *Lands Acquisition Act 1989* (Cth), s 22.

92 *Lands Acquisition Act 1989* (Cth), s 24.

93 *Lands Acquisition Act 1989* (Cth), pt VI.

94 For a more detailed consideration of the usual application of the *Lands Acquisition Act 1989* (Cth), see Gilbert + Tobin Centre of Public Law, *Supplementary Submission to the Senate Legal and Constitutional Committee's Inquiry into the Northern Territory National Emergency Response Bill* (11 August 2007), pp 3–5. At http://www.gtcentre.unsw.edu.au/resources/docs/IRLG/Supplementary_Submission_SLCLC_Aug2007.pdf (viewed 7 September 2009).

95 *Northern Territory National Emergency Response Act 2007* (Cth), s 50.

96 *Northern Territory National Emergency Response Act 2007* (Cth), pt 4, div 4.

97 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, p 14 (The Hon M Brough MP, Minister for Indigenous Affairs). At <http://www.aph.gov.au/Hansard/rep/dailys/dr070807.pdf> (viewed 23 October 2009).

On 29 May 2008, the new Labor Government introduced the Indigenous Affairs Legislation Amendment Bill 2008 (Cth), which included a process for land owners and the Government to agree on ‘an amount to be paid’ by the Australian Government for the five-year leases. The Minister said that the purpose of the amendments was to ‘minimise the prospect of these matters needing to be resolved in the courts’.⁹⁸ The amendments did not make it any clearer as to whether the Government was required to pay compensation.

In October 2008, after receiving the report of the Northern Territory Emergency Response Review Board (Report of the NTER Review Board),⁹⁹ the Australian Government commenced a process for making payments by asking the Northern Territory Valuer-General to determine a reasonable rent for the five-year leases.¹⁰⁰

Wurridjal v Commonwealth

In Chapter 1 of this Report, I summarised the High Court’s decision in *Wurridjal v Commonwealth*.¹⁰¹

In this case, the Australian Government argued that it was not required by the Constitution to pay compensation because:

- it is not required to pay compensation for an acquisition in the Northern Territory
- it continues to have a significant controlling interest in Aboriginal land and the five-year leases were a statutory readjustment of that interest rather than an acquisition.¹⁰²

This second argument, in particular, reflects poorly on the Australian Government. It is an attempt to treat Aboriginal land under the ALRA as a lesser form of ownership. The High Court did not accept the Government’s argument, and found that the Constitution does require the Australian Government to pay compensation for the five-year leases.

How to assess compensation for the five-year leases

The NTNER Act denigrates the rights of Aboriginal land owners in the Northern Territory, by both denying them an appropriate process for the acquisition of land and by attempting to avoid the obligation to pay compensation.

The issue of compensation for land that has been compulsorily acquired is difficult for Aboriginal people. Any amount of compensation needs to reflect not just the economic value of the land but also the importance of the land to Aboriginal people (including its cultural and spiritual importance) and the impact of the loss of control that results from the compulsory acquisition of the land.

98 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), ‘Greater flexibility in NT leases’ (Media Release, 29 May 2008). At http://www.jennymacklin.fahcsia.gov.au/Internet/jennymacklin.nsf/content/nt_lease_29may08.htm (viewed 23 October 2009).

99 Northern Territory Emergency Response Review Board, *Northern Territory Emergency Response: Report of the NTER Review Board* (2008). At <http://www.nterreview.gov.au/> (viewed 29 October 2009).

100 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), ‘High Court decision on NT 5-year leases’ (Media Release, 2 February 2009). At http://www.jennymacklin.fahcsia.gov.au/Internet/jennymacklin.nsf/content/high_court_decision_02feb09.htm (viewed 5 December 2009).

101 *Wurridjal v Commonwealth* (2009) 237 CLR 309.

102 S Brennan, ‘The Northern Territory Intervention and Just Terms for the Acquisition of Property: *Wurridjal v Commonwealth*’ (*Melbourne University Law Review*, forthcoming).

I asked Minister Macklin what method the Australian Government was using to determine the amount of compensation for the five-year leases.¹⁰³ She replied that the Government is committed to making 'appropriate payments', and described how the Government had asked the Northern Territory Valuer-General to determine reasonable amounts of rent as set out in the NTNER Act.¹⁰⁴

The NTNER Act says that the Northern Territory Valuer-General must not take into account the value of any improvements on the land when making a determination of a reasonable amount of rent, but provides no other guidance.¹⁰⁵

I do not accept that a reasonable amount of rent based on the unimproved value of the land represents just terms compensation for the compulsory acquisition of Aboriginal land under five-year leases. This minimises the economic value of the land – by excluding the value of any improvements which were installed by persons other than the government, or provided to the Aboriginal owners in lieu of rent. Further, it places no value on the importance of the land to its Aboriginal owners and fails to account for the fact that the land was acquired by compulsion rather than negotiation.

The future of five-year leases

One of the recommendations of the Report of the NTER Review Board was that the Government ensure that all actions affecting Aboriginal communities respect Australia's human rights obligations and conform with the *Racial Discrimination Act 1975* (Cth) (RDA).¹⁰⁶

On 23 October 2008, the Australian Government said that it accepted this recommendation and committed to introducing legislation to remove provisions that exclude the operation of the RDA.¹⁰⁷ On 21 May 2009, the Australian Government released a discussion paper called *Future Directions for the Northern Territory Emergency Response*.¹⁰⁸ The discussion paper sets out proposals in relation to those parts of the Emergency Response that relate to the RDA and provides a starting point for consultations with communities.

While the discussion paper proposes certain changes to five-year leases, it does not allow for the consideration of their removal. Community residents and traditional owners are not being consulted on whether they want five-year leases to continue. They are only being consulted in relation to the proposed amendments, as the Australian Government has already formed the view that five-year leases have

103 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Correspondence to J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, 15 July 2009.

104 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 August 2009.

105 *Northern Territory National Emergency Response Act 2007* (Cth), s 62(1).

106 Northern Territory Emergency Response Review Board, *Northern Territory Emergency Response: Report of the NTER Review Board* (2008), p 12. At <http://www.nterreview.gov.au/> (viewed 29 October 2009).

107 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Compulsory income management to continue as key NTER measure' (Media Release, 23 October 2008). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/nter_measure_23oct08.htm (viewed 29 October 2009).

108 Department of Families, Housing, Community Services and Indigenous Affairs, *Future Directions for the Northern Territory Emergency Response* (2009). At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/future_directions_discussion_paper/Pages/default.aspx (viewed 7 September 2009).

operated for the benefit of Aboriginal residents of the 64 communities and that it proposes to continue them.¹⁰⁹

The discussion paper says that:

The five-year leases have provided temporary tenure to underpin the provision of safe houses and GBM accommodation, and will underpin substantial housing refurbishments under the Strategic Indigenous Housing and Infrastructure Program.¹¹⁰

It is wrong to suggest that the provision of safe houses and Government Business Manager (GBM) accommodation, or the refurbishment of housing, required the acquisition of the five-year leases. These could easily have been achieved in other ways. Such infrastructure has been installed and refurbished for many years in the same communities without the compulsory acquisition of five-year leases.

The five-year leases represent a low point in the Government's treatment of Aboriginal land. They are a most direct expression of the Australian Government's focus on gaining control over Aboriginal land, rather than reforming tenure to assist Aboriginal people to better use their land. The five-year leases also disrupt the balance for the negotiation of long-term voluntary leases. In my view, there is no justification for their continuation.

(ii) *Statutory rights*

A further reform to Aboriginal land under the intervention was the introduction of 'statutory rights'.¹¹¹

This is a procedure under which the Australian or Northern Territory Governments can obtain a set of rights (which are called statutory rights) over certain Aboriginal land.

Statutory rights can only apply when infrastructure is installed or repaired¹¹² on Aboriginal land and the works are wholly or partly funded by the government.¹¹³ The process requires the Minister to first identify the area of land to which the statutory rights will apply and for the Land Council to provide consent.

While aspects of this process are similar to applying for the grant of a lease, statutory rights are very different from a lease. They provide no benefits to the land owner, only rights in favour of the government occupier. Those rights include the exclusive and perpetual right to occupy the land without having to pay rent.¹¹⁴

109 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 August 2009.

110 Department of Families, Housing, Community Services and Indigenous Affairs, *Future Directions for the Northern Territory Emergency Response* (2009). At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/future_directions_discussion_paper/Pages/individual_measures.aspx#4 (viewed 7 September 2009).

111 Introduced by the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), which inserted a new Part IIB into the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

112 Statutory rights can apply in the context of repairs where the total estimated costs of the repairs or renovations exceeds \$50 000: see the definition of 'threshold amount' and 'works' in s 20T of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

113 For statutory rights to be able to apply, the works must be either wholly government funded or, if the Minister determines in writing that the provisions apply, partly government funded: see *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), ss 20(u)(1)(d), 20ZF(1)(d).

114 For the definition of statutory rights, see *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), ss 20W(2), 20ZH(2).

Statutory rights are like a one-sided lease, under which the interests of the traditional owners are ignored. Traditional owners are unlikely to agree to such an arrangement by choice when they can instead negotiate a lease. To my knowledge these provisions have not been used.

However, the Government introduced modifications to the statutory rights regime in the *Indigenous Affairs Legislation Amendment Act 2008* (Cth). This could be seen to reflect an intention on the part of the Government to utilise those rights at some time in the future.

(iii) *Power to acquire town camp land*

Section 47 of the NTNER Act provides a process for the Australian Government to compulsorily acquire all rights and interests in town camp land. During the reporting period the Australian Government announced steps towards using this power in relation to the Alice Springs town camps.

Over the last few years, the Australian Government has tried to secure long-term subleases over the Alice Springs town camps. The Australian Government said that if it was granted a long-term sublease over town camp land it would upgrade housing and supporting infrastructure.

The former Howard Government had offered to spend \$60 million on upgrades if the town camps were subleased to the Northern Territory Government for 99 years. The town camp associations did not agree to this, saying that they were not opposed to long-term subleases but wanted to maintain a role in how housing was managed. They proposed a number of other subleasing and housing models. The Northern Territory Government did not agree to these other models.¹¹⁵

Negotiations in relation to subleases continued under the new Labor Government. On 10 July 2008, the parties agreed that 40-year subleases would be granted to the Executive Director of Township Leasing (EDTL). I describe this Australian Government body in more detail in section 4.4(b). The Australian Government agreed to spend \$50 million on upgrades to housing and infrastructure, and to set up a performance based selection process to determine who would manage housing in the camps within 3 years.¹¹⁶ This was later increased to \$100 million.¹¹⁷ The parties then began negotiations on the sublease terms.

Under this framework agreement, the Australian Government also provided funding for the establishment of a new community housing organisation called Central Australian Affordable Housing Company (CAAHC). CAAHC was modelled on 'growth providing' affordable housing companies such as the Brisbane Housing Company (Qld) and Community Housing Limited (Vic). The Australian Government sees this approach as representing best practice in the provision of social housing.¹¹⁸

115 Tangentyere Council, 'Alice Springs Town Camp Residents Reject Conditional \$60M Offer' (Media Release, 18 May 2007). At http://www.tangentyere.org.au/publications/press_releases/2007/PR_18May07%20TOWN%20CAMP%20RESIDENTS%20REJECT%20CONDITIONAL%20OFFER.pdf (viewed 23 October 2009).

116 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), '\$5.3 million upgrade for Tangentyere housing' (Media Release, 10 July 2008). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/upgrade_tangentyere_10jul08.htm (viewed 23 October 2009).

117 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), P Henderson (Northern Territory Chief Minister) & W Snowdon (Member for Lingiari), '\$125 million Alice Springs Transformation Plan' (Media Release, 2 May 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/125mil_alicesprings_2may09.htm (viewed 27 November 2009).

118 T Plibersek, *Room for more: boosting providers of social housing* (Speech to the Sydney Institute, Sydney, 19 March 2009). At http://www.tanyaplibersek.fahcsia.gov.au/internet/tanyaplibersek.nsf/content/social_housing_19mar09.htm (viewed 23 October 2009).

Text Box 4.1: Central Australian Affordable Housing Company

CAAHC was created to allow for a new model of Aboriginal social housing that gives Aboriginal people control over their own lives while working in partnership with governments, community agencies and the private sector in a transparent and accountable manner.

CAAHC's constitution provides for three types of members: the founding member, which is Tangentyere Council, ordinary members and agency members. Any non-government organisation which supports the objects set out in CAAHC's constitution can apply to be an ordinary member, and the Northern Territory and Commonwealth governments are both entitled to be agency members.

CAAHC will be managed by a Board of Directors. These Directors are appointed by the members. Board appointments will be made with reference to the set of skills required to manage the activities of CAAHC, including social and cultural knowledge of the town camp communities and legal, economic, property management, tenancy advocacy and housing management skills.

The aims of CAAHC are to participate in all aspects of Aboriginal social housing, including design, construction and management. CAAHC has been set up to utilise mixed funding arrangements that are similar to those used by affordable housing companies in the mainstream social housing sector. This includes private investment, the National Rental Affordability Scheme and Commonwealth Rent Assistance.

CAAHC will be able to offer affordable accommodation for both employed people and those on government benefits as well as shared equity or full home ownership. The performance of CAAHC will be assessed against the National Community Housing standards.

CAAHC represents a genuine model for Aboriginal people taking responsibility for their own housing in partnership with governments and the private and community sector.¹¹⁹

On 22 May 2009, Tangentyere announced that negotiations in relation to the terms of the sublease were close to resolution, but that it still sought agreement that:

- under the 40-year sublease to the EDTL, the community retain some key decision-making powers
- in the three-year interim period before the open tender process begins, CAAHC (and not Territory Housing) be appointed as the housing manager for town camp housing.¹²⁰

The Australian Government did not agree to further negotiation on these two points. On 24 May 2009, the Australian Government announced that it was taking the first step towards compulsory acquisition of town camp land under s 47 of the NTNER Act. Minister Macklin said:

This action is being considered as a last resort following the failure of Tangentyere Council to meet its commitments under the previously Agreed Work Plan for the town camps by the deadline of 21 May 2009. ...

119 See Tangentyere Council, *Submission to the National Human Rights Consultation Committee* (12 June 2009), pp 3–7. At http://www.tangentyere.org.au/publications/submissions/2009/SUBMISSION_HUMANRIGHTSCOMMITTEE_JUNE%2009.pdf (viewed 7 September 2009).

120 Tangentyere Council, 'Resolution on Lease Negotiations Close' (Media Release, 22 May 2009). At <http://www.tangentyere.org.au/publications/documents/TangentyereLeaseNegn.pdf> (viewed 23 October 2009).

Native Title Report 2009

For 10 months, the Australian and Northern Territory Governments have been in negotiations with Tangentyere Council. Last Thursday, the final deadline for an agreement passed. Tangentyere Council has not agreed to a fair and consistent tenancy management system.¹²¹

Tangentyere rejected that claim that it would not agree to a fair and consistent tenancy management system. Tangentyere's Executive Director, William Tilmouth, said:

We are saying that there are two ways to achieve tenancy reform, one through the public housing system and one through the community housing system by reaching accreditation against the National Community Housing Standards. ...

Town Camp people have no faith in the Northern Territory Government or their public housing system. This is why we lobbied successfully in March last year to establish the Central Australian Affordable Housing Company.¹²²

The National Community Housing Standards are the standards which apply to social housing providers across Australia.

To avoid the town camp land being acquired compulsorily, on 29 July 2009 the town camp associations agreed to the grant of a sublease on the terms required by the Australian Government.¹²³ William Tilmouth said in relation to the agreement:

We've had the gun at our head ... compulsory acquisition is the last resort. At the end of the day it's something that we've been threatened with, and it's a pretty high thing to consider. I think at the end of the day we need to work with what we have got and make some agreement.¹²⁴

The making of an agreement under threat of acquisition was described as a low point in Indigenous affairs by Australians for Native Title and Reconciliation, who noted:

While in mainstream Australia 70% of the Australian Government's \$6.4 billion Social Housing Initiative will go to community housing, Indigenous communities are being locked out of community housing. This denies them any meaningful control or decision-making role. Instead they will be forced to accept control by a government authority – Territory Housing – with a poor record in relation to Indigenous housing.¹²⁵

While this report was being prepared, an Alice Springs town camp resident commenced court action in relation to the compulsory acquisition process.¹²⁶ The Australian Government has responded by recommencing the notice period for consultations under the compulsory acquisition procedures.¹²⁷

121 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Alice Springs town camps' (Media Release, 24 May 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/alice_springs_town_camps_24may09.htm (viewed 23 October 2009).

122 Tangentyere Council, 'Tangentyere Supports Open and Transparent Tenancy Reform' (Media Release, 25 May 2009). At http://www.tangentyere.org.au/publications/documents/TENANCYREFORM_25MAY2009.pdf (viewed 23 October 2009).

123 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), P Henderson (Northern Territory Chief Minister) & W Snowdon (Member for Lingiari), 'Agreement on Alice Springs Transformation Plan' (Media Release, 29 July 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/alice_springs_transformation_plan_29jul09.htm (viewed 23 October 2009).

124 W Tilmouth, quoted in Australian Broadcasting Corporation, 'Transcript: Town camps acquisition seen as "step backwards" for land rights', *The 7.30 Report*, <http://www.abc.net.au/7.30/content/2009/s2641518.htm> (viewed 7 September 2009).

125 Australians for Native Title and Reconciliation, 'Town camps takeover a low point in Indigenous affairs – ANTAR' (Media Release, 31 July 2009). At <http://www.antar.org.au/media/town-camps-takeover> (viewed 23 October 2009).

126 L Wood, 'Court halts building in Alice town camps', *The Age* (7 August 2009). At <http://www.theage.com.au/national/court-halts-building-in-alice-town-camps-20090806-ebi7.html> (viewed 11 November 2009).

127 J Macklin (Minister for Families, Housing, Community Services, and Indigenous Affairs), 'Alice Springs town camps' (Media Release, 24 August 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/alice_springs_town_camps_24may09.htm (viewed 23 October 2009).

(b) Township leasing

Township leasing, which was introduced in 2006, remains important as the first changes made by the Australian Government as part of its Indigenous land tenure reform policy. Township leasing is made possible through s 19A of the ALRA. I described the introduction of s 19A in the *Native Title Report 2006*,¹²⁸ and in this section I provide an update on the operation of township leases.

(i) Section 19A of the ALRA

The ALRA has always provided for the leasing of Aboriginal land through s 19. This section allows for a lease to be made to any person for any purpose and contains no restrictions on the period of the lease. Leases under the new s 19A can apply only to ‘township land’, which is land on which a community is situated and which has been described by regulation. Township leases may only be made to a ‘government entity’, and must be for a period of between 40 and 99 years.

In 2007, the former Coalition Government made changes to the ALRA to create the position of the EDTL, whose role it is to hold s 19A leases on behalf of the Australian Government.¹²⁹ When a township area is leased to the EDTL, it is the job of the EDTL to create and manage subleases.

In 2008, the new Labor Government made further changes to the ALRA to expand the role of the EDTL beyond township leases. The EDTL can now also accept leases under s 19, leases over Aboriginal community living areas and subleases of a town camp (such as the Alice Springs town camps).¹³⁰

In normal circumstances the terms of a lease are decided upon by negotiation. However, s 19A specifies that certain matters cannot be included in a township lease.

Firstly, a township lease cannot contain a rule requiring the consent of any person to the grant of a sublease.¹³¹ For example, the traditional owners may wish to put a rule in the township lease which says that the EDTL must get the consent of the traditional owners or community members before granting a sublease, or before granting a certain type of sublease such as a commercial sublease. Section 19A says that such a rule is not allowed.

This means that all subleases are decided upon by the EDTL and not by the traditional owners or the community. The EDTL may be required to consult with the traditional owners or community members, but cannot be required to follow their directions or obtain their consent.

Secondly, a lease under s 19A cannot contain a rule relating to the payment or non-payment of rent under a sublease.¹³² For example, the traditional owners may wish to put a rule in the township lease which says that a sublease to a business must be for a commercial rent or that a sublease to a community organisation must be rent free. Section 19A of the Act says that such a rule is not allowed.

128 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), ch 2. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/index.html (viewed 29 October 2009).

129 *Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Act 2007* (Cth).

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

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

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

Native Title Report 2009

This means that the amount of rent which is required to be paid under a sublease is determined by the EDTL. Again, the EDTL may be required to consult with traditional owners or community members, but the EDTL is not required to follow their directions.

This is particularly important where the amount of rent that traditional owners receive under the township lease is determined by the amount of rent collected on subleases. This is the case with the two existing township leases described below, and is Australian Government policy for township leases.¹³³ This means that traditional owners cannot know, or control, whether they will receive ongoing rent under a township lease.

Overall, a major concern with township leases is that traditional owners and Aboriginal community members are required to give up control over land use decision-making in the township area.

(ii) *The Nguiu and the Groote Eylandt leases*

There have been two township leases granted under s 19A of the ALRA. The first lease was granted on 30 August 2007 over the community of Nguiu (the Nguiu lease) and the second was granted on 4 December 2008 over the communities of Angurugu, Umbakumba and Milyakburra (the Groote Eylandt lease).¹³⁴

Both leases are granted to the EDTL. The Nguiu lease is for a period of 99 years and covers an area of 454 hectares, or 4.54 square kilometres.¹³⁵ This area includes the existing community, the airport, the foreshore and a large area of vacant land around the community.

The Groote Eylandt lease is for a period of 40 years, with the EDTL having the option to renew for a further 40 years. The lease also covers large areas of land around each community. Most notably, while the community of Milyakburra has a population of around 110,¹³⁶ the lease over the community covers an area of 510 hectares, or 5.10 square kilometres.¹³⁷

The rent for both township leases comprises a one-off introductory payment and an ongoing payment. The one-off introductory payment for the Nguiu lease is \$5 million and for the Groote Eylandt lease is \$4.5 million. These amounts are paid out of the Aboriginals Benefit Account.¹³⁸

The Australian Government also agreed to provide a number of benefits for the communities. In Nguiu, this included 25 new houses, repairs and maintenance for

133 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 August 2009.

134 Copies of these leases are available for a small fee from the Northern Territory Land Titles Office. The Nguiu lease is lease number 662214 and the Groote Eylandt lease is lease number 692818. I follow the convention of describing the lease for the communities of Angurugu, Umbakumba and Milyakburra as the Groote Eylandt lease, however Milyakburra is situated on Bickerton Island rather than Groote Eylandt.

135 *Aboriginal Land Rights (Northern Territory) Regulations 2007* (Cth), r 5.

136 Northern Territory Government Bushtel, *Milyakburra community*, http://www.bushtel.nt.gov.au/northern_territory/community_search_display?comm_num=532 (viewed 7 September 2009).

137 *Aboriginal Land Rights (Northern Territory) Regulations 2007* (Cth), r 6.

138 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 64(4A)(b). In relation to the Nguiu lease, see also Department of Families, Housing, Community Services and Indigenous Affairs, *Annual Report 2007–2008* (2008), app 10 (table 4.33). At http://www.fahcsia.gov.au/about/publicationsarticles/corp/Documents/2008%20Annual%20Report/13_10.htm (viewed 11 November 2009).

other houses, \$1 million in additional health initiatives, improvements to the cemetery, a community profile study¹³⁹ and funding for a new secondary college.¹⁴⁰

I have previously expressed my concern about the link made between the provision of much-needed community services, human rights and entitlements and the grant of a township lease to a government entity. Services should be provided to communities on the basis of need and effectiveness rather than compliance with a request for a lease. The connection to the provision of services also puts pressure on traditional owners during the decision-making process. This is especially the case if traditional owners are not fully aware that they have the right to say no or that some of the services on offer are human rights that should be provided as a matter of course.

The ongoing rent is determined by the income that the EDTL collects on subleases and licences. After collecting the rent, the EDTL deducts its expenses, which includes both direct costs such as surveys and consultants and the administration costs of the EDTL for each lease (including wages of EDTL staff). If there is a balance remaining after the deduction of those expenses, it is payable as rent to the traditional owners. Although it is beyond the scope of this Report, further consideration should be given to any tax implications of this arrangement for the traditional owners.

The one-off introductory payments (of \$5 million and \$4.5 million) also represent the minimum payment for the first fifteen years of each lease. During this period, the traditional owners are only entitled to further a payment if the total rent exceeds that minimum payment. If the ongoing rent during this period is less than these amounts then the traditional owners will receive no additional payment.¹⁴¹

Grant of subleases

The EDTL advises that the community of Nguiu has been surveyed. Agreements on subleases have been negotiated over 66% of the available lots at Nguiu. At the time of writing, the communities under the Groote Eylandt lease were still being surveyed and no subleases had been granted.¹⁴²

The EDTL also advises that the majority of the lots in Nguiu – approximately 240 – have been subleased to Territory Housing for community housing. Seven home ownership contracts have been finalised, with several more community members expressing an interest. Two residents have taken a sublease over vacant land in order to build their own homes.¹⁴³ Information about the terms of those leases was not provided.

Subleases have also been finalised, or are close to being finalised, with a number of the smaller community organisations in Nguiu. The two largest occupiers of commercial / government properties, the Northern Territory Government and Tiwi Islands Shire Council, are yet to reach an agreement on sublease terms.¹⁴⁴

139 M Brough (Minister for Families, Community Services and Indigenous Affairs), 'Historic Agreement for 99 year lease in NT' (Media Release, 30 August 2007). At http://www.formerministers.fahcsia.gov.au/malbrough/mediareleases/2007/Pages/tiwi_lease_30aug07.aspx (viewed 7 December 2009).

140 M C Dillon & N D Westbury, *Beyond Humbug: Transforming government engagement with Indigenous Australia* (2007), p 131.

141 See Office of Township Leasing, *Standard Township Head Lease*, section 5. At http://www.otl.gov.au/township_head_lease/section05.htm (viewed 11 November 2009).

142 P Watson, Executive Director of Township Leasing, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 7 August 2009.

143 P Watson, Executive Director of Township Leasing, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 7 August 2009.

144 P Watson, Executive Director of Township Leasing, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 7 August 2009.

Rent under subleases

Under a township lease, the EDTL (and not the traditional owners) decides whether rent is required on a sublease.

The EDTL has advised that rent is not required under the subleases to Territory Housing or for the subleases in relation to schools. In most other instances, the EDTL advises that it has demanded, or will demand, some form of rent.¹⁴⁵

In the case of home ownership leases, rent is paid as a lump sum payment. For other commercial / government properties in the township, the EDTL has engaged a consultant to provide the improved, unimproved and annual rental estimates. These valuations are then used as a basis for negotiating the level of rent to be paid by each occupier. The level of rent depends on a number of factors including the condition of the property, any capital improvements which have been made to the property, the capacity of the organisation to pay and the extent of any ongoing repairs and maintenance required on the property.¹⁴⁶

For many community organisations and government agencies, this will be the first time that they have been required to pay rent for the use of Aboriginal land. Information about the amount of rent under each sublease is not available.

Costs of administration

As I described above, the ongoing rent under the Nguiu and Groote Eylandt township leases is the income on subleases after deduction of the expenses of the EDTL. The EDTL provided the following information in relation to its administration expenses:

2007–08	Employee expenses (two staff in Canberra and one in Nguiu)	\$281 000
	Travel	\$101 000
	Contractors (sacred site clearance certificates and survey work at Nguiu)	\$42 000
	Other administrative expenses	\$33 000
	Total for 2007–08	\$457 000

145 P Watson, Executive Director of Township Leasing, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 7 August 2009.

146 P Watson, Executive Director of Township Leasing, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 7 August 2009.

147 P Watson, Executive Director of Township Leasing, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 7 August 2009.

2008–09	Employee expenses (two staff in Canberra and four staff in Darwin)	\$519 000
	Travel (including air charter costs for Consultative Forum meetings)	\$192 000
	Contractors (\$203 000 for survey work at Nguiu, \$44 500 for valuations at Nguiu, \$54 000 for initial survey work for Groote Eylandt communities and \$39 000 for business design)	\$340 000
	Other administrative expenses	\$39 000
	Total for 2008–09	\$1 090 000

The Consultative Forum

Both township leases create a body called the Consultative Forum,¹⁴⁸ whose role is to make recommendations to the EDTL on certain matters under the lease, to facilitate communication and to discuss land use and other issues arising out of the lease. The majority of the members of the Consultative Forum are appointed by the traditional owners and the remainder are appointed by the EDTL.

In most cases where the EDTL is required to consult, the EDTL must ‘have due regard to any recommendations of the Consultative Forum’.¹⁴⁹ Under the Nguiu lease, the decisions of the Consultative Forum are binding in relation to:

- the limit of 15% of non-Tiwi residents¹⁵⁰
- permission for buildings in excess of two storeys or within 50 metres of the high water mark¹⁵¹
- certain exceptions to quarantine restrictions.¹⁵²

In all other cases, including all references under the Groote Eylandt lease, the Consultative Forum can only make recommendations which are not binding on the EDTL.

148 Under each head lease, the Executive Director Township Leasing is required to establish a consultative forum. The Consultative Forum comprises of representatives of the Land Council and the Office of Township Leasing. The forum meets regularly and provides advice to the Executive Director Township Leasing about issues of importance to the township. The Consultative Forum is a very important mechanism for keeping the Executive Director aware of emerging issues within the township. See Australian Government Office of Township Leasing, *About the Office of Township Leasing – What is the Consultative Forum*, <http://www.otl.gov.au/about.htm#5> (viewed 9 September 2009). See also Australian Government, *Executive Director of Township Leasing: Annual Report 2007–2008* (2008). At http://www.otl.gov.au/annual_report.htm (viewed 9 September 2009).

149 Australian Government, *Executive Director of Township Leasing: Annual Report 2007–2008* (2008), p 9. At http://www.otl.gov.au/annual_report.htm (accessed 9 September 2009).

150 *Memorandum of Lease – Township of Nguiu*, cl 10.5(b).

151 The EDTL is not permitted to undertake or allow any building in excess of two storeys or on the Foreshore (defined as the area between the high water mark and 50 metres landwards of this) without the consent of the EDTL: *Memorandum of Lease – Township of Nguiu*, cls 1.1, 17.2.

152 *Memorandum of Lease – Township of Nguiu*, cl 19.6.

(iii) *Other possible models*

The main problem with township leases is that traditional owners and Aboriginal communities are required to hand over decision-making about their land to a government entity. This has included not just the land on which existing infrastructure is built, but also large areas of vacant land. I believe that the reluctance of communities to enter into township leases, despite the offers of inducements by the Australian Government, is attributable to concerns about this hand over of decision-making. There are other ways of introducing leasing on communities that do not require such a hand over. In my *Native Title Report 2006*, I referred to the proposal of the former Thamurrur Council for a 40-year lease over the community of Wadeye to a body controlled by traditional owners, which would then be able to issue subleases to occupants as required.¹⁵³ At the time the Australian Government rejected this proposal, saying that the time frame was too short.

Since then, the new Government has agreed to a 40-year time frame for community leases. The Central Land Council has also proposed separate types of long-term leases for housing, government and commercial bodies, under a model which would provide certainty of tenure while retaining a higher level of traditional owner control.¹⁵⁴

These are some examples of other ways of introducing community leases. While the Australian Government has agreed to other forms of housing lease as an interim measure, as described in the next section, it remains committed to obtaining township leases for all large communities in the Northern Territory. The Government has not engaged with Aboriginal communities about other ways in which leasing can be introduced.

(c) **Tenure requirements for new housing**

In the Northern Territory, 16 communities have been selected to receive new housing under the SIHIP. In keeping with the Australian Government's secure tenure policy, communities must have in place a lease for at least 40 years in order to be eligible for new housing.

The Australian Government will accept a housing lease in one of two forms, provided that it contains the required conditions: either a township lease over the whole community or a lease over all housing areas. The term 'housing precinct lease' has been used to describe a lease over housing areas under s 19 of the ALRA that meets the Australian Government's criteria for new housing.

While the Australian Government will accept a housing precinct lease, it sees this as an interim measure pending agreement to a township lease.¹⁵⁵ Unlike a township lease, a housing precinct lease does not take in the whole community. However, it must include not only the new housing areas but all existing community housing.

153 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), pp 53–54. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/index.html (viewed 29 October 2009).

154 Central Land Council, *Communal Title and Economic Development* (2005). At http://www.clc.org.au/Media/papers/CLC_%20tenure_paper.pdf (viewed 7 September 2009).

155 Commonwealth of Australia and the Northern Territory, *Implementation Plan for National Partnership Agreement on Remote Service Delivery*. At http://www.workingfuture.nt.gov.au/download/NT_RSD_Bilat_Imp_Plan.pdf (viewed 7 September 2009).

While no rent is offered for a housing precinct lease, the Australian Government has offered upfront rent and a community benefits package for the grant of a township lease. For example, in relation to one of the central Australian communities, the Australian Government has offered \$2 million in upfront rent plus a \$2 million community benefits package.¹⁵⁶

The table below describes the main differences between township leases and housing precinct leases:

	'Township lease' under section 19A	'Housing precinct lease' under section 19
Lease area	Covers entire community and surrounding land, including roads, stores, parks, cemeteries, houses and growth areas surrounding the community	Covers all existing community housing and the proposed new housing areas
Term	Must be between 40 and 99 years	Must be at least 40 years ¹⁵⁷
Lease holder	Executive Director of Township Leasing	Territory Housing or the Executive Director of Township Leasing
Rent	Upfront rent plus community benefits package. Ongoing rent depends on subleases.	Not offering rent

As I described in the previous section, township leases have been granted over the communities of Nguiu, Angurugu, Umbakumba and Milyakburra.

On 11 February 2009, the Northern Land Council announced that the traditional owners for the communities of Galiwinku, Gunbalanya, Maningrida and Wadeye had agreed to 40-year housing precinct lease for those communities.¹⁵⁸

For the other eight communities – Gapuwiyak, Hermannsburg, Lajamanu, Milingimbi, Ngukurr, Numbulwar, Yirrkala and Yuendumu – the Australian Government is still negotiating with the traditional owners and the Central and Northern Land Councils in relation to a lease.

156 Central Land Council, *Changes to housing in your community*, Fact Sheet (2008).

157 Section 19A(4) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) says that section 19A leases must be for a period of between 40 and 99 years. While there is no limit in the Act in relation to section 19 leases, the Commonwealth requires a lease of at least 40 years.

158 Northern Land Council, 'NLC welcomes housing boost at Gunbalanya, Wadeye, Galiwinku, and Maningrida' (Media Release, 11 February 2009). At <http://www.nlc.org.au/html/files/NLC%20welcomes%20housing%20boost%20at%20Gunbalanya,%20Wadeye,%20Galiwinku%20and%20Maningrida.pdf> (viewed 7 September 2009).

4.5 Land reforms in Queensland, New South Wales, South Australia and Western Australia

In this section I describe some of the reforms which are taking place in the Australian states that are affected by the COAG Remote Partnership Agreements – Queensland, New South Wales, South Australia and Western Australia.

In these states, there has been a combination of tenure reform and the introduction of secure tenure policies.

To a significant extent, reforms to state law are being driven by policies of the Australian Government, particularly its secure tenure requirements under the Remote Indigenous Housing Agreement. Under that Agreement, the Government will provide \$4.75 billion over ten years, provided that the states introduce secure land tenure. As I set out above in 4.2(b)(ii), the Australian Government has advised the states that there are three requirements for secure land tenure.

This section describes how these requirements are being implemented in priority locations in these states.

(a) Queensland

When the Australian Government and some other states were moving towards Indigenous land rights in the 1970s and 1980s, the Queensland Government resisted. At first, it held on to the reserve system. Later, it created new ways for land to be held on behalf of Indigenous people.

In 1978, the Queensland Government legislated to create 50-year shire leases over the former reserve communities of Aurukun and Mornington Island.¹⁵⁹ In the 1980s, the Government created a new form of tenure called ‘deeds of grant in trust’ (DOGITs), under which a number of other reserves were transferred to local Indigenous councils for the benefit of Indigenous inhabitants.

The first land rights legislation, introduced in 1991, provided for the grant of land as Indigenous freehold.¹⁶⁰ Land could be granted following a land claim, which could only be made over limited areas of crown land, or by way of transfer. The transfer rules allowed for lesser forms of Indigenous land ownership to be turned into Indigenous freehold. Unfortunately, progress on the grant of Indigenous freehold has been slow.

Text Box 4.2: Types of Indigenous land in Queensland

Reserve land

Reserve land is land that is owned by the government and has been set aside for the benefit of Aborigines or Torres Strait Islanders.

Shire leases

Shire lease land is land that has been leased to the local council for 50 years. Shire lease land only applies to the communities of Aurukun and Mornington Island.

159 *Local Government (Aboriginal Lands) Act 1978 (Qld)*.

160 *Aboriginal Land Act 1991 (Qld)*; *Torres Strait Islander Land Act 1991 (Qld)*.

DOGIT land

DOGIT land is a restricted form of ownership, usually granted to a local council. DOGIT land is held on trust for the benefit of Indigenous inhabitants and is subject to greater government control than full ownership.

Indigenous freehold

Indigenous freehold is land that has been granted as freehold title under the statutory land rights legislation introduced in 1991. A grant of Indigenous freehold can be made by transfer or after a successful claim.

Transferable land

Under the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld), land described as 'transferable land' is to be granted at Indigenous freehold, without the need for a land claim. Transferable land includes reserve land, shire leases and DOGIT land.

(i) Aboriginal and Torres Strait Islander Land Amendment Act 2008 (Qld)

The *Aboriginal and Torres Strait Islander Land Amendment Act 2008* (Qld) (the Amendment Act) made a number of important changes to Indigenous land in Queensland.

A primary aim of the Amendment Act was to make it easier to grant long-term leases on Indigenous land. This was partly as a result of pressure exerted upon states by the Australian Government to make it easier to grant a long-term lease to a public housing body.¹⁶¹

In addition to making reforms to long-term leasing, the Amendment Act makes a number of other changes to Indigenous land, including:

- allowing for the grant of land to a Prescribed Body Corporate (PBC)
- creating exemptions to transferable land
- making it easier for the Government to compulsorily acquire Indigenous land.

I describe the new rules in relation to long-term leasing below, but first I provide a description of some of the other major changes.

Transferring land to a PBC

When a determination of native title is made, an Indigenous corporation – a PBC – can be appointed to hold native title rights on behalf of the native title holders.¹⁶²

Previously when transferable land was granted as Indigenous freehold, it was usually granted to an Aboriginal or Torres Strait Islander land trust to hold for the benefit of Indigenous people 'particularly concerned with the land' and their ancestors and descendants.¹⁶³ This means Indigenous people who live on or use the land or neighbouring land as well as Indigenous people with a particular traditional or customary connection.¹⁶⁴

161 'The Australian Government identified "land tenure reform", including long-term leases for public housing bodies, as a precondition for additional funding for housing on DOGIT communities': Explanatory Notes, *Aboriginal and Torres Strait Islander Land Amendment Bill 2008* (Qld), p 2. At <http://www.legislation.qld.gov.au/Bills/52PDF/2008/AborTorStlLAB08Exp.pdf> (viewed 23 October 2009).

162 *Native Title Act 1993* (Cth), pt 2, div 6.

163 *Aboriginal Land Act 1991* (Qld), s 27(3).

164 *Aboriginal Land Act 1991* (Qld), s 4; *Torres Strait Islander Act 1991* (Qld), s 4.

As a result of changes made by the Amendment Act, transferable land in relation to which there has been a determination of native title can also be granted to the PBC. When land is granted to a PBC, it holds the land for the benefit of native title holders only.

This means that there are two options when turning transferable land into Indigenous freehold – it can be granted to an Indigenous land trust to hold for Indigenous people particularly concerned with the land, or (where there has been a native title determination) to a PBC to hold for native title holders.

Exempting section of transferable land

While the legislation says that transferable land must be granted as Indigenous freehold 'as soon as practicable',¹⁶⁵ progress on the transfer of land has been slow.

One of the reasons for the long delays is that the Queensland Government has not wanted to transfer land on which infrastructure has been built. Often that infrastructure has been built without surveys or the creation of individual lots, which means that the process for excluding land with infrastructure on it has been slow.

The Amendment Act makes it easier for the Queensland Government to exclude particular areas from transfer by declaring them to be not transferable. The Minister can make a declaration over land:

- on which housing, infrastructure or a road is situated
- which is being used as part of a township by Aboriginal people
- where, having regard to the nature or use of the land, it is not appropriate or practicable for it to be granted as Indigenous freehold.¹⁶⁶

This means that when the transferable land is granted as Indigenous freehold, those areas in relation to which the Minister has made a declaration will be excluded, and will continue to be reserve land, shire lease or DOGIT land.

This allows the Government to exclude areas more easily and less expensively, as it does not have to survey each individual lot. The Government has stated that this will speed up the grant of the balance of transferable land as Indigenous freehold. However, any areas which are excluded from the grant of Indigenous freehold will continue to be held under inferior forms of title and ownership of individual lots will not be resolved.

Compulsory acquisition of Indigenous land

The Amendment Act also makes it easier for the Government to compulsorily acquire Indigenous land.

Previously the Government could only acquire Indigenous freehold by an Act of Parliament that expressly provided for the resumption of the land and the payment of just compensation.¹⁶⁷ It could only acquire DOGIT land by an Act of Parliament.¹⁶⁸

The Amendment Act allows for Indigenous freehold and DOGIT land to be acquired, and a shire lease to be resumed, by a construction authority for a relevant public purpose. To my knowledge these provisions have not been used.

165 *Aboriginal Land Act 1991* (Qld), s 29; *Torres Strait Islander Act 1991* (Qld), s 27.

166 *Aboriginal Land Act 1991* (Qld), s 16B; *Torres Strait Islander Act 1991* (Qld), s 13B.

167 Formerly s 41(1) of the *Aboriginal Land Act 1991* (Qld).

168 Formerly s 43 of the *Land Act 1994* (Qld).

New forms of long-term leasing

The Amendment Act makes a new set of rules to make it easier to grant leases on Indigenous freehold land, DOGIT land and Aboriginal reserve land.¹⁶⁹ The new rules do not apply to the Aurukun and Mornington Island shire leases.

These rules are less restrictive than previous rules in relation to leasing on Indigenous land. The requirements change depending on who the lease is granted to, for how long it will be granted and the purpose for which it will be used. Most leases no longer require the consent of the Minister. The table below summarises these new rules in relation to the grant of leases:

Lease holder	Purpose of lease	Period of lease	Consent of Minister
An Aborigine	Private residential purpose	Up to 99 years	Not required
	Any other purpose (such as a commercial purpose)	Up to 30 years	Not required
		More than 30 years (up to 99 years)	Required
The state	Public housing, public infrastructure or accommodation for public servants	Up to 99 years	Not required
		Any other purpose	Up to 30 years
		More than 30 years (up to 99 years)	Required
The spouse, or former spouse, of an Aborigine or of an Aborigine who is deceased	Private residential purpose	Up to 99 years	Not required

169 The rules for land that has been transferred to Aboriginal freehold land are set out in new sections 40D to 40N of the *Aboriginal Land Act 1991* (Qld). Sections 83R to 83Y of the Act apply the same rules to DOGIT land and Aboriginal reserve land. The rules for Torres Strait Islander freehold land are set out in the *Torres Strait Islander Land Act 1991* (Qld), ss 37D–37N.

Table 4.3: Rules in relation to the grant of leases (continued)

Lease holder	Purpose of lease	Period of lease	Consent of Minister
Any other person	Commercial purpose	Up to 30 years	Not required
		More than 30 years (up to 99 years)	Required
	Private residential purpose to support a commercial purpose		Not required
	Any other purpose	Up to 10 years	Not required
More than 10 years (up to 99 years)		Required	

Where the consent of the Minister is required, the Minister can only give consent if he or she is satisfied that the grant of the lease is for the benefit of the persons on whose behalf the land is held. There are also rules in relation to when the consent of the Minister is required for a grant of an interest under a lease.

In general, I am supportive of reforms that enable more flexible use of Indigenous land. However, attention will need to be paid to how these reforms are implemented in practice. If the reforms simply facilitate long-term leases to the Queensland Government over housing areas, Indigenous people will wonder what they have gained.

Home ownership leases

The new leasing rules include some provisions which apply specifically to 'home ownership leases', or leases to Indigenous people for private residential purposes.

A home ownership lease must be for a period of 99 years.¹⁷⁰ Instead of paying annual rent the home owner must pay the purchase cost up front. The purchase cost must be the value of the land and any buildings on the land determined using acceptable valuing methodology.¹⁷¹

There is no price discount for those Indigenous people on whose behalf the land is held. All Indigenous purchasers are required to pay the purchase price of the land and any building on the land.

¹⁷⁰ *Aboriginal Land Act 1991* (Qld), s 40J(1)(a)(i).

¹⁷¹ *Aboriginal Land Act 1991* (Qld), s 40J(1)(a)(iii).

Where the housing chief executive considers that a house has been used for social housing, then his or her permission is required for the grant of a home ownership lease over the house.¹⁷² The purchase cost must be agreed to by the housing chief executive and that part of the purchase cost which relates to the house may only be used towards providing further social housing services.¹⁷³

The Queensland Department of Communities has said that it supports the use of depreciated replacement costs as the methodology for determining the sale price of former social housing in Indigenous communities.¹⁷⁴

While the reforms to enable home ownership create an opportunity for Indigenous people in Queensland, they also raise complex issues. Careful attention needs to be paid to how the new provisions are implemented.

In the *Native Title Report 2006*, I considered the community-driven Yarrabah Housing Project. It was anticipated that the amendments to the *Aboriginal Land Act 1991* (Qld), which were then being proposed, would provide a legislative base to support leasing initiatives.¹⁷⁵ I am also aware that the community of Mapoon has been working with World Vision Australia on developing a home ownership scheme, and I hope that the 2008 amendments will assist them with the project.¹⁷⁶

As he concluded his recent visit to Australia, James Anaya (the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people) stated that:

Government initiatives to address the housing needs of indigenous peoples, should avoid imposing leasing or other arrangements that would undermine indigenous peoples' control over their lands.¹⁷⁷

It cannot be assumed that the introduction of any home ownership scheme will be successful. One of the primary findings of research conducted by the University of Queensland in 2001, which considered the outcome of previous home ownership schemes such as Katter leases (see Text Box 4.3), was that it is 'certainly clear that it will not be possible to simply transpose mainstream home ownership models' onto Indigenous communities.¹⁷⁸

172 *Aboriginal Land Act 1991* (Qld), s 40K.

173 *Aboriginal Land Act 1991* (Qld), s 136A.

174 Department of Communities (Housing and Homelessness Services), *Valuing a dwelling for a private residential lease*, Fact Sheet (2009). At http://www.housing.qld.gov.au/programs/pdf/valuing_dwelling.pdf (viewed 7 September 2009).

175 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), p 151. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/index.html (viewed 29 October 2009).

176 World Vision, 'Unlocking the path to home ownership in Mapoon – World Vision's new plan' (Media Release, 1 September 2009). At http://www.worldvision.com.au/media/PressReleases/09-09-01/Unlocking_the_path_to_home_ownership_in_Mapoon_-_World_Vision_s_new_plan.aspx (viewed 11 November 2009).

177 United Nations High Commissioner for Human Rights, *Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, as he concludes his visit to Australia* (27 August 2009). At <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/313713727C084992C125761F00443D60?opendocument> (viewed 23 October 2009).

178 M Moran et al, *Indigenous Home Ownership and Community Title Land: A Preliminary Household Survey* (2002), p 11. At http://espace.library.uq.edu.au/eserv/UQ:9135/Home_owner_UPR.pdf (viewed 7 September 2009).

Text Box 4.3: Katter leases

The term 'Katter leases' refers to perpetual leases granted over existing houses in communities in North Queensland under a Government home ownership scheme set up in the mid 1980s.

The failure of the scheme resulted in some houses falling into disrepair and being abandoned. Local councils have been engaged in drawn-out and legally complicated processes to take over leases in order to replace the housing. The reasons for the failure of the scheme include:

- that it was a government initiative pushed by the external stakeholders, rather than the community
- the houses were already old and close to the end of their life cycle
- participants did not understand their maintenance responsibility and received no education or support
- land dealings for deceased estates and / or transfer of the lease back to councils were not resolved up front.¹⁷⁹

In the community of Kowanyama, which is described in Text Box 4.4 below, around 95 Katter leases were granted. This has added to the complexity in resolving community land tenure.

In section 4.6 of this Chapter, I set out some of the principles that need to be considered prior to the introduction of any home ownership scheme or land tenure reform. While the Queensland legislation includes protection for the Government in relation to social housing, it does not mandate protections for the community or for individual participants, such as the provision of appropriate information or a mechanism for the community to agree to the parameters of the scheme.

The Queensland Government's preference for the use of depreciated replacement cost as the valuation methodology will be of significant concern to Queensland Indigenous communities. The depreciated replacement cost of a house is likely to be significantly higher than its market value, where there is a market.

Commercial leases

The leasing rules also contain certain protections in relation to leases for a commercial purpose.

As described in Table 4.3, leases for a commercial purpose for more than 30 years require Ministerial consent. In order to request this consent, the person applying for a lease must give the Minister a business plan together with evidence to show that an appropriate return on the investment cannot be obtained with a lease of less than 30 years. The Minister may also require other documents to show the purpose of the lease.¹⁸⁰

179 M Moran et al, *Indigenous Home Ownership and Community Title Land: A Preliminary Household Survey* (2002), p 10. At http://espace.library.uq.edu.au/eserv/UQ:9135/Home_owner_UPR.pdf (viewed 7 September 2009).

180 *Aboriginal Land Act 1991* (Qld), s 40F.

The Minister must obtain an independent assessment of this material, and of the financial and managerial capacity of the applicant, before making a decision in relation to the lease. Consent to the grant of a commercial lease for more than 30 years can only be given where the Minister is satisfied that any proposed development under the lease will be commercially viable, that a lease for more than 30 years is required for a return on the investment and that the applicant has the capacity to carry out the project.

The non-refundable cost of the assessment must be met by the applicant.¹⁸¹

(ii) *Tenure requirements for new housing*

In this section I look specifically at the four Queensland communities that have been selected for initial housing investment under the Remote Indigenous Housing Agreement. Those communities are Aurukun, Mornington Island, Doomadgee and Hopevale.

Aurukun and Mornington Island

The communities of Aurukun and Mornington Island are situated on land which was leased to the local Shire Council for 50 years under the *Local Government (Aboriginal Lands) Act 1978* (Qld). The Shire Councils hold the leases 'in trust for the benefit of persons who for the time being reside on any part of the land'.¹⁸²

There have been consent determinations of native title over the Aurukun¹⁸³ and Mornington Island¹⁸⁴ shire lease areas, both of which exclude an area of land around the community.

During negotiations for the consent determination in relation to Aurukun, the native title holders agreed to withdraw the claim over the community and access road. The native title holders and the shire council instead entered into the Aurukun Township & Road Indigenous Land Use Agreement.¹⁸⁵

This Agreement sets out a notification and consultation process for future developments. The process varies depending on the area of the community (in particular whether an area is developed or undeveloped) and whether it is a major or minor development.¹⁸⁶ The native title holders have also made a formal request for that part of the Aurukun shire lease which is covered by the native title determination to be granted as Indigenous freehold.¹⁸⁷ If granted, the land will be held by the PBC on behalf of the native title holders.¹⁸⁸

181 *Aboriginal Land Act 1991* (Qld), ss 40F–G.

182 *Local Government (Aboriginal Lands) Act 1978* (Qld), s 5.

183 *Wik Peoples v Queensland* [2000] FCA 1443. For information about the determination, see Agreements, Treaties and Negotiated Settlements Project, <http://www.atns.net.au/agreement.asp?EntityID=493> (viewed 7 September 2009).

184 *Lardil, Yangkaal, Gangalidda & Kaiadilt Peoples v State of Queensland* [2008] FCA 1855. For information about the determination, see the Agreements, Treaties and Negotiated Settlements Project, <http://www.atns.net.au/agreement.asp?EntityID=4779> (viewed 7 September 2009).

185 For information about this agreement, see the Agreements, Treaties and Negotiated Settlements Project, <http://www.atns.net.au/agreement.asp?EntityID=1325> (viewed 7 September 2009).

186 P Hunter (Partner), HWL Ebsworth Lawyers, Telephone interview with the Social Justice Unit, Australian Human Rights Commission, 6 August 2009.

187 P Hunter (Partner), HWL Ebsworth Lawyers, Telephone interview with the Social Justice Unit of the Australian Human Rights Commission, 6 August 2009.

188 *Aboriginal Land Act 1991* (Qld), s 27(3)(a).

Doomadgee and Hopevale

Doomadgee and Hopevale are on DOGIT land, held in trust by the local Aboriginal Shire Council for the benefit of Aboriginal inhabitants.

There has been a determination of native title in relation to the Hopevale DOGIT land area.¹⁸⁹ The Doomadgee DOGIT land area remains subject to a native title claim.¹⁹⁰ In addition to holding the deeds for the DOGIT land, the Hopevale Aboriginal Shire Council also owns an area of freehold land adjacent to the community.¹⁹¹

Lease negotiations

While the new leasing rules make it easier for commercial leasing and the introduction of home ownership schemes, they also make it easier to lease Indigenous land to the government. It would be disappointing for Indigenous people if the main impact of the amendments is to introduce broad scale leasing of Indigenous land to government agencies.

During the period in which this Report was being prepared, the communities and native title holders were still involved in negotiations with various government agencies about how the Australian Government's tenure requirements would be met. While the Queensland Government has said that they are negotiating 40-year leases in line with the requirements,¹⁹² the details of this are still being worked through.

The Queensland Government has advised the Aurukun and Mornington Island Shire Councils and the native title holders for the land comprising those shire leases that it would like to amend the *Local Government (Aboriginal Lands) Act 1978* (Cth) in order to comply with the Australian Government's funding requirements and rules in relation to secure tenure for housing and long-term leasing. This would enable the Queensland Government to extend the term of the shire leases, which are non-renewable and otherwise expire in 2029, for a further 40 years. Significant parts of these shire leases are transferable land under the *Aboriginal Land Act 1991* (Qld), which permits determined native title land within the shire leases to be granted as freehold land to the relevant registered native title body corporate under the Native Title Act, to hold on behalf of the relevant native title holders. With the Aurukun shire lease, the Aurukun township is not determined native title land and thus different land holding arrangements will need to be considered.¹⁹³

While this may enable the Queensland Government to comply with the Australian Government's rules, extending the shire leases prolongs an inadequate tenure arrangement rather than providing a long-term solution.

189 *Deeral v Charlie* [1997] FCA 1408.

190 National Native Title Tribunal, 'Gangalidda & Garawa people seek native title in north west Queensland' (Media Release, 18 May 2005). At http://www.nntt.gov.au/news-and-communications/media-releases/pages/gangalidda_garawa_people_seek_native_tit.aspx (viewed 7 September 2009).

191 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Brighter Future for Hopevale' (Media Release, 11 May 2007). At http://www.facs.gov.au/internet/minister3.nsf/content/hopevale_11may07.htm (viewed 7 September 2009).

192 M Franklin and S Parnell, 'Macklin's go-slow to "fix errors"', *The Australian*, 21 August 2009, p 6. At <http://www.theaustralian.com.au/business/industry-sectors/jenny-macklins-go-slow-to-fix-errors-on-housing/story-e6frg96x-1225764573942> (viewed 11 November 2009).

193 P Hunter (Partner), HWL Ebsworth Lawyers, Telephone interview with the Social Justice Unit of the Australian Human Rights Commission, 6 August 2009.

Shire leases are an inferior form of title. They provide a lesser form of ownership than freehold as well as involving more restrictions when dealing with the land. Governments should work towards long-term resolution of tenure. This can be achieved through a grant of Indigenous freehold under the *Aboriginal Land Act 1991* (Qld). Indigenous freehold allows for the grant of leases, including home ownership leases. The transfer process can be accompanied by the resolution of native title issues.

The Queensland Government is reported as saying that the grant of 40-year leases will allow it to introduce a home ownership scheme.¹⁹⁴ It is misleading to attempt to connect the 40-year leases to home ownership. The amendments which I described earlier mean that 99-year home ownership leases are already available on DOGIT land and Indigenous freehold. If anything, the requirement for 40-year leases will make it more difficult for home ownership schemes to operate as participating homes will have to be excised from the 40-year lease before they can be granted for 99 years.

Australian Government policy is hindering, rather than assisting, the resolution of tenure issues. This does not have to be the case. For example, in the community of Kowanyama, the federal Attorney-General is supporting a process under which the parties are working towards the long-term resolution of tenure and native title.

Below I provide a case study of this process in Kowanyama. While different issues arise in each community, the Kowanyama case study provides one example of parties working cooperatively towards the long-term resolution of issues.

Text Box 4.4: Case Study – Kowanyama

On 20 August 2008, the federal Attorney-General, Robert McClelland, and Queensland Minister for Natural Resources and Water, Craig Wallace met representatives of traditional owners to discuss options for broader native title outcomes in the Cape York region.

Following the meeting, the Attorney-General published a Joint Communiqué on the parties' commitment to resolving native title and tenure related issues on a sub-regional basis. The Joint Communiqué stated:

The first sub-region to be considered will most likely be the area centred on the Cape township of Kowanyama. Housing and tenure issues are pressing matters of concern in the township and will require a co-ordinated approach by all levels of government. The Federal Department of Families, Housing, Community Services and Indigenous Affairs has already committed to this process.¹⁹⁵

Kowanyama is a community of around 1200 people on the Cape York Peninsula, situated on a 4170 square kilometre area of DOGIT land and coastal strip. The native title holders, the Kowanyama People, have lodged a native title claim over an area which includes the Kowanyama DOGIT land.

194 E Schwarten, 'Bligh govt gears up to negotiate 40-year land leases throughout state', *National Indigenous Times online*, 21 August 2009. At <http://www.nit.com.au/News/story.aspx?id=18433> (viewed 7 September 2009).

195 R McClelland, 'Joint Communiqué on Native Title' (Media Release, 20 August 2008). At <http://www.robertmcclelland.alp.org.au/news/0808/20-01.php> (viewed 7 September 2009).

The claim area has been split into three parts for the purposes of negotiations. Part A is the section of the claim area over the Kowanyama DOGIT land but excluding the community, Part B is the claim area over pastoral leases and the Mitchell and Alice Rivers National Park and Part C is that part of the claim area over the Kowanyama community.

For Part A of the claim area, the native title holders are seeking a determination of native title, followed by a grant of Aboriginal freehold title to the prescribed body corporate under the *Aboriginal Land Act 1991* (Qld).

For Part C of the claim area, Kowanyama community land, the process commenced with the clarification of the tenure arrangements for each block in the community. The land in Kowanyama includes a mixture of DOGIT land, 'Katter leases', reserves and special purpose leases.

When the tenure of each block has been clarified, people who hold interest in those blocks will be given advice on their options. The land in the community which is transferable land under the *Aboriginal Land Act* can then be granted as Aboriginal freehold and arrangements can be made for the grant of any necessary leases.

These negotiations have included discussions on what the appropriate lease arrangements should be. These discussions are ongoing.

The settlement agreement will also include an Indigenous Land Use Agreement over the community land, which will reflect the agreed arrangements and facilitate future developments.

This process has been driven by community members and native title holders, who are very aware of the problems with existing tenure arrangements and have been trying for some years to get a resolution. It provides an example of the Australian Government and state governments supporting a process which can achieve long-term resolution of native title and tenure and provide Indigenous people with a stronger form of ownership.¹⁹⁶

(b) South Australia

South Australia has two schemes for the grant of land rights to Aboriginal people. The first scheme is set out in the *Aboriginal Lands Trust Act 1966* (SA), and relates mostly to small pockets of land in more populated areas. Land under this scheme is held by a single state-wide body called the Aboriginal Lands Trust, and includes mostly former mission and reserve land as well as other land that has been transferred to or purchased by the Lands Trust.

The second scheme is set out in two pieces of legislation, both of which deal with the management of a single large area of Aboriginal land: the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) and the *Maralinga Tjarutja Land Rights Act 1984* (SA). These Acts create land ownership based on traditional ownership. Traditional owners exercise their rights through a representative body corporate.

Both schemes provide for leasing in some form, although there have been difficulties with the restrictive procedures in relation to leases on Aboriginal Lands Trust land.¹⁹⁷

196 A Daniel (Principal Legal Officer), Cape York Land Council, Telephone interview with the Social Justice Unit of the Australian Human Rights Commission, 5 August 2009.

197 UnitingCare Wesley Adelaide, *The Anangu Lands Paper Tracker – Aboriginal Lands Trust: review of Act*, http://www.papertracker.com.au/index.php?option=com_content&task=view&id=127&Itemid=59 (viewed 7 September 2009).

(i) *Review of the Aboriginal Lands Trust Act 1966 (SA)*

In November 2008, the South Australian Government announced a review of the *Aboriginal Lands Trust Act 1966 (SA)* to respond to concerns about procedures for the use of Lands Trust land.¹⁹⁸ The Board of the Aboriginal Lands Trust had urged the Government to review the legislation for some time, and welcomed the review.¹⁹⁹

The role of the Aboriginal Lands Trust, whose Board members are appointed by the Government, is to manage land held by the Trust on behalf of three distinct groups: the Aboriginal people of South Australia as a whole; the native title holders of a particular area of land; and Aboriginal community residents. One problem with the *Aboriginal Lands Trust Act 1966 (SA)* is that it does not always make clear which of these groups the Lands Trust should represent.²⁰⁰

The activities of the Aboriginal Land Trust are overseen by the Minister, whose consent is required for land dealings such as the grant or transfer of a lease or sublease under a lease. This is very difficult to administer and, as a result, numerous leases and subleases that have been made are technically invalid.²⁰¹

The Government has said that the review of the *Aboriginal Lands Trust Act 1966 (SA)* will consider the following key issues:

- providing for clearer governance arrangements for land use decision-making at a local and regional level
- introducing a clear set of objects to the Act
- describing the qualifications required for Board membership
- describing what the role the Minister should play in relation to dealings by the Lands Trust
- how the business development processes and structures of the Trust should operate
- how the Trust provides benefits to the wider Aboriginal community in South Australia, including whether a fund should be set up
- making it easier for the Trust to grant an interest in land to Aboriginal people, and looking at whether the Trust should be able to sell land that is not being used.²⁰²

The South Australian Government has held public consultations in relation to the review of the Act. At the time of preparing this Report, the South Australian Government had not announced its response to those consultations or how it proposes to amend the *Aboriginal Lands Trust Act 1966 (SA)*.

198 Department of the Premier and Cabinet, *Aboriginal Lands Trust Act Review*, <http://www.aboriginalaffairs.sa.gov.au/altReview/Home.html> (viewed 7 September 2009).

199 Aboriginal Lands Trust SA, *Response: Review of the Aboriginal Lands Trust Act 1966 (2009)*, p 1. At <http://www.aboriginalaffairs.sa.gov.au/altReview/documents/17.ALT.pdf> (viewed 11 November 2009).

200 The Law Society of South Australia, *Submission to the Review of the Aboriginal Lands Trust Act 1966 (2009)*, paras 3–5. At <http://www.aboriginalaffairs.sa.gov.au/altReview/documents/19.LSSA.pdf> (viewed 7 December 2009).

201 Department of Families, Housing, Community Services and Indigenous Affairs, *Aboriginal Lands Trust Act 1966 – Review 2009: Submission to the Review from the Australian Government Department of Families, Housing, Community Services and Indigenous Affairs (2009)*, p 1. At <http://www.aboriginalaffairs.sa.gov.au/altReview/documents/3.%20FAHCSIA.pdf> (viewed 11 November 2009).

202 Department of the Premier and Cabinet, *Aboriginal Lands Trust Act Review Discussion Paper – Key Issues*, http://www.aboriginalaffairs.sa.gov.au/altReview/DiscussionPaper_dp3a.html (viewed 7 September 2009).

(ii) *Tenure requirements for new housing*

The two communities of Amata and Mimili, which were among the 26 priority locations from across Australia to receive initial housing investment under the National Partnership Agreement, are both in an area known as the Anangu Pitjantjatjara Yankunytjatjara lands (the APY lands) in the state's North-West.

This land is owned by a body corporate called Anangu Pitjantjatjara Yankunytjatjara, which holds title to the land on behalf of the traditional owners of the land. With the consent of traditional owners, the land may be leased for up to 50 years to a government agency or instrumentality.²⁰³

In August and November 2008, the Executive Board of Anangu Pitjantjatjara Yankunytjatjara resolved to grant 50-year leases over identified sites in Amata, Mimili and Pukatja to the Minister for Housing (SA) for new houses and major upgrades.²⁰⁴ The terms and conditions are contained in an agreed lease called the 'Ground Lease'.

The leases are not community-wide leases. They are contained to the areas where infrastructure is being installed or upgraded. Anangu Pitjantjatjara Yankunytjatjara continues to lease other community areas to service providers on a short or long-term basis so as to promote competition between service delivery contractors who tender for work on the APY lands.²⁰⁵

(c) **New South Wales**

(i) *Aboriginal Land Rights Act 1983 (NSW)*

Under the *Aboriginal Land Rights Act 1983* (NSW), Aboriginal land is granted as freehold land to Local Aboriginal Land Councils and the New South Wales Aboriginal Land Council (NSWALC). There are 121 Local Aboriginal Land Councils, which are their own legal entities. The NSWALC provides assistance and guidance to these Local Aboriginal Land Councils to undertake their core functions and responsibilities in accordance with the *Aboriginal Land Rights Act 1983* (NSW).

Land can be acquired by a land council following a claims process, which applies only to limited areas of 'claimable crown lands', or can be purchased by the land council.²⁰⁶ Subject to restrictions, the NSWALC can sell, lease or mortgage land vested in it, and local Aboriginal land councils can engage in similar dealings in relation to land they hold, subject to the approval of the NSWALC.²⁰⁷

Where a land council has acquired land through the claims process, it cannot sell, lease or mortgage that land unless native title has been extinguished or there has been a determination of native title.²⁰⁸ This rule is in addition to the Native Title Act processes that apply to land generally. There is no equivalent additional rule in relation to land that has been acquired by a land council through purchase.

203 *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA), ss 6(2)(b)(ii), 7.

204 Anangu Pitjantjatjara Yankunytjatjara, Minutes of Special General Meeting, 20 August 2008, at <http://www.waru.org/organisations/ap/apymminutes/sgmmins080820.pdf> (viewed 7 September 2009); Anangu Pitjantjatjara Yankunytjatjara, Minutes of Executive Meeting No 5 of 2008/2009, 21 November 2008, at <http://www.waru.org/organisations/ap/apymminutes/execmins081121.pdf> (viewed 7 September 2009).

205 Anangu Pitjantjatjara Yankunytjatjara, Minutes of Executive Meeting No 5 of 2008/2009, 21 November 2008. At <http://www.waru.org/organisations/ap/apymminutes/execmins081121.pdf> (viewed 7 September 2009).

206 *Aboriginal Land Rights Act 1983* (NSW), s 38.

207 *Aboriginal Land Rights Act 1983* (NSW), ss 40B–40D.

208 *Aboriginal Land Rights Act 1983* (NSW), s 40AA.

On 63 former Aboriginal reserves (which are now on Aboriginal land), numerous houses were constructed on the same land portion. In November 2008, the NSWALC and the Australian Government announced a \$6 million partnership to allow for the subdivision of this land into individual parcels, to allow for individual leasing and ownership and for the proper management and funding of essential service infrastructure such as electricity and water.²⁰⁹

(ii) *Tenure requirements for new housing*

Walgett and Wilcannia have been identified as two of the 26 priority locations across Australia to receive housing investment. Both are remote towns with a mixture of land ownership, including Aboriginal land.

The Australian and New South Wales governments recently finalised Remote Service Delivery Action Plans for Wilcannia and Walgett. However, at the time of writing the detail of these plans had not been released to the public.

(d) Western Australia

Western Australia is the only jurisdiction in Australia that has failed to enact some form of land rights legislation, despite its significant Aboriginal population.²¹⁰ While significant areas of land are held for the benefit of Aboriginal people, it is largely held under forms of title derived from the reserve system rather than Aboriginal ownership. In this context, native title has been particularly important in safe-guarding the traditional rights of Aboriginal people.

In May 2009, the Western Australian Government announced its intention to make reforms to Aboriginal-held land in Western Australia.²¹¹

The reforms are a direct response to the three tenure requirements imposed by the Australian Government, as set out in section 4.2(b)(ii). Western Australia is eligible for up to \$1.18 billion in housing funding over ten years under the Remote Partnership Agreement,²¹² provided it complies with the Australian Government's tenure requirements.

The Western Australian Government has proposed two sets of reforms in order to be able to comply with these requirements. The first set of reforms will enable the Aboriginal Lands Trust to appoint the Department of Housing to manage housing on its behalf, with the agreement of communities. The second set of reforms will enable the Department of Housing to manage Indigenous community housing on other land tenures with the agreement of communities and to facilitate home ownership and commercial use of Aboriginal land.

209 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs) & B Manton (Chair, NSWALC), 'Encouraging Indigenous home ownership and better infrastructure management' (Media Release, 21 November 2008). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/home_ownership_21nov08.htm (viewed 27 November 2009).

210 H McCrae et al, *Indigenous Legal Issues, Commentary and Materials* (4th ed, 2009), p 273.

211 Government of Western Australia, 'State Government paves way for indigenous housing funding boost' (Media Release, 5 May 2009). At <http://www.mediastatements.wa.gov.au/Pages/WACabinetMinistersSearch.aspx?ItemId=131787&minister=Buswell&admin=Barnett> (viewed 7 September 2009).

212 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Remote Indigenous housing investment' (Media Release, 23 March 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/remote_indigenous_housing_23mar2009.htm (viewed 7 September 2009).

In addition to reforming its own laws, the Western Australian Government has asked the Australian Government to make changes to the Native Title Act.²¹³

(i) *Aboriginal Lands Trust housing*

The Aboriginal Lands Trust is a statutory body established under the *Aboriginal Affairs Planning Authority Act 1972* (WA). It is composed of Aboriginal persons appointed by the Minister,²¹⁴ and its main function is to hold land to manage and use for the benefit of Aboriginal persons in accordance with the wishes of the Aboriginal inhabitants.²¹⁵

The Aboriginal Lands Trust is responsible for the management of approximately 27 million hectares, or around 11% of the land area of Western Australia.²¹⁶ The land:

comprises different tenures including, reserves, leases and freehold properties. A significant proportion of this land comprises reserves that have Management Orders with the Aboriginal Lands Trust (generally having the power to lease), with their purposes mostly being for 'the use and benefit of Aboriginal inhabitants'.²¹⁷

Around 80% of Aboriginal people who live in remote or very remote communities live on land that is managed by the Aboriginal Lands Trust.²¹⁸

In 2007, the Aboriginal Lands Trust and the Department of Housing entered into a Memorandum of Understanding for the Department of Housing to start being responsible for the construction and management of housing on Lands Trust land. This was part of a larger change to the management of remote Aboriginal housing in Western Australia.

In the past, remote Aboriginal housing has largely been delivered through local Indigenous Community Housing Organisations. Under the current arrangements, communities are offered the option of entering into a Housing Management and Maintenance Agreement with the Department of Housing for a five-year period. The Agreement appoints the Department to provide repairs, maintenance and housing and tenancy management, either directly or through regional Aboriginal organisations called Regional Service Providers. The Housing Management and Maintenance Agreements make no change to ownership of the housing or the land on which it is situated.

While the agreements are optional, communities that do not enter into an agreement will not receive (or be funded for) tenancy management, general repairs and maintenance or new housing. The Department of Housing will, however, provide those communities with a basic level of service to ensure that the housing does not become dangerous or unsafe.²¹⁹

213 Government of Western Australia, 'Native title issues frustrate community works' (Media Release, 2 December 2008). At http://www.housing.wa.gov.au/index_2127.asp (viewed 7 September 2009).

214 *Aboriginal Affairs Planning Authority Act 1972* (WA), s 21.

215 *Aboriginal Affairs Planning Authority Act 1972* (WA), s 23.

216 Department of Indigenous Affairs, *Aboriginal Lands Trust*, <http://www.dia.wa.gov.au/Land/Aboriginal-Lands-Trust/> (viewed 7 September 2009).

217 Department of Indigenous Affairs, *Aboriginal Lands Trust*, <http://www.dia.wa.gov.au/Land/Aboriginal-Lands-Trust/> (viewed 7 September 2009).

218 Department of Housing, Government of Western Australia, Telephone interview with the Social Justice Unit of the Australian Human Rights Commission, 28 July 2009.

219 Department of Housing, Western Australia Government, Telephone interview with the Social Justice Unit of the Australian Human Rights Commission, 28 July 2009.

The Department of Housing now provides housing management services to over 2400 houses in 140 discrete remote communities.²²⁰ The Western Australian Government has proposed reforms to provide legal support for the Aboriginal Lands Trust to appoint the Department of Housing to manage housing on Lands Trust land.

At the time of preparing this Report, the bill to enact the amendments had not been finalised. However, the Department of Housing advised my office that the Western Australian Government plans to:

- amend the *Aboriginal Affairs Planning Authority Act 1972 (WA)* to allow the Aboriginal Lands Trust to appoint the Department of Housing to manage housing on its behalf, where the community has agreed to appointment
- amend the *Housing Act 1980 (WA)* to allow the Department of Housing to manage housing which it does not own.

The Department of Housing also advised that the amendments will not involve any changes to tenure or disturbance of native title.²²¹

(ii) Home ownership and commercial use of Aboriginal land

The Western Australian Government has stated that the second stage of its reform program, which is more extensive, will take place over a few years.

This second stage of reforms will enable the Department of Housing to manage housing with the agreement of communities on other forms of land held for the benefit of Aboriginal people, and will also facilitate home ownership, including the ability to obtain a mortgage, and commercial land use and investment on Aboriginal-held land.

As part of this, the Government has stated that it will also review policies, administrative practices and other legislative impediments to the creation and transfer of individual title on Aboriginal-held land, including land registration and planning.²²²

No detail is available yet in relation to these second stage reforms, and the Western Australian Government has undertaken to consult broadly with Aboriginal communities and native title bodies about the reforms.²²³

220 Department of Indigenous Affairs, Government of Western Australia, *Submission to the Senate Select Committee on Regional and Remote Indigenous Communities* (27 May 2009), p 13. At http://www.aph.gov.au/senate/committee/indig_ctte/submissions/sub90.pdf (viewed 7 September 2009).

221 Department of Housing, Government of Western Australia, Telephone interview with the Social Justice Unit of the Australian Human Rights Commission, 28 July 2009.

222 Department of Housing, Government of Western Australia, Telephone interview with the Social Justice Unit of the Australian Human Rights Commission, 28 July 2009.

223 Department of Housing, Government of Western Australia, Telephone interview with the Social Justice Unit of the Australian Human Rights Commission, 28 July 2009.

Text Box 4.5: The Bonner Report

In 1995, the Western Australian Government commissioned a review of the Aboriginal Lands Trust. The review was chaired by Neville Bonner, a former Liberal Senator and the first Indigenous person to be elected to the Australian Parliament. The Report of the Review of the Aboriginal Lands Trust, known as the Bonner Report, was provided to the Western Australian Government in 1996.

The Bonner Report focused on the issue of land ownership and how Aboriginal people could be provided with improved forms of land ownership that recognised both the economic and cultural aspirations of diverse Aboriginal communities. The Report stated:

The challenge for governments is to provide models of land tenure to Aboriginal people which integrate economic and cultural aspirations. Economic development should not be at the expense of cultural maintenance.²²⁴

While recognising that no single grand gesture will achieve a transition to productive, healthy and economically sustainable Aboriginal communities, the Bonner Report recommended a focus on providing Aboriginal people with improved ownership of land. It argued that while land was still held under the Aboriginal Lands Trust, other strategies to assist social and economic development would, to varying degrees, be impeded.²²⁵

This Report outlined guidelines to enable the transfer of land title from the Aboriginal Lands Trust to Aboriginal ownership. Progress on the transfer of land to Aboriginal ownership has been slow.

The Western Australian Government has said that the second stage of reforms will include changes to 'help facilitate home ownership and commercial use of Aboriginal land'.²²⁶ The recommendations of the Bonner Report (see Text Box 4.5) provide a foundation for reforms to facilitate home ownership and commercial development. I ask the Western Australian Government to use this opportunity to work with Aboriginal people and organisations to find ways of delivering stronger forms of Aboriginal ownership in Western Australia that support their engagement in the economy on terms over which they have control.

The Bonner Report notes 'the issue of providing Aboriginal people with wider options in terms of land title and land management is more reliant on political commitment than the creation of new legislation'.²²⁷ The Report also urges caution in relation to relying on legislative amendment to deliver real changes for Aboriginal people. Any reforms that are designed to improve Aboriginal land tenure must be supported by an ongoing commitment to implementing the reforms and an increased willingness to engage with Aboriginal people and organisations.

224 Aboriginal Lands Trust Review Team, *Report of the Review of the Aboriginal Lands Trust* (1996), extracts reproduced in 'Report of the Review of the Aboriginal Lands Trust' (1997) 2(1) *Australian Indigenous Law Reporter* 110, p 111.

225 Aboriginal Lands Trust Review Team, *Report of the Review of the Aboriginal Lands Trust* (1996), extracts reproduced in 'Report of the Review of the Aboriginal Lands Trust' (1997) 2(1) *Australian Indigenous Law Reporter* 110, p 111.

226 Government of Western Australia, 'State Government paves way for indigenous housing funding boost' (Media Release, 5 May 2009). At <http://www.mediastatements.wa.gov.au/Pages/RecentStatements.aspx?ItemId=131787&page=8> (viewed 7 September 2009).

227 Aboriginal Lands Trust Review Team, *Report of the Review of the Aboriginal Lands Trust* (1996), extracts reproduced in 'Report of the Review of the Aboriginal Lands Trust' (1997) 2(1) *Australian Indigenous Law Reporter* 110, p 111.

(iii) Native title and Aboriginal heritage

The third area of reform proposed by the Western Australian Government relates not to its own legislation but to the Native Title Act. The Western Australian Government has called for a new approach to native title and Aboriginal heritage management in relation to the installation of public works.

In particular, the Minister for Housing has stated that he favours:

- approaching the Commonwealth to amend the Native Title Act to allow a ‘non-extinguishment’ principle to apply to land for public works
- the introduction of a standard ILUA template to streamline the process and manage expectations
- the use of umbrella agreements as a way of bulking up negotiations and projects rather than dealing with them on a case by case basis.²²⁸

Native title representative bodies have expressed frustration at the Western Australian Government’s approach to native title, saying that the Western Australian Government has a policy of trying to avoid native title rather than giving native title holders the opportunity to be consulted.²²⁹

The Western Australian Government made representations to the Australian Government in relation to amending the Native Title Act.²³⁰ Western Australian native title representative bodies were not consulted in relation to those representations.

While this Report was being prepared, the Australian Government released a discussion paper on possible amendments to the Native Title Act in relation to housing and infrastructure for remote Indigenous communities. The discussion paper states:

The Government is considering amending the Native Title Act to include a specific future act process to ensure that public housing and infrastructure in remote Indigenous communities can be built expeditiously following consultation with native title parties but without the need for an Indigenous Land Use Agreement (ILUA).

The new process could be used for projects benefiting remote Indigenous communities, including locations covered by the National Partnership on Remote Service Delivery, and could enable vital housing and infrastructure projects to proceed with a specific consultation process for this issue.

The infrastructure facilities covered by the new process would include public housing and other developments such as medical clinics, schools and police stations, street lighting, water supply and electricity distribution. The new process would cover such facilities only where they are being established to service the relevant Indigenous community.²³¹

228 Government of Western Australia, ‘Native title issues frustrate community works’ (Media Release, 2 December 2008). At http://www.housing.wa.gov.au/index_2127.asp (viewed 23 October 2009).

229 See, for example, Kimberley Land Council, ‘Government Policy not Traditional Owners Block housing in Kimberley’ (Media Release, 10 February 2009). At http://www.klc.org.au/media/090210_MR_KLC_Housing.pdf (viewed 23 October 2009).

230 Department of Indigenous Affairs, Government of Western Australia, *Submission to the Senate Select Committee on Regional and Remote Indigenous Communities* (27 May 2009), p 14. At http://www.aph.gov.au/SENATE/committee/indig_ctte/submissions/sub90.pdf (viewed 23 October 2009).

231 Attorney-General’s Department and the Department of Families, Housing, Community Services and Indigenous Affairs, *Discussion Paper: Possible housing and infrastructure native title amendments, 19 August 2009* (2009). At http://www.fahcsia.gov.au/sa/indigenous/pubs/land/Pages/NativeTitleAmendments_DiscussionPaper.aspx (viewed 7 September 2009).

I consider that all governments should seek agreement with the affected communities about housing and infrastructure rather than look for minimalist procedures.²³²

(iv) *Tenure requirements for new housing*

The priority locations for initial housing investment in Western Australia under the National Partnership Agreement are Fitzroy Crossing, Halls Creek and the Dampier Peninsula (in particular the communities of Ardyaloon and Beagle Bay).

Fitzroy Crossing and Halls Creek are towns and are composed mostly of freehold title. There are also other forms of land tenure, in particular in relation to Aboriginal-held land. In Halls Creek, for example, land which is occupied by Aboriginal communities includes:

- Crown reserve with a management order to the Aboriginal Lands Trust for the use and benefit of Aboriginal people
- Crown reserve with a similar management order to the Aboriginal Lands Trust, which is also subject to a long-term lease to a local Aboriginal corporation
- Crown reserve with a management order directly to a local Aboriginal corporation
- land owned by the Department of Housing.²³³

The land on the Dampier Peninsula is also held under a variety of different forms of ownership. Native title applications have been registered in relation to land surrounding Fitzroy Crossing and Halls Creek, and large parts of the Dampier Peninsula are subject to a determination of exclusive native title.²³⁴

The Department of Housing has advised that it is still in the process of determining the exact locations for new housing in these areas, and that it is considering locations in the region of the identified communities and not just in the communities themselves. The tenure requirements for the new housing areas are also still being finalised, and will in part rely on the reforms to Aboriginal Lands Trust housing, which are described above.²³⁵

4.6 Principles for Indigenous land tenure reform

In Chapter 4 of the *Native Title Report 2005*, I provided a human rights appraisal of reforms to Indigenous land and recommended principles that should guide reforms.²³⁶ The central principle is free, prior and informed consent at all levels: in relation to legal and structural changes and the development of new policies as well the implementation of reforms and the involvement of individuals. In Annexure 3 to

232 Australian Human Rights Commission, 'Native title should be protected at all costs' (Media Release, 13 August 2009). At http://www.humanrights.gov.au/about/media/media_releases/2009/74_09.html (viewed 23 October 2009).

233 Department of Housing, Government of Western Australia, Telephone interview with the Social Justice Unit of the Australian Human Rights Commission, 28 July 2009.

234 *Sampi v State of Western Australia (No 3)* (2005) 224 ALR 358.

235 Department of Housing, Government of Western Australia, Telephone interview with the Social Justice Unit of the Australian Human Rights Commission, 28 July 2009.

236 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, Human Rights and Equal Opportunity Commission (2006), ch 4. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport05/index.html (viewed 29 October 2009).

the *Native Title Report 2005* I set out the key elements of free, prior and informed consent.²³⁷

Since that time, the Australian Government has endorsed the Declaration on the Rights of Indigenous Peoples. The Declaration provides guidance in relation to how Indigenous land reform should be implemented. The Declaration is included as Appendix 4 to this Report.

Below I set out some principles that should be considered prior to the introduction of land tenure reforms and any home ownership scheme.

Principle One	Indigenous land must not be treated as a lesser form of land ownership. Consistent with this principle, Indigenous land owners must not be required to forego any of their rights in relation to the land in order to receive essential services and infrastructure.
Principle Two	Government policies in relation to negotiating leases on Indigenous land should be consistent with international human rights standards. Consistent with this principle: <ul style="list-style-type: none"> ▪ the lease area and period of the lease must not be greater than what is required for the provision of the service ▪ the right of Indigenous landowners to charge rent must be respected ▪ the terms should respect the principles of self-determination by incorporating local Aboriginal decision-making authority.
Principle Three	Reforms to Indigenous land tenure must follow the process for free, prior and informed consent. Consistent with this, governments must consult broadly in relation to any reforms. For consultation to be effective, governments need to provide clear and detailed information about the purpose and scope of any proposed reforms. Principles for consultation are set out in Appendix 3 to this Report.
Principle Four	Government policies must acknowledge the distinction between the interests of community residents and the interests of land owners and native title holders, and support appropriate mechanisms for agreement making.
Principle Five	Tenure reform should not lead to any involuntary reduction in the Indigenous estate.
Principle Six	Tenure reforms should aim to provide Indigenous people with stronger forms of Indigenous land ownership.

²³⁷ T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, Human Rights and Equal Opportunity Commission (2006), Annexure 3. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport05/index.html (viewed 29 October 2009).

Principle Seven	Compulsory acquisition of Indigenous land or native title rights, must only be used as a measure of last resort after full consideration of the social, cultural and spiritual consequences of acquisition, including a consideration of the traditional law of many Indigenous peoples to have control over access and use of their lands. Consistent with this, laws in relation to compulsory acquisition must not make it easier to acquire Indigenous land than other forms of land.
Principle Eight	Where Indigenous land or native title is acquired, the land owners or native title holders must receive just terms compensation.
Principle Nine	<p>Before a home ownership scheme is developed on Indigenous land, the community residents and land owners and any native title holders must first be provided with all necessary information on home ownership. This includes:</p> <ul style="list-style-type: none"> ▪ economic modelling for that community on the possible implications of a home ownership scheme, which must include a description of what might happen to house prices over time and what this might mean for the community and homeowners ▪ how the price will be worked out for the sale of former government housing ▪ the options in relation to transfers, including the implications of 'open' and 'closed' markets ▪ how the scheme might be regulated and governed ▪ the obligations of home owners in relation to maintenance ▪ the obligations of home owners under a home loan or mortgage, including the circumstances in which a home may be lost or forfeited.
Principle Ten	Where a community chooses to develop a home ownership scheme, the governance arrangements for the scheme must respect local Aboriginal or Torres Strait Islander decision-making authority.
Principle Eleven	Government housing must be sold at a price that reflects the housing market and the income capacity of participants rather than the depreciated asset value of the building.
Principle Twelve	Financing for home ownership schemes should include ways of recognising broader contributions, such as 'sweat' finance and 'good renter' programs, ²³⁸ and ways of giving Indigenous land owners and native title holders the benefit of their land ownership.

238 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, Human Rights and Equal Opportunity Commission (2006), pp 141, 143. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport05/index.html (viewed 29 October 2009).

Principle Thirteen	<p>Participants in home ownership schemes must receive appropriate information before entering the scheme. This includes:</p> <ul style="list-style-type: none"> ▪ a property condition report that includes a description of potential repairs and maintenance for the building in the next few years ▪ financial planning advice ▪ legal advice on the implications of home ownership and having a home loan / mortgage.
Principle Fourteen	<p>Governments must ensure that any home ownership benefits or incentives offered to Indigenous people living on Indigenous lands are extended to Indigenous people across Australia in a fair and equitable manner to ensure that all Indigenous people can enjoy the benefits of home ownership.</p>

4.7 Conclusion

In this Chapter, I have attempted to identify the reforms to Indigenous land tenure that are being implemented across Australia. It is concerning that the Australian Government has not presented its policies on land tenure reform in a clear and transparent way.

I am further concerned that currently there appears to be a strong government focus on obtaining secure government tenure rather than providing Aboriginal and Torres Strait Islander people with economic development opportunities or improved forms of land ownership.

Overall, there is a strong sense that reform is being imposed from the top down in a way which leaves Aboriginal and Torres Strait Islander people feeling anxious and uncertain. This is inconsistent with the Government's desire 'to build new partnerships with the Indigenous community by reaching lasting and equitable agreements'.²³⁹

All people in Australia have a right to adequate housing and to essential services. Aboriginal and Torres Strait Islander peoples should not have to give up other rights, including our rights to our lands, territories and resources, to be able to access such basic services. I call upon governments to work with us to close the gap in a way that respects, protects and fulfils our fundamental human rights, and to follow the principles outlined above when considering land tenure reform.

239 R McClelland (Attorney-General), *Native Title Consultative Forum* (Speech delivered at the Native Title Consultative Forum, Canberra, 4 December 2008), para 45. At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2008_FourthQuarter_4December2008-NativeTitleConsultativeForum (viewed 16 November 2009).

Recommendations

- 4.1 That the Australian Government amend the *Northern Territory National Emergency Response Act 2007* (Cth) to end the compulsory five-year leases, and instead commit to obtaining the free, prior and informed consent of traditional owners to voluntary lease arrangements.
- 4.2 That the statutory rights provisions, set out in Part IIB of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), be removed.
- 4.3 That the Australian Government meet with the Aboriginal land councils to discuss other ways of introducing broad scale leasing to communities on Aboriginal land in the Northern Territory, which do not require communities to hand over decision-making to a government entity.