

## Property as Governance: Time, Space and Belonging in Australia's Northern Territory Intervention

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This article analyses two cases brought by aboriginal Australians against the Australian government acquisition of long leases of their land under the Northern Territory National Emergency Response Act 2007. These leases are conspicuous, particularly in that the government always made it clear that it would not take up its right to exclusive possession of the leased land, and has not done so. The leases have not been used to evict residents, as some feared; nor to pursue mining or agricultural activity. Socio-legal theories centered on the right to exclusive possession cannot account for these leases. The article explores the use of property under the 2007 Act, the legal geographies of the areas subject to the leases and the political potency of property beyond exclusive possession, and suggests an understanding of property as a spatially contingent relation of belonging. Specifically, the article argues that property is productive of temporal and spatial order and so can function as a tool of governance.

In July 2012, Australia's Northern Territory National Emergency Response Act 2007 (NTNERA) officially came to an end. The controversial Act, passed on the basis that rates of child sex abuse in Northern Territory aboriginal communities had become a national emergency, enabled a racially discriminatory federal government 'intervention' in the Territory that has been the subject of criticism from a wide range of activist groups, human rights organisations,<sup>1</sup> and the United Nations.<sup>2</sup> Among a number of highly paternalistic measures, the intervention involved the Australian federal government compulsorily acquiring long leases (five years and above) of aboriginal land. This article discusses the purpose and effect of the intervention leases, and the two cases that have (unsuccessfully) challenged them, namely *Reggie Wurridjal, Joy Garlbin and the Bawinanga Aboriginal Corporation v The Commonwealth of Australia and The Arnhem Land Aboriginal Trust*<sup>3</sup> (*Wurridjal*) and *Shaw v Minister for Families, Housing, Community Services and Indigenous Affairs*<sup>4</sup> (*Shaw*). From a property law perspective, the leases are curious in that the government always made it very clear that

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1 See for example Amnesty International, 'Discriminatory aspects of the NTER yet to be addressed' (Sydney, 4 February 2009) at <http://www.amnesty.org.au/news/comments/20169> (last visited 15 August 2011); Intervention Rollback Action Group, 'Rollback the Intervention' (Alice Springs, 2009) at <http://rollbacktheintervention.wordpress.com> (last visited 18 August 2011).

2 J. Anaya, 'Observations on the Northern Territory Emergency Response in Australia' Report by the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (2010).

3 [2009] HCA 2.

4 [2009] FCA 844 and [2009] FCA 1397.

it would not take up its right to exclusive possession of the leased land, and true to its word, it has not done so. The leases have not been used as a way to directly push residents off their land, as some feared; nor have they been used to pursue any kind of mining or agricultural activity. In fact theories of property that center around the subject's right to possess an object and exclude others from it, cannot account for these leases. To make sense of how property is being used in the NTNERA leases, a different analysis is needed, an analysis that focuses not on the propertied subject and her right to possess and exclude, but on the space through which property is constituted, and the way that that space affects how people live.

The analysis of the purpose and effect of the intervention leases that I put forward here is one that begins by looking at the legal geographies of the land subject to the leases – in particular, the areas of land being contested in the *Wurridjal* and *Shaw* cases. Discussing and building upon an understanding of property as a spatially contingent relation of belonging, I explore the political potency of property beyond exclusive possession and its various effects. This understanding involves thinking about property not just in terms of objects that belong to and are possessed by subjects, but also in terms of parts that belong to and are constitutive of wholes. The latter understanding of property as part-whole belonging enables an analysis whereby characteristics generally associated with identity politics (such as whiteness or aboriginality) can be understood as property in the same way as the ownership of more tangible objects can. My analysis of the cases demonstrates that what was at stake in the contested leases was not so much possession of the land, as it was the time and space of belonging that property produces. Specifically, I argue that property can be understood as a process that is productive of temporal and spatial order, and that this production allows property to function as a tool of governance.

## THE INTERVENTION

'The intervention' is the term given to the set of policies enabled by the federal government's NTNERA, the tabling and passage of which followed the Northern Territory government's 'Little Children are Sacred' report, which contained allegations of widespread child sex abuse in the Territory's remote aboriginal communities.<sup>5</sup> These allegations were based on a nine-month inquiry led by Rex Wild QC, a non-aboriginal lawyer, and Pat Anderson, an aboriginal woman with expertise in indigenous health. The report itself did not declare the existence of an emergency, but did state that the issue of child sexual abuse was one that required urgent attention.<sup>6</sup>

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5 P. Anderson and R. Wild, 'Little Children are Sacred' Report of the Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Northern Territory Government (2007).

6 *ibid.*, 7.

The Northern Territory is Australia's third largest federal division but its least populated (230,000 residents).<sup>7</sup> It is the 'most aboriginal' area of Australia in the sense that it has by far the highest aboriginal proportion of its population of any Australian jurisdiction (over 30 per cent compared to the next highest 3.8 per cent),<sup>8</sup> the highest number of native title land claims,<sup>9</sup> and is the site of the first and most significant Aboriginal land rights legislation passed in Australia to date (around 45 per cent of the area of the Northern Territory is now aboriginal-owned under the Aboriginal Land Rights (Northern Territory) Act 1976 (Land Rights Act) which is far higher than in any other jurisdiction).<sup>10</sup> The Northern Territory is one of only two mainland Australian territories, the other being the small area around the federal capital of Canberra. Although the territories are now self-governing, they are still subject to having their laws over-ridden by the federal government,<sup>11</sup> a level of intrusion from which the Australian states are immune. Drawing on this power, the federal government, which was then headed by conservative Prime Minister John Howard, announced on 21 June 2007 that the levels of child sex abuse in the Northern Territory's aboriginal communities had become a national emergency to which the Territory government had failed adequately respond. As such, the federal government was to immediately draft, pass and implement emergency response legislation. With bipartisan support from the then Labor opposition, the NTNERA took effect in the prescribed Northern Territory communities within weeks of its announcement.<sup>12</sup>

The NTNERA and associated amending legislation introduced a range of highly paternalistic and racially discriminatory measures to large areas of the Northern Territory. These measures apply to 'prescribed areas' of the Territory, which are defined in the Act as all aboriginal land<sup>13</sup> as well as any other area declared by the relevant Minister, with the exact co-ordinates for the prescribed areas listed in a schedule to the Act.<sup>14</sup> All prescribed areas are those of aboriginal communities.<sup>15</sup> The NTNERA measures applicable in the prescribed areas include a total ban on the possession and consumption of alcohol,<sup>16</sup> compulsory income management for all welfare recipients,<sup>17</sup> compulsory installation of

7 Australian Bureau of Statistics, 'Australian Demographic Statistics' (Canberra, 2009) at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0/> (last visited 15 February 2010).

8 Australian Human Rights Commission, 'A statistical overview of Aboriginal and Torres Strait Islander Peoples in Australia' (Sydney, 2008) at [http://www.hreoc.gov.au/social\\_justice/statistics/index.html#Heading34](http://www.hreoc.gov.au/social_justice/statistics/index.html#Heading34) (last visited 15 February 2010).

9 National Native Title Tribunal, 'Northern Territory' (Canberra, 2010) at <http://www.nntt.gov.au/Native-Title-In-Australia/Pages/Northern-Territory.aspx> (last visited 15 February 2010).

10 B. A. West and F. T. Murphy, *A Brief History of Australia* (New York: Infobase Publishing, 2010) 85.

11 The Constitution of the Commonwealth of Australia, s 122.

12 NTNERA, s 2.

13 That is, land held on trust under the Land Rights Act.

14 NTNERA, s 4.

15 Based on a search of all legislative instruments passed under NTNERA as at 15 February 2011.

16 NTNERA, s 12.

17 NTNERA, s 126.

anti-pornography filters on all public computers as well as obligatory record-keeping of all computer users,<sup>18</sup> cutting back of the permit system for entry onto aboriginal land,<sup>19</sup> federal government takeover of local services and community stores as well as a ministerial power to suspend all elected councilors,<sup>20</sup> a ban on Northern Territory courts from taking customary law into account when dealing with bail applications and sentencing,<sup>21</sup> and compulsory rent-free five-year leases of aboriginal land to the federal government.<sup>22</sup> The compulsory income management means that welfare recipients have half of their fortnightly payments quarantined for food and other essential items only, for which they are issued a 'basics card' that can only be used in approved stores within the Northern Territory.<sup>23</sup> The NTNERA made itself exempt from Australia's Racial Discrimination Act 1975<sup>24</sup> as it would otherwise have clearly fallen foul of its prohibition of discrimination on the basis of race.

The NTNERA does not actually implement most of the recommendations of the Little Children are Sacred report. In many cases the relationship between the intervention provisions and child protection 'remains unexplained',<sup>25</sup> and the intervention has been criticised by the United Nations, a number of human rights organisations and many activist groups.<sup>26</sup> It has also been noted that according to some statistics the rates of child abuse in the Northern Territory are in fact lower than in most other Australian jurisdictions,<sup>27</sup> and the number of convictions for child sex abuse in the prescribed areas did not significantly rise during the intervention despite increased police powers and surveillance.<sup>28</sup> Yet despite the apparent absence of a 'national emergency' concerning child sex abuse in the prescribed communities, the intervention remained in force for its full five-year period, ending in mid-2012 due to its sunset clause.<sup>29</sup>

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18 NTNERA, Part 3.

19 Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory Emergency Response and Other Measures) Act 2007, Sched 4.

20 NTNERA, Parts 5 and 7.

21 NTNERA, ss 90, 91.

22 NTNERA, Part 4, Division 1.

23 Housing Australian Government Department of Families, Community Services and Indigenous Affairs, 'Closing the Gap in the Northern Territory: January 2009 to June 2009 Monitoring Report' (2009) 54.

24 NTNERA, s 132.

25 L. Behrendt, C. Cunneen and T. Libesman, *Indigenous Legal Relations in Australia* (Sydney: OUP, 2009) 81–82.

26 See for example Anaya, n 2 above; Amnesty International, n 1 above; Intervention Rollback Action Group, n 1 above.

27 West and Murphy, n 10 above, 232.

28 Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, 'Closing the Gap: Monitoring Report July – December 2010' (2010) Section 6.7.

29 NTNERA, s 6.

## THE LEGAL GEOGRAPHY OF THE MANINGRIDA REGION AND ALICE SPRINGS TOWN CAMPS

In order to understand the broader significance of the *Wurridjal* and *Shaw* challenges to the intervention leases, it is useful to consider the legal geography of the Maningrida and Alice Springs town camp areas that these cases concern. Consistent with the spatial turn in the humanities and social sciences, legal geography shifts the focus of analysis away from the legal subject and onto the places, spaces and landscapes in which the subject is located.<sup>30</sup> Legal geographer Nicholas Blomley, for example, has shown ways in which violence is encoded in landscapes – through spectacular means such as nation–state border walls but also through more mundane means such as private property rights.<sup>31</sup> Though disparate in its methods and theoretical underpinnings,<sup>32</sup> legal geography demonstrates the political importance of space, asking how the spatial connects with the legal and the social, both conceptually and in a range of practical settings.<sup>33</sup> In questioning how subjects, practices and things come to have a particular place in the world (and to be out of place elsewhere), legal geography resonates with phenomenological approaches such as those of Franz Fanon and Sara Ahmed. Drawing on Fanon, Ahmed argues that ‘doing things’ depends not so much on intrinsic capacity, or even upon dispositions or habits, but on the ways in which the world is available as a space for action, a space where things ‘have a certain place’ or ‘are in place’.<sup>34</sup> In other words, the world is a space where subjects, objects and practices belong in particular places, and where that belonging affects what is possible for whom. Exploring the legal geographies of the Maningrida region and the Alice Springs town camps, asking what kinds of spaces they are and who and what belong there, is a useful way to begin interrogating what was at stake in the intervention leases.

Both the Maningrida region and the Alice Springs town camps are of course located in the Northern Territory, which has always been regarded as ‘the last frontier’ in terms of the ongoing production and maintenance of Australia as a white settler state.<sup>35</sup> The harsh desert and tropical conditions in the Territory made it the most difficult area of Australia to populate with white settlers, with international commentators in the early 1900s suggesting that white Australians had not effectively occupied the north to the level required by international law, and Australian politicians speaking publicly of ‘the problem’ of the lack of white settlers and the ongoing prevalence of

30 For an overview of legal geography see N. Blomley, D. Delaney and R. T. Ford (eds), *The Legal Geographies Reader: Law, Power and Space* (Oxford: Blackwell, 2001).

31 N. Blomley, ‘Law, Property, and the Geography of Violence: The Frontier, the Survey and the Grid’ (2003) 93 *Annals of the Association of American Geographers* 121.

32 A. Philippopoulos-Mihalopoulos, ‘Law’s Spatial Turn: Geography, Justice and a Certain Fear of Space’ (2011) 7 *Law, Culture and the Humanities* 182.

33 See n 30 above.

34 S. Ahmed, ‘A phenomenology of whiteness’ (2007) 8 *Feminist Theory* 149, 152.

35 West and Murphy, n 10 above, 86.

aboriginal culture in the north until the 1940s.<sup>36</sup> The present-day aboriginal land rights movement began in the Northern Territory in 1966, with the Gurindji people walking off the Wave Hill cattle station and demanding the return of their land – a fight they won in 1975, and which led to the Land Rights Act the following year.<sup>37</sup> The Northern Territory was only declared to be self-governing rather than under the direct control of the federal government in 1978.<sup>38</sup> The Territory government's attitude towards the federal government has been described as one of 'hostile suspicion' due to both the long history of federal control and the federal government's retention of its constitutional power to override Territory decisions.<sup>39</sup> The Northern Territory thus continues to be a place where the forces of Australian settler colonialism meet with significant aboriginal resistance.

### The Maningrida region

The Maningrida region over which the leases in the *Wurridjal* case is concerned, is an aboriginal community in Arnhem Land, a large, remote region on the north coast of the Northern Territory. Due to its remote position and its extreme tropical and often drought-ridden environment, Arnhem Land has a relatively short colonial history compared with other regions of Australia (and even with other regions of the Northern Territory), meaning aboriginal customs, beliefs and institutions are still relatively strong.<sup>40</sup> Arnhem Land has been an aboriginal reserve since 1931, and since 1980 has been held by the Arnhem Land Aboriginal Trust (the Land Trust) for the benefit of several clans who are recognised as traditional owners under the Land Rights Act.<sup>41</sup> Like all land granted as a fee simple estate, the Maningrida region and all of Arnhem Land is 'private property', with entry and occupation specifically prohibited by the Act unless the person entering is either a traditional owner or has permission to enter.<sup>42</sup>

The township of Maningrida was established as an instrument of government policy in 1957.<sup>43</sup> With 2,700 residents, Maningrida today is the equal largest aboriginal community in the Territory and a relatively prosperous one. A Territory government report from 2008 states that Maningrida has 'a relatively well-developed economy with generally good work force participation ethic and

36 H. Reynolds, 'Reviving Indigenous Sovereignty?' (2006) 6 *Macquarie Law Journal* 5.

37 B. Attwood and A. Markus, *The Struggle for Aboriginal Land Rights: A Documentary History* (Melbourne: Allen & Unwin, 1999) 222–240.

38 R. Gerritsen and D. Jaensch, 'The Northern Territory' in B. Galligan (ed), *Australian State Politics* (Melbourne: Longman Cheshire, 1986) 140.

39 *ibid*, 152.

40 J. C. Altman, 'Fresh Water in the Maningrida Region's Hybrid Economy: Intercultural Contestation over Values and Property Rights' (Australian National University, 2008).

41 Agreements, Treaties and Negotiated Settlements Project, 'Arnhem Land Aboriginal Trust' (Melbourne, 2011) at <http://www.atns.net.au/agreement.asp?EntityID=3210> (last visited 2 March 2011).

42 Land Rights Act, s 70.

43 Altman, n 40 above, 1.

a track record of developing and sustaining trading businesses'.<sup>44</sup> While many aboriginal people have moved to the township of Maningrida itself, many also continue to live in outstations on the region, of which there are over 30.<sup>45</sup> Due to the relatively short history of white settlement and the support of outstation living by the local Bawinanga Aboriginal Corporation, which runs programs promoting aboriginal languages and culture, aboriginal residents' relationship with land in the Maningrida region and throughout Arnhem Land is stronger than in other parts of Australia and is also robustly defended in the face of encroaching white governance. Apart from being a strong site of aboriginal culture, Arnhem Land communities are also willing to use the legal system to defend their way of life. In July 2008 for example, the Arnhem Land Aboriginal Land Trust won an action against the Northern Territory government in the High Court for exclusionary rights over the tidal waters surrounding Blue Mud Bay.<sup>46</sup>

### The Alice Springs town camps

The Alice Springs town camps that were the subject of the sub-leases in the *Shaw* case are also places of aboriginal resistance, but with a different legal geography. In contrast to the Maningrida region, which has been inhabited by the same cultural groups of aboriginal people for centuries and remains an area of strong aboriginal culture largely because it has managed to stay at a distance from white settlers, the Alice Springs town camps are uniquely post-contact places that are by definition located in close proximity to settler space. The town camps only came into existence when white settlement began in the 1880s at the site that is now Alice Springs.<sup>47</sup> Aboriginal people who had been dispossessed from their traditional lands moved in towards the town, where they could access rations and employment, and where those whose children had been forcibly taken into state care could visit them in Alice Springs institutions.<sup>48</sup> The camps consist mainly of self-constructed shacks built without government permission.<sup>49</sup> From a legal perspective they were originally classed as illegal squatters on crown land.<sup>50</sup> Aboriginal people were attracted to town camps because they provided a space almost free of colonial control. In contrast to the missions and reserves of the late 1800s and early 1900s, town camps allowed aboriginal languages to be spoken, cooking to be done in aboriginal style and children to be raised by their own families.<sup>51</sup> The camps also provided a safe

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44 Northern Territory Government, 'Maningrida Study' (Darwin 2008) at [http://www.dhlgrs.nt.gov.au/\\_\\_data/assets/pdf\\_file/0020/121367/Maningrida\\_Study.pdf](http://www.dhlgrs.nt.gov.au/__data/assets/pdf_file/0020/121367/Maningrida_Study.pdf) (last visited 3 December 2011).

45 Altman, n 40 above, 1.

46 *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* [2008] HCA 29.

47 F. Coughlan, 'Aboriginal Town Camps and Tangentyere Council: The Battle for Self-Determination in Alice Springs' (MPhil Thesis, School of Humanities, La Trobe 1991) 22.

48 *ibid.*

49 P. Memmott, 'From the 'Curry to the 'Weal: Aboriginal Town Camps and Compounds of the Western Back-Blocks' (1996) 7 *Fabrications: The Journal of the Society of Architectural Historians, Australia and New Zealand* 1, 4.

50 Coughlan, n 47 above, 80.

51 *ibid.*, 29.

place for aboriginal people who live further out bush to come and stay for extended periods.<sup>52</sup> In short, as Frances Coughlan argues, ‘cultural destruction programs were not carried out on the town camps in the way they were on government settlements and church run missions’.<sup>53</sup>

The town camps thus first developed, and continue to exist today, as places physically close to the white settler space of Alice Springs but culturally distant from it. An architectural study of the town camps in the 1990s stated that they

have been created and built by their users, adjusted as required to suit their own lifestyle and changing needs, and supportive of their own social organisation and interaction, all this being done by the people with their own devices, their own labour and skills, and drawing where appropriate on the traditions of their pre-contact indigenous architecture.<sup>54</sup>

Anthropologists have also pointed out the autonomy and permanence of town camp communities, their distinct social kinship structures and their continuing attachment to traditional aboriginal beliefs and values.<sup>55</sup> A development study from 1981 emphasised that the town camps were a place of open rejection of ‘the European suburban way of life’,<sup>56</sup> and historian Henry Reynolds writes that similar town camps in the neighbouring state of Queensland acted as ‘refuges for guerilla fighters, and also training centres for urban criminals whose pursuits were a form of ongoing resistance to colonial domination’.<sup>57</sup>

Since the mid-1970s, the Alice Springs town camp communities have been attempting to negotiate legal recognition of their presence on and relationship with the land. The communities formed Housing Associations for each respective camp and in 1977 the associations established an umbrella organisation, Tangentyere Council, to assist with negotiations for leases of the land and to help tackle other needs such as garbage and water services, roads, education, training, employment and housing.<sup>58</sup> The town camps were not eligible for a grant of deed under the Land Rights Act, but could apply for long leases under the Special Purpose Leases Act 1953 (NT) or the Crown Lands Act 1992 (NT). The Northern Territory government reluctantly granted a number of leases to town camps that applied, but in 1981 it announced a freeze on the granting of any further leases on town camps ‘until adequate and rational use is made by aboriginals of existing land grants’.<sup>59</sup> The freeze lasted until 1986,

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52 *ibid.*, 11.

53 *ibid.*, 29.

54 Memmott, n 49 above, 1.

55 *ibid.*, 3.

56 M. Heppell and J. J. Wigley, *Black Out in Alice: A History of the Establishment and Development of Town Camps in Alice Springs* (Canberra: Australian National University, 1981) cited in Memmott, n 49 above, 4.

57 H. Reynolds, ‘Fringe Camps in Nineteenth Century Queensland’ in *Lectures on North Queensland History* 3<sup>rd</sup> series (Department of History, James Cook University, Townsville, 1978) cited in Memmott, n 49 above, 7.

58 Coughlan, n 47 above, 58.

59 *ibid.*, 83.

after which leases were granted to the remaining town camps, but battles continued with the government over the provision of essential services to the town camps, in particular running water. While the town camps had always been faced with the social problems of poverty and dispossession, these were compounded by alcoholism and related problems when the Northern Territory government passed legislation in 1983 making it a criminal offence to drink alcohol in public within two kilometers of any licensed premises. Aboriginal drinkers, who were not welcome in pubs, retreated to the town camps as places where they could drink safely.<sup>60</sup> The Tangentyere Council introduced a number of programs to address drinking and associated problems in the town camps, though these were generally poorly funded and largely unrecognised by Territory and federal governments.<sup>61</sup>

The Alice Springs town camps have thus had a tumultuous relationship with both the Northern Territory and federal governments. While the federal government's Land Rights Act prohibited the town camp communities from eligibility for freehold title, it did make provision for the camps to apply for leases from the Northern Territory government, which each town camp Housing Association eventually managed to do. And while the Tangentyere Council faced opposition from the Territory government, it did eventually manage to incorporate and win funding from both the federal and Territory governments to run successful housing and social programs for the town camp communities with little government interference. The funding and property rights were not enough to overcome the social problems faced by the town camp communities and their lack of essential services – several town camps today still do not have power or running water.<sup>62</sup> The town camp communities experienced a tension between seeking government recognition and assistance on the one hand, and prioritising the retention of aboriginal control on the other.

The government maintained a generally negative attitude toward town camps. A Commonwealth government report from 1982 defined town campers as

any group of Aboriginals living at identified camp sites near or within towns or cities which form part of the socio-cultural structure of the towns and cities, but which have a lifestyle that does not conform to that of the majority of non-Aboriginal residents and are not provided with essential services and housing on a basis comparable to the rest of the population.<sup>63</sup>

Although urban policy experts argued for the legitimacy of town camps as permanent aboriginal communities, noting the cultural autonomy enjoyed by

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60 *ibid.*, 100.

61 Tangentyere Council, 'History' (Alice Springs, 2011) at <http://www.tangentyere.org.au/about/background/> (last visited 2 March 2011).

62 *ibid.*

63 Commonwealth of Australia, 'Strategies to Help Overcome the Problems of Aboriginal Town Camps' Report to the House of Representatives Standing Committee on Aboriginal Affairs (Canberra: Government Printer, 1982) 5–6.

the communities and the stability of aboriginal people living in town camps compared to those living in the suburbs, successive Territory and federal governments have been reluctant to recognise and support the town camps as viable aboriginal-controlled spaces.<sup>64</sup>

Both the Alice Springs town camps and the Maningrida area have well-entrenched geographies of tension with and resistance to the Australian state. Both are places constructed out of broader relations of colonisation and resistance between aboriginal Australians and white Australian law. And unlike most of Australia, both the Alice Springs town camps and the Maningrida can be described as spaces of aboriginal belonging – spaces where white people are a minority, bush food is still cooked and shared in traditional ways, people value sleeping outside and caring for the land in a non-agricultural way, and aboriginal languages are widely spoken. In this sense it is somewhat unsurprising that they were legislatively singled out from the rest of Australia. Though the NTNERA prescribed these areas on the basis of race and purportedly deviant sexuality, they had long been places that did not fit with the rest of post-contact Australia.

### **THE CASES: REGGIE WURRIDJAL AND BARBARA SHAW AGAINST AUSTRALIA**

There have been two legal challenges brought against the intervention, both involving local aboriginal challenges to government leases. The first case, led by Reggie Wurridjal, concerned the five-year lease of the Maningrida region to the Commonwealth, and the second case was brought by Barbara Shaw concerning 40-year (and longer) sub-leases of the Alice Springs town camps. Although both cases raise questions of administrative and public law, my analysis focuses on the property aspect. As stated above, from a property law perspective the leases are curious in that the federal government never took up its right to exclusive possession, and apparently never intended to. Possession was not what was ultimately at stake in the contest for property in the Maningrida and Alice Springs town camps. As I have argued elsewhere, although there is an extremely wide and rich body of research on property, most theories of property continue to have as their focus the propertied subject and her right to possess and/or exclude, rather than the broader space through which property is constituted.<sup>65</sup> Bringing a spatial analysis to property offers new perspectives on its constitution and effects. To make sense of what was at stake in the intervention leases, it is necessary to consider property not just in terms of subjects and possession but also in terms of spaces and belonging.

The fact that the leases and sub-leases are the only intervention provisions to be challenged in court is interesting because on the face of it they are some of the less intrusive provisions of the intervention. The leases and sub-leases subject to

64 J. Taylor, 'Aboriginal intra-urban mobility in Katherine, Northern Territory' (1990) 8 *Urban Policy and Research* 76, 77–79.

65 S. Keenan, 'Subversive Property: Reshaping Malleable Spaces of Belonging' (2010) 19 *Social and Legal Studies* 423.

challenge only make the federal government the tenant of aboriginal land, they explicitly prohibit any mining from taking place,<sup>66</sup> and they do not have an immediate effect on the daily lives of aboriginal people as provisions such as compulsory income management and the total ban on alcohol do. Although the five-year leases grant the federal government ‘exclusive possession and quiet enjoyment of the land while the lease is in force’,<sup>67</sup> it has not, in any of the prescribed areas, sought to enforce this right. Government officials made a point of publicly assuring aboriginal land councils that the leases did not amount to a land grab.<sup>68</sup> Indeed then Prime Minister John Howard said in reaction to land grab allegations that ‘we’re offering a guarantee that we’re not taking anything from anybody. We’re trying to give things back’.<sup>69</sup> The government asserts that the leases ‘help to expand opportunities for business investment such as farming, tourism and retail businesses and home ownership’ and ‘offer opportunity for economic development and better housing and infrastructure’ for the benefit of the existing aboriginal communities.<sup>70</sup> In terms of better housing and infrastructure, the government argued that having long leases meant that it would not have to go through bureaucratic approval processes from aboriginal owners in order to make repairs on houses and impose maintenance conditions on individual renters.<sup>71</sup> The minister stated that the leases would also allow the government to promote private home ownership in aboriginal communities rather than the communal title which almost all aboriginal land is currently held under.<sup>72</sup> Almost identical arguments were made in regards to the 40-year sub-leases.<sup>73</sup>

Anti-intervention campaigners point out that, contrary to the federal government’s stated objectives, housing for aboriginal people in the prescribed areas has not improved under the intervention leases and sub-leases, and any ‘economic development’ has been negligible.<sup>74</sup> Although the government reports that it built 310 new houses between the beginning of the intervention in mid-2007 and June 2011, activists note that many of these houses are for non-aboriginal

66 NTNERA, s 35(2B).

67 NTNERA, s 35(1).

68 ABC News, ‘QC rejects NT land grab fears’ (Sydney, 17 July 2007) at <http://www.abc.net.au/news/2007-07-11/qc-rejects-nt-land-grab-fears/96634> (last visited 3 December 2011).

69 P. Karvelas and S. Parnell, ‘Communal land up for grabs’ *The Australian* 30 June 2007 at <http://www.theaustralian.com.au/news/nation/communal-land-up-for-grabs/story-e6f6g6nf-1111113856963> (last visited 24 August 2011).

70 J. Macklin, ‘Stronger Futures in the Northern Territory’ Australian Government Discussion Paper (Canberra, June 2011) 13 and 22.

71 Karvelas and Parnell, n 69 above.

72 *ibid.* The Commonwealth government continues to have a policy of encouraging private home ownership in aboriginal communities, although how that ownership is linked to government leases is less clear in more recent reports: Macklin, n 70 above.

73 M. Brough, ‘Minister disappointed by decision on Alice Springs Town Camps’ (Canberra, December 2010) at [http://www.fahcsia.gov.au/sa/indigenous/pubs/nter\\_reports/closing\\_gap\\_NT\\_jul\\_dec\\_2010/Documents/part2/Closing\\_the\\_Gap\\_Part2.htm](http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/closing_gap_NT_jul_dec_2010/Documents/part2/Closing_the_Gap_Part2.htm) (last visited 25 August 2011).

74 Intervention Rollback Action Group, n 1 above; ABC News, ‘Intervention delivering “empty shipping containers, no houses”’ (Sydney, 7 September 2008) at <http://www.abc.net.au/news/2008-07-09/intervention-delivering-empty-shipping-containers/2498780> (last visited 23 August 2011).

government agents who are being shipped in to the Territory to administer the NTNERA, rather than for aboriginal residents.<sup>75</sup> Whether individual home ownership is a desirable goal for aboriginal people is itself highly contestable, but at any rate, the slight increase in home ownership by aboriginal people that the government claims is now occurring has not solved the ongoing housing crisis in aboriginal communities in the Territory.<sup>76</sup> However, while activists were concerned that the government control of housing enabled by the leases will come to mean ‘higher rents, more restrictive tenancy conditions and easier eviction’,<sup>77</sup> there is no evidence that the federal government has used its leases and sub-leases to directly push existing residents out of their homes.<sup>78</sup> In neither the Maningrida region nor the Alice Springs town camps has the federal government taken up its leasehold right to exclusive possession.

Sean Brennan notes that the federal government’s rationale for the five-year leases has shifted over time, and was always ambiguous.<sup>79</sup> Its rationale for the 40-year sub-leases is not entirely clear either, but in its negotiations for the sub-leases it stated that it wanted access to and control of the land so as to make tenancy management reforms,<sup>80</sup> and that

[t]his leasing offer is not about kicking people out of their homes in Town Camps. The Government wants to make the houses in Town Camps better and safer for the people who are living there. We don’t want people to end up living in the scrub or the river.<sup>81</sup>

On a standard property law analysis, the federal government’s behaviour of going to great lengths to become the tenant (and sub-tenant) on land and then not taking up its right to exclusive possession is bizarre. Paddy Gibson argues that the leases are an attack on the gains won in the aboriginal land rights struggle, namely ‘aboriginal control over their own lives’.<sup>82</sup> However that control had already been taken on a more direct and dramatic level with other provisions in the intervention such as the total ban on alcohol and compulsory income management.

Why then did the government insist on acquiring property rights in these areas when it had already taken control of residents’ lives through more direct measures, and when it never intended to take possession of the land? Beyond the

75 P. Gibson, ‘Return to the Ration Days’ Jumbunna (Sydney, 2009) at <http://www.jumbunna.uts.edu.au/pdfs/JIHLBP11.pdf> (last visited 2 December 2011) 17.

76 The government acknowledges in its latest report that ‘there remains a serious shortage of decent houses in remote Northern Territory communities’: Macklin, n 70 above, 22.

77 Gibson, n 75 above.

78 Existing rights and interests in the land are preserved by section 34 of the NTNERA, but s 37 allows the Minister to terminate preserved rights.

79 S. Brennan, ‘Wurridjal v The Commonwealth: The Northern Territory Intervention and Just Terms for the Acquisition of Property’ (2009) 33 *Melbourne University Law Review* 957, 963.

80 *Shaw v Minister for Families, Housing, Community Services and Indigenous Affairs* [2009] FCA 1397 (*Shaw No 2*) at [103]–[104].

81 Commonwealth fact sheet reproduced in *Shaw No 2* at [111].

82 Gibson, n 75 above.

symbolism of land rights, what was at stake in the contest for property in the Maningrida and Alice Springs town camps? My reading of the cases is directed towards answering these questions.

### *Wurridjal v The Commonwealth of Australia*

The *Wurridjal* case was brought by Reggie Wurridjal and Joy Garlbin, who are senior Dhukurrjji people and traditional owners<sup>83</sup> of the area of land around the township of Maningrida. As traditional owners under the Land Rights Act, Wurridjal and Garlbin are entitled to enter, use and occupy the Maningrida land in accordance with aboriginal tradition, and to have the title to that land held for their benefit by the Land Trust.

As a prescribed area, the Land Trust was required to grant a five-year rent-free lease of the Maningrida region to the Commonwealth (in practice, the federal government), which took effect from 18 February 2008.<sup>84</sup> As stated above, under the lease the Commonwealth enjoys the standard tenancy rights of exclusive possession and quiet enjoyment.<sup>85</sup> Being an intervention lease however, it also includes highly unusual terms in favour of the tenant. The landlord (the Land Trust) is not able to vary the terms or terminate the lease although the tenant (the Commonwealth) can do either at any time; the tenant is not liable for any damage it does to the land or any of the buildings on it during the term of the lease, and the tenant is free to sub-lease, licence, part with possession and otherwise deal with the land.<sup>86</sup> The lease also gives the Commonwealth the power to direct aboriginal corporations who occupy any part of the land to manage its assets in a particular way or to transfer its assets to the Commonwealth.<sup>87</sup> The lease thus inverts the usual power relationship between landlord and tenant, but retains the defining feature that makes it a leasehold rather than a freehold estate: time. The freehold estate in fee simple has long been defined by its unlimited duration,<sup>88</sup> whereas leasehold estates are terms of years *absolute*. So although the lease of the Maningrida land grants to the tenant powers generally given to the landlord and thus associated with 'ownership', the estate is nonetheless a leasehold rather than a freehold because it has an end-date. The Land Trust's reversionary title is 'better' because the federal government's title has an expiry date.

In October 2007, before the lease had come into effect, the Wurridjal team filed their action in the High Court of Australia claiming that the five-year lease over Maningrida was unconstitutional because it was a compulsory acquisition of

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83 Within the meaning of the Land Rights Act, s 3.

84 The lease was compulsorily acquired under the NTNERA, s 31. As of December 2010 the federal government holds 64 such leases in the Northern Territory under this legislation: Macklin, n 70 above, 22.

85 NTNERA, s 35(1).

86 NTNERA, s 35 (2)–(7).

87 NTNERA, s 68.

88 '[H]e who has a fee simple estate in land has a time in the land without end, or the land for time without end' *Walsingham's Case* (1573) 2 Plowd 547, 555, quoted in K. Gray and S. F. Gray, *Elements of Land Law* (Oxford: OUP, 5<sup>th</sup> ed, 2009) 59.

property other than ‘on just terms’, contrary to section 51(xxxi) of the Constitution.<sup>89</sup> Being traditional owners of the land, Wurridjal and Garlbin also claimed that their entitlements under the Land Rights Act to enter, use or occupy Maningrida land in accordance with aboriginal tradition<sup>90</sup> constituted property that had been acquired by the Commonwealth other than on just terms through the NTNERA changes to the Land Rights Act permit system. The principle reason Wurridjal and Garlbin argued that the acquisition was unjust was that the Commonwealth was not required to pay the Land Trust rent for the lease, along with other one-sided lease provisions such as those allowing the Commonwealth to unilaterally alter its terms at any time. The claimants also argued that the leases amounted to an acquisition of their property as traditional owners (not just as beneficiaries of the Land Trust but in their own right), because unlike the Land Trust, the Commonwealth was not obliged to hold the land for the claimants’ benefit, and because their rights as traditional owners were now at the Commonwealth’s unfettered discretion.<sup>91</sup> In response, the Commonwealth filed a demurrer alleging that even if the facts claimed by Wurridjal and Garlbin were true, there was still no legal case to answer.

In a long and complex 6-1 decision delivered in February 2009, the High Court granted the Commonwealth demurrer, finding that the leases did not effect any acquisition of property from Wurridjal or Garlbin and that although the leases did acquire property from the Land Trust, that acquisition was on just terms. The legal legitimacy of the 64 NTNERA leases throughout the Territory was thus affirmed.

### *Shaw v Minister for Families, Housing, Community Services and Indigenous Affairs*

The *Shaw* case, which was heard in two stages, was a challenge to the Commonwealth’s use of its power to compulsorily acquire particular land in the Northern Territory under section 47(1) of the NTNERA. *Shaw*, like *Wurridjal*, was an aboriginal challenge to the operation of the NTNERA, but whereas in *Wurridjal* the question was whether the five-year lease of the Maningrida region amounted to an acquisition of property other than on just terms, in *Shaw* the question was whether the Commonwealth was bound by the rules of procedural fairness when it exercised its power to compulsorily acquire land. The land at stake in *Shaw* was that of the Alice Springs town camps. As discussed above, these town camps are areas that have been built and inhabited by aboriginal people since the late 1800s.<sup>92</sup> Today there are some 19 town camps around Alice Springs, each existing as a permanent community.<sup>93</sup> Each town camp community has its own Housing Association which holds the town camp land under

89 The section relevantly states ‘The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: (xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws’.

90 Land Rights Act, s 71.

91 *Wurridjal* at [350] per Heydon J.

92 Coughlan, n 47 above, 22.

93 Memmott, n 49 above, 3.

leases in perpetuity from the Northern Territory government under the Special Purposes Leases Act 1953 (NT) and the Crown Lands Act 1992 (NT).<sup>94</sup> Since early 2007 (before the announcement of the intervention) the federal government had been trying to gain long (between 40 and 99 years) sub-leases over the town camps from the Housing Associations, offering nominal rent (\$1 for the entire length of the lease) and an investment of between \$50 million and \$125 million in housing and associated infrastructure.<sup>95</sup> Negotiations for these sub-leases were still in process when the intervention was announced, and all Alice Springs town camps were soon after declared to be prescribed areas subject to the NTNERA.<sup>96</sup> The NTNERA itself modifies the Special Purposes Leases Act 1953 (NT) and the Crown Lands Act 1992 (NT) to increase the Commonwealth's administrative powers over the town camps,<sup>97</sup> as well as explicitly providing for town camp leases to be compulsorily acquired by the Commonwealth.<sup>98</sup>

Negotiations over the town camp sub-leases continued unsuccessfully for almost two years, with an impasse being reached over the Commonwealth's refusal to guarantee the Housing Associations the retention of certain key decision-making powers over the nature of the housing and infrastructure to be built.<sup>99</sup> In late July 2009 the Commonwealth Minister Jenny Macklin, told the Housing Associations that if they did not agree to the sub-leases as drafted she would use her powers under the NTNERA to compulsorily acquire the Housing Association's leases.<sup>100</sup> A number of the associations promptly signed agreements granting the Commonwealth 40-year sub-leases. Barbara Shaw, a resident of the Mount Nancy town camp, filed an action against Macklin in the Federal Court seeking orders restraining Macklin from using the NTNERA to compulsorily acquire any town camp land, and restraining both Macklin and the Housing Associations from either entering or executing the sub-leases.<sup>101</sup> Upon the first hearing of the matter in August 2009, Shaw won an injunction temporarily granting those orders until a full trial could be heard. The injunction was granted on the basis that there were two questions of law to be tried before either the acquisition or sub-leases could go ahead. The first was whether Macklin, in executing her power of compulsory acquisition under the NTNERA, was obliged to provide procedural fairness to those affected by the acquisition; the second was whether the Housing Associations would be breaching their own constitutional objective of acting in the interests of their aboriginal members by granting the sub-leases.<sup>102</sup>

Three months later at the full hearing, Shaw lost on both arguments. In regards to the first question, Justice Mansfield of the Federal Court found that the

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94 Memmott, *ibid*, 58–75.

95 *Shaw No 2* at [75] and [110].

96 *ibid* at [3].

97 NTNERA, ss 43–46.

98 NTNERA, s 47.

99 *Shaw No 2* at [107]–[133].

100 *ibid* at [133].

101 *Shaw v Minister for Families, Housing, Community Services and Indigenous Affairs* [2009] FCA 844 (*Shaw No 1*) at [65].

102 *ibid* at [75]–[99].

section of the NTNERA allowing the Commonwealth to compulsorily acquire town camp land ‘in its terms and in its context demonstrates an intention that the rules of procedural fairness . . . be excluded’.<sup>103</sup> Interpreting the statute, Mansfield J held that the absence of any requirement to give the town camp residents notice or an opportunity to be heard before the town camp lands were compulsorily acquired ‘cannot have been by oversight’.<sup>104</sup> Macklin was thus free to compulsorily acquire the town camps without having to comply with the ordinary rules of procedural fairness towards those affected. In regards to the second question, Mansfield J held that granting the sub-leases was not contrary to the interests of the Housing Associations’ members because granting the sub-leases would benefit those members (because of the \$100 million that Macklin would then spend on infrastructure improvement),<sup>105</sup> and because even though the sub-leases would extinguish the tenancy agreements that individual residents such as Shaw had with their Housing Associations, those tenancies were merely periodic in nature anyway.<sup>106</sup> Mansfield J dismissed residents’ fears of losing their homes under the sub-leases, accepting the Minister’s argument that the sub-lease arrangements would effectively just replace the Aboriginal Housing Associations with the Executive Director of Township Leasing (a Commonwealth government department) as ‘the landlord’ in each individual tenancy, without actually changing the rights already existing under those tenancies.<sup>107</sup>

Two weeks after Mansfield J handed down this decision, 17 out of the 18 Alice Springs town camps began the 40-year sub-leases of their land to the Commonwealth. The remaining town camp community of Ilpeye Ilpeye instead had their land compulsorily acquired.<sup>108</sup> Macklin announced that prisoner work gangs (consisting overwhelmingly of aboriginal men) had already started to ‘clean up’, ‘fix’ and ‘make safe’ the town camps and that her department was ‘committed to providing better homes for the people of the Alice Springs town camps, in particular for the children, women and the elderly’.<sup>109</sup>

## PROPERTY, PERMANENCE AND GOVERNANCE

The *Wurridjal* and *Shaw* cases show that the property disputes over the intervention leases and sub-leases were not primarily about possession of land.

103 *ibid* at [162].

104 *ibid* at [163].

105 *ibid* at [270].

106 *ibid* at [226].

107 *ibid* at [260]–[262].

108 J. Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, ‘New housing opportunities in Ilpeye Ilpeye’ (Canberra, 29 January 2010) at [http://www.jennymacklin.fahcsia.gov.au/mediareleases/2010/Pages/new\\_housing\\_opp\\_29jan09.aspx](http://www.jennymacklin.fahcsia.gov.au/mediareleases/2010/Pages/new_housing_opp_29jan09.aspx) (last visited 3 December 2011).

109 J. Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, ‘Work begins on town camps’ (Canberra, 7 December 2009) at [http://www.jennymacklin.fahcsia.gov.au/mediareleases/2009/Pages/work\\_begins\\_town\\_camps\\_7dec2009.aspx](http://www.jennymacklin.fahcsia.gov.au/mediareleases/2009/Pages/work_begins_town_camps_7dec2009.aspx) (last visited 3 December 2011).

Possession of the leased land has overwhelmingly remained with aboriginal residents in both the Maningrida and Alice Springs town camp areas. Although the right to possess the land was an essential aspect of the property being contested, it was a different aspect of property that was being fought for in these cases. As Nicole Graham has argued, although contemporary property theory focuses on the propertied subject's possession and ownership of the object, the conceptual origins of property are based on property being 'proper to' a person – that is, the physical qualities or things so closely associated with the person that he or she could be identified with them.<sup>110</sup> This aspect of property – its association with identity, the physical particularities of place, who and what are proper to the Maningrida and Alice Springs town camps – was what was at stake in *Wurridjal* and *Shaw*.

Drawing on the legal geographies discussed above, it is clear that both the Maningrida area and the Alice Springs town camps are spaces where, unlike the rest of Australia, aboriginal relations of belonging – aboriginal practices, identities and ways of life – are widely respected, supported and normalised. By acquiring leases of these areas, the Commonwealth poses a tangible threat to the social, cultural and physical space of the Maningrida and the Alice Springs town camps, even without taking exclusive possession.

Drawing on Davina Cooper's work on property practices, I have argued elsewhere for an understanding of property as a spatially contingent relation of belonging.<sup>111</sup> Rather than theorising property as an extension of or essential part of the propertied subject, Cooper understands property as 'a set of networked relations in which the subject is embedded'.<sup>112</sup> Crucially, that set of networked relations must include a relation of belonging. The relation of belonging might be between a subject and an object, as property is traditionally understood (such as the relation between a homeowner and her house, a car owner and her car, or the Land Trust and the Maningrida area), or it might be the constitutive relation between a part and a whole (such as the relation between a child and her family, a Christian and Christianity, or an aboriginal Australian and aboriginal Australia). The second understanding of belonging is rooted in social connections, and is something of a departure from traditional and legal understandings of property. It does however resonate strongly with Cheryl Harris' analysis of whiteness as property.<sup>113</sup> Using the analysis of part-whole belonging, whiteness can be understood as property because the property-holder is embedded in certain social relations and networks of belonging. A white person can enjoy the privileges of whiteness because he or she belongs to the various social relations and networks that constitute whiteness. As writers such as Ruth Frankenberg have shown, those relations and networks are complex and far-reaching. Whiteness, like all racial categories, is socially constructed through historically specific

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110 N. Graham, *Landscape: Property, Environment, Law* (Abingdon: Routledge, 2011) 24.

111 Keenan, n 65 above.

112 D. Cooper, 'Opening up Ownership: Community Belonging, Belongings, and the Productive Life of Property' (2007) 32 *Law & Social Inquiry* 625, 636.

113 C. I. Harris, 'Whiteness as Property' (1993) 106 *Harvard Law Review* 1707.

fusions of political, economic and other forces.<sup>114</sup> Whiteness in turn ‘constructs daily practices and worldviews in complex relations with material life’.<sup>115</sup> That is, whiteness is productive of subjectivities. So while whiteness can be understood as belonging to the white subject as Harris argues (whiteness as property in the sense of subject-object belonging), the white subject also belongs to the complex relations and networks that form whiteness (whiteness as property in the sense of part-whole belonging).

Both understandings of belonging (subject-object and part-whole) implicate social relations and networks that extend beyond the immediate subject and object of property. What is essential to property is the space through and in which it occurs. In order to constitute property, I argue that the set of networked relations to which Cooper refers must not only include one of belonging between either subject and object or part and whole, but must also be structured in such a way that the relation of belonging is conceptually, socially and physically supported or ‘held up’. By this I mean that those relations are recognised, accepted and supported in ways that have a range of effects and consequences. For example in Australia, white relations of belonging tend to be held up by space in a multitude of ways that aboriginal relations are not (through institutional means such as English-language education in schools and legal recognition of white kinship structures, through social validation such as accepting, supporting and celebrating white people in positions of power and authority, through positive media representation, through the availability of culturally appropriate housing, etc). This holding up by space of a relation of belonging is more than the act of state recognition, which has been specifically critiqued for its predetermination of the bounds of the propertied subject, particularly in colonial contexts.<sup>116</sup> While recognition, as Brenna Bhandar argues, ‘fails to escape the violence inherent in colonial spatial and temporal orders’,<sup>117</sup> the concept of ‘holding up’ is directly concerned with these orders.

To fully understand the significance of the *Wurridjal* and *Shaw* cases, both the subject-object (who has rights to the land) and part-whole (members of which cultural group belong here) aspects of property must be considered. As will be discussed below, property is not something that can simply be ‘taken’ in a single transaction as a legal, subject-object analysis would suggest. Rather, because ‘holding up’ is an ongoing process, property is better understood as a process that is productive of spatial and temporal orders. Those orders hold up relations of belonging, governing who and what belongs, and who and what are out of place.

114 R. Frankenberg, *The Social Construction of Whiteness: White Women, Race Matters* (London: Routledge, 1993) 204.

115 *ibid.*, 228.

116 B. Bhandar, ‘Plasticity and Post-Colonial Recognition: “Owning, Knowing and Being” ’ (2011) 22 *Law and Critique* 227, 228–229.

117 *ibid.*, 228.

***Wurridjal v The Commonwealth: property and permanence***

In granting the Commonwealth's application for a demurrer in *Wurridjal*, the High Court made several determinations on what the law regards as 'property'. All but one of the judges found that the five-year lease over the Maningrida area that the Land Trust had been compelled to grant the Commonwealth *did* amount to property that had been acquired, though most of those judges found that it had been acquired only from the Land Trust and not from *Wurridjal* or *Garlbin*. Each of the majority judges held that *Wurridjal* and *Garlbin* were merely beneficiaries of the Land Trust's title, meaning that *Wurridjal* and *Garlbin* themselves could not enforce any legal rights as property owners.

The question of whether the possession, quiet enjoyment and various other rights compulsorily granted by the Land Trust to the Commonwealth in the five-year leases amounted to 'property' involved two separate but related questions – did the Land Trust's rights over the land amount to property in the first place, and if so, did the five-year leases amount to an acquisition of that property?<sup>118</sup> The leading judgment of Chief Justice French looked at a range of precedents that had variously defined property as 'every species of valuable right or interest',<sup>119</sup> 'a bundle of rights'<sup>120</sup> and/or a right of legal action.<sup>121</sup> Against these broad definitions he states what property is *not* – property is not a right that is 'inherently' or 'of its nature' susceptible to variation.<sup>122</sup> French CJ noted that the Land Trust's fee simple estate in the Maningrida, which the Commonwealth's lease had carved an interest out of, was created by and embedded in the 'inherently variable regulatory framework' of the Land Rights Act.<sup>123</sup> This system of statutory regulation made the Land Trust's rights in the Maningrida different from the rights of other private land-owners, but for French CJ this level of regulation was not enough to mean that the Land Trust's rights in the Maningrida fell short of amounting to 'property', as the Commonwealth had argued.<sup>124</sup> French CJ thought it significant that the purpose of the Land Rights Act was to grant rights to aboriginal people that were comparable to the rights of non-aboriginal land-owners.<sup>125</sup> For French CJ this suggested that the Land Trust's rights over the Maningrida did amount to property, and although those rights were open to being varied by government to some extent, those rights were still similar enough to the non-variable nature of other kinds of land ownership rights for them to constitute property.

The one judge who found that the five-year leases did not amount to property at all, Justice Crennan, did so on the basis that although the Land Trust's

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118 *Wurridjal* at [95] *per* French CJ.

119 *ibid* at [87].

120 *ibid* at [89].

121 *ibid* at [90].

122 *ibid* at [93].

123 *ibid* at [94].

124 *ibid* at [101].

125 *ibid* at [98]–[100].

rights over the Maningrida could be classified as property, the five-year leases did not amount to an acquisition of that property. Crennan J argued that the leases did not amount to property principally because the Land Trust's rights over the Maningrida were wholly dependent upon the Land Rights Act and that 'the scheme of control' of land under that Act had always been susceptible to adjustment such as being forced to grant long leases to the Commonwealth on stringent terms.<sup>126</sup> So although Crennan J regarded the Land Trust's fee simple estate in the Maningrida as 'a formidable property interest',<sup>127</sup> it was a *sui generis* kind of property interest because it was inherently susceptible to significant government interference such as the lease in question. The lease was thus not an acquisition of property, but merely a temporary adjustment – the Land Trust retained its *sui generis* fee simple estate.

In dissent, Justice Kirby argued that the compulsory leases did amount to acquisitions of property not only from the Land Trust but also, at least arguably, from Wurrldjal and Garlbin. So Kirby J agreed with the majority that property had been acquired from the Land Trust; however he differed from the majority in also finding that it was at least arguable that a different kind of property had also been acquired from Wurrldjal and Garlbin. Kirby J argued that 'the nature' of the property asserted by Wurrldjal and Garlbin was 'somewhat different from, and additional to, conventional property rights known to Australian law'.<sup>128</sup> He analysed this 'different' property claimed by Wurrldjal and Garlbin on two bases – the first being as people who are recognised under local aboriginal traditions, observances, customs and beliefs as entitled to use the land for a wide range of particular purposes, and the second being as a traditional owner under the Land Rights Act.<sup>129</sup> While the latter claim to property, that based on section 71 of the Act, is the same kind of property that the majority found belonged to the Land Trust, the property claimed on the basis of aboriginal traditions, observances, customs and beliefs is different and more complex because it is not based on white Australian law. Kirby J lists the 'traditional purposes' that the claimants' distinctly aboriginal property entitles them to perform, such as:

- Utilising certain floral species and minerals on the Maningrida land for medicinal purposes in accordance with custom
- Observing traditional laws and performing traditional customs and ceremonies, particularly on sacred sites, on the Maningrida land
- Being responsible for maintaining the traditional connection of the members of the Dhukurrldji clan with country.<sup>130</sup>

Kirby J notes both the 'ancient' nature of these traditional purposes<sup>131</sup> and the recognition of the purposes in aboriginal law.<sup>132</sup> He argues that the distinctly

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126 *ibid* at [441] *per* Crennan J.

127 *ibid* at [417].

128 *ibid* at [244] *per* Kirby J.

129 *ibid* at [245].

130 *ibid*.

131 *ibid* at [204].

132 *ibid* at [220].

aboriginal property being claimed here is something that is different from and in excess of legal property. This aboriginal property is not confined to an 'interest in land' based on white Australian law like the Land Trust property, but consists of a range of rights and responsibilities associated with the land and with aboriginal cultures.

Within the one judgment then, Crennan J, Kirby J and French CJ offer three distinctly different approaches to the meaning of property, although all three approaches have an important commonality. The judges differed on what kind of rights constitute property, and on to whom this property could belong. Crennan J's understanding of property as 'a scheme of control' that depends completely on Anglo-Australian law and is therefore susceptible to adjustment by government is very different from Kirby J's understanding of property as a range of rights and responsibilities deriving from aboriginal law and custom. French CJ's leading judgment, with which a majority of the court agreed, was something of a compromise between Crennan J and Kirby J's positions. Property for French CJ is a broad and ill-defined bundle of rights deriving from Anglo-Australian law but not inherently susceptible to adjustment by government or by anyone else. For French CJ, the Anglo-Australian legal recognition of aboriginal rights to land given in the Land Rights Act gave the Land Trust enough control over the Maningrida for its relationship with that land to qualify as property; for Crennan J the recognition in the Land Rights Act amounted only to a *sui generis* property that was inherently open to government adjustment; and for Kirby J that recognition was somewhat secondary to the fact that the aboriginal people who the Land Trust represents, including Wurrildjal and Garlbin, had a deep and ongoing relationship with the Maningrida. Thus for Crennan J property is a scheme of control rooted solely in Anglo-Australian law; for French CJ property is a bundle of rights rooted in Anglo-Australian law; and for Kirby J property is a complex range of rights and responsibilities not necessarily rooted in Anglo-Australian law (although recognised by it).

What each of these different approaches to property had in common was their implicit understanding of the temporality of property. For Crennan J, the leases did not amount to an acquisition of property because they were merely a temporary adjustment to the Land Trust's rights over the Maningrida, and such temporary adjustments were inherent in the Land Trust's *sui generis* fee simple estate.<sup>133</sup> For French CJ, the rights the Land Trust had were not inherently susceptible to adjustment because they were similar to a fee simple, which for him meant that they were permanent enough to amount to property.<sup>134</sup> Kirby J had a similar analysis of the rights of the Land Trust to French CJ, but he also argued that the rights that Wurrildjal and Garlbin had pursuant to aboriginal custom could amount to property because although those rights exceeded the

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133 *ibid* at [395] and [412] *per* Crennan J.

134 Indeed French CJ even held that the changes to the permit system effected by the NTNERA amounted to an acquisition of property from the Land Trust (*ibid* at [107]), but that the acquisition was not in addition to that already effected by the leases (at [108]).

statutory property in land (which belonged to the Land Trust) those right were nonetheless permanent, stable and capable of ongoing enjoyment.<sup>135</sup>

So all three of the approaches found property to require a level of permanence, reiterating the idea I have discussed elsewhere that property provides a strong link between past, present and future.<sup>136</sup> Building on a conception of property as a relation of belonging held up by the space around it, I have argued that a certain level of permanence is usually required for something or someone to belong. If the relation of belonging is only held up temporarily then it is more likely to be a loan than property. Drawing on Liz Grosz's understanding of time as braided together from the specific fragmented durations of each thing or movement,<sup>137</sup> I argued that the settledness and longevity of instances of property mean that the individual strands of 'property time' to be braided together are long and similarly aligned. The result is that property produces a strong link between past, present and future. Each occurrence of property is dependent on the past. As Ahmed argues, 'what is reachable is determined precisely by orientations we have already taken'.<sup>138</sup> But while property's beginning is dependent on the past, once begun, property is oriented towards the future. Once a space is shaped around an object or body, it is more likely to remain there. And the better a space accommodates particular objects or bodies, the more it encourages similar objects and bodies to settle there in the future. The linear temporality of property makes the relations of belonging being held up seem 'natural'. Indeed Michelle Bastian argues that the concept of linear time has served as a philosophical foundation for the separation of nature (which has an underlying logical physical time-line from past to present and can thus be predicted and managed) and culture (which is the realm of agency and unpredictable change).<sup>139</sup> The linear temporality of property has a naturalising and normalising effect.<sup>140</sup>

This linear temporality also supports a view of history as an inevitable march towards a common goal and space as a neutral platform which time happens over the top of. As geographer Doreen Massey puts it, 'coexisting heterogeneity or difference is reduced to place in the historical queue'.<sup>141</sup> Difference is neatly packed into bounded spaces and dismissed to the past, which is implicitly understood as singular – as 'our' past. So indigenous cultures and people are understood as belonging to an era of history that has now ended, and those from the 'developing world' are understood as needing to 'catch up' rather than being on their own coeval temporal trajectory. It is partly for this reason that Massey insists on an understanding of space as dynamic and heterogeneous – not the

135 *ibid* at [296] *per* Kirby J.

136 Keenan, n 65 above, 432.

137 E. Grosz, 'Thinking the new: Of futures yet unthought' in E. Grosz, *Becomings: Explorations in Time, Memory and Futures* (New York: Cornell University Press, 1999).

138 Ahmed, n 34 above, 152.

139 M. Bastian, 'Inventing Nature: Re-writing Time and Agency in a More-than-Human World' (2009) (47) *Australian Humanities Review* 99.

140 It is notable that when the 'emergency' NTNERA came to the end of its five-year period, it was immediately replaced by the Stronger Futures in the Northern Territory Act 2012, which has a ten-year period: s 118.

141 D. Massey, *For Space* (London: Sage, 2006) 69.

dead, inert matter which time runs over the top of, but the constantly evolving, politically important dimension of multiplicity itself.<sup>142</sup> That is, space as active, as constitutive of social relations, and thus as definitive of who and what belongs where and who and what is out of place.

Though the judges in *Wurridjal* did not express themselves in terms of time and space, in legitimising the leases, the judgment has significant temporal and spatial effects. This case was not only deciding who the land belongs to in law (subject-object belonging – the Land Trust, the Commonwealth or the traditional owners) but also, and perhaps more importantly, it was deciding whose space of belonging mattered in the Maningrida, and how that space was to be shaped in the future. The case was framed in terms of subject-object belonging because that is the property framework through which Anglo-Australian law operates. However what was at stake in *Wurridjal* was not just the land subject to the lease (although that land was an essential enabler), it was also the issue of part-whole belonging: members of which cultural group belong in the Maningrida? Which social and cultural identities, practices and ways of life should be held up in the Maningrida, which should be out of place and how is the space to be oriented in the future? By finding that the Anglo-Australian legal system, rather than the local Maningrida aboriginal laws and customs, was the relevant criterion in determining who the Maningrida belonged to, the majority judges were not just legitimating the Commonwealth's five-year lease, but were also allowing the production of a space in which aboriginal residents' identities, practices and ways of life may not be held up in the future in the way they are held up in that space now.

In terms of its privileging of abstracted legal rules over local networks and relations that had built up over many centuries, the outcome in *Wurridjal* was in some ways similar to what Alain Pottage has described as the changing nature of the measure of land. Writing in the British context and focusing on the increasingly mandatory requirement that dispositions of land be registered (rather than relying on title deeds), Pottage argues that registration 'removes titles from networks of organic or practical memory, and deposits them in an administrative archive, accessible and decipherable only to the index of the archive'.<sup>143</sup> When the organic or practical memory belongs to one set of laws and customs (aboriginal people of the Maningrida) and the index of the archive to another (white Australia as directed by the Commonwealth government) then that removal of title is likely to have powerful, and in this case, colonial effects.

### ***Shaw v The Minister: property as governance***

Unlike *Wurridjal*, in which the fee simple title to the Maningrida land was held by the aboriginal Land Trust, in *Shaw* it was accepted by both parties that Alice Springs town camp land ultimately belonged, at law, to the Northern Territory

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142 *ibid.*

143 A. Pottage, 'The Measure of Land' (1994) 57 *Modern Law Review* 361.

government – the Housing Associations had leases in perpetuity, but not the fee simple title. It was also accepted that Macklin had the power to compulsorily acquire the leases in perpetuity from the Housing Associations and that in so doing, she would acquire property from the Housing Associations.<sup>144</sup> The question was simply whether, in compulsorily acquiring that property, the Minister was bound to follow the standard administrative law requirement of affording procedural fairness to those affected by her exercise of government power. While the court's final decision that the Minister was not bound by the procedural fairness requirement is a notable development in terms of Australian administrative law, it also has significant consequences in terms of the meaning of property and belonging in post-contact Australia.

A question that was not asked of the courts in the *Shaw* cases but that anti-intervention activists had been asking the government since negotiations over sub-leases began, is 'why property?'<sup>145</sup> Why did the Commonwealth government, represented by Minister Macklin, need to invoke property law in order to implement its housing and infrastructure program in the Alice Springs town camps? The same arguments that the government used to justify the five-year leases were used to justify the need for long sub-leases of the town camp land – namely 'to provide security for the government's investment and to ensure that housing reforms can be implemented effectively'.<sup>146</sup> The government's purported need for security and efficiency was not questioned in court, but it is an odd requirement. The Australian government does not usually demand property rights over land before it agrees to build infrastructure and to provide essential services to it. Government services such as sewerage, running water and garbage collection are provided to all other Australian residential areas, which consist overwhelmingly of privately owned and rented property, without the government needing to sub-lease the land first.

Apart from its stated desire for security of investment and effective implementation, the Commonwealth's desire and eventual acquisition of property rights over the Alice Springs town camp lands was intimately connected to its repeatedly stated goal of 'normalising' the town camp communities.<sup>147</sup> While seeking security of investment and access might be politically questionable, it is perfectly understandable in terms of an economic analysis of property as a legally defined relation of subject-object belonging grounded in the right to exclude. By acquiring sub-leases, the federal government ensured that it would have exclusive rights to any improvements in land value that will likely result from its

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144 *Shaw No 2* at [351].

145 For an archive of activist press releases questioning the necessity of the intervention leases see the Rollback the Intervention website at <http://rollbacktheintervention.wordpress.com/media/> (last visited 12 December 2011).

146 *Shaw No 2* at [94].

147 J. Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Street names and street lights for Alice Springs town camps' (Canberra, 19 April 2011) at [http://www.jennymacklin.fahcsia.gov.au/mediareleases/2011/pages/st\\_names\\_lights\\_190411.aspx](http://www.jennymacklin.fahcsia.gov.au/mediareleases/2011/pages/st_names_lights_190411.aspx) (last visited 14 December 2011); Macklin, 'Stronger Futures in the Northern Territory' n 70 above, 5; 'Aboriginal camps organisation to discuss new lease deal' *ABC News* 12 May 2009 at <http://abc.gov.au/news/stories/2009/05/12/2567654.htm?site=alicesprings> (last visited 9 March 2011).

investment and also ensured that its workers would have exclusive rights of access to the land to make those improvements. However, considering that the land in question is low in commercial value and unlikely to significantly increase considering its remote position and impoverished and marginalised demographic, it seems reasonable to surmise that the purpose of normalisation is at least as significant as security and access.

A goal of normalisation where ‘the normal’ is defined by non-aboriginal standards sounds very much like the policy of assimilation that dominated Australian and other settler colonial approaches towards indigenous populations prior to the adoption of ‘multiculturalism’.<sup>148</sup> Assimilation or normalisation, where the normal is defined by the values of the dominant culture, operates as a method for governments to maintain political control of physical areas where there are multiple and potentially conflicting cultures. The connection between the control and disciplining of populations on the one hand and the maintenance of state sovereignty over territory on the other has been explored by post-colonial scholars, geographers and political theorists,<sup>149</sup> and it is a well-settled rule in international law that control over an identifiable area of physical space is an essential criteria for statehood.<sup>150</sup> From a public law perspective then, the Commonwealth’s desire for control over the town camps is consistent with this basic premise that in order to govern a population the state must have control of the territory where that population lives.

Yet the type of control over land being referred to in these political and public law considerations is different from the type of control over land generally associated with private property rights. The Commonwealth government controls the seven million square kilometres that make up its territory in a different way from how most home-owners control their parcel of land. Exploring the use of private land rights by local government in a different context, Davina Cooper distinguished between land as property and land as territory.<sup>151</sup> In the case that Cooper studied, private land rights were used by the local government in part because they were seen by the councilors as giving a certain legitimacy to decision-making that was different from public justifications concerning territory. This legitimacy derived in part from the assumption that private land-owners act for non-political reasons.<sup>152</sup> Yet in that case, as in the *Shaw* and

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148 Assimilation was the general governmental policy towards aboriginal people from about 1940 to the early 1970s. The assimilation policy was defined by the Native Welfare Conference in 1961 as follows: ‘The policy of assimilation means that all Aborigines and part-Aborigines are expected eventually to attain the same manner of living as other Australians and to live as members of a single Australian community enjoying the same rights and privileges, accepting the same responsibilities, observing the same customs and influenced by the same beliefs, as other Australians’. C. A. Blanchard, *Return to Country: the Aboriginal Homelands Movement in Australia* (Canberra: Australian Government Publishing Service, 1987) xxi.

149 See D. A. Rossiter, ‘Producing Provincial Space: Crown Forests, the State and Territorial Control in British Columbia’ (2008) 12 *Space and Polity* 215; P. Fitzpatrick, ‘“No Higher Duty”: Mabo and the Failure of Legal Foundation’ (2002) 13 *Law and Critique* 233.

150 M. N. Shaw, *International Law* (Cambridge: CUP, 2003) 178.

151 D. Cooper, *Governing Out of Order: Space, Law and the Politics of Belonging* (London: Rivers Oram Press, 1998) 156.

152 *ibid*, 158.

*Wurridjal* cases, private land rights – land as property rather than territory – functioned as a technique of political struggle.<sup>153</sup>

I argued above in relation to the *Wurridjal* case that by finding the Anglo-Australian legal system rather than the Maningrida aboriginal laws and customs to be the relevant criteria in determining who owned the Maningrida, the majority legitimised a white space of belonging rather than an aboriginal one. If the space holds up white relations of belonging at the expense of aboriginal ones, in one of the very few areas of Australia where aboriginal ways of life are still supported today, then the lease in question will have important and tangible political effects. Understood as a relation of belonging held up by space, property is productive of its own spatial and temporal order. This production can in turn function as a kind of governance.

There is already a significant body of Foucauldian work demonstrating that governance works not only by virtue of direct state control, but also by virtue of more subtle control of individual identities through the design of permissible behaviours and thoughts.<sup>154</sup> Nikolas Rose has shown how techniques of governance in ‘advanced’ liberal democracies have come to involve a vast array of forces which link the regulation of public conduct with subjective emotional and intellectual capacities and ethical regimes.<sup>155</sup> Building on Rose’s work Davina Cooper has explored ‘governance at a distance’, whereby the actions of subjects are guided ‘through the production of expertise and normative inculcation so that they govern themselves’.<sup>156</sup> Governance at a distance is far broader than management, concerning authority within an area as well as the structuring of resources, discourses and terrain.<sup>157</sup> Yet despite there being sophisticated understandings of governance as spatial, there has been little consideration of the governmental power of property. Some economists have explored the idea of property as governance in the narrow sense that a subject who has property in an object governs that object.<sup>158</sup> Charles Reich’s analysis of the increase in state governmental power through its increased ownership of property formerly held by non-state actors uses this framework.<sup>159</sup> But there has been no consideration of the power of property to govern at a distance, beyond the immediate subject and object of property. So governance not just in the sense of the subject’s control over her object, but also in the sense of the broader, spatial means through which property might guide and even control what happens where and what is possible for whom.

153 *ibid*, 163.

154 A. D. Beresford, ‘Foucault’s Theory of Governance and the Deterrence of Internet Fraud’ (2003) 35 *Administration and Society* 82–103; A. Hunt and G. Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1998) 78.

155 N. Rose, ‘Governing “Advanced” Liberal Democracies’ in A. Sharma and A. Gupta (eds), *The Anthropology of the State: A Reader* (Oxford: Wiley-Blackwell, 2006) 144.

156 Cooper, n 151 above, 12.

157 Cooper, *ibid*, 162.

158 See for example O. Hart and J. Moore, ‘Property Rights and the Nature of the Firm’ (1990) 98 *Journal of Political Economy* 1119; A. Agrawal, ‘Common Property Institutions and the Sustainable Governance of Resources’ (2001) 29 *World Development* 1649.

159 C. A. Reich, ‘The New Property’ (1964) 73 *Yale Law Journal* 733.

The propertied subject can only exert control over her object to the extent that the space in which she is embedded will allow – the object belongs to the subject because the subject is positioned in space in a particular way. The space in which the subject is embedded holds up her relation of belonging with the object. To suggest that subjects exert control over objects that belong to them without considering the importance of the space in which the subject is embedded is to miss an important part of property's power. That is, the power of the space that property both produces – the space that holds up and, over time, naturalises relations of belonging. For example, when a home owner lives in her house over a period of time she will fill it with her furniture and other belongings, decorate it a particular way, invite her friends to visit, and become known to her neighbours. She and others in the area will come to understand the house as *her place*. The space around the property-owning subject will become increasingly oriented toward her, holding up her relation of belonging with the house to the extent that over time, as discussed above, it seems 'natural'. Subjects, objects and practices that do not fit that space – whether they be individual intruders, rogue objects out of place or unwelcome gatherings – will be excluded or realigned, not just by the propertied subject, but also by the space itself. The locks on the doors and glares of the neighbours will control what happens in and around the house as much as the specific acts of the propertied subject herself will. The economic theories of property as governance fail to account for the governmental power of the space beyond the subject.

The economic theories of property as governance miss the part-whole aspect of property and its governmental power. Retaining membership of a particular group (that is, remaining part of a whole) requires the maintenance of particular behaviours and ways of being. So for example to be Christian requires at least the maintenance of a particular belief system, to be a woman requires adherence to particular gender norms<sup>160</sup> and to be white is not just about skin colour but also requires adherence to particular cultural norms.<sup>161</sup> This kind of property thus also exerts governmental power. Property as part-whole belonging has an impact on how physical space is organised as well as producing social norms that encourage subjects to govern themselves. It is an ongoing process because to function as property, this part-whole belonging must have a level of permanence – it cannot involve a one-off conformity to particular cultural norms, but rather must extend over time such that the space in and through which the relation occurs is holding it up, and in turn becoming more firmly oriented toward that relation. Thus the governance of subjects through property as part-whole belonging also produces a particular temporal and spatial order.

The essential component of both kinds of property (whether subject-object or part-whole) is that there is a space that holds up the relation of belonging. Every instance of property as 'subject-object' belonging has effects that are constitutive of subjectivity, and every instance of property as 'part-whole' belonging has

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160 J. Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990).

161 See B. B. Rasmussen, E. Klinenberg and I. J. Nexica (eds), *The Making and Unmaking of Whiteness* (London: Duke University Press, 2001); Frankenberg, n 114 above.

effects on social and physical space. So although owning a house clearly involves property as subject-object belonging, it is also constitutive of the subject's identity as 'a home owner' (part-whole belonging). And similarly, although being white clearly involves property as part-whole belonging, it also has tangible effects on social and physical space and on what is available to the white subject (subject-object belonging). The governmental power of property also spans across both subject-object and part-whole belonging. Both types of belonging guide the actions of subjects and shape the spaces in which those subjects exist. Various studies of shopping malls for example explore how they are governed through a combination of the private property right to exclude, middle class ideals and surveillance technology.<sup>162</sup> The combination of subject-object and part-whole belonging governs the space of the mall – the right to exclude (subject-object belonging) being supplemented by more insidious techniques that require subjects to behave in a particular way (part-whole belonging). The result is a space in which behaviours that conform to particular middle class ideals and patterns of consumption belong and other behaviours (such as skateboarding, sleeping or begging) do not. Property thus has the power to govern beyond the direct control that a subject exerts over her object. The space that property produces governs the conceptual, social and physical shape of the various elements which constitute it.

Property's power to produce spaces that hold up some relations of belonging and not others makes it a powerful tool in reshaping spaces and governing subjects. As the town camps are prescribed areas under the NTNERA, the Commonwealth was already using various non-proprietary techniques of governance to affect the physical (the houses, roads, plumbing, electricity, etc) and the social (alcohol and pornography bans, welfare quarantining, increased police presence) space of the town camps. But these non-proprietary methods of governance do not have the capacity to reshape the space of belonging in these aboriginal areas in the way that property can. Property's governmental power reaches beyond the subjects and objects that are involved in the immediate relationship of belonging and to the space that surrounds and includes them. By acquiring property rights in the Alice Springs town camps, the tenancy agreements that individual camp residents had previously held with the Housing Associations were terminated, and the government became their new landlord, with power to change the lease terms, as well as the town camp physical environment, as it saw fit.<sup>163</sup>

While the government has been clear that it will not exclude residents, it nonetheless has the power to, for example, institute lease terms that prevent them from having open fires in their yards (thus preventing aboriginal people from cooking culturally appropriate food) or from having large numbers of people stay at any one time (thus preventing aboriginal people from main-

162 M. Voyce, 'The Privatisation of Public Property: the Development of a Shopping Mall in Sydney and its Implications for Governance through Spatial Practices' (2003) 21 *Urban Policy and Research* 249, 251 and 259; A. Bottomley and N. Moore, 'From Walls to Membranes: Fortress Polis and the Governance of Urban Public Space in 21st Century Britain' (2007) 18 *Law and Critique* 171.

163 *Shaw No 2* at [251].

taining connections with family who live out bush). These are the top two reasons listed as common bases for eviction of aboriginal people from their homes in a 2009 report documenting town camp concerns over the potential sub-leases.<sup>164</sup> Whether or not such evictions occur, stretching out over 40 years, the sub-leases have the capacity to reshape the temporal and spatial order of the town camps, such that they no longer hold up aboriginal practices and ways of being and are instead shaped to fit the requirements of white settler Australia. If non-aboriginal relations of belonging are held up over time, they will increasingly seem to naturally fit there. The sub-leases thus play an essential role in the government's 'normalisation' agenda. Like in *Wurridjal*, what was at stake in *Shaw* was not so much the subject's right to exclusive possession of an object that comes with property, as it was the space that property produces, the space that governs who and what belongs and who and what are out of place.

## CONCLUSION

Examining the legal geographies of the Maningrida area and the Alice Springs town camps, this article has shown that these areas are spaces of aboriginal belonging. With a long history of aboriginal resistance to Australia's settler colonial government, the continued existence of these spaces of belonging in the Northern Territory is subversive of the white-dominated power relations that prevail throughout the rest of the country. Building on an understanding of property as a spatially contingent relation of belonging, I have argued that these Northern Territory areas are spaces where, unlike the rest of Australia, aboriginality functions as property. Being aboriginal is a relation of belonging that is held up in these areas, as aboriginal identities, practices and ways of life are conceptually, socially and physically supported in ways that they are not in the rest of Australia. The meaning and effect of property, and in particular, of the federal government's compulsory leases of land in these areas under the NTNERA, must be understood in this spatial context.

Indeed putting the leases in this spatial context enables an understanding of the effect of property under the NTNERA that socio-legal understandings of property that center around the subject's right to exclusive possession cannot provide. The spatial analysis of the Commonwealth's compulsory leases of the Maningrida and Alice Springs town camps land presented in this article shows that the NTNERA leases were not principally about possession. In neither the *Wurridjal* nor *Shaw* legal challenges to the leases was possession at the heart of the argument. Rather, what was at stake in the cases was the temporal and spatial order that property produces. By producing a temporal and spatial order in which some relations of belonging are held up and others are not, property functions as a kind of governance. The NTNERA leases functioned as a less

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164 Intervention Rollback Action Group, 'Background to the threatened Commonwealth acquisition of Alice Springs town camps' (Alice Springs, 2009) at <http://rollbacktheintervention.files.wordpress.com/2009/07/tangentyere-background-briefing2.pdf> (last visited 4 December 2011).

direct kind of governance than other intervention measures, which affected the everyday lives of aboriginal people on a far more immediate level. Property was being used in the NTNERA not so the government could directly displace residents from the land, but so that it might instill a different space of belonging there. Property's governmental power reaches beyond the subject, determining not only what belongs to who, but also who belongs where, and how spaces of belonging will be shaped in the future.