Land Rich, Dirt Poor?

Aboriginal land rights, policy failure and policy change from the colonial era to the Northern Territory Intervention

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Statement of originality

This is to certify that to the best of my knowledge, the content of this thesis is my own work. This thesis has not been submitted previously, either in its entirety, or substantially, for a higher degree or qualification at any other University or institute of higher learning. I certify that the intellectual content of this thesis is the product of my own work and that all the assistance received in preparing this thesis and sources have been acknowledged.

Diana Perche

Abstract

This thesis examines the development of Aboriginal land policy in the Northern Territory of Australia, and uses a policy dynamics approach to analyse the policy decision making in this area over long time periods. This approach is useful in helping to uncover key areas of continuity, and gradual change, in Aboriginal land policy, since the early colonial era, and it draws attention to the ways in which policies framed around Aboriginal land rights in the current era have retained links to the earliest policies framed during invasion and settlement. The thesis argues that path dependency has been a very significant feature of Aboriginal land policy, and the Howard Coalition government's recent amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* in 2006 and 2007 are better understood as a part of a much longer policy trajectory.

The thesis identifies five distinct (though overlapping) temporal sequences: (a) the early colonial era, marked by fear, brutality and misunderstanding between settlers and Indigenous people; (b) the humanitarian era, shaped by the Buxton committee report of 1837 which called for the creation of Aboriginal reserves as both compensation and a form of protection; (c) the later protection era which saw early humanitarian impulses turn to a greater focus on segregation and control; (d) the assimilation era, where reserves were closed in the southern parts of Australia, with the expectation that Aboriginal people join white society, while extensive reserves were retained in the north where Aboriginal people were understood to retain traditional customs and lifestyles; and (e) the land rights era, where activist campaigns in response to prominent conflicts over non-Indigenous use of Aboriginal land for pastoral and mining resulted in governments converting reserves into Aboriginal-owned land, under inalienable communal title. Two critical junctures, in the form of government reviews, are pinpointed as moments where substantial policy change has been rendered possible: the Buxton committee in 1837 and the Aboriginal Land Rights Commission led by Justice Edward Woodward in 1973-4. Outside these critical junctures, policy development has been incremental.

The thesis explores the shifting frames used by policy makers around Indigenous land from the colonial era to the present day with respect to four themes: the *purpose* of allocating sections of land for Aboriginal use or recognition of ownership, *access* to Indigenous land, *difference* in terms of Indigenous expectations of ownership and relationship with land, and the *governance* or power to make decisions with respect to Indigenous land. It traces these themes from the initial formulations of Aboriginal rights to land in terms of humanitarian protection, social justice and economic development in the early colonial era, through to the rise of the land rights movement in the 1960s and the current focus on marketisation, economic development and the push to use Indigenous land to alleviate disadvantage. Careful tracing of each of these themes over time illuminates the path dependency which dominates in this policy area, and isolates the two critical junctures where substantial leaps in problem definition are discernible.

The thesis considers Aboriginal land rights policy in the Northern Territory in the light of the current dominant debate around policy failure in Indigenous affairs, and reflects on the Howard government's strategic use of the frame of policy failure to explain the need for the government to "wind back" land rights. The thesis uses contemporary theory concerning the politics of evaluation (including emphasis on short term contingency and political strategy) and the political use of evidence and expertise in policy making to explain the development of policy on Aboriginal land through each identified temporal sequence, up to and including the most recent sequence spanning the Howard government's 2006 amendments and the implementation of the Northern Territory Intervention in 2007. The thesis observes the erratic and selective use of expert knowledge of Aboriginal people and their economic, social, spiritual and political relationship with the land, and the persistent triumph of settler ideology over Aboriginal interests in land policy.

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Chapter 1: Introduction

"We do need to ask ourselves why, when Indigenous Australia theoretically controls such a large proportion of the Australian land mass, they are themselves so poor. Being land-rich, but dirt-poor, isn't good enough. We have to find ways to change that."

Senator Amanda Vanstone, (former) Minister for Indigenous Affairs, *Address to the National Press Club*, 23 February 2005

As Federal Minister for Indigenous Affairs, Liberal Senator Amanda Vanstone expressed a widely-felt frustration common to many observers of Indigenous issues in Australia in the twenty-first century: why is it that Indigenous Australians are still so disadvantaged after thirty years of land rights? Why, when they appear to have made so many gains with the recognition of native title, do they still rank at the bottom of almost every measure of social disadvantage? Why, as Vanstone described it, are they still "land-rich, but dirt-poor"?

Levels of Indigenous disadvantage, while never completely off the political agenda in Australia over the past decades, have certainly received increased amounts of official attention in recent years, notably since 2002 when the Council of Australian Governments (COAG) commissioned the Productivity Commission, through its Steering Committee for the Review of Government Service Provision (SCRGSP), to produce bi-annual reports providing detailed statistical data on Indigenous social and economic welfare, including employment participation, education levels, health burdens, housing and contact with the criminal justice system. Each report since the first in 2003 has outlined the deep chasm between the life experiences of Indigenous Australians and non-Indigenous Australians (see for example SCRGSP 2011). While the reports in many areas do not provide for sufficient disaggregation between rural, remote, regional and urban Indigenous people, it is incontestable that there are significant gaps in the prospects and life opportunities available to Indigenous people in Australia. Poverty and social exclusion are disproportionately the lot of Indigenous Australians compared to their non-Indigenous compatriots. As Senator Vanstone described it, many Indigenous people can certainly be described as "dirt poor".

At the same time, the wave of land rights legislation around Australia in the 1970s and 1980s, followed by the recognition of native title rights to land after the *Mabo* case in the High Court in 1992 and the passage of the Commonwealth *Native Title Act 1993*, have resulted in a considerable

amount of land being recovered by its traditional owners. During the same period government programs such as the Aboriginal Development Commission and the Indigenous Land Fund have allowed Indigenous people to purchase land. Recent estimates indicate that the Indigenous estate covers 22 per cent of the Australian land mass, taking into consideration Aboriginal owned land under land rights legislation as well as land over which native title has been recognised granting exclusive possession (Sanders 2014, 4; Altman, Buchanan and Larsen 2007; Pollack 2001). In the Northern Territory, where the most beneficial form of land title exists under the *Aboriginal Land Rights (Northern Territory) Act 1976*, the extent of Aboriginal owned land is more striking, with 49.1 per cent of the land mass now under Aboriginal title (Altman, Buchanan and Larsen 2007, 9). Given that the Indigenous population in Australia is estimated to be almost 670,000 people, approximately 3 per cent of the Australian population as a whole (ABS 2012), this appears on the face of it to be a substantial amount of land in the Indigenous estate. Senator Vanstone's assessment that Indigenous Australians are "land rich" would appear to be justified.

The expression "land rich, dirt poor" is not uniquely applied to Indigenous Australians. It reflects the experience of indigenous peoples in other parts of the world also. Rebecca Adamson, an advocate and President of the First Nations Development Institute in the United States, for example, applied the same expression to Native Americans, whose tribes are described as "the single largest private land holders in the United States" with an aggregate land holding of almost 100 million acres (Adamson 2003). Adamson points out, however, that the nature of land holding allowed to Native American tribes in the United States severely limits the extent to which the tribes are able to benefit from the assets they hold, in part because the natural resources have already been exhausted, and in part because the land is held in trust for the tribes by the government, allowing economic benefits (from activities such as forestry, oil drilling and mining) to be channelled in other directions, away from the indigenous owners.

It is clear that the experience of Indigenous Australians is not dissimilar. There are no guarantees that holding land title will generate a financial return, given the many factors beyond the control of landowners, ranging from physical geography and geology to volatility on world markets. Much of the Indigenous land estate is extremely remote: 98.6 per cent of Indigenous controlled land is deemed to be in "very remote" areas, particularly in the Northern Territory and Western Australia (SCRGSP 2011). The historical process of returning land to Indigenous traditional owners has ensured that the land which has been granted has been the land which the European settlers had not been able to find immediately useful (Peterson 1985). Much of Indigenous land in Australia is considered to be unviable, marginal land because of its remoteness, poor soil quality, lack of water or harsh climate (Altman et al, 2005). The most likely source of economic benefit from Indigenous land is from

mining, but while royalty equivalents are paid to land owners, minerals are considered to be the property of the Crown.

Senator Vanstone's juxtaposition of land rights and economic viability is fundamental to the response of the Howard government to Indigenous land policy in the Northern Territory, where the Commonwealth has primary responsibility for the legislation of Aboriginal land rights. Her comment reflects a conservative impatience with welfare dependency and reliance on government, at the same time as a neoliberal drive to expose as much as possible of the workings of the state and the economy to the dynamics of market forces. It bundles together two very different issues however, in a manner which suggests only one possible solution to the problem of Indigenous disadvantage. If land is the primary asset the Aboriginal and Torres Strait Islander population possess, then it must be turned to their economic advantage, no matter how this undermines the traditional Indigenous understanding of land and country. The Howard government pursued this agenda in the Northern Territory with its promotion of private home ownership rather than communal land rights, the introduction of 99-year government-controlled headleases over townships in order to promote non-Indigenous investment, the paring back of the permit system which allowed Indigenous communities to control who entered their land, and the imposition of conditions in return for improvements to land through Shared Responsibility Agreements. For many observers, these policies constituted a profound attack on Indigenous land rights, especially as the Northern Territory land rights legislation was widely treasured as the most beneficial in Australia.

The significance of land

The ownership of land, and the associated rights to use and access the land, have been a consistent source of tension between European settlers and the Indigenous population of Australia since the very first encounters. This reflects its centrality in the Indigenous experience of colonisation and its aftermath, in terms of dispossession of land and resources, and the associated loss of sovereignty and culture. This continues to have a profound impact: "Contestation over territorial space and its consequences for indigenous identity and jurisdiction in the settler state was, and is, at the heart of colonisation" (Tehan et al 2006, 4). It has been the misfortune of the Indigenous people in Australia, however, never to be in the position of dictating how the problem of land ownership should be understood and negotiated, even though land rights and land ownership have been on the government agenda in many different guises over the past two centuries.

Clearly land and land ownership represents very different things to Indigenous Australians, compared with the Western liberal tradition of seeing land as property which can be traded in the market. There are also differences in perspective between Indigenous people, and "no single kind of

relationship to country can be presumed among the indigenous population" (Merlan 2007, 133). The spiritual significance of land is complex and can form the basis of a person's identity. As Behrendt and Kelly (2008, 1) describe it, the bond between Aboriginal people and their land is "spiritual and custodial, not proprietary", and "[c]ountry is central to the identity of an Aboriginal person, providing physical, cultural and spiritual nourishment". Land forms the basis of social, historical and legal relationships within a community (Goodall 1996, 7-13),

Land also has a political and moral element for Aboriginal people. The demand for land rights can thus assume many different forms. Goodall notes:

> [W]hile land is a constant presence in Aboriginal political demands, the ideas of land expressed in these public debates have been varied and complex. Sometimes land has been demanded as a concrete goal, with particular areas in mind; at the same time land might be also an ideal and a rallying call, a symbol of both rightful possession and unjust dispossession, and as well a focal point for identification (Goodall 1996, xix).

The particular experience of British colonisation in Australia, where there was no treaty or agreement to trade the land to the settlers, gives a further ethical dimension to the demand for land rights as reparations, and recognition of the continuing sovereignty of the Indigenous peoples who never surrendered (Behrendt and Kelly 2008). For many Indigenous people, demands for land are thus inextricably combined with demands for self-determination and the right to live independently and autonomously, separate from the settler society.

The economic value of land is another consequential aspect of land rights, and this has been a recurrent theme in Indigenous campaigns to recover land. Traditional economic uses of the land such as hunting and food gathering have been overshadowed by benefits from allowing mining and other industries such as pastoralism and tourism on Aboriginal land. The economic power of land rights is often misinterpreted or overlooked in the popular non-Indigenous understanding of the policy problem, which focuses instead on the "traditional" connection to land associated with spirituality and sacred sites (Merlan 2007). Rowley (1986, 67) reminds us that "The commitment to land rights is strongly emotional and often religious. But it is quite essential for economic recovery".

Land rights have been a vital rallying point of Indigenous activism for many decades, and there have been substantial gains in land ownership as a result of this, as we have observed. The campaign has been arduous, long, and often discouraging, and has created sharp divisions between Indigenous and non-Indigenous Australians at particular points in time. The Indigenous activist and former director of the Central Land Council, Bruce ("Tracker") Tilmouth emphasises the difficulty of obtaining land rights in the Northern Territory, given the strong resistance by vested interests and reluctant

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governments. In his words, "land rights took a lot of getting, by a lot of people" (Tilmouth 1998, x). The Aboriginal lawyer Nicole Watson underlines the centrality of land and the tendency to overlook the political costs of the battle for land rights in her critique of the Howard government's new agenda for Aboriginal land as follows:

> The pursuit of land justice has been the most enduring theme of the Indigenous political struggle... The history of the land rights movement has been conspicuously absent from the current debate, implying that communal lands were gifts from the colonial state, arising independently of black agency. In reality, however, each community's title deed carries the indelible blood stains of our ancestors (Watson 2005, 1).

The protracted and often fierce struggle for land justice from the Indigenous perspective is a reflection of the relative political power of Indigenous people in the Australia polity, as a small, fragmented and widely dispersed section of the population competes with well-connected and lavishly resourced interests. While the achievements of the land rights struggle have been substantial with respect to the total land mass recovered, the power imbalance has allowed the government to retain firm control of the transfer of land. Where land claims have been granted, native title recognised or land purchased, the interests of the dominant settler society have been protected, and the land which has been granted has been largely unviable or unwanted by other more powerful interests. Politicians have adopted a "pragmatic" approach based on "what the electorate will accept" (Merlan 2007, 136). As Tim Rowse observes, "Land rights were achieved despite the political and economic weakness of the Indigenous minority because no-one's interests were threatened (though much political effort, at times, was put into making land rights *seem* threatening)" (Rowse 2006, 5; emphasis in original).

Given the spiritual, moral, political and economic value of land for Indigenous Australians, the evaluation by Senator Vanstone of the outcome of land rights policy is a confronting one. Her comments downplayed the achievements of the land rights struggle and deliberately minimised the non-economic value of Indigenous land as understood by Indigenous people, even those who are not recognised as traditional owners of particular areas of land. The moral, political, spiritual and symbolic worth of the land was dismissed as insignificant when compared to the destitution of Aboriginal landowners in economic terms. The political strategy behind this statement deserves examination.

Land rich, dirt poor: Land rights as policy failure

Senator Vanstone's description of Indigenous people in Australia as "land-rich but dirt-poor" signalled an important turning point in Indigenous land policy in Australia. As Minister for Indigenous

Affairs under the Howard Coalition government, Senator Vanstone oversaw a portfolio which was both highly contentious and unsettled, as much of what had been stable and unquestioned for several decades in Indigenous politics was under scrutiny. The Howard era has been widely recognised in terms of Indigenous policy as being a time of significant policy change, and conflict between the government and key Indigenous leaders was clearly evident (Sanders 2005a; Dodson 2008). Prime Minister John Howard had disappointed many Indigenous people and their supporters by insisting on "practical" rather than "symbolic" reconciliation, and refusing to apologise to the "Stolen Generations" on behalf of the Australian government for policies of government-sanctioned removal of Aboriginal children which had continued over decades. Howard's strident campaign against the High Court's *Wik* decision and the government's legislative response, winding back many of the gains achieved through the *Native Title Act 1992*, created a sense of betrayal among many Indigenous communities (Hocking and Stern 1998). At the time of Senator Vanstone's speech in 2005, the abolition of the representative body, the Aboriginal and Torres Strait Islander Commission (ATSIC) had been announced, and "new service delivery arrangements" were being put in place to manage Indigenous affairs, despite little consultation with Indigenous people, and resistance from the Labor opposition and minor parties (Sanders 2005a, 165; Bradfield 2006).

In this tense atmosphere, the Howard government began to refer more consistently to policy failure in Indigenous affairs, linking present levels of disadvantage and dysfunction in Indigenous communities to past policies of self-determination and a misplaced focus on Indigenous rights and "symbolic" reconciliation (Sanders 2008a; Maddison 2009; Bradfield 2006). Indigenous leaders were demoralised to find that the causes for which they had fought hard over decades were now rejected as hopeless and even dangerous. As Maddison observes, for many Aboriginal leaders and activists "the hard won rights that were achieved in political struggle over the previous thirty years seemed to slip from their grasp", leaving them "angry and despondent" (Maddison 2009, 12).

The "failure" was not unquestioned by experts in the policy area. The Chairman of the Productivity Commission which presented the bi-annual reports on *Overcoming Indigenous Disadvantage*, Gary Banks, was articulate in pointing out the successes identified at local and community level to counterbalance the grim data his reports presented on deficits and disadvantage, and noted that much more time would be needed to turn around decades of neglect and discrimination (Banks 2009). Directly attacking the premise of the claim of "failure", anthropologist Jon Altman argued that "available official statistics for the period 1971-2001 actually suggest that social indicators in both absolute and relative (ratio of Indigenous to non-Indigenous) terms have improved, at least at the national level" (Altman 2007, 2). Political scientist Bradfield (2006) observed that the policy of "self-determination" and "separatism", which had allegedly failed to deliver results in terms of Aboriginal

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economic participation and wellbeing, had never been serious government objectives over three decades of Aboriginal policy, and instead the small gains in the form of native title or Aboriginal-controlled administration through ATSIC had been examples of "domestication" and placation of Indigenous demands on the government's own terms.

The Howard government's frame of policy failure cast blame in the direction of Indigenous organisations, activists and supporters who had emphasised land rights and Indigenous self-determination and failed to change the levels of Indigenous disadvantage. ATSIC was a particular target, and Maddison (2009, 7) remarks, "ATSIC was blamed for lack of progress in areas where it had never had any program responsibility, and this supposed failure was in turn used to explain the poor living conditions and short life expectancies of many Indigenous people". This rhetorical blame-shifting was damaging, and diverted attention from many of the real problems in Indigenous affairs. For example, Dillon and Westbury (2007) acknowledged the clear failures in Indigenous affairs but contended that the causes of the failure were largely the government's own fault, with its complex institutional settings, "buck-passing" across different agencies and levels of government, lack of cultural awareness and deliberate disengagement from Indigenous policy making as a response to self-determination. This government failure was dramatically revealed in a confidential report prepared in 2010 by the Department of Finance for the Labor government Cabinet, later released under Freedom of Information. The report was scathing about the "dismally poor" outcomes in Indigenous affairs despite substantial expenditure over years, and pointed to problems of implementation, including duplication and lack of coordination, which threaten the effectiveness of Indigenous policy across all levels of government (DFR 2010).

The label of "policy failure" is a powerful one, and it was used effectively by the Howard government ministers to justify the series of dramatic changes in policy direction in Indigenous affairs (Sanders 2008a). Indigenous land in the Northern Territory was a focal point in this reform agenda. Senator Vanstone's description of Aboriginal people as "land rich, but dirt poor" was a signal of the Howard government's intention to make changes to the land rights legislation in the Northern Territory, with the purported intention of opening the land up to business and private home ownership, in an attempt to move Aboriginal land into the "economic mainstream". These changes would include amendments to the funding arrangements stemming from mining on Aboriginal land, measures designed to reduce the power of Aboriginal Land Councils, the statutory bodies which represent Aboriginal traditional owners, and a new form of township leasing for Aboriginal land which would allow individuals and business to lease sections of Aboriginal land from the government. In the legislative debates, members of the Howard government deplored many of the aspects of Aboriginal land rights which were most cherished by the activists who had fought for them: the "communal

ownership" of Aboriginal land, the inalienability of the land, and the emphasis on the customary and spiritual connection to the land which was reflected in the legislation.

Many of these amendments had first been proposed in an evaluation of the *Aboriginal Land Rights (Northern Territory) Act 1976* conducted for the Howard government by John Reeves, in 1998. This evaluation was striking for its comprehensive critique of the purpose and functions of land rights, and its new criteria for evaluating the success or failure of the policy, based on cost-benefit analyses in terms of economic opportunities for Indigenous and non-Indigenous residents of the Northern Territory (Reeves 1998). Many of Reeves' recommendations were strongly criticised by experts and parliamentarians (HORSCATSIA 1998; Altman et al 1999), but several years later the Howard government used the opportunity of a majority in the Senate to begin to implement its new land rights agenda.

The Howard government's new focus on land as the basis for economic participation is remarkable, for three reasons. Firstly, this is the first time in the history of land rights legislation that the policy objective has been to make Aboriginal land ownership more like that of mainstream Australia, rather than separate and distinct, on the basis of a recognition of the special status of Indigenous Australians as prior occupants and traditional owners. Secondly, it is clear that where in the past land rights or land ownership have been depicted as a solution to the problem of Indigenous disadvantage, or compensation for the problem of dispossession, this time it is the land itself which is seen as being the cause of the problem. This is because the nature of Indigenous ownership is communal rather than individual, a poor fit within the Western liberal conception of property ownership. Finally, the Howard government introduced 99-year headleases over Aboriginal townships, in addition to the later compulsory acquisition of Aboriginal land for a five-year period combined with the removal of the permit system for non-Indigenous access as part of the controversial Northern Territory Emergency provisions. Four decades after the land rights era began, in 1966, these combined measures represented the first time that a government has sought to actively wind back the gains of land rights, by taking land back.

The negative assessment of "land rich, dirt poor" would thus bear fruit in a clearly identifiable shift of policy direction. The practical impact of these changes may have been far less than the symbolic impact (Terrill 2010), but they were interpreted by Aboriginal leaders in very negative terms. Patrick Dodson, for example, argued that the measures being applied in the Northern Territory were assimilatory, and "the notion of a 99-year lease became both the practical and symbolic instrument of the Howard government's crusade to make Indigenous people culturally invisible in a world where

the aspirations of individuals are seen as the most important element of civil society" (Dodson 2008, 28).

The new policy direction in the Northern Territory was frequently condemned by observers as ideological, rather than evidence-based (Altman et al 1999; Sanders 2008a, Maddison 2009). The Howard government's failure to consult with Aboriginal people was a significant source of tension. Another subject of criticism was the government's inadequate understanding of Aboriginal communities, their economic aspirations, and their relationship with the land (Maddison 2009, 79-82). The Reeves Report, the basis of the legislative amendments to the land rights legislation, had been a particular target of criticism for its misreading of anthropological evidence relevant to Aboriginal land and its value (Altman et al 1999; Altman 2001). The Northern Territory Emergency Response in 2007 was another government action which appeared to bear little relation to the best available knowledge of Aboriginal social problems and the aspirations of the residents of remote communities (Altman and Hinkson 2007; Cox 2011). The use of evidence in policy making in Indigenous affairs has clearly emerged as a pressing issue for many experts and academics (Altman 2001; Maddison 2012; Sanders 2010; Altman and Russell 2012).

Evaluation, evidence and Indigenous policy making

Altman (2001) provides a personal account of his experience of supplying expert evidence to the Reeves review on Aboriginal land rights in the Northern Territory, and a subsequent parliamentary inquiry on the same subject, and finding his evidence challenged, ignored, disrespected, misinterpreted, and unacknowledged at different points in the review process. He notes that "[o]ne of the very puzzling results of these inquiries is how quite similar research could be interpreted in almost diametrically opposite ways" (Altman 2001, 12). Observing the political tensions surrounding the review, he draws conclusions about the selective use of evidence by policy makers, the lack of transparency and accountability around the inquiry process, and the futility of engaging in the process as a subject matter expert.

Considerable work has been done in the past two decades in policy studies on the politics of evaluation and the role of evidence in policy making, but there has not yet been much application of these theoretical developments to the area of Indigenous affairs in Australia. Notable examples include Altman and Rowse (2005), Maddison (2012), Cox (2011) and Sanders (2010). Each of these authors examines the politics behind the use of evidence, though they define politics in varying ways. Altman and Rowse (2005) identify the competing priorities and perspectives of the two social sciences which have contributed most directly to Indigenous policy, anthropology and economics. Sanders (2010) argues that evidence plays a secondary role to political ideology in Indigenous policy.

He explains the long-running ideological debates over the relative importance of the "competing principles" of guardianship, equality and choice for Indigenous people, and suggests that arguments over these conceptual frames will make selective and partial use of the available evidence. Cox (2011) considers the evidence which was used by the Howard and Rudd governments to develop the policies included in the Northern Territory Emergency Response, particularly with respect to the welfare quarantining program. She describes the discriminatory and incomplete use of the available evidence by government decision makers, and in particular calls for greater attention to be paid to evaluation research and data collected by Indigenous researchers, to counteract the prevalence of the "dominant definition of 'evidence'" (Cox 2011, 88). Maddison (2012, 270) draws attention to the "social and institutional inequalities" which reflect the power structures in society, and effectively stifle Indigenous viewpoints in policy debates, making Indigenous perspectives difficult to articulate and unlikely to be properly heard.

The impact of politics on the use of evidence in Indigenous policy making warrants further scholarly attention. Close examination of the problematic links between evidence and policy decisions can provide an important insight into policy making affecting minority groups in society, and may also help to explain the relative lack of progress in addressing Indigenous disadvantage and inequality. This thesis, therefore, will focus on the political uses of evaluation and the contested translation of evidence into decisions in the area of Indigenous land policy.

When examining how a policy problem is evaluated and framed, it is essential to recognise the effects of power, and specifically, to identify which actors have the power to define the problem. In other words, "[i]f evaluations can best be understood as forms of knowledge based on consensually accepted beliefs instead of on hard-boiled proof and demonstration… it becomes quite important to ascertain whose beliefs and whose consensus dominates the retrospective sense-making process" (Bovens, 't Hart and Kuipers 2006, 327). For a policy area such as Indigenous affairs in Australia, the asymmetry in power and unequal political strength of the two sides of the debate is particularly obvious. Even in more evenly balanced political contests, it is well recognised that governments are uniquely positioned to set the agenda and define problems in their own terms, with their unequalled access to information and resources, and media (Edelman 1988). This is in part explained by the institutional advantages which are ranged to support a particular view of policy problems and solutions, which Schattschneider (1960) notably described as the "mobilisation of bias". In exploring the use of evidence in policy making, this thesis will therefore concentrate on government actors, in order to better illuminate the exercise of governmental power in decision making and value shaping in Indigenous affairs.

Much of the recent work on the politics of evaluation emphasises the control which can be exercised over evaluation by those who commission, conduct and interpret the research (Bovens, 't Hart and Kuipers 2006). Clearly political advantage can be obtained through strategic use of evaluation to identify scapegoats, justify past actions, and nudge policy in new directions. This focus on the agency of the decision makers pays insufficient attention to the impact of past policy decisions (Perche 2011). The policy legacy of previous decision makers will limit the capacity for present-day decision makers to determine entirely new policy objectives, as existing policy leaves institutional traces which cannot be easily swept aside (Pierson 2004). For this reason, there are often potent continuities in policy making which can constrain policy making into the future. This is often called path dependency.

Path dependency in Aboriginal land rights policy

Continuity is a prominent theme in many accounts of Indigenous politics in Australia, and numerous authors have considered the impact of path dependency in explaining policy development in Indigenous affairs over time. The following examples illustrate the widespread understanding of continuity in Indigenous-settler relations, identified across the disciplines of policy studies, political economy, anthropology, politics and history. Each of these authors have observed the importance of path dependency in substantially limiting the range of policy responses which have been adopted over time. (A more comprehensive discussion of path dependency as it is used in policy studies is presented in Chapter 2.)

There have been a number of economic analyses of the development of Aboriginal land rights which draw attention to the long term government objectives to secure access to Aboriginal land for mining interests, the need to draw Aboriginal people actively in to the cash economy after prolonged exclusion when they were living on reserves and stations before the Equal Pay decision in 1966 (Peterson 1985; Rowley 1970), and the deliberate retention of administrative control of Aboriginal land in the interests of "sustaining capital accumulation" (Palmer 1983, 16). In all of these accounts, the development of land rights policy is the product of state action, not Indigenous activism, and it is based on powerful path dependency around state control of welfare, land and economic settings. These accounts provide a strong rebuttal to the more pluralist, activist-centred histories such as Heatley (1980), Burgmann (2003) and Norman (2009).

A more ideational approach to explaining path dependency has been developed in recent years by Will Sanders, who identifies three dominant principles or logics which have been continuously present in Indigenous affairs, but receive varying emphasis at different points in time (Sanders 2008a; 2013; 2014). The principles of guardianship, equality and choice, as observed in the previous

section, are the basis of the different ideological approaches which have held sway over Indigenous affairs through different time periods, thus helping to describe the shifts from assimilation to self-determination and paternalism. The constant presence of each of the principles, even when they are not dominant, points to the strong continuities in Indigenous affairs over time, balancing all three principles, even as policies appear to change on the surface. Sanders (2014, 1) describes his competing principles as "the source of… animation and life" in Indigenous affairs, but his framework does not explain how or why different principles become dominant at different times. In other work, Sanders (2008) has described a "generational shift" in Indigenous politics which can explain the varying dominance of different principles, and he notes two particular punctuations which are both related to Aboriginal land rights, in the early 1970s and then in the mid-2000s. This is another approach which places considerable emphasis on path dependency.

Rowse (2012) has used a similar conceptual framework to illustrate the continuities in Indigenous affairs since the late 1960s, observing that the state shifts between treating Indigenous Australians as either "peoples" or "populations". Recognition of Indigenous peoples implies political status, separate identity, and rights to land and autonomy, whereas recognition of populations refers to administrative practices of data collection and measurement of deficits and gaps, with no collective identity or rights. This distinction allows Rowse to describe the shift in the government's overarching approach from assimilation to self-determination, and to note the minimisation of collective rights such as land rights in present day concerns for "practical reconciliation" or "closing the gap". Rowse emphasises the endurance of both constructions of Indigenous Australia, highlighting the path dependency at the level of ideological frames reflecting government and societal values.

Finally, scholars working within the conceptual framework of "settler colonialism" also focus on the long-term impact of past events, and in particular, the persistence of "settler ideology" and the continuation of the process of Indigenous dispossession well beyond the end of the frontier conflicts (Veracini 2003; Wolfe 2006). Settler colonialism refers to nations such as Canada, New Zealand, the United States and Australia where colonial settlers have not decolonised, after extracting resources and labour, but instead have remained permanently in the colonial setting, displacing and destroying the indigenous population in an enduring, continuous process of dispossession. The establishment of these permanent colonies was "inevitably premised on the possibility of controlling and dominating indigenous peoples" (Veracini 2013, 314), as they served no purpose as cheap labour, and were not recognised as political equals. Settler colonialism emphasises the ongoing fact of dispossession and erasure of indigenous presence, through administrative, political and economic practices. As Maddison (2013, 288) summarises it, "the structures, and structural violence, of settler colonialism continue to dominate the lived experience of Indigenous populations". This framework

thus makes a very strong statement about path dependency in Indigenous-settler relations, but it gives relatively little attention to the agency of Indigenous and non-Indigenous actors who engage in resistance or reconciliation, and lessen the impact of settler state power in specific circumstances and specific moments in time.

This thesis focuses on the strong continuity of core ideas, principles and frames, following Sanders and Rowse, and also recognises the enduring powerful structures of the state which shape the lives, choices and political actions of Indigenous Australians. Path dependency plays an essential role in Indigenous affairs, in both material and ideational terms, but does not obliterate all agency on the part of Indigenous people or the state itself. Political circumstances change over time, and individual choices can weaken, or even disrupt, path dependency in important ways.

In seeking to understand the policy making with respect to Aboriginal land rights in the Northern Territory, identifying the role of path dependency is of vital importance. As will become clear later in this thesis, attitudes and decisions developed in the period immediately after British colonisation established patterns and power relationships which would determine land policy for many decades. The increasing influence of humanitarian ideals in the 1830s shaped the policy of protection and the creation of Aboriginal reserves which were still in place well into the twentieth century. The existence of these reserves, isolated and remote, and in many cases of little use to the settlers, made the granting of land rights a relatively "easy" process in the 1970s (Rowse 2006). Path dependency is also particularly evident following the legislation of Aboriginal land rights for the Northern Territory in 1976, as institutions and expectations grew up around the land rights policy, and these limited the range of possible amendments which the Howard government could legislate and implement three decades later, as we will explore in later chapters.

Research question

Taking into account the earlier discussion of the politics of evaluation, the use of evidence in policy making, and the importance of path dependency as a constraint on decision making, the research question for this thesis is as follows:

> *How do we explain the framing and development of Aboriginal land rights policy in the Northern Territory of Australia from the early colonial era to the end of the Howard era?*

In addressing this question, the thesis will be guided by the following sub-questions, which will help to capture the key issues identified earlier:

> *How has the problem of Aboriginal rights to land been defined by Australian governments over time in the Northern Territory?*

What evidence has been used by the Commonwealth government, and how has this been reflected in the policy which is formulated with respect to Aboriginal land rights?

What impact do past policies have on policy formulation in the present day with respect to Aboriginal land rights in the Northern Territory?

The focus of the thesis will be on land rights in the Northern Territory, because this is the jurisdiction where the Commonwealth government has had undivided authority over Indigenous affairs, not shared with the state governments, since it acquired the Territory from South Australia in 1911. It has also been a jurisdiction where the Commonwealth has experimented with many aspects of Aboriginal policy, often seeking to establish a policy direction which the state governments might follow. The specific example of Aboriginal land rights in the Northern Territory gives us a substantial, but contained, case study to explore with respect to path dependency and the use of evidence in policy making.

In order to understand the development of Aboriginal land policy over time, and examine the impact of path dependency, this thesis traces the evolution of four key themes which have been essential aspects of Aboriginal land ownership from the government's perspective. The government approach to the four themes has clearly changed over time, often incrementally, but occasionally more dramatically and rapidly. Each of the themes is prominent in current debates about Indigenous land policy, but they also capture ideas and attitudes which have characterised Indigenous/settler relations from the earliest days of the colonial era. These themes will be introduced briefly in the next section.

Key themes in Aboriginal land rights policy: purpose, difference, governance, access

The first theme which will be explored in the following examination of Aboriginal land policy is the *purpose*, which refers to the policy's objective and rationale. It is well recognised in policy studies that evaluation of a policy's success or failure is most commonly determined by measuring performance against the original objectives of the policy makers (Hogwood and Gunn 1984; Althaus, Bridgman and Davis 2013). Policy objectives do not remain constant over time, however, and this can have profound implications for the later evaluations of policy (McConnell 2010; Bovens, 't Hart and Kuipers 2006). As observed earlier, the Howard government's negative evaluation of several decades of Aboriginal land rights was based on a shifting understanding of the appropriate purpose of Aboriginal land ownership (Terrill 2009). Careful tracing of the changes to the purpose of Aboriginal land policies over time will allow us to explore the continuity between early colonial governments, who established Aboriginal reserves for protection and segregation purposes, and later governments who designated extensive reserves with the objective of encouraging Indigenous

people to maintain their culture in isolation from white settlers. It also allows us to contrast these early purposes with the shifting objectives of land rights, ranging from maintaining traditional religious connections, delivering social justice, allowing for autonomy and self-determination, and providing the basis for economic independence (Goodall 2008; Attwood 2003a; Peterson 1985).

Difference is the second theme, and this is concerned with the positive or negative conceptualisation of Indigenous difference from non-Indigenous Australians. This has been an important recurring theme in the history of Indigenous/settler relations, but it has a particular resonance in current debates about "Closing the Gap" and addressing Indigenous disadvantage using mechanisms which are designed to erase or minimise Indigenous choices to protect and maintain cultural and social diversity (Altman 2009). In the early colonial era, differences in language, culture, and law resulted in misunderstandings and conflict, and the colonial governments soon focused on "Christianising and civilising" the Aboriginal people, to make them less different (Woolmington 1988). This negative construction was not substantially challenged until the 1960s when the government's ideological approach of assimilation began to be dismantled (Rowse 2005; McGregor 2011). Aboriginal difference came to be positively constructed, and formed the basis of the claim to land rights, linked to traditional culture and religious connections with the land, contrasting with the non-Aboriginal understanding of land (Chesterman 2005; Taffe 2005). The reliance on difference as the basis of Aboriginal land rights would come under question, as we shall explore, as traditional connections to land and communal ownership began to be understood as a trap which could inhibit Indigenous economic development and mobility (Merlan 2007).

A third aspect is *governance*, which incorporates consultation with Aboriginal people about government policy decisions, and also control over decisions about the land itself. Consultation between government authorities and local Indigenous communities in the early colonial era was almost non-existent, and Indigenous people were not recognised as possessing any form of political authority (Karskens 2009). In the 1960s, this attitude changed dramatically, with a rapidly developing awareness of the need to seek the views of Aboriginal people about their own land and future (Chesterman 2005). The question of control over the land underwent a similar reversal. Control was entirely in the hands of the governing authorities during the era of reserves and missions, but the land rights policy developed in the 1970s explicitly handed decision making to the newly recognised land owners (Russell 2005).

The final theme is *access* to Aboriginal land. It is intricately connected to the preceding theme of governance control, as it reflects the power to decide who may pass over the boundaries of Aboriginal land, and in what circumstances. As we shall observe later in the thesis, this aspect is

interesting because it undergoes several complete reversals. In the early Protection era, the policy on access reflects a concern to keep Aboriginal people segregated on identified reserves, preventing them from moving freely away from the reserves without permission, and thus also protecting them from corrupting external influences (Broome 2010). Restriction of movement by Aboriginal people beyond the boundaries of the reserves was a clear expression of the power of the dominant settler governments to control Aboriginal behaviour and limit their freedom, but also reflected the paternalist assumptions that Aboriginal people were child-like in their need for isolation to prevent inevitable degradation through contact with more resilient and resourceful European settlers (Rowse 1998; Barry 2008; Blake 1998). During the later era of Aboriginal land rights, access became a question of controlling unwanted incursions on Aboriginal owned land by non-Aboriginal people without formal permission, in accordance with Indigenous customary practice (Williams 1999). This was recognised as a legitimate expression of genuine Aboriginal ownership of the land, but also became quickly connected with questions of economic development of Aboriginal-owned land, and potential conflicts between Aboriginal control of access and the national interest (ALRC 1974; Altman and Peterson 1984).

By focusing on these four themes throughout the following chapters, we will be able to observe both incremental and radical changes in the government's conceptualisation of land rights for Aboriginal people over time. Each of the themes has evolved and developed over time, reflecting changing attitudes and values associated with Indigenous land, and all of them have been subject to sudden and far-reaching challenges as the result of new evidence or new understanding of the policy problem, frequently resulting from evaluation.

Methodology

Following the policy dynamics approach to analysing policy processes (Kay 2006), this thesis will use a wide range of documentary sources to develop an historical narrative of the development of policy concerning Aboriginal land and land rights in Australia, in particular with respect to the Northern Territory. The thesis will provide a "thick description" of the formulation and subsequent evaluations and amendments to the Aboriginal land rights policy, by exploring the shifting ideas through this period of time (Geertz 1973). The thesis does not adopt a particular theoretical model of policy, but will draw on relevant policy theory when appropriate to help make sense of the available data. This approach is consistent with political science as a pluralistic discipline, which values diversity in explaining political and policy phenomena (Hay 2002; Stoker and Marsh 2010).

Throughout the thesis, the focus will be on the language and frames used by the government actors in the process of policy formulation with respect to Aboriginal land. Frames are selective

representations of policy problems, which reflect values and beliefs, but also favour specific material and political interests (Schön and Rein 1994; Stone 2002). (This concept will be further explained and defined in Chapter 2.) The thesis will also examine the ways in which government actors have interpreted the opportunities and constraints they face in their own temporal setting, and how they have made choices in line with those interpretations, which are reflected in the frames that they evoke (Schön and Rein 1994; Jones and Baumgartner 2005). By tracing the four identified themes of purpose, difference, governance and access throughout the analysis, we will be able to identify gradually changing attitudes and interpretations as well as large-scale, paradigmatic changes. The thesis adopts a strongly qualitative and discursive methodological approach, which is highly appropriate for the conceptual phenomena being utilised (Vromen 2010; Charmaz 2006).

The development of these ideas will be traced through key documents on the public record, including parliamentary debates, speeches, media reports, policy documents, and commentary by observers, experts and stakeholders. Where possible, emphasis will be placed on government-commissioned evaluations of the land rights policy, as these are valuable markers of the evolution of frames applied to Indigenous land, from the perspective of the dominant actors. Other forms of policy-relevant research will be examined in the absence of formal policy evaluations, and this will help to build a clearer picture of the use of expert evidence in Indigenous policy making.

This thesis adopts a very long timeframe in order to be able to identify and examine path dependent processes which stretch back to the earliest days of Indigenous/non-Indigenous encounters in the British colonies of New South Wales. This will allow a deeper understanding of the impact of path dependency on the formulation and legislation of Aboriginal land rights for the Northern Territory in 1976, and subsequently on the Howard government as it amended the legislation in 2006 and 2007. Clearly the quantity of primary documentary evidence which is available for earlier time periods is more limited than for later periods, and early sources have been supplemented with secondary analysis from historians where appropriate.

In analysing Indigenous land policy over this long timeframe, it becomes clear that the policy paradigm has been remarkably stable. This thesis identifies two significant turning points, or "critical junctures" in land policy: the Select Committee on Aborigines in 1835-6, known as the Buxton Committee, and the Woodward Royal Commission in 1973-4. The first of these saw the beginning of the emphasis on reserves as part of a policy approach of protection and compensation, emanating from the humanitarian critique of colonisation which was prominent in Britain in the 1830s. This humanitarian frame would shape land policy through until the twentieth century, when protection began to be displaced by a new policy goal of assimilation, and this ensured that there were

significant sections of land which were designated Aboriginal reserves in the Northern Territory. The second critical juncture marked the formal adoption of land rights as official government policy, representing a new form of compensation for dispossession, combining full ownership, freehold title, with a concern for economic independence and political self-determination.

This thesis brings a fresh perspective to the much-studied history of settler-colonial Australia, and explores new questions emerging from policy studies which draw attention to the role of politics and power in the complex process of policy making. This thesis provides a detailed account of the development of Aboriginal land rights policy from the colonial era through to 2007 through the prism of public policy theory, allowing us to analyse the impact of path dependency and the political use of evidence and evaluation in Indigenous affairs. This will help to develop a deeper understanding of the policy changes made in the last two years of the Howard government with respect to Aboriginal land rights in the Northern Territory, following on from Senator Vanstone's negative appraisal of Indigenous Australians as being "land rich, dirt poor". This analysis will contribute directly to current knowledge about government approaches to policy making for Indigenous people in Australia. It will also identify key areas of concern in the consideration of the current value and future prospects of the Indigenous land estate, particularly in the Northern Territory.

Outline of this thesis

In accounting for Aboriginal land rights policy, this thesis adopts a broadly chronological approach, with some circling back and overlap in time periods to provide a more fine-grained analysis where appropriate. Each chapter analyses a specific temporal sequence, or time period. As governance arrangements changed, and economic and social circumstances evolved, the "Aboriginal problem" rose and fell on the policy agenda. From the early colonial period onwards, governments frequently conducted investigations into the welfare of Aboriginal people, and these evaluations serve as important markers of changing policy directions, reform and adaptation.

The next chapter, Chapter 2, introduces the reader to public policy literature related to policy evaluation, the use of evidence in policy decision making, and path dependency. It draws on recent theoretical work on the politics of evaluation and relates this to three common perspectives of policy making and power. The chapter also explores the policy dynamics approach (Kay 2006) in more detail, including the concept of temporal sequences, and it explains the mechanisms through which path dependency can affect policy formulation and decision making.

The following chapters are concerned with the historical development of Indigenous land policy over the first two centuries of European settlement on the Australian continent. A policy dynamics approach to Indigenous land policy in Australia draws our attention to the multiple temporal

sequences which overlap and intersect in the history of Indigenous-settler relations and contestation over land ownership. These chapters identify and trace the temporal sequences which were most important in shaping the land policies which would be possible in the Howard era and beyond. Each chapter considers a different temporal sequence, but all of them are concerned with the overarching sequence of the gradual extension of colonisation, as the frontier moved across the entire continent.

Chapter 3 examines the first temporal sequence from the first European settlement through the early decades of frontier conflict, leading up to the evaluation of the impact of the colonial process on indigenous people by the humanitarian members of the Buxton Committee in 1835-6. This chapter explains the origins of the first Aboriginal reserves under the banner of protection, and provides an explanation of the humanitarian ideology which would govern Aboriginal policy making for almost a century, with some distortion over time and across jurisdictions. The chapter also considers the localised patterns of dispossession and adaptation that particular Indigenous groups experienced in specific places. The variation of experience across different parts of Australia is noteworthy, and the timing of the arrival of the settlers and the potential for resistance and adaptation by the Indigenous people had consequences which are still important today.

The following chapter, Chapter 4, considers the application of the humanitarian values in each mainland jurisdiction as the frontier extended and each colonial government wrestled with its own local Indigenous and settler demands, and adapted humanitarian ideals in policies of protection which were transferred and adapted across borders and across time. This chapter will demonstrate the positive and negative feedback processes which flowed from the Buxton Committee's report, as protection took on a controlling and punitive character in the jurisdictions closest to the frontier. The chapter closes at the end of the frontier conflict in the Northern Territory, with the active engagement of the Commonwealth in Indigenous affairs in the 1930s, and the adoption of extensive reserves as a dramatic solution to the inevitable encroachment by settlers on the last remaining areas of Aboriginal land.

Chapter 5 observes the adoption of a new frame for Indigenous affairs, moving from assimilation to self-determination. This period was dominated by Prime Minister Menzies, and Aboriginal affairs were shaped by his Minister for Territories, Paul Hasluck. In this post-war temporal sequence, humanitarians campaigned for formal equality and civil rights, but Indigenous activism and international pressures demanded a new recognition of Indigenous-specific rights, in particular, land rights and self-determination. This chapter examines the role of anthropologists advising government, with uneven impact, and observes other path-breaking evaluations which gave Indigenous people a strong voice for the first time.

In Chapter 6, the development of a new land rights policy by the Labor Party in opposition during the late 1960s leads to the opening of a window of opportunity which places Aboriginal land rights on the Commonwealth government's agenda. The election of the Whitlam Labor government was rapidly followed by the establishment of the Woodward Royal Commission of 1973-4 to inquire into the legislation of Aboriginal land rights for the Northern Territory. This chapter argues that Woodward's inquiry served as the critical juncture, marking a shift in policy paradigm to a very new understanding of Indigenous land ownership. The chapter examines the passage of the *Aboriginal Land Rights (Northern Territory) Act 1976* by the Fraser government and observes the consolidation of land rights as reflected in two key evaluation documents.

Finally in Chapter 7, we turn to the Howard government's reform agenda for land rights. This chapter considers the Reeves evaluation of the land rights legislation, and reflects on the critical response to the review which ultimately delayed but did not deter the Howard government's plans to amend the legislation. The amendments which were passed in 2006 concerned the township leases and changes to the structure and funding of the Land Councils. Later amendments in the context of the Northern Territory Emergency Response in 2007 went further, with compulsory acquisition of Aboriginal land and the removal of the permit system controlling access to Aboriginal owned land. The chapter reflects on the relationship between evaluation, expert evidence and decision making, particularly in the context of crisis, and notes the early signs of a new critical juncture in this previously settled policy area.

Chapter 2: The dynamics of policy change

Indigenous affairs came to be strongly associated with the label of policy failure during the Howard era, as discussed in the previous chapter. Few aspects of Indigenous policy making were left untouched: scathing reports of community dysfunction, alcohol and substance abuse, violence and antisocial behaviour, poor health, low educational attainment, high unemployment, welfare dependency and entrenched disadvantage were common, and responsibility was often given to the communities and individuals themselves, alongside their separate Indigenous governance structures. The Reconciliation decade which had been commenced under the previous Labor government was allowed to dwindle to an unremarkable end, and achievements in native title were portrayed as unreasonable challenges to legitimate non-Indigenous use of the land. Calls for an apology for the historical treatment of the Stolen Generations were persistently rejected, and prominent Indigenous activists who had advocated self-determination were discredited for their associations with failed policies, corruption and mismanagement.

Policy failure is a powerful label. Not only does it bring into question the objectives and the implementation of a past policy, it undermines the reputation of all those who were associated with the failed policy, excluding them from participation in future policy debate. In the case of Indigenous affairs in Australia, the dominant image of failure became so widely accepted that it shaped policy debates, and public attitudes, and ultimately allowed the Howard government to introduce a range of policies which would have been unthinkable in earlier years (Sanders 2008a; Maddison 2009; Altman and Hinkson 2007). Critics were discredited, and past aspirations of self-determination were abandoned, as the Howard government abolished ATSIC, wound back native title and land rights in the Northern Territory, and ultimately introduced the Northern Territory Intervention.

The use of the label of policy failure with respect to Indigenous policy draws our attention to the role of evaluation in policy formulation. Evaluation of past policies clearly plays an essential part in the development of future policy. Past experience informs policy making in the present, and knowledge of what has gone before, and whether past policies have succeeded or failed, will affect the way in which current policy makers respond to the challenges they face. The exact manner in which evaluation contributes to, or shapes, subsequent policy formulation is little examined, however, and its impact is often assumed, rather than explained. This chapter will begin by considering the use of evaluation by policy makers, and will focus in particular on the politics of evaluation. This emphasis on the role of interests, strategy, and competing perspectives will help us to better understand the complex and contingent relationship between evaluation and policy formulation, in particular by

observing the potential for political advantage to be gained from the strategic or selective presentation of policy outcomes.

As we noted in the previous chapter, the accusations of policy failure around Indigenous land in 2006 and 2007 reflected a wider debate around Indigenous rights and welfare, extending beyond the critical evaluations of specific policies and the demands for policy change. Prime Minister John Howard rejected the achievements of the earlier Hawke and Keating era as "symbolic" rather than "practical" reconciliation, and the ensuing debate saw new frames being applied to Indigenous affairs, displacing older settled ideas about self-determination and land rights, with a growing focus on economic disadvantage and welfare dependence. The change from Labor to Coalition governments in 1996 saw the beginning of what some observers called the "history wars" or the "culture wars" as competing frames were contested in public and political debate.

This battle over frames is illuminated by much of the constructivist literature in policy studies, which is concerned with the way in which policy problems are framed, defined, or represented. Theorists working in this post-positivist, or argumentative, literature emphasise the importance of rhetoric, discourse, and debate in the contest over ideas which is at the basis of policy making. This chapter will thus identify several key aspects of the literature around framing, including the use of binaries, metaphors, and constructions of target populations to persuade policy makers and others of the merits of particular policy directions. Frames which become dominant in a given policy area can be very slow to develop and shift, unlike the politics of evaluation which is observable in the short term. In order to observe the consolidation of particular frames or dominant problematisations around a given, we must examine their development over time. This demands a different temporal scale in explaining the construction of the policy problem, as it explores the gradual emergence and growing dominance of key frames over a long period of time.

As observed in the previous chapter, the changing ideas around Indigenous land during the Howard era can also be seen to reflect a deeper and more significant "generational shift" (Sanders 2008a) in Indigenous affairs, as policies which had been settled since the 1970s were challenged and abandoned in the late 1990s. Policy scholars would use the term paradigm shift to describe the scale of the change in policy. The notion of a policy paradigm implies a certain continuity in ideas and approaches over a long period of time, and emphasises the development of institutions around the policy in question, shaping expectations and behaviours of policy makers, and key interested parties. Theorists in the institutionalist literature emphasise path dependency, and the significance of policy legacies which limit or constrain the choices made by policy actors in subsequent time periods. This chapter will thus conclude with a brief discussion of the role of time and timing in policy

development, and the impact of path dependency as a structure which shapes decision making into the future.

In summary, in observing and explaining the changes to the land rights regime during the Howard era, it is clear that there are a number of temporal sequences which are important in explaining the policy shift. The first of these is the policy failure debate itself, particularly with respect to Indigenous land, and this demands an examination of the politics of evaluation and the way in which evaluation is used by policy makers to shape future policy. The second temporal sequence is broader, and looks at the changing frames which dominate the debate around Indigenous rights and welfare from the beginning of the Howard era. The third temporal sequence focuses on the establishment of land rights as a policy in the 1970s, and the institutionalisation of the policy, which began a long period of continuity and stability in the policy area.

It is clear that the historical development of the Aboriginal land rights policy is important in understanding the changes of 2006 and 2007. This thesis thus adopts an approach which Adrian Kay (2006) has called "dynamic analysis". This approach is concerned with providing a "structured narrative", or history, of the policy, drawing attention to the manner in which institutions and structures enable or constrain actors at different points in time in the life of the policy. This understanding of policy dynamics incorporates a "granular" understanding of time, focusing on the "different rhythms, cycles and process speeds in the policy process" (Kay 2006, 7). Analysis of the policy process is thus interested in examining the multiple temporal sequences which intersect, and impact on the possibilities and choices which are made by policy actors, using the benefit of hindsight to determine which institutions and structures have been most influential. As Kay proposes, "Policy narratives embrace the complexity of different processes of different speeds and at different levels coexisting in the same policy path; indeed, it is the aim of the narrative to weave these together into a coherent story" (Kay 2006, 60).

This chapter will introduce the relevant theoretical literature to help understand the politics of evaluation, the link between evaluation and policy formulation, framing, and path dependency, noting the different temporal sequences which these concepts will help to explain.

Explaining policy and policy evaluation

In order to understand how evaluation is used in policy making, it is important to differentiate between the various approaches to describing and explaining the activity of policy making in the literature. Colebatch (2006a, 2006b) provides a useful set of three broad categories which capture the range of perspectives of both policy practitioners and scholars involved in public policy. Colebatch names these three perspectives, or "accounts", authoritative choice, structured

interaction and social construction. The accounts differ in terms of the range of participants they include in the policy process, the nature of the activity undertaken in the name of policy making, and the assumptions made about the motivations which drive the participants. We shall explore each of these perspectives in turn.

The first perspective which Colebatch describes is that of authoritative choice, and it is essentially a *rationalist* approach to public policy. Colebatch observes that this is the "mainstream account" which is "taken for granted in most of the literature" (Colebatch 2006b, 40). It is the basis of much of the American literature on policy analysis, and underpins the model of the "policy cycle" used by Althaus, Bridgman and Davis (2007) to describe the policy process in the Australian context. This understanding of policy is concentrated on the activities of government, particularly ministers and their immediate advisors. Policy in this sense is seen to be concerned with making decisions, or solving problems, by receiving expert advice, applying reason and exercising authority. Participation in the policy process is limited to a very small range of actors, and policy choices are depicted as top-down, rational and technical.

Colebatch's second perspective, structured interaction, is *pluralist* in emphasis. Structured interaction explains the policy process in terms of the competition between different interests and stakeholders who interact with government and with each other in an attempt to influence decision making within a given policy area. Colebatch describes this perspective as horizontal, as it draws on the notion of governance as the interplay between relatively equal actors with shared policy objectives. The policy process is not limited to government activity, in the form of specific top-down decisions, but is concerned with the constant bargaining and negotiation which takes place between the various actors within a policy community, each pursuing their own interests. This highly contested style of policy making, with diverse voices competing to advise and be heard by decision makers, has been described as "post-Machiavellian policy making" (Howard 2005; Radin 2000).

Colebatch's final account of policy is that of *social construction*. This is a much broader understanding of how policy is made, and experienced, in society as a whole, through language or discourse, and the constant struggle over ideas and values. *Constructivist* accounts of policy acknowledge the ambiguity and complexity in policy contests, as different types of knowledge can be brought to bear on a policy issue, and different interpretations can be made of the nature of the policy problem. The activity of policy can be seen as meaning making: constructing persuasive stories about the nature of a policy problem, its urgency or severity, its causes and solutions, and appropriate responses. Social construction includes a wider range of participants than the other two perspectives, because it is concerned with shaping values and knowledge in society, rather than simply influencing a specific

government decision. Constructions are contested, and changeable, but dominant constructions of a policy problem will determine the scope and form of policy making which is possible for governments and other policy actors.

From this outline of the three contrasting views of the activity of policy making, it is clear that each of these perspectives will consider the exercise and purpose of policy evaluation very differently. The following section will discuss the range of definitions of policy evaluation across these perspectives, before turning to the critical issue of how each of them treats the issue of politics and its influence on the conduct and utilisation of evaluation in policy making.

Defining policy evaluation

Evaluation is well recognised as an essential element in good policy making, but there is remarkable divergence within the literature on how evaluation should be defined, performed and studied. Recent decades have seen dramatic increases in scholarly and practitioner attention to evaluation theories and methodologies, particularly in the United States, and the interdisciplinary nature of evaluation has ensured the representation of a wide range of approaches. Having emerged originally from specific policy areas such as education, and defence and national security, policy evaluation became more generally appreciated towards the end of the 1960s, in association with the wide-ranging social policy program of United States President Lyndon Johnson's "Great Society", and the deliberate effort to improve policy analysis with reliance on applied social research (Weiss 1998; Mark et al 2006, 9). More recently, evaluation has further increased in prominence, first with the shift to managerialism, and its strong focus on efficiency in government, and then as a key element in the demand for evidence-based policy (Fischer 2003; Pawson 2006).

A number of scholars have attempted to categorise the different schools of thought which are discernible within evaluation studies. Many of these have adopted a chronological, or evolutionary approach, describing evaluation theory as progressing through successive stages of development (see for example, Guba and Lincoln 1989; Shadish, Cook and Leviton 1991; Vedung 2007). Others have pointed to fundamental differences in epistemology which form the basis of divergent approaches to evaluation, particularly between positivist or rationalist approach, contrasted with post-positivist or argumentative approach (for example Fischer 2003; Bovens, 't Hart and Kuipers 2006), and some have attempted to find a middle ground between epistemological extremes (Pawson 2006; Marsh and McConnell 2010).

Policy evaluation has certainly evolved and changed over time, as new ideas and methodologies are advanced and adopted. It is clear, however, that older ideas about the form, methods and purpose of evaluation have not disappeared completely, but are still identifiable, and influential (Parsons

2002). Thus the rationalist approach to policy evaluation has not been eclipsed by the argumentative approach, as optimistically suggested by some scholars (eg Bovens, 't Hart and Kuipers 2006; Sanderson 2002), but in fact both are defended and continue to coexist within the field of evaluation studies. This can be explained by the epistemological differences, which are entrenched, between positivism and constructivism. The continued salience of these conflicting approaches can also be usefully analysed using Colebatch's different theoretical perspectives of the policy process, outlined earlier, all of which continue to reflect the range of lived experiences and conceptions of policy making according to different participants in the policy community. It is helpful, then, to consider the way in which evaluation is defined by each of the policy perspectives.

A typical definition from the *rationalist* perspective is the following, provided by a leading American scholar in evaluation studies, Carol Weiss: "Evaluation is the *systematic assessment* of the *operation* and/or the *outcomes* of a program or policy, compared to a set of *explicit* or *implicit standards*, as a means of contributing to the *improvement* of the program or policy" (Weiss 1998, 4; emphasis in original). Weiss' definition is based on an understanding of evaluation as a professional activity, a "practical craft" (Weiss 1998, 5), and she thus narrows her focus to consider only one form of genuine evaluation, for her purposes, being "evaluation research". Evaluation, as Weiss defines it, is thus limited to impartial, externally-driven research, using recognised social science methods, and conducted with "formality and rigo[u]r" (Weiss 1998, 4). Weiss explicitly rejects "offhand evaluations that rely on intuition, opinion, or trained sensibility" and argues that internal evaluations are prone to "optimism" as participants are invested in the program under examination (Weiss 1998, 5-6).

This very prescriptive definition is consistent with a rational approach to policy making. It presents evaluation as an activity which is clearly identifiable and distinguishable from the other stages of the policy cycle, being carried out by an entirely separate set of specialised actors (Althaus, Bridgman and Davis 2007). Consistent with the rationalist view of the policy process as ordered and linear, progressing logically through successive stages of problem solving, evaluation is seen as a *retrospective* activity which is conducted at the end of the process (Hogwood and Gunn 1984, 219). (The exception to this, *ex ante* evaluation, sometimes used early in the policy making as a means of assessing available options and predicting likely outcomes, is similarly separate from the rest of the policy process, and relies on identical methodologies, but will not be considered further here.) For rationalists, evaluation is thus focused on measuring outcomes against the objectives which were clearly established at the beginning (John 1998, 23). As Sanderson makes clear, this depends on the twin rational assumptions that objectives can be clearly defined, and that policy interventions can be effective and precisely targeted, producing proportional and predictable change in a specific policy area (Sanderson 2002, 441).

According to the rationalist perspective, evaluation research is expected to be conducted according to the most appropriate research methodology, providing clear and reliable data as the basis for policy decisions. In accordance with a positivist epistemology, evaluation research is expected to present the *truth* about the impact or effectiveness of a given policy, and where there is some ambiguity about the available data, effort is made to improve the research methods used (Rogers and Williams 2006). Peter John (2011, 158) points to weaknesses in social science research in clearly identifying the relationship between cause and effect in policy terms, and emphasises the importance of using appropriate research methods to establish causation. Where possible, the preferred methods are those which closely resemble scientific inquiry, such as randomised control trials, pilot policy implementation, design experiments, and synthesis of research (John 2011; Stoker and John 2009; Pawson 2006). Much of the data which is associated with this rationalist approach to evaluation is quantitative, with a focus on measurable indicators of outcomes, inputs and outputs, costs and benefits, and achievement or otherwise of policy objectives (Sanderson 2002, 436).

A *pluralist* approach to evaluation, in contrast, acknowledges the variety of views which may exist, inside and outside government, of the success or failure of a policy. Evaluation thus becomes part of the competition over policy ideas, as disparate actors generate their own research about policy in order to influence others in the structured interaction which shapes the policy debate. Pluralists recognise a much more extensive range of types of evaluation research as legitimate contributions to policy knowledge, including inquiries, reports, critiques and surveys conducted by internal and external actors, none of whom can claim impartiality and neutrality in the policy decision making. Howlett, Ramesh and Perl (2009, 183-5) describe a broad spectrum of formal and informal types of evaluation, ranging from formal, routine bureaucratic reporting through parliamentary inquiries, and judicial review, and at the other extreme, including informal public protests as a less structured, but recognisable, form of evaluation. Clearly such an array of evaluation types will allow for a considerably more diverse selection of appropriate research methodologies than the quantitative methods preferred by rationalists. Methods will also vary according to the resources which are made available for the evaluation exercise (Maddison and Denniss 2009, 178), and clearly not all actors will have access to the same financial and human resources, or expertise.

More significantly, the pluralist perspective recognises the potential for conflict between different actors, and, in their quest to influence the policy process, actors are likely to be selective and instrumental in the way in which they produce, and apply, evaluation research. Evaluation in a given policy context will produce winners and losers, and will reflect the concerns and priorities of some interests, but not others (Hogwood and Gunn 1984, 238-9). Inconvenient evaluation research can be rejected, or ignored, deliberately or otherwise, as policy actors will apply "perceptual filters" which

"screen out dissonant information and reaffirm conforming information" (Sabatier and Weible 2007, 194). Skilful policy entrepreneurs will use the results of favourable evaluations to persuade decision makers of the merits of their argument, at the expense of their opponents (Kingdon 2003). In the pluralist understanding of the policy process, evaluations can be very costly to some actors, but windfalls for others, as judgements of policy success or failure can lead to programs being discredited, and abandoned, or alternatively affirmed and expanded. Governments, too, can suffer from hostile evaluations; indeed, "[f]or governments, program evaluation is a high wire act" (Wanna, Butcher and Freyens 2010, 269). It should be remembered, though, that governments enjoy significant advantages in the contest over policy evaluation, as they can restrict access to much of the vital information by limiting terms of reference, refusing to release relevant data, or ignoring unwelcome assessments of government activity (Wanna, Butcher and Freyens 2010, 269-272; Weiss 1998; Nutley 2003).

This acknowledgement of the subjective nature of evaluations is significantly removed from the rationalist depiction of evaluation as a technical and neutral process, concerned with collecting data which is valid, reliable, and value-free, and can be divorced from the context in which it is produced. The pluralist perspective, in contrast, recognises the importance of the political context in which evaluation takes place and the extent to which key voices and viewpoints can be dominant, while others are ignored, or excluded from the process. The "explicit or implicit standards", to use Weiss' term, by which the policy is measured will plainly differ according to the priorities and perspectives of the actors undertaking the evaluation. Policy objectives can be ambiguous, or disguised, or inadequately documented, and the appropriate standards against which a policy's impact should be measured can be subject to debate (Hogwood and Gunn 1984, 222-3). For example, the success or failure can be measured with regard to the political popularity of the policy, the appropriateness of the process of decision making and implementation, as well as the achievement or not of programmatic goals (McConnell 2010). Each of these sets of criteria will have more or less salience to different policy actors, and observers, and success in one does not necessarily entail success in the others.

Pluralists understand the multitude of ways in which evaluations can be constrained, or indeed manipulated in order to produce palatable conclusions, or to damage political opponents (Maddison and Denniss 2009, 179). For example, terms of reference can be confined to avoid embarrassing revelations, or expanded to enable political point-scoring, and timeframes can be extended or contracted in order to affect the findings (McConnell 2010, Bovens and 't Hart 1996). The process of evaluation can also be affected by the variable quality and accessibility of data, and subsequently, by the selective or erroneous interpretations made of the data, or indicators, by the researcher, and

also by the end-user (Kingdon 2003). Evaluation scholars adopting the pluralist perspective admit the difficulty in attaining the necessary objectivity in evaluating policy, and the way in which politics and power affect the selection and application of data in any evaluative exercise (House 2008; Bovens, 't Hart and Kuipers 2006). Actors inside and outside government can manipulate the evaluation process, the results, and their presentation to the public, for their own self-interest, or political purposes.

The timing of evaluation in terms of the policy process is less prescriptive for pluralists than that imagined by rationalists, as evaluation is seen as an activity which can occur constantly throughout the policy process, rather than being limited to a distinct stage following the program's implementation. Conflict over the merits of a policy intervention will be constant, between the wide range of actors engaged in structured interaction around the given policy area. Evaluations will thus be used to influence the policy process at many different stages, as policy agendas are shaped, options considered, and decisions are made and put into effect (John 1998, 30).

We turn finally to the *constructivist* perspective. This account of policy making acknowledges the necessarily subjective nature of evaluation recognised by the pluralists, recognising the significance of the different vantage points, methodologies, timeframes, and purposes of evaluation. Social construction emphasises the way in which evaluation is used selectively, alongside other types of policy knowledge, to shape arguments and persuade others, but it also calls attention to the values, ideologies and underlying assumptions which determine the way in which evaluation is interpreted by all actors (Fischer 2003). Constructivists understand the importance of uncovering the "previous experience, belief systems, values, fears, prejudices, hopes, disappointments, and achievements" which are the basis of the competing constructions in a given policy area (Guba and Lincoln 1989, 143). Evaluations of specific policy interventions become significant when they echo existing assumptions about problem definitions, they reinforce values associated with specific target populations, and they bolster particular ideological stances in a given policy debate.

In contrast with the pluralist approach, this perspective does not assume that it is the rational pursuit of self-interest which drives the behaviour of the various political actors as they undertake or use evaluation from conflicting vantage points. Rather, it concentrates on the way in which policy evaluation reflects and perpetuates existing power structures, as it gives a voice to some actors, and some arguments, but stifles others (Bovens, 't Hart and Kuipers 2006, 327). Social construction is concerned with the manner in which some types of knowledge, such as specific examples of policy evaluation, become so dominant that they form the unquestioned basis of policy making, in the interests of some, but to the detriment of other sections of the community.

For constructivists, policy evaluation is an activity which takes place in a highly contested context, where ambiguity is the norm, and "facts" are disputed (Guba and Lincoln 1989; Stone 2003). Objectivity is seen to be an impossible ideal. Debates about which methodology is most appropriate, and which evaluation most accurately captures the relevant information about the impact of a policy intervention, are inconsequential in this perspective, though they reveal much about the struggle for power and voice in the policy debate. For constructivists, the attempt to separate "facts" from "values" is fruitless: it is the values themselves which are worth bringing to the surface and examining critically (Bovens, 't Hart and Kuipers 2006, 326). A notable example of this is the methodology developed by Guba and Lincoln (1989) for constructivist, or "Fourth Generation" evaluation. Their methodology concentrates on encouraging stakeholders to reveal their "claims, concerns and issues" through a careful, iterative process, in order to uncover deep-seated values, prejudices, fears and aspirations, and thus build a collaborative, shared construction of the policy intervention.

Constructivists may be innovative in their choices of methodology, but they place more importance in the interpretation attached to evaluation, as it is used to build persuasive arguments, pointing to policy success or policy failure, and linking policy problems to their causes and solutions in a convincing narrative (Fischer 2003, Stone 2003). In this sense, then, the way in which formal evaluations are interpreted, reported, debated and incorporated into the policy discourse warrants careful examination. Policy evaluation fuels the policy debate, as the different sides of an ideological struggle adopt evaluations which add strength to their own social construction of the policy problem. This does not occur at clearly distinguishable stages of the policy process; rather, it is a steady, persistent contribution to society's understanding of the social problem, as key actors draw on evaluations of past policies to shape their construction of the policy problem in the present.

Clearly the range of perspectives on policy making allow for a striking variety of conceptions of evaluation and its place in the policy process. There are significant differences in terms of the expectations each perspective holds of the objectivity which is possible in evaluation research, and of the understanding of the purpose of evaluation as an activity in the policy process. Drawing from each of the perspectives, we can also see that policy evaluation can take many forms: formal and informal, external and internal, scientific and idiographic. It includes evaluation research produced by professional evaluators, in addition to other formal processes associated with government accountability such as reports by the Ombudsman, the Auditor-General, and parliamentary committee inquiries. Internally produced bureaucratic evaluations are also important, as are those evaluations produced by policy actors outside government, such as interest groups, think tanks, academics, political parties, and the media. Each of these policy actors can contribute to the policy process by generating their own evaluation research, but each actor also plays a role in interpreting,

debating, and disseminating the results of evaluations. These activities form part of the bigger picture of evaluation and its place in the policy process, and point to the political nature of the utilisation of research, which will be explored in the next section in more detail.

How is evaluation used in the policy process? And how does politics intervene?

The question of how evaluation is, or should be, incorporated into policy making is frequently and vigorously canvassed in the evaluation literature. In public policy literature more broadly, the same question is revisited in the debate around evidence-based policy, and the appropriate application of evidence (which includes evaluations alongside other policy-relevant research and knowledge) to policy making. The rationalist, pluralist and constructivist perspectives of the policy process have predictably responded in divergent ways to the rise of the evidence-based policy movement in the last fifteen years, adopting contrasting normative views of the utilisation of evaluation, and other evidence, by policy makers.

In all three perspectives, the role of politics is essential to explaining the manner in which evaluations are linked to policy formulation, but there are important differences in the conceptualisation of politics and power in each account. This section will consider each perspective in turn, giving attention to the following key elements of the process linking evaluation to policy formulation: the way in which politics and power are understood to intervene in evaluation, the research context in which evaluation takes place, the purpose of evaluation and the language used to describe it, the manner in which the evaluation is seen to influence policy making, and finally the type of policy change which can result from evaluation.

Authoritative choice: Politics as stakeholder interference

Beginning with the first perspective, the rationalist or authoritative choice account of policy, it is clear that politics is rendered almost invisible in most rationalist evaluations, and is given scant attention in theoretical discussion. Within the limited circle of actors who are seen to play significant roles in this account of policy making, it is assumed that there is little dispute over the nature of the policy problem, the chosen policy direction, and the need for evaluation. The same kind of broad consensus may be expected among the researchers working within the given policy area (Nutley, Walter and Davies 2009, 6). As noted earlier, the rationalist perspective describes evaluation as a mechanism for identifying the *truth*, which should be then applied by the authoritative and impartial decision maker. Evaluation amounts to "technical verification", focusing on whether the objectives have been achieved, and how efficiently this has happened, in terms of measuring inputs against outputs (Fischer 2003, 192-4). Furthermore, evaluators are assumed to be neutral, technical experts, and there is little recognition of the potential for power imbalances between the evaluators and their

subjects to affect evaluation research. Evaluation is ideally conducted by dispassionate evaluators, who are able to isolate themselves from the political context in which they work.

Where politics is recognised at all, it is seen as something separate from and occurring outside the realm of the actual evaluation activity itself. Rationalists may reluctantly acknowledge the challenges presented by working in a political environment, for example, where politicians, stakeholders and special interests may seek to improperly influence the evaluation task, in terms of its design, access to information, or dissemination of results (Chelimsky 2008, 404). Hall, for example, provides the following typical advice: "Researchers need to resist pressure from influential stakeholders to compromise research integrity in order to produce outcomes favourable to those stakeholders" (Hall 2009, 43). Evaluators may be unable to avoid the impact of politics on the utilisation of their evaluation data, at the end of the research, when confronted with hostile stakeholders who disagree with their findings and recommendations (Datta 2011). Evaluators are encouraged to defend their impartiality and neutrality in such circumstances, particularly as it is the independence of the evaluation which gives it its power and legitimacy in terms of holding government to account (Chelimsky 2006; 2008).

Having excluded politics from the account of policy as authoritative choice, the relationship between the knowledge generated through the evaluation process and improvements to policy decision making and implementation is assumed to be direct and instrumental (Weiss, Murphy-Graham and Birkeland 2005; Nutley, Walter and Davies 2009, 9; Sanderson 2002, 438-440). New knowledge, or findings, from evaluation research should translate immediately into appropriate adjustments to the policy settings. The scale or level of change which might result from evaluation research is likely to be limited, however. There is no scope for radical policy change resulting from the findings of such evaluations, as within the authoritative choice account there is consensus around how the policy problem is understood and how it should be addressed, and this consensus is unlikely to be challenged (Nutley, Walter and Davies 2009, 6). Where policies are found to be inefficient, or unable to satisfy the policy objectives, recommendations will be made which address what Sabatier and Jenkins-Smith describe as "secondary beliefs" around the policy problem, that is, details in terms of rules, guidelines, budgets, and so on, which do not call into question the policy direction as a whole (Sabatier and Jenkins-Smith 1999). Policy change resulting from evaluation in this account of policy is thus of an incremental nature.

Advocates of evidence-based policy usually adopt this rationalist perspective on how evaluation research should be transferred into policy decisions, but have often been forced to explain why the available evidence is *not* automatically used by policy makers. Failure on the part of policy makers to

follow the recommendations made in evaluations is often explained by failures on the part of the evaluators to provide research with sufficient clarity, timeliness, relevance, or accessibility (Nutley 2003). Stoker and John argue, for example, "Evaluation can be dismissed by politicians because it challenges prevailing interests or wisdom or because it offends dominant ideologies or partisan positions, but ... in many instances evidence is simply not available in a usable form at the time when policy makers need to make a decision" (Stoker and John 2009, 357). Alternatively, the failure to adopt research findings can be blamed on the lack of capacity on the part of the policy makers to interpret or apply the data presented in evaluation research to a specific problem (for example, Peel and Lloyd 2008; Zussman 2003), an inability to appreciate the detail or complexity of research findings (Pawson 2006, 175), or the unwillingness of policy makers to accept findings which do not fit within the prevailing ideology or existing practice (Weiss et al. 2008, 33; Askew, John and Liu 2010).

As Nutley, Walter and Davies observe, these supply-side and demand-side explanations overlook the real problem, which is a lack of connection between researchers and policy makers, and a lack of common understanding of the purposes and methods of research (Nutley, Walter and Davies 2009, 15-17; see also Denniss 2006). No matter how accurate or clearly presented the research may be, Pawson, Wong and Owen remind us that research is inevitably always playing catch-up: "Evidence-based policy will only mature when it is understood that it is a continuous, accumulative process in which the data pursue but never quite draw level with unfolding policy problems" (Pawson et al 2011, 543). The limitations of research also need to be better understood by policy makers in terms of what Cherney and Head describe as the "fidelity/adaptation dilemma", which requires the careful balancing of faithfulness to the research and the need to adapt recommendations to suit specific local circumstances (Cherney and Head 2010, 511-512). The importance of context and contingency in evaluation findings can be difficult to reconcile with the need for generalisable recommendations in the language of technical verification (Fischer 2003).

The logical extension of a rationalist view of evaluation and its desirable connection to policy decision making has been observed in the policy of "imposed use" (Weiss et al 2006, 2008). In this case, the United States Department of Education has required its school districts to identify and point to evidence which supports their choice of drug abuse prevention programs in order to receive federal funding. As Weiss and her colleagues have noted, the result has been encouraging for rationalist evaluators who bemoan the disappointing utilisation of evaluation research, but it has also pointed to the weaknesses of policy makers in judging variable evaluation quality, in interpreting findings, and in applying results to their own contexts. The coercive nature of this form of evidence-based policy also shatters the rational ideal of linking knowledge to policy decision making, as the imposed

use of evidence amounts to little more than a "bureaucratic exercise", rather than considered application of evaluation to policy decisions (Weiss et al 2008, 41).

In summary, the rationalist account of policy seeks to deny the impact of politics on the adoption or utilisation of evaluation in policy making, but rationalists must constantly find explanations for the gap between evaluation research and the formulation of subsequent policy. By pointing to limitations on the part of researchers, users, or the link between the two sets of actors, as explanations of the lack of uptake of evaluation research, the authoritative choice perspective chooses to portray the existence of conflicting viewpoints as either the consequence of poor communication, or professional incompetence.

Pluralism: Politics as competition for influence

In contrast with the rationalist perspective, the pluralist approach explicitly recognises the political context in which evaluation takes place, and embraces the contest over ideas and influence in the policy process. Pluralists see evaluation as ammunition in contests with winners and losers, as one view prevails in the structured interaction with the government's decision makers. In the competitive political environment, policy actors or entrepreneurs who are seeking advantage over their opponents can use evaluation research selectively, and strategically, presenting evaluation results in order to validate their own position, and to persuade decision makers to adopt their cause (Sabatier and Weible 2007; Kingdon 2003). As described by Weiss et al (2005, 14), "evaluation is often used to buttress an existing point of view".

Because pluralists recognise the politics in the utilisation of research, they also acknowledge the very political nature of the design and conduct of evaluation. As we explored earlier, evaluation can be infused with politics in terms of the research design, including the framing of terms of reference, the timeframe and resources made available, and methodology chosen. This application of politics to evaluation is far from benign: House, for example, warns of the dangers of bias in evaluation, pointing to the known manipulation of data, selective release of results, and deliberate acts of deception in scientific research for pharmaceutical companies, and he criticises the lack of adequate regulation of evaluation practices (House 2008). By controlling and shaping the evaluation research process, the different interests will be able to ensure that they have the results they need to persuade decision makers of the merits of their argument when seeking to influence the policy process.

In such a contested policy environment, according to the structured interaction account, the policy community will be clearly divided, and this provides scope then for real policy change to result from evaluation, as the knowledge it produces is used for political and strategic purposes. The policy

community or subsystem will be made up of different groups or coalitions of actors, working to change, or defend, the status quo (Sabatier and Jenkins-Smith 1999; Sabatier and Weible 2007; Cobb and Ross 1997). Researchers involved in evaluation may be drawn into the policy debate, but may be more likely to see their roles as critics of government, in the contentious, rather than consensual, research environment (Nutley, Walter and Davies 2009, 6). Evaluation research may be used by one coalition to give legitimacy to an existing policy, while recommending minor adjustments (Taylor and Balloch 2005, 8-9). On the other hand, new learning from evaluation may be employed to shift the dominant understanding of a policy problem (or "policy core beliefs", as they are named in the Advocacy Coalition Framework) in favour of one group or coalition of actors, at the expense of another (Sabatier and Jenkins-Smith 1999). Pluralists recognise the clear advantages which evaluation research can offer to actors engaged in such contests; predictably, they "may devote considerable resources to exploiting and developing the evidence base, and they can be seen to deploy a number of strategies to increase the impact that their evidence-informed policy may have on policy" (Nutley, Walter and Davies 2009, 19).

In the policy context of structured interaction, it is clear that evaluation, and other forms of evidence, are not the only elements which feed into policy making. Considerations of available resources, electoral appeal, tradition, past experience, ideology and values all compete with the recommendations of evaluation research for influence over policy decisions (Sanderson 2006, 125). Head (2008) usefully describes three types of evidence or knowledge which inform the policy process: scientific research (that is, formal evaluation using social scientific methods) is thus weighed up against the two other evidence types, professional practices (routines and experience developed over time), and political judgement (including considerations of public opinion, interest group demands, media coverage and short-term political strategising). This is an explicit acknowledgement of the significant role played by politics in the transition from evaluation to policy formulation, as political knowledge potentially overshadows the knowledge obtained through formal evaluation altogether. Another way of describing the impact of politics, or ideology, is as a filter, which affects how much and what types of evaluation information will be absorbed (Taylor and Balloch 2005, 15; Kingdon 2003; Weible, Sabatier and McQueen 2009).

Because evaluation is recognised to be occurring in a political context, scholars adopting the pluralist perspective understand that there will be a wide range of competing views of the success or failure of a given policy, and evaluations will differ according to the standpoint of the evaluator (McConnell 2010, Bovens, 't Hart and Kuipers 2006). Fischer describes the language of evaluation in this context as "situational validation", and this process is concerned with testing the appropriateness or "relevance" of the policy to the problem it seeks to address, by uncovering the implicit assumptions

embedded within the "problem situation" (Fischer 2003, 194). The potential diversity of experiences and perspectives in a given policy area will mean that the validation of a policy requires consultation with a range of actors: government actors, advocates, clients, and other affected parties.

Many evaluators thus recognise the importance of including the voices and opinions of stakeholders other than government actors in their research, and considerable work has been done in developing techniques of participative evaluation which emphasise diversity and democracy in evaluation research (Greene 1999; Cousins and Whitmore 1998). Participation by affected stakeholders is not only seen as essential to gaining a deeper understanding of the policy outcomes and impact, for government; it can also be understood to provide opportunities for disenfranchised or excluded groups to be empowered in the process, through the exchange of information and mutual respect (Taylor and Balloch 2005, 6-7). We shall return to the recognised need to encourage broad participation in evaluation in the next section, from the constructivist perspective.

To summarise the pluralist understanding of the impact of politics on evaluation utilisation, we have seen that the diversity of interests, goals and motivations within the policy community ensures constant contestation over the assessment of past policy and the formulation of new policy. Evaluation is used strategically as ammunition in the battle for influence, and where evaluation findings are adopted by policy makers, this is the product of successful advocacy by skilled policy entrepreneurs, in their interaction with government decision makers, rather than a reflection of the quality, validity, or appropriateness of the evaluation itself.

Social construction: politics as meaning making

As we have seen, the constructivist account of policy making adopts a more expansive understanding of the policy process, and emphasises the underlying power structures which are reflected in the policy debate. Politics in social construction is not so much about the overt conflict between competing interests, but rather, the underlying struggle over dominant values and ideas in the policy community and in society itself (Lukes 2005). These values and ideas are discernible in the language of policy debates, as different actors engage in sense-making, and preference-shaping, by presenting their rival interpretations, or constructions, of policy problems and solutions.

Since the nature of political conflict is values-based, rather than interest-based, in social construction, we would expect to find that policy evaluation serves a different purpose from the pluralist one of ammunition in a battle for influence. Fischer observes that evaluation in this context is no longer simply concerned with "technical verification" or "situational validation" of a policy in its specific setting, as was appropriate in rationalist and pluralist accounts. Instead, evaluation is focused on testing the acceptability of the values or ideology underpinning the policy in society

generally, and thus uses a discourse of "societal vindication and ideological choice" (Fischer 2003, 192). Evaluation is thus deployed in deep and long-running ideological contests over beliefs, morals and values, and competing conceptions of the "good society" and the "proper role of government". These form the basis of the "deep core beliefs" which are recognised as being normative, stable, and remarkably difficult to change, being generally understood from the believer's perspective as "the truth" (Sabatier and Jenkins-Smith 1999; Weible, Sabatier and McQueen 2009, 122, Guba and Lincoln 1989, 148).

Instead of contributing specific knowledge about clearly identifiable policy programs, evaluation is usually interpreted by policy actors as affirmation or criticism of their pre-existing values and ideological position. As Guba and Lincoln explain (1989, 145), "A construction once formed is likely to maintain itself. What counts as information or evidence within that construction is in part determined by the construction itself". Information which does not fit the existing belief system will be filtered out, or ignored, or treated with suspicion (Weible, Sabatier and McQueen 2009).

New information, such as evidence from policy evaluation, can challenge existing constructions, however, by providing new understandings of the policy problem which can accumulate and evolve over time. Baumgartner and Jones (1993) describe the process through which a "policy image" can change, as actors work to redefine a policy problem, drawing on symbolism and new information, to challenge the assumptions and values associated with an existing policy. In the process, new actors can be drawn into the debate as the "policy venue" shifts, and the conflict expands to include new voices (Schattschneider 1960, Pralle 2006). This presents important opportunities for far-reaching policy change, where goals and objectives are re-examined, as existing values are challenged, often by outsiders (Nutley, Walter and Davies 2009, 6). When entire belief systems are brought into question by new evidence which does not fit comfortably with existing constructions, this can lead to a shift in the policy paradigm (Guba and Lincoln 1989, 148; Kay 2006).

The link between evaluation and policy formulation is not an instrumental one, then, but rather "conceptual" (Weiss et al 2005, 13-4). The utilisation of evaluation can thus be indirect, and incidental, as new problem definitions emerge and are gradually accepted in policy debate. Evaluation is not the only element which contributes to this process, clearly: experience, ideological preferences, beliefs and values will all affect the interpretation of the evaluation findings. Conceptual use of evaluation can be protracted, but ultimately very powerful: "[w]hen evaluation findings percolate into the decision arena in direct and indirect ways, sometimes in the long term, they become the new common wisdom" (Weiss et al 2005, 14).

Social construction is concerned with the way in which evaluations are incorporated into arguments about policy. In this process, evaluations can be distilled from highly complex research exercises, generating multiple recommendations, into symbols and slogans, which reflect and affirm particular ideological positions, and simplify the debate (Edelman 1985). The evaluation process is not complete once a report has been written; instead, the manner in which the evaluation is interpreted, or filtered, and used in the subsequent political debate, is also a significant part of the evaluation activity. This has been described as an iterative, dynamic process, as "research evidence may not arrive as uncomplicated 'facts' to be weighed up in making policy decisions, but may be translated and reconstructed through ongoing dialogue with research producers" (Nutley, Walter and Davies 2009, 17). Evaluations can thus have an impact on policy formulation long after they are completed, as policy actors continue to refer to and build on their findings, and their symbolic value continues to resonate in debates.

In the constructivist account, the role of evaluation in the policy process is overshadowed by the much more significant contest over the manner in which problems reach, or fail to reach, the policy agenda, and the grievances of certain groups in society are articulated, or stifled. In the effort to shape the dominant social construction of a policy issue, actors can engage in strategies to discredit their opponents, and destroy confidence in the evidence their opponents produce (Cobb and Ross 1997). In terms of evaluation, these efforts to deny access to the agenda can include disputation over details of research, selective or misleading use of the data, undermining the authority of researchers, and attempts to confuse the public by emphasising complexity, and using highly technical language.

Constructivists recognise that this struggle over the policy agenda, and the shaping of preferences and values, is an unequal one, and there are some groups in society which are effectively marginalised, or excluded from the policy process. This acknowledgement of the inequality of different groups in society extends beyond the pluralist recognition of the need to include diverse stakeholder voices in evaluation, as it draws attention to the institutionalised mechanisms by which some voices are effectively silenced by the dominant values and priorities of other groups. This is the "mobilisation of bias" which ensures that certain groups and their concerns are excluded from discussion and decision-making, as institutions are structured in ways which make their participation difficult (Bachrach and Baratz 1970).

In a strident criticism of this type of institutionalised exclusion in evaluation in the United States, Stanfield (1999) notably deplores the "relevance gap" between what is evaluated by social science researchers and the lived experience of their subjects, and draws attention to the "insidious racialism" which still causes social scientists to adopt a particular perspective in designing and

conducting evaluation. As he observes, "Not only are we professionally socialized to ask negative questions about Black experiences, but we are also socialized not to ask certain questions that might shed a more positive light on Black people" (Stanfield 1999, 421). Stanfield describes such uneven research design as driven by a paternalist deficit model which underpins policy evaluation with respect to African Americans, and assumes that they are necessarily the object of government efforts to reform and improve their condition. He points to the lack of recognition by researchers of the diversity of lived experience (positive and negative) in the African American population, and also notes the extent to which research is designed and funded by those outside the community which is evaluated.

More recent scholarly work in evaluation studies from the constructivist perspective has placed emphasis on culture, rather than race, as another potential obstacle to effective participation in policy evaluation. Evaluators are thus encouraged to develop cross-cultural competence or responsiveness, in order to ensure effective inclusion of different groups, and "multicultural validity" for their evaluation research (Kirkhart 2010). Culture is inconsistently defined in evaluation literature, and Chouinard and Cousins (2009, 483) note that it is an essentially contested, and indeed a "stubbornly ambiguous, contradictory and elastic term". A common theme, however, is the importance of the historical, political and social aspects of culture which can create unequal power relationships between evaluators and their respondents, or between governments and the client groups they are targeting through policy interventions.

Culturally sensitive evaluation demands a heightened awareness of this unequal distribution of power, as well as an ability to encourage genuine participation in all stages of the evaluation process. As described by Samuels and Ryan (2011, 185), "the culturally responsive evaluator recognizes that within the evaluation context, there are different dimensions, locations, perspectives, and characteristics of culture that influence the ways programs are designed, implemented, and experienced by individuals and groups". The challenges presented by these different cultural backgrounds are further compounded by the evaluator's own cultural values and experiences which will impact on the design and conduct of the evaluation research. This poses a critical threat to validity of cross-cultural evaluation, as noted by Chouinard and Cousins (2009, 485): "The real danger is that the legitimacy of our more privileged position [as researchers] acts as blinders, shielding us from questioning the universality of our research concepts and methodologies and from thinking about our privileged cultural position as a social construction". Even when it is attained, cultural sensitivity on the part of the evaluator may come too late in the process, or be constrained by the circumstances of the evaluation research. For example, Botcheva, Shih and Huffman (2009, 178-9)

observe that evaluators can be required to evaluate policies which have not been culturally appropriate in their formulation or implementation, but the evaluators are not then allowed to adjust their research design to include the cross-cultural perspective.

Having acknowledged the range of voices which are often excluded in the political struggle over values and ideas, constructivists recognise the uniquely powerful position of government as a dominant actor in the policy process. Governments play an important role in shaping values and preferences in society, through the control of information, the management of debates and public discourse, and through the messages sent in the design of policy (Edelman 1985; Schneider and Ingram 2005; Bacchi 2009). Evaluation of policy can be seen as an instrument of authority and legitimacy for governments who seek to control the social construction of a particular policy area, and their chosen policy direction. Governments can use evaluations strategically to enhance their popularity, to defend the status quo, and to harm their opponents (Taylor and Balloch 2005).

The link between policy evaluation and policy formulation is not an instrumental one, for constructivists, as we have seen. The contribution of evaluation to the policy process is indirect, and conceptual, as evaluations are interpreted and incorporated into the policy debate over time, when they are understood to fit with existing understandings of the policy. Social construction shows us that there are many ways in which evaluation can be seen as "inherently political", as conflicting assessments of policy impact and performance are constructed by different groups, and are then woven into arguments about policy. Constructivists understand the diversity of experience of policy in a community and work to give voice and power to those groups which are usually marginalised, however the powerful position of government in shaping debate and controlling policy design is not easily overlooked. Social construction sees politics as a struggle over ideas and values in society: evaluations and their representations in policy debates provide us with useful signposts pointing to the underlying conflicts and flashpoints in that political struggle.

In a constructivist account of policy making, evaluation is used as part of a broader, more pervasive activity of framing. The next section looks at framing, in order to explain more fully the connection between evaluation of past policy and the formulation of policy for the future.

Framing

The struggle over ideas and values can be observed in the manner in which issues are framed, or selectively represented and interpreted. According to Schön and Rein (1994, 23), frames are created from the "underlying structures of belief, perception and appreciation", and they are used by policy actors to sift through the complexity of information and experiences in the real world, in order to select key elements which are given particular significance. Frames can be influenced by beliefs,

ideology, and values, but they are also driven by material and political interests and strategies (Stone 2002).

Frames can often be understood as stories, which identify the causes of a policy problem, and point to the solution (see Schön and Rein 1994, 26; Fischer 2003, 144; Stone 2002). Stone explains the use of story-telling devices such as symbols, metaphor, synecdoche and ambiguity to construct frames which cast blame, promote heroes, and encourage specific remedies (Stone 2002, chapter 6). Schön and Rein also describe the use of metaphor in political argumentation, and further note the use of dualisms, which set up powerful binary opposites, a "normative leap" which is built in to the framing of a policy problem, such that a particular course of action becomes the only reasonable path to follow. They give examples of *healthy v diseased*, or *complete v fragmented*. As they describe it:

> "Through the processes of naming and framing, the stories make the 'normative leap' from data to recommendations, from fact to values, from 'is' to 'ought'. It is typical of diagnostic-prescriptive stories such as these that they execute the normative leap in such a way as to make it seem graceful, compelling, even obvious." (Schön and Rein 1994, 26)

Frames are thus used not just to make sense of a situation, but also as techniques of persuasion which select and present information in order to promote specific policy decisions.

Bacchi (2009) expands on this concept of framing with her "What's the problem represented to be?" approach to policy analysis, drawing attention to the way in which representations of policy problems are selective and partial, and are also based on historical development and acceptance of particular knowledge and understandings of issues as dominant. She also points very strongly to the impact of particular problem representations in terms of material, psychological and discursive effects. As she observes, frames have real consequences. Gottweis sums up this approach by observing that for this form of policy analysis, "language is not only an instrument of communication, it is also constitutive of policy" (Gottweis 2006, 464). For these theorists, the language used in the arguments around the policy, as well as in the formal policy documents and legislation, should be the focus of analysis.

Another important effect of the framing of an issue is the potential for expansion or containment of the conflict between different groups (Schattschneider 1960). By defining an issue narrowly, focusing on geographical limits, or expert knowledge, or specific decision-making authority, the range of stakeholders and policy makers can be contained, and the policy agenda controlled. Conversely, those with an interest in changing the policy may seek to draw in a wider range of actors, expanding the conflict, and as the issue receives more attention, the frame may shift and result in different policy decisions, made in different policy venues (Baumgartner and Jones 1995, Pralle 2006).

A further example of the consequences of framing is provided by Schneider and Ingram (1997) in their work on policy design and the construction of target populations. By framing specific groups in society as either deserving or undeserving, through the design of policies aimed at specific sections of society, governments create particular expectations of positive or negative treatment which are reinforced over time. A negative frame, for a target population with little access to power, will impact on their level of democratic participation and recognition over time. Those groups who are perceived as deserving and valuable in society, on the other hand, will expect policy makers to pay attention to their concerns, and will participate more actively in the political process. The framing of target populations also affects the nature of the institutions which develop to serve particular groups, and once established, this is very difficult to change.

The consequences of framing may be clear, but there is considerable division within the social construction literature about the motivations behind the framing technique. In many respects this reflects the distinction between pluralist and constructivist accounts of evaluation in the policy process, discussed earlier. Some authors are more inclined to observe the material interests which propel particular frames into the foreground (eg Cobb and Ross 1997; Kingdon 2003; Stone 2002), where others emphasise the power of the ideas on their own (Hay 2006a). The strategic use of framing by individuals seeking to influence the policy process is a feature of the work of Kingdon (2003) and Zahariadis (2007), who describe the manipulation of information by skilful entrepreneurs in order to create an emotional impact on decision makers and the public. Schneider and Ingram (1997) point to the deliberate use of negative frames for specific target populations as an election-winning tactic for politicians seeking to attract voter support. Bacchi (2009) and Stone (2002) are both concerned with the intentional crafting of frames, or problem representations, by governments, in order to dominate in a political contest. Edelman (1985) also clearly recognised the role of government in using frames and symbols in order to reassure, or frighten, the mass public.

Frames are constantly contested, and new frames are often slow to develop and resonate with decision makers and the public. However, once they are adopted by government, their dominance can be difficult to shake. As metaphors, or stories, frames are very easily applied to evaluations of past policies, and in this way they can be highly effective in communicating a particular understanding of a policy issue, and indicating a clear path ahead.

Crisis: a policy evaluation with frame attached

A crisis is a very particular type of frame which can be applied to a policy which is deemed to have failed dramatically. A crisis is an event or situation which is out of the normal range of experience, and which cannot be dealt with using normal ways of doing things. Crisis is characterised by three

features: threat (to lives, security, or core values), uncertainty (how bad is it, and how best to respond?), and urgency (limited time to make critical decisions) (Boin et al 2005, 2-4). Constructivist scholars emphasise the extent to which crisis must be interpreted, allowing political actors considerable space to apply competing frames, and in doing so, attempt to protect their own interests and damage those of their opponents. The competing frames can be based on different understandings of the severity of the crisis, how it came about and how it should be resolved, who should take responsibility for its management, and what lessons should be drawn from the crisis to prevent its recurrence (Boin et al 2008, 286). Politicisation of a crisis, through "blame games" and recriminations, can have far-reaching implications, as culprits are identified, core values are undermined, and established policies or institutions are found to be inadequate (Brandstrom and Kuipers 2003). As Paul 't Hart argues, "To declare something an emergency or a crisis boils down to saying the following: something is seriously wrong; urgent and drastic action needs to be taken to cope with the consequences and prevent further escalation; somebody needs to be blamed for this unacceptable turn of events" ('t Hart 2008, 159).

Governments, and political leaders, can find themselves in an unusually powerful position in a time of crisis, as they are called upon to make sense of what is happening, to explain the causes and identify the solutions, and to take the decisive action needed to bring the crisis to a close (Boin et al 2005). In this way, a crisis can present important opportunities for governments to shape the policy agenda, and to obtain strategic advantage over their political opponents. This is why governments can be persuaded to exploit a crisis situation in order to achieve both policy and political objectives. The threat, uncertainty and urgency associated with a crisis can provide a government with convenient cover for unpopular policy change, at the same time as providing attractive options to criticise and weaken political adversaries. Paul 't Hart defines crisis exploitation as "the purposeful utilization of crisis-type rhetoric to significantly alter public perceptions, public policies and public careers" ('t Hart 2008, 163). He describes the strategies of crisis exploitation in terms of imposing a dominant frame on the situation, thus seeking to control public and political perceptions of the severity, scope and symbolism of the crisis, and the identification of the appropriate scapegoat for blame and punishment. Such tactics are not without risk: having described a situation as a crisis, no government can be assured of achieving their objectives, of resolving the crisis and successfully implementing the necessary policy change, and furthermore, the blame games and politicisation of a crisis, once commenced, can lead down unpredictable paths (Brandstrom and Kuipers 2003). The political context of any crisis will ensure that framing is contested, and dominant frames can lose their advantage as events unfold.

The outcomes of a crisis, then, for leaders, can take a number of different forms, and these can change over time (Boin et al 2008, 13). Leaders, having gained respect for effective crisis management and termination, can find themselves in a position of "elite reinvigoration", where their electoral popularity is improved. On the other hand, leaders may suffer from "elite damage", where their legitimacy and credibility are harmed and their popularity may decline to the point of losing an election or being forced to resign. The third possible outcome is "elite escape", where political fortunes are unaffected, most often because the crisis and its management are rapidly overshadowed by other events and issues. These possible outcomes are dependent on a range of factors, including the nature of the media coverage the crisis receives, the popularity of the government before the crisis began, the timing of the crisis relative to an election, and the salience of the issue itself within the voting public.

The significance of crisis and crisis exploitation in this case is in terms of its potential as a type of evaluation to shape the policy agenda, and provide a path to policy change. Many scholars recognise crises, or "focusing events", as important factors in policy change, allowing for policy making to move away from its more usual pattern of incrementalism, or maintenance of the status quo (Baumgartner and Jones 1993, Kingdon 1995, Sabatier and Jenkins-Smith 1999, Birkland 1997). A crisis can be seen to open a "window of opportunity" for policy makers as it prompts a re-examination of the problem definition in a given policy area (Kingdon 1995). As a problem is redefined in terms of its severity, scope, impact, causes and solutions, then existing policies can seem inappropriate and new policies become possible. In this way, path dependency is weakened, or disrupted, and incrementalism can give way to more radical policy change.

Crisis does not always lead to substantial policy change, however. In many cases, key interests, inside or outside government, are able to shape the outcomes of a crisis, ensuring that there is minimal long-term impact on the status quo. Using framing tactics, such as those described by Cobb and Ross (1997) in terms of agenda denial, actors may elect to offer symbolic placation of those seeking major policy change, or alternatively, attack their opponents by challenging their legitimacy and credibility. In terms of the framing of the crisis itself, key actors can persuade policy makers, and the public, that the crisis demands no significant response as it presents no real challenge to critical values, or alternatively, they can convince observers that the responsibility for the crisis lies with specific individuals, or is explained by systemic failure – thus absolving them of responsibility, and shaping certain types of policy responses (Brandstrom and Kuipers 2003). Policy change in the context of a crisis can thus range from mere "fine-tuning" of existing policy, through more significant "policy reform", to the very unusual "paradigm shift" (Boin et al 2008, 16-17) which will be discussed further in the next section.

Temporality, path dependency, and policy change

We have considered the link between evaluation and policy formulation, and this understanding of the policy process is based on relatively short timeframes. Our discussion of the development of dominant frames showed that this is generally a slower process, though clearly new frames can be very quick to emerge and take hold in the context of a crisis. A third and final temporal scale remains to be explored, that of the long-term policy development, and the institutionalisation which occurs over decades, or longer, around established policy issues. Many policy theorists have argued strongly for the need to adopt long timeframes in examining policy development, stretching over at least a decade and often considerably longer (Sabatier and Jenkins Smith 1993; Baumgartner and Jones 1993; Marsh and Rhodes 1992). This section will explain the utility of an institutionalist approach to explaining policy development, with particular emphasis on path dependency, sequencing and timing.

Institutionalism is a theoretical approach which has been reinvigorated in recent decades, as theorists have sought to counter pluralist, behaviouralist and rational choice approaches to politics, and to restore the traditional emphasis in political studies on the role of the state as an autonomous and enduring actor (March and Olsen 1984; Skocpol 1979). It is important to note that there are significant ontological and epistemological differences between a number of different forms of new institutionalism, and the theoretical debate in this area is exceedingly complex (Hay 2006b; Lowndes 2010). Key points of division are focused on the definition of an institution, and the mechanisms by which the behaviour of actors is understood to be affected or determined by institutions (Cairney 2012).

Institutions are commonly defined as the rules (formal and informal) which shape the behaviour of actors (Lowndes 2010). They can be entrenched in bureaucratic practice, such as in the form of standard operating procedures or routines, or they can take the form of accepted values, norms and conventions which are accepted within a specific organisation (Hall and Taylor 1996, 938). More succinctly, institutions can be understood as "humanly designed constraints on subsequent human action" (Sanders 2006, 43). This is the power of institutions, which is recognised in all varieties of institutionalism: the power to shape behaviour, to include or exclude specific actors from decision-making, and to restrict the range of choices made by actors in a given context (Moe 2006). Public policies can establish rules which govern a given policy area, thus setting up expectations of particular patterns of behaviour, and structuring the context in which actors make strategic choices. It is for this reason that public policies can be seen as institutions in themselves (Pierson 2006).

As Hall and Taylor (1996) identified, there are two approaches to explaining the mechanisms through which institutions can impact on individual behaviour. The first of these is the "calculus approach" which emphasises the instrumental, strategic decision making by individuals who maximise utility by choosing actions based on the certainty of predictably behaviour of those around them within an institution. The second of these is the "cultural approach" which places more weight on the interpretations the individuals form of the routines and patterns of institutions which establish their preferences and give them a sense of institutional identity (Hall and Taylor 1996, 939). The calculus approach is most strongly associated with rational choice institutionalism, but historical and constructivist institutionalism identify both approaches in their explanations of individual behaviour (Hay 2006b; Steinmo 2008, 126). This means that institutions have a causal power which is inherently complex and contextual, and is based on "logics of appropriateness", or interpretations of expected patterns of behaviour within a given setting (March and Olsen 2006).

Historical institutionalists are notably interested in the way in which institutions limit possibilities for change, and thus ensure continuity and incrementalism (Rhodes et al 2006). This effect is called path dependency, and in policy terms it suggests that past policy decisions limit the range of potential choices which can be made in the future (Hay 2006b, 64-5). Pierson describes path dependency as a product of what economists label "increasing returns", the positive feedback which reinforces and perpetuates a decision, once made, making subsequent departures from the chosen path more and more difficult as time goes by (Pierson 2004, 20-22). This notion of path dependency does not imply intentionality, however: on the contrary, the outcomes of path dependent processes are in fact frequently observed to be "unintended consequences and inefficiencies" (Hall and Taylor 1996, 942). Nevertheless, the result of path dependency is "stickiness" or inertia, as the potential for reversing policy decisions dwindles, and policies become entrenched.

How does path dependency shape policy-making? Pierson (2004, 64) argues that the feedback process which is engendered by public policies creates certain effects on the policy environment which can become self-reinforcing. When a government formulates and implements a particular policy, it exercises its political authority, obliging actors to behave in particular ways. At the same time, the government sends signals to other actors about what they can expect from government, and how they should organise and behave in order to benefit from the incentives offered (Pierson 2004, 35-6). Over time, this will impact on the range of actors who remain involved in the policy area, as the feedback process will encourage some groups and discourage others. Jones and Baumgartner (2005, 49-50) similarly explain the effects of path dependency in terms of the institutions, or agencies, which are established as a result of policy change, and which then "acquire a life of their own", as interest groups and the agency's own personnel adapt their behaviour around

the new policy. Schneider and Ingram (2005, 19-26) also describe a more intricate set of expectations and relationships between governments and their policy's target population, produced by the feedback from a policy, and amplified over time. These relationships and expectations are built around the allocation of resources, benefits and burdens, the selection of policy instruments, the power relationships established between government agencies and their clients, and the messages which are received by the target population about how the government views their concerns and how effective their participation in the policy process is likely to be. Positively constructed target populations are therefore encouraged to expect beneficial treatment from government, and are likely to organise themselves effectively and to remain active in the policy process. Target populations which are negatively constructed in policy designed by governments are more likely to disengage from the political process, demonstrating the degenerative impact of path dependency (Ingram, Schneider and de Leon 2007).

Clearly when tracing the effects of path dependency, it is important to be able to identify the point at which the feedback processes begin. This is what Pierson (2004, 51) calls the "critical juncture". Whereas in the early stages of a sequence of events, the range of options available to actors is broad, once a "branching point" has been passed, and the path has been set, the options are ever more limited. It is the circumstances around the critical juncture which can therefore set in train the sequence of events, or choices, which follow. Even if hindsight suggests that the chosen path was predictable or inevitable, it is important to recognise the contingent, accidental, or even unintended nature of the decisions made at this early stage (Cowlishaw 1999, 8). It is also crucial to realise that the interests which are well served at the end of a period of a path-dependent process are not necessarily the ones which were best served by the original decision at the start; rather, the benefits of the process of positive feedback may have been unforeseeable at the time of the critical juncture (Pierson 2004, 46-7). Furthermore, Pierson emphasises that the critical juncture is not necessarily a "large event", or a choice which is immediately obvious for its significance. Often the critical juncture can appear relatively minor when compared with the effects of the feedback process it engenders over time. Indeed, Pierson suggests that it is in the nature of the feedback processes around path dependency that the "outcomes of early events of processes in the sequence may be amplified, while the significance of later events or processes is dampened" (Pierson 2004, 45). This means that attempts to reverse an earlier policy decision can be less effective than the original decision to set it in place: over time, the policy can become almost impossible to undo.

With path dependency, we observe the impact of the past on the present: controlling behaviour, limiting options, curtailing policy making, and ensuring that the legacies of the past are not forgotten or easily swept aside. Policy makers in the present inherit a vast array of policies from the past, and

must work within the confines of earlier decisions, and the institutional settings and political and social expectations which have flowed from them (Rose and Davies 1994; Rose 2005). In contrast with the contingent nature of policy evaluation discussed earlier in this chapter, path dependency is a picture of stability and continuity between past and present, and into the future. Feedback processes emanating from past decisions ensure that even if they are re-examined, adapted, or amended, policies, once institutionalised, may be very hard to extinguish (Schneider, Ingram and deLeon 2014).

Constructivist institutionalists have moved away from the strong emphasis on path dependency, urging a greater recognition of the capacity of actors to make choices in terms of their interpretation of the power of institutions (Hay 2006b, see also Heclo 2006). The structural power of institutions to constrain actors is diminished, as actors' perceptions of the value of the institution shift over time, and their memories of the original objectives and norms are attenuated. Heclo (2006) explains that institutional thinking concentrates on the long term, and reflects an understanding of the value of institutions which outlast any particular individual's short-term decision, but this nevertheless places the actor in a situation where there are choices to be made, and agency to be exercised. The institutions themselves only have the structural power that the actors accord to them, and this can change over time, and from individual to individual, though an institution is understood to be the reflected values of a collection of actors, not solitary individuals (Kay 2006). Constructivists are concerned then with uncovering the actors' changing *interpretations* of the institutions and their power, rather than assuming that path dependency is inevitable or deterministic (Hay 2006b, 65).

It is this reflective capacity of actors which allows for policy paradigms to develop, and then to shift. The historical institutionalist Peter Hall described the concept of a policy paradigm in structural terms, as a "framework of ideas and standards" which is almost invisible, being taken for granted, and thus it determines the choices of policy makers in imperceptible ways (Hall 1993). Kay, as a constructivist, defines a policy paradigm as the "abilities, dispositions and memories that facilitate intentional human agency" (Kay 2006, 70), and while he presents these as rules which are most often followed unthinkingly, he draws particular attention to the agency of the policy makers. A paradigm shifts when the rules are consciously observed, questioned and changed through a deliberate and collective decision making process involving all the actors who habitually follow the institutional rules associated with the paradigm (Kay 2006, 71). Kay understands actors to be "situated agents", working within given contexts or structures, but able to make choices which can affect the structures (see also Marsh 2010; Hay 2002).

Using this constructivist understanding of path dependency and policy paradigms, Kay (2006) therefore proposes a policy dynamics approach to explain policy development over time. Kay argues that path dependency should not be assumed to apply comprehensively in a given policy setting, but should be used with a "fine-grained perspective", allowing for some aspects of a policy decision to be "locked-in", and some to be open to adjustment over time (Kay 2006, 38; see also Hay 2006b). He points to the multi-layered temporal sequences which are in play at the same time, and notes that from the time of the original policy choice, there will be different "cycles" of policy decision making, with new decisions accumulating, overlapping, and "patching" over previous choices (Kay 2006, 119-120). In line with the historical institutionalist emphasis on context described earlier, Kay also underlines the contingent and complex nature of the policy process, noting that the conditions in which preferences are formed, intentions articulated, decisions taken and consequences revealed are all going to vary due to the passage of time (Kay 2006, 24). As observers with the benefit of hindsight, then, it is important to consider the uncertainty and range of possibilities available to decision makers, rather than simply assuming that consequences are the direct result of original intentions.

This longer temporal sequence allows for a better understanding of the policy process, and places the use of the policy failure label, and the politics surrounding such evaluation, into its proper context. The role of the critical juncture, and the manner in which policies and institutions develop or accumulate around a given policy decision over time, are useful in explaining the possibilities and perceptions of the policy makers working in the same policy area, in a different time. The examination of multiple temporal sequences allows for a deeper understanding of the scope and significance of the policy change.

Policy dynamics also explicitly considers temporality in a different sense, paying attention to the impact of timing and sequencing, that is, considering *when* specific events, or decisions, occur, in relation to others. The relative timing of events can be seen to affect policy outcomes, either because one event precedes another (sequencing), thus creating a situation where certain courses of action become possible, or impossible, or because two (or more) events occur at the same time (conjuncture), setting up similar possibilities or impossibilities (Pierson 2004, chapter 2). The importance of relative timing in shaping events is familiar to political observers who know the possibilities allowed by electoral cycles and changes of government, interest group activity and lobbying, crisis and unusual events, and how they can intersect (Howlett and Goetz 2014; Goetz and Meyer-Sahling 2009). Many policy theorists, following Kingdon (2003), have developed this notion of timing to explain how "windows of opportunity" open, as events, interests and actors coincide for brief periods of time, allowing policy change to take place. There is nothing predictable or

determined about such policy windows: while events may coincide creating potential for change, opportunities may be missed or fumbled, and windows may close again. Timing in this sense then is a matter of serendipity and chance, but without such a confluence of events within a specific timeframe, policy change may not take place. This adds an extra dimension to our temporal analysis using a policy dynamics approach.

Conclusion

This chapter has outlined three different accounts of the policy process, rationalist, pluralist and constructivist, and used these to explain three different approaches to policy evaluation, and the politics which impacts on the evaluation and its translation into later policy formulation. Expanding on the constructivist approach to policy studies, the chapter has further explored framing, and crisis, as important aspects of the policy process, which can often work at a different time scale. Finally, the chapter has drawn on historical and constructivist institutionalism to outline the notion of path dependency, which points to the institutionalisation of policy over time, and the continuity which stems from this. Using a policy dynamics approach, this thesis will utilise a range of different temporal scales in explaining the policy changes around Aboriginal land rights during the Howard era. This approach will draw attention to both structure and agency, and to the role of ideas, interests and institutions in policy making. As already discussed in Chapter 1, the analysis will focus on four themes which have been identified as especially relevant to Aboriginal land rights policy, namely purpose, difference, governance and access.

Chapter 3: Early colonialism and the humanitarian critique

Soon after the arrival of the first settlers in Sydney Cove, their superior weaponry and technology, combined with strength in numbers and organisation, had overpowered the Indigenous population in the immediate area. The Indigenous people in the Port Jackson area were already demoralised by disease and starvation, and unable to present a combined military resistance to the invaders. These initial experiences of the Indigenous presence were to determine much of subsequent Indigenous/settler relations. Settler attitudes towards the Indigenous occupants of the land were shaped by fear, pity, disgust and indifference as well as a manifest ignorance of the Indigenous people and their connection with the land. These attitudes were the basis of the frame which decision makers applied to the problem of the presence of Indigenous people in and around the colony. The dominant frame also told a story of the triumphant superiority of settler society, and the inevitable decline and perhaps disappearance of the original inhabitants.

The salience of this frame over the next hundred and fifty years illustrates the existence of a temporal sequence which it is important to observe for an understanding of Indigenous land policy in the present day. Conflict over Indigenous ownership of the land has been shaped by the power relations that were established in the earliest encounters between settlers and the original occupants of the continent, and path dependency has ensured that the policy legacy of the early period is still discernible today. This temporal sequence of invasion and colonisation began in 1788 and continued through to the 1920s when areas of the Northern Territory were still being identified and occupied by settlers.

Within several decades of their arrival on the continent, settlers acknowledged the need to restore some sections of land to Indigenous people, and these areas were labelled reserves. This chapter traces the evolving policy paradigm around the recognition of Indigenous ownership of the land in the earliest stages of British settlement. The chapter begins with the arrival of the first settlers in 1788, and considers the early attempts to conciliate with the Indigenous inhabitants as the invasion and occupation of the southern parts of the Australian continent persisted. The chapter identifies a critical juncture in the 1830s as humanitarians in Britain called for the protection of Indigenous people in all parts of the British Empire, acknowledging the harmful process of colonisation and dispossession. The systems of protection and reserves which were established in response to this critical evaluation were long lasting in their impact, and ultimately formed the basis of the land rights legislation which was passed in 1976 for the Northern Territory. This chapter explores the origins of

this path dependency, and identifies the key elements of the humanitarian critique of colonialism which would shape Indigenous land policy for the next century.

The arrival of the British settlers: curiosity, resistance and the Frontier War

When Governor Arthur Phillip took command of the First Fleet in 1787, preparing for the voyage to the new territory of New South Wales, he received instructions from King George III concerning the establishment of the penal colony. These instructions reflected the patchy knowledge of the destination at the time, which was based on the reports brought back from the 1770 voyage of Captain James Cook, particularly by Joseph Banks, the botanist. On several occasions following their return to London, Banks had advised members of parliament in committee hearings that the Indigenous inhabitants of Britain's newly claimed territory were living in a "state of nature", demonstrating no interest in trade or private property, and no evidence of political organisation (Shaw 2008, 266). Moreover, the inhabitants appeared to be few in number, and with no identifiable built structures or cultivation of agriculture, it was assumed that they were not particularly attached to specific areas of land.

Phillip's instructions thus warned him to take precautions to protect the settlers and their provisions from attacks by the "natives", and suggested using some of his provisions for bartering with them. Most significantly, he was instructed to pursue peaceful relations with them, and ensure the other settlers did the same, in the pursuit of British interests:

> You are to endeavour by every possible means to open an Intercourse with the Natives and to conciliate their affections, enjoining all Our Subjects to live in amity and kindness with them. And if any of Our Subjects shall wantonly destroy them, or give them any unnecessary Interruption in the exercise of their several occupations. It is our Will and Pleasure that you do cause such offenders to be brought to punishment according to the degree of the Offence. You will endeavour to procure an account of the Numbers inhabiting the Neighbourhood of the intended settlement and report your opinion to one of our Secretaries of State in what manner Our Intercourse with these people may be turned to the advantage of this country. (Governor Phillip's Instructions 25 April 1787)

The expectation of peaceful coexistence and shared use of the land soon gave way to conflict and fear, as the Aboriginal people resisted the encroachment of settlers onto their land, and proved to be far greater in number and tenacity than anticipated.

The Aboriginal people of Sydney Cove, the Eora, reacted cautiously to the arrival of the settlers initially, avoiding contact and withdrawing from the areas immediately surrounding the settlement (Broome 2010, 23). As the population was depleted by disease and hunger, however, the Aboriginal groups began to "come in" to the settlement, curious to discover more about the intruders on their

land, and seeking food and other rewards from contact with the settlers, including tea, alcohol and tobacco (Reynolds 2006). Governor Phillip encouraged such contact, as instructed, and sought to accommodate the Eora in the settlement, allowing them spaces to camp and meet within the growing town. Food shortages affected both colonists and Aboriginal people, however, and this soon led to direct conflicts as Aboriginal people objected to the loss of access to their usual hunting and fishing grounds (Karskens 2009, 369).

The behaviour of the Aboriginal groups around Sydney Cove was replicated according to similar patterns in other parts of the Australian continent as the British settlers explored and occupied further afield. Early mutual curiosity and accommodation between settlers and local Aboriginal peoples inevitably turned to open conflict in time, in each colony, as it gradually became clear that the settlers' intentions for their occupation of the land were permanent, not transitory (Pope 1989; Reynolds 2006). Disease often spread long before the arrival of the Europeans, depleting and weakening the Aboriginal population in advance of the often bitter and protracted battles for use of the land which were to follow (for example Goodall 2008, 26-28; Pope 1989, 36-41). Historical records provide official reports and eyewitness accounts of battles, murders and punitive treatment of Aboriginal people throughout the nineteenth century, as regions were progressively occupied by settlers and Aboriginal people were pushed off their own country. Deaths were numerous on both sides, as Aboriginal groups engaged in revenge attacks and reprisals, in response to the violence and effects of the invasion of their land (see for example Reynolds 2006, Kidd 1997, Read 1983, Pope 1989). Many more deaths were caused by starvation as Indigenous people lost access to their familiar sources of food and water, or saw them destroyed by cattle and sheep, and exotic plants.

Many historians have described the conflicts which followed between Indigenous inhabitants and invading settlers by using the language of war. Henry Reynolds (2006) famously used the notion of the "Frontier Wars", and others have pointed to the resistance by Aboriginal people as "guerrilla tactics" (Hunter 2012) or "acts of terrorism" (Goodall 2008). For these historians, physical resistance to the occupation by the settlers demonstrate that the land was never freely surrendered to the British by the Indigenous owners. This resistance took many forms: in addition to pitched battles, Aboriginal groups employed tactics such as surveillance, surprise raids, opportunistic theft, isolated attacks, and deliberate destruction of property. They retaliated against intrusions onto sacred sites, and stole stock, crops and equipment in response to their exclusion from their traditional hunting grounds. Not all forms of resistance were recognised as such by the settlers. For example, Reynolds (2006, 92-99) describes in some detail the use of sorcery by the Aboriginal people against settlers, using magic in the same way that they did against other Aboriginal groups in times of conflict, calling for illness, death and other misfortune to fall upon specific individuals or groups. This was no doubt

a practice which was easily overlooked by settlers who knew nothing of the spiritual lives of the Aboriginal people they were displacing.

The Indigenous resistance on the frontier was costly in human and economic terms for the settlers, and at times these costs threatened the viability of the poorly funded early colonies (Pope 1989, Hunter 2012). For the settlers, the establishment of the first colonies and the gradual extension of the boundaries of the settled lands was "a perilous and precarious exercise" (McHugh 2004, 4), as "Black resistance in its many forms was an inescapable feature of life on the fringes of European settlement" (Reynolds 2006, 37). The hostile and unfamiliar environment proved difficult to cultivate, and fear of the Aboriginal occupants was ever-present. As the frontier moved, the settlers sought out land for crop cultivation, and later for pastoral use as the demand for wool and beef within the colony and across the British Empire encouraged what Broome has described as "a fantastic land grab that was unique in world history" (Broome 2010, 37).

Though described as a war, it is important to recognise that the conflicts were highly localised, as the frontier moved. Each group or band used different tactics and methods to defend their own country, but did not engage in "formal strategic cooperation" with other neighbouring groups (Goodall 2008, 33). Their experiences were varied, as regions were explored and occupied by settlers in waves through the entire nineteenth century, beginning in the southeast, and spreading inland eventually from Brisbane and Perth, and later from Melbourne and Adelaide and finally up through the Northern Territory and the Top End at the end of the nineteenth century (Broome 2010). The first colonies, New South Wales settled in 1788 and Van Diemen's Land (Tasmania) in 1803, were penal colonies, primarily made up of convicts and their guards, the soldiers, and the contact with Aboriginal people was often brutal, driven by fear and desperation as the colonies struggled to find the resources they needed to survive. Later settlements, such as Adelaide in South Australia settled in 1836, the Swan River Colony (later Perth) in 1829 in Western Australia, were founded by free settlers under more humanitarian instructions from the British government, modelled on those given to Captain Phillip. Their interactions with the Indigenous people were nevertheless characterised by hostility and violence as the settlement became established and the frontier moved inland. Early expansions were protected by military forces, and citizen militias, and later settlers were supported by police officers, including Native Police, conducting deterrent or punitive expeditions against Aboriginal groups, as late as the late nineteenth century in the northern parts of the continent (Kidd 1997; Russell 2005).

John Batman's colony settled in 1835 at Port Philip (Melbourne) was not under instructions of the British government, and his activities seeking to establish a "treaty" with the local Aboriginal people were quickly reproved (Attwood 2009). This was a revealing episode which demonstrated the

practical implications of the Crown's right of pre-emption which the Colonial Office was determined to enforce (McHugh 2004). The imperial authorities held that decisions about property rights were uniquely subject to the Crown's sovereignty, and no indigenous inhabitants of the settled colonies would be recognised as possessing any kind of tribal or customary title over the land.

As will become clear in this chapter, land policy in the early colonial era was shaped in important ways by the temporal and geographical proximity of the frontier. Foster and Nettlebeck define the "frontier" as "that phase of European settlement from the time settlers first intruded into Aboriginal country to that point when their authority over Aboriginal people was effectively established" (Foster and Nettlebeck 2009, 211; see also Foster and Nettlebeck 2012). This process had to be completed before land tenure could be renegotiated with the original owners in a meaningful sense.

The first reserves: compensation and containment

New South Wales and the model Aboriginal farmers

Against this background of frontier war and resistance, it is important to acknowledge that the settlers did engage in conciliatory acts in acknowledgement of the loss of land experienced by the Indigenous people, in areas where the most frightening stage of the frontier was passed. The first time that land was formally granted to Aboriginal people in the early settlement was under Governor Lachlan Macquarie in the 1820s. Macquarie began by building a farm at Georges Head in 1815 and granting it to one of the Aboriginal leaders, Bungaree, in the expectation that it could be used to train Aboriginal people in farming, and to model "civilised" behaviour to others (Karskens 2009, 503, 526). Karskens notes that the choice of site was significant: "Georges Head was far enough away from Sydney to discourage Aboriginal people from visiting the town. In effect this was also the first official attempt to remove Aborigines from the urban environment, reversing Phillip's relentless attempts to bring them in" (Karskens 2009, 503). A similar attempt to encourage a "village" out of the Aboriginal camping ground at Elizabeth Bay was soon abandoned as the land was sought by settlers who wanted to establish villas and gardens within easy reach of the main settlement (Karskens 2009, 526-7).

Macquarie also established small farming allotments for Aboriginal people at Blacks' Town (near today's Blacktown) along with a Native Institution as a school for Aboriginal children (Broome 2010; Goodall 1990). Karskens (2009, 501-2) observes that was a "pet project" for the Governor, though it was short-lived. Macquarie offered incentives similar to those provided for freed convicts, "free tools, seeds, clothing, and victuals for six months", but this was not sufficient to attract the Aboriginal people to settle for long, and the farms were soon abandoned or given to white settlers instead.

Clendinnen (2003, 273) describes this as "Governor Macquarie's doomed experiment of turning nomads into farmers" and notes that despite the material encouragements provided for the selected Aboriginal farmers, before long they "abandoned the nascent farms, ate, sold or lost the animals, and stripped the huts of saleable items".

The allocation of small sections of land for selected Aboriginal people in the vicinity of the expanding settlement was significant for the frames which were applied to the Aboriginal people at the time. Clearly they represent attempts to share the land peacefully, but they also reflect the underlying expectation that Indigenous people would soon recognise the inherent superiority of the British settler technology and way of life. There was no consideration of the alternative Indigenous perspectives on law, land ownership and traditions, nor was there any inclination to learn from the Indigenous people's practical experience of land use in the area of the settlement. The dominant frame around Indigenous land can be usefully explored by examining each of the core themes identified in Chapter 1 in turn: *purpose*, *access*, *difference* and *governance*.

Behind the allocation of small areas of land as farms lay a number of *purposes*. There was no expectation that the Aboriginal people would become integrated into the labour force of the early settlement, and no need for this given the substantial pool of convict labour (Clendinnen 2003, Broome 2010). The behaviour and appearance of the Aboriginal people was confronting, and often frightening, to the settlers, and clearly the motivation of moving them out of sight, to fixed areas at a safe distance from the settlement, was an important one (Karskens 2009). The pity many settlers felt for the "wretched state" of the Aboriginal people who had been displaced from their land also sparked a sense of obligation and duty to care for them. At the same time, the small allotments equipped with tools and supplies for farming were also designed to teach the Aboriginal people how to live productively, improving and cultivating the land, like the British did themselves.

Access for Aboriginal people to the settlement was a pressing issue at this time. Karskens (2009) observes the shift of thinking by the time of Governor Macquarie's term: where Phillip had sought to accommodate the Aboriginal people in the settlement, and allow them spaces to camp and meet within the growing town, his successors were more inclined to see Aboriginal presence as a threat. Governor King issued instructions preventing Aboriginal people from entering settlements in 1805, cutting them off from their food supplies. Attitudes changed further by the 1830s, when there was a clear desire for "gentility and respectability" among many of the settlers, who saw the Aboriginal people as "an embarrassment, relics of the colony's unrespectable origins" (Karskens 2009, 533). Ongoing violent conflicts over food sources, the treatment of women, and access to specific areas also caused concern. The policy thus changed, and Aboriginal people were deliberately pushed out

of the towns, and their camping and ceremonial grounds were taken for use by the settlers (Karskens 2009, 534). The allocated farms thus provided one area where the Aboriginal were seen to be legitimately gathered, even if these sites were of not special interest to the Aboriginal people themselves. There was no attempt to accommodate the Aboriginal people on land which was important to them, or to recognise the ties that particular groups had to specific sites and areas, or the inter-tribal tensions over boundaries and territory (Karskens 2009, 503).

Despite these attempts to control *access* to the settlement, many Aboriginal people continued to live relatively traditional lives, on the outskirts and in unclaimed bushland around the settlement, some through until the twentieth century (Karskens 2009, 535; Read 2000, 204-7). Some Aboriginal groups also negotiated with individual settlers to be able to stay on land granted as estates within the Sydney settlement, in some cases working for estate holders, and continuing their traditional lifestyles where they could (Karskens 2009, 537). Karskens calls this arrangement "the history of shared country, of overlaid possession", and it demonstrates a complexity in the post-frontier adaptation to new circumstances by Indigenous and non-Indigenous people. This is an important theme to which we shall return later.

The colonial authorities appeared reluctant, even unable, to acknowledge the positive aspects of Indigenous *difference*. They were certainly conscious of the obligations they owed to the Aboriginal people who had been displaced by the settlement, and this accounted for the privileged, or charitable treatment which some Indigenous individuals, such as Bennelong and Bungaree, received from the Governors. The tolerance of ongoing difference was constrained, however. Historians have noted the similarity of the policy of allocating farmland to Aboriginal people with the policy for emancipated convicts, with similar resources and expectations, as the authorities sought to apply standard treatment for working class poor to the Indigenous people around the settlement (Clendinnen 2003; Goodall 2008). Aboriginal people were expected to change their hunter gatherer practices of wandering over the land and become sedentary and productive, like the British themselves.

The issue of *governance* of Aboriginal people was a contentious one throughout this period as their legal standing in the new settlement was unresolved. Aboriginal people were not yet considered to be British subjects able to stand trial as equals in the courts, and conflicts between Aboriginal people were deemed to fall outside the imported British legal system. The lack of legal remedies for Aboriginal incursions on settler property, theft or physical assault meant that the question of how to govern the Aboriginal inhabitants could not stay unresolved for long, however. Early attempts to persuade, cajole, and engage the Aboriginal people with gifts and barter were soon replaced by

imposition of British law and force, and an expectation that Aboriginal people would be subject to the law (Hunter 2012; Pope 2011). McHugh describes the gradual and relatively *ad hoc* assumption of legal dominance over Aboriginal people in Australian colonies as the product of a "murky ambivalence" (McHugh 2004, 192; see also pages 159-64).

In terms of the governance of the land allocations themselves, while the reserves and farming lots were set aside as a kind of compensation for dispossession, the Aboriginal people chosen to use them were given no control or security of tenure. Failure to use the land "correctly" resulted in the resumption of the allocation by the Governor. As Banner notes, "when land was set aside, it was... analogous to a trust with the Aborigines as beneficiaries and settlers as trustees, with the power to make the important decisions" (Banner 2005, 129). Aboriginal people were not recognised as land owners in the imported British system of property ownership.

Following the failed experiment of turning Aboriginal people into model farmers, Macquarie's successors began to allocate larger areas of land as reserves to missionaries, rather than directly to individual Aboriginal people. Governor Brisbane granted 10,000 acres of land near Lake Macquarie to the London Missionary Society to use as a mission for the Aboriginal people in 1825, and this practice was continued by Governor Darling (Shaw 2008, 268). This was among the first attempts by missionary societies began to operate in the colony (O'Brien 2011, 2) as the Reverend Samuel Marsden had earlier persuaded religious organisations that the Aboriginal people were "incapable of conversion", and thus undeserving of the church's attention, in contrast with the Maoris and Pacific Islanders. The missions were unsuccessful in terms of conversions and ability to retain Aboriginal people as residents: the colonial government closed the mission at Lake Macquarie in 1841, and the London Missionary Society had already withdrawn its support for the missionary in charge, the outspoken defender of Aboriginal welfare Lancelot Threlkeld, in 1829 (Keary 2009).

Such allocations of land may be seen as beneficial policies, but they must be understood in the context of the ongoing violence which was continuing to rage as the settlers spread over greater areas of land. The same Governor Brisbane who allowed the London Missionary Society the large allocation of land for Aboriginal people also declared martial law west of the Blue Mountains in 1824, as the Wiradjuri resistance to settler incursions around Bathurst took on a particularly frightening form. Providing specific areas of land for Aboriginal occupation and use was not considered in the frontier phase, but only once the uncertainty of the initial occupation had passed.

Van Diemen's Land: Reserves as segregation

The frontier phase was particularly brutal in Van Diemen's Land (Tasmania) during this same period, as the resistance of the Aboriginal clans was fierce and sustained. Governor Arthur (serving between

1824 and 1836) reluctantly developed extreme policies to deal with the competing demands for Aboriginal land. From 1817 onwards, the influx of free settlers, many of them veterans of the Napoleonic wars seeking to establish themselves as pastoralists, triggered a dramatic land grab which displaced the Aboriginal inhabitants brutally and remarkably rapidly (Ryan 2012). The settlers filled the Aboriginal hunting grounds with sheep, and fences, and the ensuing conflicts between the pastoralists and the Aboriginal clans in the area were vicious, with murders and violent reprisals on both sides. The "Black War" began in 1826 as Governor Arthur used police and military force to expel Aboriginal people from the "Settled Districts", calling on them to surrender, in the hope that they would accept relocation to a reserve allocated in the north-east, a policy which he borrowed from colonial experiences in Canada and the Cape Colony (Ryan 2012, 83, 100). Arthur also declared martial law, for a long period of three years (Ryan 2012, 105). Most dramatically, he engaged the policy of the "Black Line" in 1830, using a human chain of men, 2200 soldiers, convict and civilians, to work their way as a 190 kilometre line across the "Settled Districts", driving the remaining band of approximately 500 Aboriginal people towards the Tasman Peninsula. The effort to round up the Aboriginal clans failed, as many slipped through the line untraced, but the cost was high, with hundreds of Aboriginal lives lost during this period. The remaining few clans surrendered in 1830 and 1831, and Arthur engaged George Augustus Robinson to travel through each of the regions of the island to convince Aboriginal people to surrender, and be transported to a reserve on Flinders Island to escape settler violence (Ryan 2012, 141).

This episode in Indigenous-settler history reveals a frame being applied to Indigenous people and their claims to land ownership similar to that observed earlier in Macquarie's colony of New South Wales, albeit intensified as a result of the settlers' fear of Indigenous violence and ongoing resistance. Macquarie did not attempt to remove Indigenous people from the settlement as Arthur did, but both wrestled with the apparently irreconcilable interests in the land between settlers and Indigenous people. The *purpose* of removing Indigenous people from the settled areas to prevent such attacks was very clear, but the moral sense of obligation to care for them was also an important driver of the policy. Ryan observes that the resources allocated to the Wybalenna reserve on the island were remarkably generous: "Never again would a government-supported Aboriginal Station in Australia enjoy such a high level of financial support and employ such a large number of skilled people to look after a relatively small number of Aborigines" (Ryan 2012, 222). She explains this by pointing to the humanitarian beliefs of the two key actors, Arthur and Robinson, who believed they were saving the Aboriginal people from certain extermination (Ryan 2012, 215-6).

In terms of *access*, the Flinders Island reserve was chosen as it was a sufficient distance from Van Diemen's Land to prevent escape, but close enough for supplies to reach the settlement easily. Some

of the Aboriginal people returned but only when accompanied by Robinson on expeditions to persuade other Aboriginal people to join them on the reserve. The Aboriginal people were allowed to hunt and follow their traditional lifestyles to a certain extent on the reserve, thus maintaining their *difference* from the white settlers, but they were nevertheless expected to change their nomadic practices and live in houses like white settlers. There was no allowance made for the cultural and ceremonial links to their traditional lands. The loss of *access* to their own country proved to be impossible to bear for many. *Governance* was very much in the hands of the settlers. The coercive nature of the removal to Flinders Island, and the constant presence of British settlers in positions of authority (with the religious supervision and soldiers to preserve law and order) ensured that the Aboriginal people had little control over their own affairs. The unhappiness of the Aboriginal residents was evident: few children were born, most of the group of Aboriginal residents succumbed to illness, and many died in the first few years.

The colonial governors struggled to satisfy the demands of the fearful settlers and the needs of the displaced Aboriginal people, and certainly failed to control the violence on the frontier. The human and economic cost of war on the frontier was debilitating for the colonies. These problems were not exclusive to New South Wales and Van Diemen's Land, however. Other British colonies across the Empire were facing similar challenges, and the British policy makers began to reconsider their colonial policies and practice.

Evaluating colonial policy: Buxton and the humanitarian critique

By the 1830s concern was building in Britain about the treatment and welfare of indigenous people in British colonies. The Colonial Office received worrying reports of violent conflict on the frontier in Australia, particularly with the Black War in Van Diemen's Land, and sketchy accounts of events from Governor Benjamin D'Urban in the Cape Colony which downplayed mistreatment of San and Khoekhoe people and threats of war with the Xhosa. These reports caught the attention of a network of activists often described as humanitarians, or evangelicals. This network had been active in the earlier movement around the abolition of slavery, which was achieved in 1833. The activists were evangelical Christians or Quakers, and one of their prominent leaders was the parliamentarian Thomas Fowell Buxton. Attwood describes him as "the lynchpin of their network" and points to his close personal connections with the Colonial Office, in particular with the consecutive ministers in the period, Thomas Spring Rice, Lord Glenelg and Sir George Grey (Attwood 2009, 62-3). The humanitarians obtained key information about activities in the colonies through their well-placed contacts among missionaries working in the colonies, many very critical of the mistreatment of indigenous people that they observed in remote parts of the empire.

Buxton and his supporters successfully agitated for a parliamentary inquiry into the treatment of indigenous peoples in the colonies, known as the Select Committee on Aborigines (the Buxton Committee). This inquiry has received considerable attention in historical accounts of colonial policies towards Indigenous Australians in recent years (eg Reynolds 1987) but historians of the period increasingly emphasise that the Buxton Committee was not representative of the British policy over the longer term, and was in fact the product of a unusual confluence of personalities and events (eg Attwood 2009 and 2013; Elbourne 2003 and 2009). As Elbourne observes, "The 1835-36 Select Committee was the contingent product of political circumstances that would not again align in the same manner, as the 1832 Reform Act and the 1833 abolition of slavery, among other things, created a window of opportunity for well-connected abolitionist leaders, such as Buxton, with a perceived populist base, briefly to influence colonial policy towards indigenous peoples" (Elbourne 2003, 8). The inquiry nevertheless provides a significant insight into the frames which were emerging around indigenous rights and welfare at a critical point in British colonial history, and these frames proved to be more durable in the Australian colonies than they were perhaps in London.

The Select Committee on Aborigines received evidence in 1835 and reported in 1836 and 1837. A total of 46 witnesses gave evidence before the committee, though very few of these were from Australian colonies, and none of these were indigenous. Buxton and his associates did receive personal advice from influential colonial figures from colonies on the eastern side of the Australian continent, such as attorney Saxe Bannister, missionary Lancelot Threlkeld and Governor Arthur. Membership of the committee included a number of sympathetic humanitarians, including allies and relatives of Buxton, notably his son-in-law Andrew Johnston and another relative by marriage Joseph Pease (Elbourne 2003, 9; Laidlaw 2004). Despite Buxton's role as the public face of the committee process, he was actively but secretly supported by several women in Buxton's immediate family, notably his daughter Priscilla and his cousin Anna Gurney. These women were instrumental in the agitation for the inquiry, writing parliamentary speeches, and maintaining regular correspondence with informants in the colonies. During the inquiry itself, they assisted with writing questions, conducting background research, selecting witnesses, and writing the final report (Laidlaw 2004, Elbourne 2009). Their strong Christian beliefs, and experience in supporting the earlier anti-slavery campaign as well as campaigns to support the poor in Britain, very much shaped their approach and conclusions with respect to indigenous people in the far-flung colonies.

As an evaluation of colonial policy and implementation, the Buxton Committee was clearly driven by the values and concerns of its instigators, in particular a Protestant Christian concentration on the importance of conversion as essential to the salvation of indigenous peoples subjected to the degradation of colonialism (Elbourne 2009). As the title of its report indicates, the report expressed

the policy objectives for indigenous peoples as being "due observance of Justice and the protection of their Rights; to promote the spread of Civilization among them, and to lead them to the peaceful and voluntary reception of the Christian Religion" (cited in Elbourne 2003, 10).

This evangelical focus on conversion was aimed at both Aboriginal people and settlers, including the convicts and working class sailors, whalers, and others whose morality was deemed to be wanting. O'Brien (2011, 1) uncovers the "mixture of religious impulses that informed humanitarian thought: exhortation to justice, charity, restitution, atonement and edification were entwined with biblical narratives of banishment, judgement and the doctrine of the elect". Many of the ideas had been earlier applied to the British working classes, and the poor, by the humanitarians in the campaigns around the amendments to the *Poor Law* in 1832, with the shift towards "indoor" rather than "outdoor relief". As Amanda Barry observes, the humanitarians had been concerned with "civilising and 'improving' projects amongst British working classes in the midst of the Industrial Revolution… As these policies were transferred to colonial locations, similar anxieties about morality, decency and Christianity characterised discussion of Indigenous 'problems' as had attended debates about Britain's working class" (Barry 2008, 412).

This attitude within the humanitarian network points to its very specific social class origins, which also affected the values and remedies considered in the inquiry. Elbourne notes the class-based assumptions which underpin the Buxton Committee inquiry and report, and observes that "extensive white settlement compelled upper-class bureaucrats and activists to think about whether working-class settlers were adequate agents of colonialism" (Elbourne 2003, 7). Laidlaw (2004) describes the Buxton family as "middle class and comfortably off, though not extremely wealthy", but observes their engagement in philanthropic causes, benefiting from relatively high levels of education and access to information and campaign activities with others of similar class and religious backgrounds. The physical and social distance between those evaluating colonial policy and those implementing it and affected by it was profound, and this certainly affected the report's reception in the colonies.

The Buxton report linked moral failures of individuals, settlers or colonised, on the empire's frontier to the virtue of the British nation as a whole. In the view of the report's authors, Britain had a particular duty to exercise virtue in expanding its empire. As the report argues:

> The British empire has been singly blessed by Providence, and her eminence, her strength, her wealth, her prosperity, her intellectual, her moral and her religious advantages, are so many reasons for peculiar obedience to the laws of Him who guides the destinies of nations. These were given for some higher purpose than commercial prosperity and military renown. (Select Committee 1836 p76)

As with many evaluation exercises, the Buxton Committee was obliged to take into account political interests and government receptivity in drafting its final report. The Committee was initially very critical of the behaviour of colonial officers in the Cape Colony, having received its evidence from missionaries, rather than colonial authorities, but it was forced to delay, and amend, its report in order to take into account additional official evidence from the Cape. The Colonial Office was also reluctant to accept embarrassing criticisms of the government at a time of political instability, with King William IV on his deathbed, and the most strident criticisms of the Cape policies were removed in order to avoid controversy (Laidlaw 2004, 5). It is clear that the British government was under considerable pressure also as a result of lobbying by private companies and individuals seeking to profit from colonising new territories in Australia and New Zealand, unhindered by undue moral concern over the welfare of the indigenous people (Hunter 2012, 82). As Laidlaw explains, "the final report did represent a compromise, its recommendations accordingly too vague and too general for the government to feel obliged to implement them" (Laidlaw 2004, 19-20).

The Buxton Committee made a number of recommendations which are relevant to the policy around Indigenous land. Firstly, the Committee noted the clear conflict of interest between settlers and local indigenous populations with respect to the protection of the indigenous population. It therefore suggested that this responsibility should fall to the executive (the Governor of the colony, under the direction of the Colonial Office in London) rather than the local parliament, as it would not be "ministering to all popular prejudices" (Select Committee 1836, 77). This was in fact already "official practice of the time", with the strength of metropolitan control from the Colonial Office through the Governors in the colonies (McHugh 2004, 132). It would certainly have been a recommendation which suited the Colonial Office, especially in the context of their dissatisfaction with the performance of D'Urban in the Cape Colony. The centralised control was ceded within two decades, however, due to costs and perceived failure in effectiveness, and in Australia most of the colonies were granted self-government in the 1850s (McHugh 2004, 133).

The Buxton Committee also argued that attempts to purchase land or formulate treaties with indigenous people should be avoided, as such agreements were compromised by the unequal power relations between the two parties (Select Committee 1836, 80; see also Attwood 2009, 98). Allowing such agreements would also be tantamount to retrospectively recognising the sovereignty of indigenous inhabitants of all British colonies, and this would jeopardise the status of all existing colonies established under the authority of the British Crown (McHugh 2004; Banner 2007; Attwood 2009). This policy had already been adopted by the Colonial Office with respect to John Batman and his attempt to sign a treaty with the Kulin people in the Port Phillip colony in 1835, and was also applied in the new colonies in South Australia and Western Australia. The signing of the Treaty of

Waitangi with Maori leaders in New Zealand in 1840 was an exception rather than an example to be followed.

Significantly, the Committee recommended that a sufficient portion of the revenue of all colonies be dedicated "to provide for the religious instruction and for the protection of the survivors of the tribes to which the lands comprised in that Colony formerly belonged" (Select Committee 1836, 79). The Committee based this recommendation on the observation that:

> Although it be true that the land in our Colonies has derived the greater part of its exchangeable value from the capital and the labour employed in the cultivation of it, yet, even in its most rude and wild state, that land is demonstrably worth a very large amount of money… It requires no argument to show that we thus owe to the natives a debt, which will be but imperfectly paid by charging the Land Revenue of each of these Provinces with whatever expenditure is necessary for the instruction of the adults, the education of their youth, and the protection of them all. (Select Committee 1836, 79)

This explicit recognition of the prior indigenous ownership of the land has created considerable interest among historians. Reynolds (1987) uses the report to argue that Indigenous rights to land were recognised from the earliest stages of colonisation, implying a cause for compensation and restitution in the present. However, there is little consensus on this aspect of the Buxton report among historians. Attwood observes that Buxton's overriding interest was in protecting the civil rights of indigenous people, rather than conceding their ownership of the land, and he thus placed a much stronger emphasis on the duty of the British settlers to spread civilisation and Christianity as a means of protecting their welfare (Attwood 2013, 59-60). Such an approach not only reflected Christian and humanitarian values; it would provide longer-term security for the settlers, and would protect the reputation and image of the British Empire.

This approach is also consistent with McHugh's depiction of the notion of Crown guardianship as a key element of legal doctrine during this period. As he explains, "imperial officials believed that governmental power was to be exercised as to protect and guard the non-Christian people until such time as they could achieve full political equality with the Crown's natural-born subjects. In the meanwhile… these vulnerable people were under a special species of Crown protection or guardianship" (McHugh 2004, 131). Having conceded collective ownership over the land, the appropriate response from the Buxton Committee's perspective was thus not to restore land to those who had lost it, but to assert the Crown's exclusive and closely supervised prerogative to purchase land in future, and to protect the natives by assisting them to make the transition to "civilisation" and Christianity, through instruction and education. The assimilationist assumptions, combined with an obvious paternalism, are easier to understand when contrasted with the only

other alternatives which seemed available to the colonists at the time, slavery or complete extermination (Hunter 2012, 95).

The meaning given to prior ownership of the land was also limited, and this is best understood in the context of the theory of stadial history, widely accepted in that period, which depicted human progress through stages of development, "hunting, pastoralism, agriculture and commerce", giving increasing importance to property and exclusive ownership (Attwood 2013, 57). McHugh (2004, 122) observes the prevalence of stadial thinking in the witness statements to the Buxton Committee, as witnesses sought to position the indigenous people in the various colonies at different points on the inevitable progression, justifying their treatment in terms of the progress they had made, or were making. Stadial theory was also widely accepted in Australia as a dominant "colonial ideology" (Belmessous 2011, 12). The colonists then based their justification of their usurpation of the indigenous lands on the idea that property ownership was irrelevant to an economy based on hunting, where all land was deemed to be common land. Attwood quotes the South Australia Commissioners (of the Colonisation Commission) who expressed a widespread view to the Colonial Office that "In the colonisation of Australia, it has been invariably assumed as an established fact that the unlocated tribes have not arrived at that stage of social improvement in which a proprietary right to the soil exists" (Attwood 2013, 71). Their lands were thus labelled "waste and unoccupied".

This understanding of stadial history informed the pragmatism with which the Buxton Committee and the Colonial Office viewed the ongoing dispossession of indigenous people. Implicit in the Buxton report is the recognition that the colonisation of the new territories in the British Empire was not going to be rescinded. The potential economic value of the land and its produce for the Empire was clearly enormous. Furthermore, the colonies had been established with a founding principle of Crown ownership of all land, or pre-emption, and settler grants or purchases were to be made with respect to the Crown alone. As Attwood observes, the path dependency here was already strong, with many vested interests involved: "By the time the British approved the founding of a colony in South Australia in the mid-1830s it had been acting for nearly fifty years as though it was the only owner of the land. This was the basis of every settler's title, and it would have been extremely difficult to overturn this arrangement" (Attwood 2013, 82; see also Banner 2005). Colonial Secretary Glenelg recognised this in his dispatch to Governor Bourke in 1836 concerning his reluctance to allow treaties to be negotiated as Batman had attempted in Port Phillip (Hunter 2012, 171). The second Governor in Western Australia, John Hutt, who was noted for his sympathetic attitude towards the Aboriginal people in the colony, drew similar conclusions, as Hunter recounts: "while there was an awareness that indigenous people had their own proprietary rights divested of by the British

government, there was no going back to review the matter, just as the Buxton Committee had decided. The threat to British sovereignty and control was too great" (Hunter 2012, 175).

From evaluation to policy making

Historians have debated the impact of the Select Committee on Aborigines on subsequent policy making. Some assessments emphasise the significant long term impact of the report, while others note distant colonists paying lip service to the recommendations in the short term, disregarding inconvenient guidelines when convenient. It is useful here to consider the different accounts of policy making outlined in Chapter 2, as they help to explain these varied assessments.

Because many recommendations were ignored, or only adopted in part, Laidlaw suggests that the report "did not have the influence hoped for by the Buxtons" (Laidlaw 2004, 19). It is clear that the Colonial Office was sympathetic to the conclusions of the Committee, and had allowed its recommendations to shape policy decisions in the period during and immediately after the release of the report, but its decisions were constrained by party politics and staff turnover, a lack of resources, and the very real challenges of implementation with enormous distances and poor communications between London and the colonies all over the globe. Laidlaw's assessment reflects the authoritative choice account of policy which expects direct linkages between evaluation and policy, and notes implementation gaps with dismay.

In contrast, historians such as Elbourne have emphasised the difference between the humanitarians in their rarefied setting of upper middle class activism in Britain and the rougher, more pragmatic settlers in the colonies, commenting that the Committee's recommendations "in no sense excited consensus" (Elbourne 2003, 9). The Colonial Office in London communicated the Buxton recommendations to key appointed staff in the colonies, but their attempts to apply them were frustrated by local resistance from settlers with interests in the land and fear of frontier violence (Goodall 2008, 51). Hunter observes that Lord Glenelg provided both Governor George Gawler of South Australia and Governor John Hutt of Western Australia with copies of the Buxton Committee's report before their commission, but both were forced to adapt their policies in the face of local demands (Hunter 2012, 93; see also Berg 2010). Another analysis which emphasises the competing interests of a structured interaction account of policy is that of Attwood (2013) who observes that the Committee's recommendations were general rather than specific, and in many cases the contingent circumstances of each colony, and the relations developed with the indigenous people in each place played a more important role in determining ongoing policy than a report devised thousands of miles away (Attwood 2013). Local interests and local priorities overshadowed the directions proposed by the Buxton Committee, and the relative power of the indigenous people the

settlers encountered made a significant difference. This goes some way to explaining the very divergent responses to the recommendation on treaties, comparing South Australia, the Cape Colony and New Zealand, where recognition of sovereignty and of political and military capacity among the indigenous people was so varied.

A social constructivist approach to assessing the impact of the Select Committee on Aborigines would consider the longer timeframe and look for a more gradual change in attitudes, ideas and values. It is true that the humanitarian or evangelical network was influential for a relatively short period in British politics, but policies towards Aboriginal people in the Australian colonies through the remainder of the nineteenth century clearly stemmed from the Buxton Committee's exposition of British duties and responsibilities as they were understood in the 1830s. O'Brien (2011) observes the sentiment expressed in the Buxton report that the settlers owed some form of reparation, or compensation, to the indigenous people, noted above, and argues that it was this aspect of Buxton's report which had far-reaching impact on policy in Australian colonies through to the 1880s. She explores the evolution of the frame of compensation as it was used to explain the need for reserves and missions over the second half of the nineteenth century, and while the positive feedback flowing from these decisions was clear in the areas of land designated as Aboriginal reserves, O'Brien also notes the negative feedback processes which turned policies of protection into coercion and control in Queensland in particular over time. These feedback processes will be explored in more detail in the next chapter.

The Select Committee on Aborigines can thus be seen as a critical juncture in colonial policy making towards Aboriginal people in Australia. While the short-term, direct impact of the Committee's recommendations may have left the Buxton family and their associates disheartened, the longer term feedback processes emanating from this point in colonial policy making have proven to be significant, especially in terms of Indigenous land policy (O'Brien 2011). The Buxton Committee insisted on two key responsibilities for colonial powers towards the indigenous people they encountered and displaced: the responsibility to protect, by allocating small reserves of land where they could live in security, and the responsibility to civilise, by establishing missions where Aboriginal people could be educated and trained to adopt settler lifestyles and religion. Both of these responsibilities resulted in the allocation of small defined areas of land, for Aboriginal people to access and use in ways which were determined appropriate by the supervising authorities.

Protection and reserves: the challenges of implementation

The Buxton Committee's recommendation of reserving a portion of land allocations for the benefit of indigenous people was formalised as British colonial policy in several different ways. The

instructions which the Colonial Office dispatched to Governors were also interpreted by the respective colonies in ways which suited their local priorities and relations with the Aboriginal people. The Committee may have been disappointed at the slippage between their recommendations and the policies as actually determined in the Australian colonies, but much could be explained in modern terms as implementation failure.

Lord Glenelg instructed the South Australian colonisers to allocate 20 per cent of land sales to Aboriginal people, in his Letters Patent in 1836. His successor Secretary of State John Russell sent similar dispatches in 1840 to Governor Hutt in Western Australia and Governor Gipps in New South Wales proposing that 15 per cent of annual revenue from the sale of Crown lands be reserved for Aboriginal people, in particular for their protection and the establishment of reserves (Hunter 2012, 176). Hunter (2012) recounts the revenue shortfalls in Western Australia which meant that the allocations for Aboriginal needs were deemed impossible in the short term. The Aboriginal people in other colonies fared little better: according to O'Brien, in 1845 about 3 per cent of land revenue was spent on Aboriginal people in 1845 in NSW, and in Victoria and South Australia by the 1860s it was only 1 per cent (O'Brien 2011, 4).

A second policy emanating from this recommendation was the provision of reserved areas of land. In New South Wales the *Land Act* passed in 1842 was the first to provide for Crown land to be allocated to Aboriginal people (Goodall 2008, 53). In South Australia, some areas of land were reserved from sale, for the benefit of Aboriginal people, under the trusteeship of the Protector of Aborigines, who leased them to European settlers for farming (Raynes 2002, 12). The colonies struggled with this direction, as the settlers resented the loss of useful land (Broome 2005, 40). Land allocation policies were under pressure from another quarter at the time, with the growing influence of the ideas of Edward Gibbon Wakefield, known as "systematic colonisation". This economic approach to colonisation called for more attention to the revenue-raising potential of land allocation, and thus to the limiting of land holding and the boundaries of settlement, with Crown land to be sold at market value or higher (Attwood 2009, 17-18). This emphasis on deriving the greatest possible economic value from the land combined with the reservation of land for Aboriginal people had the makings of policy incoherence.

A third aspect of this policy was the establishment of protectorates in each colony. The Buxton Committee's notion of the Protector of Aborigines was based on the earlier model of the Protector of Slaves (Nettlebeck 2012, 397). The first of these was created by the British government in Port Phillip in 1838 (Furphy 2013; Broome 2010, 52) and was followed soon after in the colonies of South and Western Australia (Nettlebeck 2012, 398). In all these colonies the rapid expansion of

pastoralism was understood to threaten the welfare of the Indigenous people. Goodall (2008, 51) suggests that the intended role of the Protectors was that they travel with Aboriginal groups, learning their languages, acting as advocates, and safeguarding the continuation of traditional hunting. However, the role evolved quickly into a more limited notion of identifying areas of land as reserves for the use of the Aboriginal people, and encouraging them to settle in one place, using rations as encouragement. This process had mixed success. In Port Phillip, the empty stations were closed in 1843 (Furphy 2013, 71, 73). In Western Australia, the policy rapidly became coercive: protectors adopted more punitive measures when Aboriginal people resisted the pressure to settle on the government stations, prohibited Aboriginal people from moving freely, banished them from towns, punished them severely for crimes against settlers, and imprisoned many on Rottnest Island for transgressions (Nettlebeck 2012). Buxton's vision of a steady application of the rule of law to indigenous peoples was difficult to realise in practice.

The protectors were given an especially difficult role as agents of the Buxton Committee's concept of protection. Their tasks included mediating between the Aboriginal people and the settlers, preventing and policing violence and criminal acts on both sides, allocating rations and identifying reserves, advocating for Aboriginal people in the court system, and attempting to reform, train and civilise the Aboriginal people (Nettlebeck 2012, 400). The protectors found themselves very isolated, having little institutional support, and facing strong opposition from beleaguered settlers (Nettlebeck 2012, 411). The economic pressures of the depression in 1844 only exacerbated the situation, and government funding for the protectorates dwindled (Broome 2005, 40). The settlers quickly became convinced that the policy was a failure, and the "Protectorate experiment" was abandoned in Port Phillip and Western Australia in 1849, with the Protectors being rebadged as 'Guardians" (Furphy 2013; Nettlebeck 2012, 410). In South Australia, the Protector resigned in 1856 and was not replaced (Raynes 2002, 17).

Protection and reserves: reflecting on the dominant frames

The Buxton Committee report made a strong impression on decision makers in the Australian colonies, and their attempts to implement the recommendations reflect the application of a new humanitarian frame to the policies around Indigenous land. This section examines the policy on reserves in the period after the Buxton Committee released its reports, with reference to the core themes of *purpose*, *difference*, *access* and *governance* in order to illustrate the impact of the humanitarian critique on colonial policies in this period.

With respect to *purpose*, there is remarkable continuity with the frames that had been applied in the early colonial period. In the 1840s the prevailing policy was one of providing reserves for Aboriginal

people on the assumption that they would eventually learn to use the lands in the same manner as the European settlers did. This echoed Macquarie's earlier attempts in the 1820s to train the Aboriginal people to be like the settlers. The reserves were supervised, and supplied rations for the Aboriginal residents, thus providing for the possibility of tuition in European ways.

Aboriginal *difference* continued to be ignored. There was no acknowledgement of the spiritual and social value of the land for Aboriginal people, though allegiance to particular areas of land for particular groups was increasingly recognised (Goodall 2008, 52; Hunter 2012, 228). Nor was there any inclination to grant large areas of land, and allow Aboriginal people to continue their traditional lifestyle and land use. The Colonial Land and Emigration Commission argued in 1840 that land granted to Aboriginal groups should not be estates large enough to support traditional hunting and gathering, but rather should be "moderate reserves" which would allow for agriculture in the manner of British settlers' use of the land (Goodall 2008, 52). This was seen as the most efficient allocation in terms of how many people the cultivation of the land could feed, and thus afforded a good fit with Wakefield's guidelines of systematic colonisation (Shaw 2008, 285; Attwood 2009, 17-18). In South Australia, this approach was applied *Waste Lands Act* of 1842 which empowered the Protector to identify small reserves for the purpose of farming by Aboriginal people (Brock 1993, 14). In Western Australia, Governor Hutt also allocated land for farming purposes, with a view to the future "amalgamation" of the Aboriginal people into the settler society (Hunter 2012, 177). When the reserves were not taken up, or used as the governors intended, they were leased to settlers instead.

Indigenous people had seen the value of downplaying their *difference* in the interactions they had with governing authorities during this period. Many Aboriginal people clearly framed their requests for small allocations of land in order to fit within settler expectations. In Port Phillip, for example, the elder Billibellary requested a small area of land by the Yarra River in 1843, stating that "if Yarra blackfellows had a country on the Yarra… they would stop on it and cultivate the ground" (Attwood and Markus 1999, 31; Broome 2006, 43.2). This example is typical of many other recorded requests made of government during the 1840s in Victoria, in written letters and petitions. Aboriginal people frequently requested land from the authorities in exchange for "living like Whites", or in recognition of their assiduously developed "respectability" on white terms (Curthoys and Mitchell 2011, 188; Rowse 2005).

Access to reserves during this period was more liberal than the example of Van Diemen's Land, though clearly there were crucial differences between reserves in Victoria and those in Western Australia, where movement around settled areas was already being restricted. Increasingly, Aboriginal people were charged with trespass for returning to their lands (Hunter 2012, 225), and

they were expected to restrict their movement to identified stations and reserves, as chosen for them by the governors. On the other hand, the British government saw access to traditional lands as an important issue in the light of the rapid spread of pastoralism in the southern colonies. Following the Buxton Committee's recommendations, the Secretary of State for the Colonies, Earl Grey, instigated the *Imperial Waste Lands Act* of 1846. This legislation provided explicitly for continued rights of Aboriginal people to hunt and gather in areas over which pastoral leases had been granted, as these leases were not deemed to grant exclusive occupation to the leaseholders (Goodall 2008, 53-5; Broome 2010, 53). This allowed the continuation of the "shared occupation" of the land as noted earlier, albeit dependent on the goodwill of the settlers holding the leases, as policing on the frontier was poorly resourced.

Governance of the reserves was never understood to be within Aboriginal control. Buxton's rule of law would continue to be applied by the colonial authorities. While these authorities recognised the reserves served as a form of compensation for the dispossession of the Aboriginal people, allocations of land were nevertheless "analogous to a trust with the Aborigines as beneficiaries and settlers as trustees, with the power to make the important decisions" (Banner 2005, 129). Land was granted in the form of leases, not freehold title, and if Aboriginal people were not deemed to be using the land in a productive manner, the lease could be revoked, and the land used as a source of income for the government (Pope 1989, 134-5).

Conclusion

As this chapter has shown, land policy towards Aboriginal people in the 1840s had crystallised around the humanitarian values associated with Buxton and his Committee, but retained a distinct pragmatism associated with the ongoing struggles at the frontier and the challenge of making the colonies economically viable. Early assumptions about the ability of the Indigenous people to adapt to settler lifestyles and uses of the land had given way to a greater acknowledgement of the harm done in the colonisation process, and an urge to offer some reparation in its place. The promise of "civilising" and "Christianising" the Indigenous people was one part of this compensation, but the establishment of protectors and allocation of small reserves proved to be a more practical solution. The reserves which were allocated were the beginning of a long path dependent process in Indigenous land policy.

The following table summarises the shift in frames which applied to Aboriginal reserves, with respect to the core themes of purpose, access, difference and governance between the early colonial period and the protection policies implemented following the Buxton report:

Table 3.1   Framing Indigenous reserves: early colonial period and early protection period

	Early colonial period 1788-1835	Early protection period 1835-60
Purpose	Reserves served as • A means of preventing settler/Indigenous conflict • A way of keeping Indigenous people at an acceptable distance from settlements • Model farms, for training Indigenous people in European farming techniques	Reserves served as • Compensation for loss of land • Sanctuary from frontier violence • A place for training and education in Christian beliefs, farming and domestic labour • Sufficient land for farming, not traditional hunting and gathering
Access	• Indigenous people excluded or expelled from settled areas • Indigenous people to be confined to reserves where possible	• Indigenous people encouraged to live on reserves, but not forced • Small reserves at suitable distance from settlements
Difference	• Indigenous people expected to adapt to superior settler lifestyle • Access to traditional lands increasingly restricted	• Indigenous people recognised as prior owners, but an inferior race • Indigenous people would benefit from civilising and Christianising • Access to traditional lands increasingly restricted
Governance	• Authoritarian • Reserves were Crown land given in trust, and reclaimed at will • Crown's right of pre-emption • Indigenous people on reserves lived under supervision of officials or missionaries	• Paternalist • Reserves were Crown land given in trust, and reclaimed if improperly used, or demanded by settlers • Indigenous people on reserves lived under supervision of officials or missionaries

As summarised in the table, it is clear that the humanitarian critique of colonial practices had a substantial impact on policy makers' understanding of the role of reserves in broader Indigenous policy. In the aftermath of the Buxton report, Indigenous land was framed in terms of a causal story of compensation, protection and civilisation. In terms of purpose, there was a clear recognition of the duty to compensate Aboriginal people for the loss of their land, but the allocation of land was soon constrained to small grants for farming purposes, like the settlers, rather than larger grants allowing continuity of practice and use of land. These grants were precarious and frequently reclaimed, as settlers demanded access to desirable sections of land, and Aboriginal people refused

to move to the designated areas, away from their own country, or failed to satisfy settler expectations of agrarian cultivation of the land.

Aboriginal difference was recognised simply in terms of the obligation to make reparations, but their cultural differences were expected to disappear as they became "amalgamated" into the settler mode of living. Access to traditional lands was increasingly prevented for Aboriginal people as settlers moved into new regions, fencing land and retaliating brutally against incursions. Earl Grey's provisions for ongoing roaming access to pastoral leases had been legislated, but the implementation of this was variable. Aboriginal people were given no power to govern themselves on the allocated reserves, but were expected to be supervised and trained into civilised ways by government officials and Protectors.

In applying the humanitarian ideals outlined in the Buxton Committee report, the colonial authorities had concentrated on the responsibility to protect. The other responsibility articulated by the Buxton Committee, to "civilise" the Aboriginal people, came to be increasingly important in the next period, a new temporal sequence which is covered in the next chapter. As will become clear, this "civilising mission" ultimately degenerated into a project of assimilation, which saw reserves used as places of imprisonment and hard-won land reclaimed as Indigenous people were forced to leave the reserves and become absorbed into the wider community.

Chapter 4: Protection, segregation and the extensive reserve

The previous chapter outlined early attempts to accommodate Indigenous people within the rapidly expanding land grab of the early colonies in Australia, and considered the critical juncture of the Buxton Committee and the policies of protection which were implemented following the committee's critique of colonialism and its impact on indigenous people. We have already observed the implementation difficulties faced by colonial governments attempting to adapt the Buxton recommendations to the stubborn and often harsh realities of settler-indigenous relations in places where the frontier was a very recent memory.

This chapter picks up this chronological account in the 1850s, when most of the colonies obtained self-government, and independence from the British Colonial Office. The chapter explores the positive and negative feedback processes which continued to emanate from the Buxton report through the following decades, to the 1930s when extensive reserves were adopted as Indigenous land policy in the northern parts of Australia. The chapter draws on key policy evaluations which were conducted in Aboriginal affairs by colonial, state and Commonwealth governments during this period. The evolution of the policy paradigm can thus be traced through the changing frames applied by the evaluators. The frames evolved in important ways in response to Indigenous requests and behaviour, changing economic priorities, and new quasi-scientific understandings of race and the potential for Aboriginal people to become absorbed into the settler population. Most of all, the frames turned to the second responsibility identified by the Buxton Committee, that of "civilising" the Indigenous people, or forcing them to conform to settler expectations.

The contingent nature of the policy paradigm will be detectable in the adaptations that each colony or state made to the dominant frames, in line with their localised experiences and interests. In order to identify these variations, each jurisdiction will be considered in turn, observing the temporal sequences which linked the humanitarian ideas espoused by Buxton to the later adaptations and modifications on the ground. As will be made clear, the policy dynamics around Aboriginal reserves diverged during this period: the colonies of the south were abandoning reserves at the same time as the colonies closer to the frontier in the north were opening new, large reserves. This divergence will be explained in terms of the proximity of the frontier and the nature of settler occupation, as well as the impact of timing, as ideas and knowledge about race, culture and the potential of integration changed.

The chapter thus explores the evolution, and occasional distortion, of humanitarian ideas in each jurisdiction, through to the 1930s when assimilation came to be the new dominant frame. As we shall see in the next chapter, the frame of assimilation brought significant reforms in favour of formal equality for Indigenous Australians, but also engendered an important debate about Indigenous *difference*, and it was in this context that Indigenous *access* to land began to be discussed using a new language of "rights".

Self-government, and post-frontier policy making

During the decade of the 1850s, the colonies of New South Wales, Queensland, Victoria, South Australia and Tasmania were granted self-government by Britain, and Western Australia followed in 1890. This new form of *governance* marked the beginning of a new temporal sequence for each of the colonies, as they adopted responsible government and detached themselves from the control of the Colonial Office. After decades of interventionist policy from London, the granting of self-government allowed the British politicians to cast blame on settler governments for the treatment of Aboriginal people without taking responsibility (McKenna 2012). As the British government ceded control of Aboriginal affairs, policy making was increasingly decentralised, and each new state developed its own policies aimed at its own Indigenous population. Policies developed differently depending on the size and visibility of the Aboriginal population, and the ongoing exposure to the frontier.

For the first few decades of self-government, the relationship between the newly independent governments and Aboriginal people was characterised more by neglect than anything else (Russell 2006, 105-106). Frontier violence had all but ended in the southern states, though it continued in Queensland, Western Australia and later in the Northern Territory as settlers pushed further north. For most settlers in the south, the "siege mentality" had passed (Morgan 2006, 2), and Aboriginal people were no longer seen as a threat to settler security. The question of ownership of the land had been reduced to occasional parliamentary debates about the efficient annual distribution of blankets as an appropriate form of recompense for the loss of lands in New South Wales (Doukakis 2006). In Victoria, the abolition of the Aboriginal Protectorate left a vacuum for Aboriginal policy, and government assistance to Aboriginal people (including rations, blankets and legal support) was dramatically reduced (Broome 2005, 120). Many Aboriginal people had paid work of some kind, though it was poorly paid and often exploitative, and the labour shortages in rural areas resulting from the Gold Rush allowed many Aboriginal labourers to find work in areas close to or on their own land (Goodall 2008, 66-74; Doukakis 2006).

Within the decade, however, pressure on the new colonial governments began to grow, from a number of quarters: humanitarians and missionaries criticised the neglect of Aboriginal welfare, settlers vied with Aboriginal groups for access to more land, and white residents of larger towns objected to the presence of Aboriginal people. This chapter briefly considers each of the mainland colonial governments in turn, with particular focus on their policies around Indigenous land. As will be observed, many patterns of evaluation and policy change were repeated in the different jurisdictions, as policies were trialled and subsequently transferred, and as governments adapted to the different stages of settlement and frontier conflict.

Victoria

In Victoria, where the rapid spread of pastoralism, combined with disease and frontier violence, had severely depleted the Aboriginal population by the late 1840s, concerns were expressed by secular and Christian humanitarians about the plight of the Aboriginal people, and a Select Committee on Aborigines was convened in 1858-9, chaired by Thomas McCombie. This committee reasserted the humanitarian approach of Buxton (Attwood and Markus 1999, 32), and argued:

> Victoria is now entirely occupied by a superior race, and there is scarcely a spot, excepting in the remote mountain ranges, or dense scrubs, on which the Aborigine can rest his weary feet. To allow this to continue would be to tolerate and perpetuate a great moral wrong; and your Committee are of opinion that, even at this late period, a vigorous effort should be made to provide for the remnants of the various tribes, so that they may be maintained in comparative plenty. (McCombie Committee Report 1859, iv)

McCombie's committee echoed the Buxton Committee's call for a moral response to the hardship faced by the Indigenous people, but continued to frame them as inferior people with no prospect of inclusion or equality with the settlers. McCombie's report called once more for reserves to be allocated to Aboriginal people. This measure was again presented as a form of compensation for past mistreatment, but is also notable for its insistence that the reserved lands be on the Aboriginal groups' traditional hunting grounds. This was a direct response to the requests of the Kulin people themselves, and the recommendations of William Thomas, the former Protector. The Committee also recommended that the reserves be suitably isolated from the corrupting influences of white settlement, including licensed taverns, reflecting an ongoing paternalist desire to protect the child-like Aboriginal people from moral danger (McCombie 1859, v; Broome 2005, 122-3).

In response to the McCombie Report, the Victorian government established the Central Board for the Aborigines in 1860 and created a new reserve system which Broome describes as "the most comprehensive reserve system in nineteenth-century Australia" (Broome 2005, 126). The new

system of protection was more aligned to settler interests and more coercive than the protectorates which originally emerged from the Buxton recommendations (Furphy 2013, 75, 82). Five of the seven reserves which were established were given to missionary organisations to run, and the others remained under state control. *Governance* was based on an ongoing assumption of the need for guardianship over the Aboriginal people, and training to help them to live like the white settlers.

The reserves served many purposes as the Aboriginal population had differing needs. As Penny van Toorn (2006, 123) explains, the *purpose* of the reserves included:

> [T]o give the 'dying race' a safe refuge to live out their remaining years, and to educate and train the young, especially those of mixed descent, so they could eventually obtain employment and 'make themselves useful', instead of being a 'nuisance' and a burden on taxpayers.

The offer of education for the young was an attractive inducement for many of the Aboriginal residents, however the supervision of the reserves was often draconian and poorly resourced, and the lands allocated were not large enough to allow the Aboriginal residents to support their communities by farming or by traditional hunting and gathering.

The reserves faced considerable pressures, as Diane Barwick notes:

> Greedy colonists opposed reservation of land and lobbied for access to the little that was reserved. They criticised the cost of maintaining Aborigines on the allotted tracts of poor quality and urged their dispersal as a useful labour force for the colony. The Aboriginal farmers had little funding for development, inadequate rations and no wages. They had to work elsewhere to obtain cash for their needs and then were criticised for the failure to cultivate the reserve. (Barwick 1998, 38)

Barwick's study of the reserve known as Coranderrk is one of a number of significant efforts by historians to uncover the Aboriginal perspective of life on the Victorian reserves. She emphasises their continued advocacy for security of tenure over the land, and for support in providing adequate rations, fair wages, and protection from the challenges by local settlers, anxious to access their profitable cleared land. Curthoys and Mitchell (2011) also record the repeated requests made to Victorian authorities by residents of the reserves calling for security of land tenure and support, using petitions, representations to members of parliament and the Board, letters to newspapers and statements to inquiries. Penny van Toorn (1999; 2006) observes the importance of the ongoing political and social authority structures within the community at Coranderrk, reflected in the petitions and letters handwritten by younger members of the community but speaking for the Wurundjeri elders with traditional authority over the land.

The skill of literacy was a "powerful tool" for engaging directly with the colonial government (van Toorn 2006) but the Aboriginal demands were necessarily framed in terms which reflected settler values and priorities. As Curthoys and Mitchell (2011, 185) describe it, "Over time, Aboriginal people found some cracks in the colonial edifice that settlers had built to exclude them, and they made their case". Thus even as they criticised their supervisors, they expressed their aim of making the reserve self-supporting (for example, *Petition to the Board 5 September 1881*, cited in Attwood and Markus 1999, 46). They also framed their requests for assistance in terms of a mutual, albeit asymmetrical, relationship of obligation, which emphasised the adaptations they had already made to conform to the demands of settler respectability, and attempted to invoke the paternalism of the British settlers (Rowse 2005, 51; Broome 2006, 42.3). This is typified in the "Queen Victoria narratives" which were commonly invoked by Aboriginal people, who understood that the reserves (including Coranderrk) had been granted by the Queen in compensation for their dispossession, thus acknowledging the authority of the British state in their own story of reciprocal obligations (Lydon 2002, 84).

Aboriginal motivations have been widely debated by historians, and questions have been raised about Indigenous capacity and agency, as well as Indigenous priorities in a rapidly changing environment. Attwood argues that Aboriginal promises to be "good, progressive subjects of the Crown" in the activism around Victorian reserves such as Coranderrk should be understood as a claim for independence and autonomy, rather than a demand for land "as an end in itself" (Attwood 2003a, 16-7). This downplays the evidence that the Kulin people chose the land which would become the Coranderrk reserve themselves, and lobbied the Board to gazette the land for their use, with the support of the missionary John Green who was to become their station manager (Curthoys and Mitchell 2011, 188-9). Goodall's interpretation points to a more strategic range of motivations for the Aboriginal people in claiming land as reserves: she notes that they requested land for economic purposes, whether residential, subsistence or agricultural; they sought freehold title as a secure form of tenure which they could pass on to their children and subsequent generations; and most importantly, "they were not asking for just any parcel of productive land; they were asking for land within their traditional country… it is clear that Aborigines were arguing that their ownership of land was sanctioned by tradition and religion" (Goodall 2008, 100). It is worth noting, then, that while Aboriginal demands were made on the basis of their *difference* from the settlers, as original inhabitants with spiritual links to the land they claimed, though they did not necessarily see this as precluding them from being "good, progressive subjects". The government's responses were made on the basis of an assumed transition of the Aboriginal people to being the *same* as the settlers in their aspirations, and in their attitude towards and use of the land.

Coranderrk was held as an example by the government and the media of the potential of reserves to civilise the Aboriginal people, and it was supported by a number of white activists in the media, parliament, and churches (Attwood 2003a, 20). Newspaper coverage of Coranderrk, using photography by Charles Warren, demonstrated the "rapid progress being made by Aboriginal residents in adopting Christianity, a work ethic, and European material culture" (Lydon 2002, 8). The potential for assimilation did not erase Aboriginality, however: the reserves also allowed Aboriginal people to retain many elements of their traditional culture and collective identity, often unobserved by their white supervisors and government authorities. There is evidence that Aboriginal people continued ceremonial activities, pursued their own spiritual and traditional connections with the land, and maintained kinship obligations (Goodall 2008, 119; Broome 2010, 84-5).

In 1869, after much lobbying of the Victorian government by settler interests, the *Aborigines Protection Act* was passed with far-reaching consequences, especially as it was later emulated in the other colonies. Boucher and Russell (2012) argue that this was a "progressive" piece of legislation which sought to reconcile the two prevailing ideas among the Melbourne elite in this period: the conviction that the Aboriginal people were a "dying race", combined with a moral (or humanitarian) imperative to protect those who had been brutally dispossessed. They also note that a significant driver of the policy change was ongoing presence of Aboriginal people in the urban area of Melbourne in the 1850s and 1860s, causing discomfort to the town residents as they were "soliciting sixpences", engaging in begging and prostitution. Settlers pressured the government to forcibly remove Aboriginal people to distant reserves, and the illiberal legislation was the result. The Central Board was renamed the Board for the Protection of Aborigines and it was given the power to compel Aboriginal people to move on to reserves, where they would receive instruction, the discipline of work, and the benefits of Christianity (Broome 2010, 86 and 146). The *purpose* of the reserves thus changed, though it was still framed in terms of protection. Broome (2010, 176-8) observes that the new generation of Gold Rush immigrants now holding many positions of power in government felt less obligation to recognise the Aboriginal people as original inhabitants and so owed some reparation. Claims to land on the basis of *difference* thus lost their salience. Indeed, the treatment of Aboriginal people on reserves resembled the policies of "indoor relief" applied in workhouses for the poor in Britain (Broome 2005, 179).

Access to and from the reserves became more restrictive, with the goal of segregation, and this meant that the Aboriginal people on reserves were unable to seek employment without the approval of the Board or their local Guardian, or engage in advocacy of their interests to the governing authorities (Broome 2005, 150). Supervision on the reserves became more intrusive and disciplined, and *governance* by the Protection Board was remote and unsympathetic to Aboriginal interests. One

notable example of this was the removal of Coranderrk manager John Green in 1874, against the wishes of the residents, resulting in the sustained "rebellion" described by Barwick (1998) as the Kulin protested their insecurity and mistreatment by Green's successors (see also Attwood 2003a, chapter 1).

By the 1880s, settler demands for *access* to the land coincided with financial and ideological pressures on the government to cut costs in administering Aboriginal affairs and reduce government support. These pressures, together with a growing sensitivity to race, caused the distinction between "full-blood" and "half-caste" Aboriginal people to become increasingly important to policy makers, and subject to legislative differentiation. The Victorian government chose to focus its welfare attention on "full-blood" Aboriginal people, at the expense of the younger generations of mixed descent, who were expected to become absorbed in the wider community (van Toorn 2006, 123). In 1886, amendments were made to the *Aborigines Protection Act* which resulted in the expulsion of "half-castes" from reserves, in the expectation that they would support themselves in the wider community and ultimately disappear (Broome 2010, 94). In framing the "full bloods" as the deserving category, as the only "true" Aboriginal people, policy makers were also reflecting the growing conviction that the Aboriginal race was dying out, and that within a few generations of forcing those of mixed descent to be absorbed into the wider population, there would soon be no "Aboriginal problem" for the government to consider.

The impact on the reserves was severe. As younger workers of mixed descent were removed from the reserves, it became harder to maintain the farms in a viable manner. Population numbers dropped on the reserves and governments responded to settler demands to access the land. The reserves were gradually reduced in size as sections were leased piecemeal to local settlers, and by the first decade of the twentieth century, Lake Tyers was the only reserve remaining (Broome 2010, 95).

New South Wales

New South Wales followed the Victorian example, with a similar temporal sequence delayed by two decades. As in Victoria, a renewed attention to Aboriginal policy was triggered by a sudden increase in visibility of Aboriginal people in urban areas, as a result of changes to legislation around land ownership in the 1860s. Urban workers had demanded and received the right to "free selection", dividing up the larger pastoral runs and allowing individuals to choose their own block of land on which they could live out the "agrarian myth" as "sturdy yeomen" (Goodall 2008, 81). With this sudden "intensification of land use" by a new group of settlers, more Indigenous people were forced to leave their land during the 1860s and 1870s and they tended to congregate more visibly in towns

and large centres such as Sydney. Their destitution created more pity and disgust than fear, and they were despised for their disrespectable public drinking and violence (Goodall 2008, 105; Morgan 2006, 3-5). Their presence was seen as a new kind of threat, as Morgan (2006, 8) explains: "The camps of Indigenous people in and around the city were seen as a source of moral danger, as magnets to dissolute white men – places for sly grog and illicit sexual activity."

The New South Wales government appointed George Thornton as Protector of the Aborigines in 1881, and in 1883 he was made chairman of the new Board for the Protection of the Aborigines. This Board did not have the support of legislation, unlike the Victorian example, and Goodall observes that the Board was "a small administrative body, with little support or interest from the government, no legislative base and no policy" (Goodall 2008, 108). The Board was thus caught between the demands of the Aboriginal people and those of the settler interest groups. The Board created a significant number of reserves (approximately 170 by 1910) and assumed responsibility for an increasing number of people drawn to rations and provision of clothing, having previously depended on the charity of station owners (Long 1970, 28). Many of those who lived on reserves had work outside the reserve, though some were self-supporting.

Goodall (2008) argues that a substantial part of the Indigenous response to the intensification of land use and the pressure to leave traditional country was a concerted campaign for land grants from the government. She describes this Indigenous land acquisition movement in this period as a successful one, with many reserves being created at the instigation of Aboriginal groups, on their traditional country. Goodall counts the success in terms of numbers of reserves and responses to Aboriginal demand, observing that "At the height of Aboriginal holding of reserve lands in 1911, there were 115 reserves totalling 26,000 acres. Of these, 75 were created on Aboriginal initiative" (Goodall 2008, 113). Noting the position of the reserves, Goodall argues that the land acquisition movement was most active in assuring reserves were available where the intensification of land use had been most fierce, rather than in the places where the Aboriginal population was highest or the levels of poverty were the greatest (Goodall 2008, 103).

Settler priorities were nevertheless very powerful in this period, and the importance of Aboriginal people in the labour force was not negligible. Aboriginal communities were often forced to live "out of sight but not out of reach" as the location of the missions and reserves ensured that they could still be used for local cheap labour, in rural occupations as well as in domestic and institutional settings (Goodall 2008, 108-110; see also Norris 2012). Their visibility in the towns was limited as much as possible, and the moral impetus to prevent Aboriginal people from succumbing to the temptations of alcohol was also important (Goodall 2008, 107-8). This restrictive aspect to reserves

was given more strength with the passage of the *Aborigines Protection Act* in 1909, giving the Board the power to control movement on and off reserves, and also to remove Aboriginal children and adults of mixed descent from reserves, as had happened in Victoria.

Life on the reserves in the first decades of the new century was bleak for many. The New South Wales government took control of a number of missions, and imposed managers on many previously unsupervised reserves. Funding of the reserves declined steadily, as administrators became concerned about the financial burden of Aboriginal affairs, and conditions on the reserves lagged well behind those in the towns (Ellinghaus 2003, 193). The Aboriginal residents were subjected to a loss of privacy, regular inspections of hygiene and housekeeping, corporal punishment, inadequate rations, poorly maintained housing, poor education and health care, and strict segregation (Broome 2010, 97-9; Read 1983). Those who lived off the reserves fared little better, struggling to find paid employment in white communities in difficult economic times, and exposed to the racism of White Australia (Attwood 2003a).

The New South Wales Board shared the Victorian concern with the growing category of Aboriginal people of mixed descent, and it used the powers of the 1909 legislation to remove children from their families, in order to train them in institutions and thus impact on the Aboriginal birth rate (Goodall 2008, 143). It is clear that this policy had both racial and financial motivations (Ellinghaus 2003). Peter Read has described the Aboriginal policy from 1909 onwards as a policy of dispersal, which "looked to the day when there would be no reserves, no Board, no expense and no people claiming Aboriginal descent" (Read 1983, 25). The policy makers perpetuated the assumption that the Aboriginal people were a "dying race" and believed that the Aboriginal people in the southern parts of Australia had already lost their distinctive culture. They actively worked towards the elimination of the "Aboriginal problem" by separating people from their communities, and preventing them from associating with each other (Read 1983, 25-6). The government was concerned with the apparent dependence of Aboriginal people on state support, and saw the problem as one of "transforming such people, and their children, into industrious citizens" (Long 1970, 29). Reserve managers were thus expected to urge those residents who were "lighter-skinned and able-bodied" to leave the reserves and establish new lives in the wider community (Macdonald 2005, 189). As Read observes, "the hundreds of people whom the Board expelled from its reserves on the grounds that they were not Aborigines were in many cases immediately hounded from their new camps on the grounds that they were. By the beginning of the depression many of the displaced people had spent a decade wandering from station to reserve to fringe-camp" (Read 1983, 27).

This costly program was ultimately funded by leasing and selling Aboriginal reserves (Goodall 2008, 145). Goodall describes this as the "second dispossession" and notes that the situation worsened after World War 1 as Aboriginal reserve land was divided and granted to returned servicemen through the Settler Scheme. Aboriginal people had few options, and despite vigorous protests against the loss of their reserves, which in many cases they had improved by clearing and farming, many found themselves removed from their land and forced to fend for themselves in fringe camps close to unwelcoming towns (Maynard 2005). Long records the government's policy in the 1930s as a rational one of making the reserve system more efficient by closing smaller reserves and encouraging the residents to move to the larger reserves which were better serviced, and better equipped to train residents for a life off the reserves (Long 1970, 30-31). This assimilationist goal was made possible by the earlier revocation and reclaiming of Aboriginal land, most of it in the most fertile areas. Goodall calculates that of the 27,000 acres which was considered Aboriginal land in 1911, almost half had been taken away by 1927 (Goodall 2008, 163). As the New South Wales government turned its attention to assimilation in the 1940s, many more reserves were closed and residents were forced to move away (Macdonald 2005; Rowse 2005, 244).

Queensland

The frontier war is widely recognised to have been particularly ferocious in Queensland, peaking in the 1870s as pastoralists extended their reach further north. Queensland had been split from New South Wales and granted self-government in 1859, and this meant that for most of the pastoralist expansion there was no restraining oversight from the Colonial Office in Britain, in contrast with the southern colonies (O'Brien 2011). Queensland was also much more densely populated by Aboriginal people before the arrival of the settlers, and the resistance to the invasion and occupation of their land was stronger. Settlers were less numerous and more fearful, the terrain more difficult, and firearm technology much more efficient in this stage of the frontier (Broome 2010, 109). Aboriginal policy following self-government was limited to the activities of the Native Police, who were notorious for their cruelty as they "dispersed" Aboriginal groups. Missionaries and some station owners provided some shelter from the frontier conflict, but it is in Queensland that the greatest losses of life occurred (Reynolds 2006).

The language of humanitarianism, including the need for reparation and the moral duty to protect Aboriginal people from the violence of dispossession, was still prevalent in public debate during this period. Raymond Evans (1999) observes the puzzling juxtaposition of violent and exclusionary practices in Queensland with a professed concern for the "dying race", and suggests that "Examined dispassionately, 'doomed race' predictions themselves were not born solely of solicitude for a broken people, but can equally be seen in the context of a self-fulfilling prophecy", thus excusing the

continuation of the behaviours which most threatened the viability of the Aboriginal people (Evans 1999, 144). Evans describes the use of humanitarian language and themes as "more exonerative than accurate". O'Brien similarly observes the distortion of the humanitarian theme of reparation in Queensland in the late nineteenth century, and notes that "discussion was more often conducted in tones of impatience than remorse" (O'Brien 2011, 2). In contrast with the southern colonies in the 1830s, where humanitarians had recognised the need for sanctuary and care, here the purpose had changed to a demand for control and removal of Aboriginal people out of the sight of the settlers, and away from the temptations and vices of settler society (O'Brien 2011, 6-8).

This dual objective of compensation and control was articulated by journalist, explorer and politician Archibald Meston, who was appointed Special Commissioner by the Home Secretary, and delivered his *Report on the Aboriginals in Queensland* in 1896. This report was critical in shaping Queensland policy in Aboriginal affairs for decades to follow (Long 1970, 94). In conducting his inquiry, Meston proudly observed that he had "travelled over 5,000 miles by steamer, whale-boat, ding[h]y, horse, and on foot", and had made contact with "sixty-five different tribes", demonstrating his goodwill to those groups he encountered in the more remote areas by presenting them with a bullock (Meston 1896, 1-2). His overall conclusion was that the Aboriginal people required protection by the government in order to save them from extinction as a race. Meston's notion of "protection" was effectively isolation from the predatory and corrupting influences of white settlers on the frontier and Asian fishermen on the coasts, in accordance with Buxton's recommendations decades earlier.

In contrast with New South Wales and Victoria, the frontier conflicts were still ongoing or in recent memory in Queensland, and there were many areas not yet settled by Europeans. Meston thus identified two different categories of Aboriginal people, demanding quite different policy responses. He found that there were many tribes "still in their original condition, living as they lived 1,000 years ago… still absolutely wild, and fortunately for them free from any intercourse or contamination by white men" (Meston 1896, 2). For these groups, he proposed:

> As they occupy country not required for settlement, and therefore need not necessarily be disturbed, it seems desirable only to establish friendship, visit them occasionally to hear their grievances, give them some useful and ornamental presents, and *leave them alone.* (Meston 1896, 3, emphasis in original).

Meston predicted that a potential risk to these reserved areas might come from mining interests, but in such a case the state should step in to prevent "collisions" and "mutual misunderstanding" (Meston 1896, 5).

Meston's policy recommendations for those in settled areas were more coercive, as he deemed them to have lost their traditional customs and lifestyle, through contact with white settlers, and to have "descended gradually through various stages of degradation to a condition which is a reproach to our common humanity" (Meston 1896, 5). His report reflected a widespread concern in this period with racial purity, and in particular a concern with the contact between South East Asian and Polynesian pearl and bêche-de-mer fishermen, seen as leading to both a repugnant miscegenation and to drug dependence (Ellinghaus 2003). He was not interested in fostering Aboriginal connections with specific areas of land or particular tribal groups, but saw the policy problem in terms of protecting each race from the other, and thus ensuring "secure safety for the lives and property of the settlers" (Meston 1896, 4; see also Thorpe 1984). For Aboriginal people in settled areas, then, he recommended:

> They require collection on suitable reserves, complete isolation from contact with the civilised race to save them from that small section of whites more degraded than any savage; kept free from drink and opium and disease, the young people and the able-bodied taught industrious habits, and to raise their own food supplies; the old people being decently cared for, and receiving the modest amount of comfort they require, or all that is necessary in the declining years of their existence. Even acceptance of the 'doomed race' theory can in no way absolve a humane and Christian nation from the obligations they owe to this helpless people… (Meston 1896, 5).

Meston was strongly in favour of the work of the missions in providing these services for the Aboriginal people, following the Buxton framework for "protection" in more remote areas beyond the reach of the state. He was nonetheless concerned with the cost to the state of missions which were unable to sustain themselves, being poorly situated. Unusually among his contemporaries, he saw the primary purpose of the missionaries as providing the Aboriginal people with the necessary food and water, and a "cheerful situation", rather than a Christian education or civilisation for its own sake (Meston 1896, 6). The Queensland government was supportive of this approach, which emphasised the self-supporting nature of reserves under missionary control, and minimal outlay for the government itself, as with the deepening economic depression and the impact of recent severe floods in the colony, minimal government intervention in financial terms was more than just ideologically attractive (Thorpe 1984, 64).

In response to this report, the Queensland government enacted the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* with the intention to respond to the "Aboriginal problem" in a decisive manner. Western Australia would soon pass legislation modelled on this Act in 1905, and South Australia and the Northern Territory would follow in 1911. The government designated reserves and began to compulsorily remove Aboriginal people from the more settled areas in the

south of Queensland to the reserves. Fraser Island, and later Palm Island, were especially attractive for policy makers as it was difficult for the Aboriginal inmates to leave (Watson 2010). Policy makers were well aware of the Aboriginal resistance to the removal policy, and to the damage it did to people who were attached to particular areas of land but were forcibly separated from their families and communities. Nevertheless, the removal to reserves fulfilled both economic and corrective *purposes*, and was applied widely across the south to all those who were deemed infirm, old, unemployable or dangerous to the white community. Blake has argued that removal was implemented for "those who were of no economic value or posed a threat to the health and well-being of the local community" (Blake 1998, 52).

While the reserves provided food, shelter, and security for the Aboriginal residents, and allowed some continuity of culture and tradition, it can be argued that many of the southern Queensland reserves took the form of "total institutions", like prisons and concentration camps, allowing no interaction with the outside world (Sutton 2003; Hume 1991). The coercive nature of the reserves is evident in the use of barbed wire, barred windows, high fences, and physical separation between inmates and staff, and between parents and children (Sutton 2003).

Unlike in New South Wales, these reserves were not created in response to demands from Aboriginal people seeking to remain on their traditional lands, and indeed most Aboriginal people were removed significant distances away from their own country, and forced to live with a number of different tribal groups. *Access* to the reserves was forbidden for non-Aboriginal people, in order to prevent inter-racial sexual relationships (Ellinghaus 2003, 187). Visitors to the reserves were limited to those officials authorised under the legislation (Rowley 1970, 184). Those residents who wished to leave the reserve were required to seek permission from the governing authority, the missionary or Protector. *Governance* of the missions and reserves by white supervisors was paternalist, and controlling. Residents were required to seek permission to marry, and to seek employment, and their bank accounts were controlled on their behalf. Leisure activities and traditional ceremonial activities were banned, and contact with the outside world tightly controlled. Conditions on the reserves were often bleak, with limited rations, malnutrition, disease and poor housing (Hume 1991), though the Queensland government is recognised for having maintained the highest dedicated expenditure for its Aboriginal population throughout this period.

What is most significant about the reserve system in Queensland in terms of later land policy is the size of the reserves, particularly in the frontier areas of the far north and the western part of Cape York. The large areas of Crown land in northern Queensland were often declared to be Aboriginal reserves under the management of missions, rather than under Aboriginal control, but their size and

ability to be self-supporting meant that economic activity under missionary supervision was viable (Rowley 1970, 246-8). While the oversight of the missionaries was strict and allowed little personal freedom, this policy did allow many Aboriginal people in the north of Queensland to remain on their own lands and retain links to community, family, and traditional culture.

Unlike the southern colonies, Queensland supported the system of missions and reserves throughout the first half of the twentieth century, and it was not until 1965 that the legislative framework was substantially changed (Broome 2010, 222-4). Where the southern colonies had sought to relieve their financial burden by removing Aboriginal people of mixed descent from reserves, the Queensland authorities saw "half-castes" as "the most vexing problem the administration is faced with" (Bleakley 1924, 7), and leaned on the missions to help bear the load. Queensland's Chief Protector from 1914 to 1942, John Bleakley, argued that "it is essential that the gulf between the white and black race should be widened as far as possible" (Bleakley 1924, 7), and so he removed those of mixed descent to reserves rather than taking them from the reserves, as Victoria had tried to do from 1886. In the Depression in the 1930s, Aboriginal and part-Aboriginal people were removed to reserves in even greater numbers as people living on reserves were not eligible for unemployment benefits (Murphy 2013). This meant that the population on reserves continued to be high, and residents over generations developed a high level of dependence on the reserve system, in isolation from the cash economy.

Western Australia

In Western Australia, protection policies followed similar patterns to Victoria and New South Wales, but as in Queensland, the vast distances and small settler population in the northern regions ensured that there was little oversight of the frontier. Western Australia was much slower to be granted self-government by Britain, and the colony was under pressure to demonstrate that it was treating its Indigenous population humanely. Green argues that this created a greater reliance on missionaries to bring a humanitarian flavour to what was otherwise a very brutal frontier (Green 1988, 161). However, as Rowley observed grimly, "In the triangle of tension – mission, settler, and government – it is typical of the continental frontier of Australia that the government role is weak" (Rowley 1970, 201). Nettlebeck describes the protection policies between 1850 and 1886 as "ambiguously implemented by the magistrates and police who represented government on Western Australia's expanding frontiers" (Nettlebeck 2012, 409). Settler interests prevailed, and the oversight of the British colonial authorities and the missionaries was limited in its impact.

By the time the new Aborigines Protection Board was established in 1886, the pastoralists had moved north from the Swan River into the Gascoyne, Pilbara and Kimberley regions. The conflicts of

the frontier were still raging at this time, as Aboriginal people fiercely resisted the occupation of their lands. The Board was made trustee of the "Native Reserves" which the government had the power to declare on areas of Crown Land under the *Aborigines Act* of 1889. "Cattle spearing" was a significant issue for the pastoralists, and the retaliatory actions taken by settlers and police were particularly cruel. The colony suffered from a severe shortage of labour, and this meant that there was a heavy reliance on Aboriginal labour. The conditions in which many Aboriginal people worked in the pastoralist and pearl fishing industries in Western Australia have been described as "indentured slavery". Workers often received no wages, and those who escaped from their employer were brought back by police (Rowley 1970, chapter 11). Misdemeanours were treated harshly, with prisoners often transported in neck chains, and starved by police during transportation (Roth 1905, 13-15; see also Green 1988).

Western Australia was finally granted self-government in 1890, though full control of Aboriginal affairs was not ceded by the British government until 1897. In 1904, the Queensland Protector Walter Roth was appointed to conduct a Royal Commission into the employment, treatment, and welfare of Aboriginal people, and the administration of the Aborigines Department (Roth 1905). Delivering his report in 1905, Roth observed the mistreatment and abuse of Aboriginal people on the frontier with dismay, and recommended improved oversight of employment conditions for Aboriginal labourers and treatment of prisoners. With respect to the conflict over land, Roth recommended that large reserves be created for Aboriginal people to allow them continued access to hunting grounds. This was not simply a humane response: it was also a clear recognition of the need to stem the cost of the continuing violence of the frontier. Roth argued:

> In your Commissioner's opinion large northern reserves for hunting purposes are imperative not only on humanitarian grounds, but also on grounds of practical policy… If the natives continue to be dispossessed of the country upon which they are dependent for their food and water supplies, by their lands being rented for grazing rights at a nominal figure… bloodshed and retribution will be certain to ensue… and the Executive, in its efforts to restore law and order, and in the cost of rations… will be ultimately put to an expenditure considerably in excess of the total rents received… The poor wretches must be allowed the wherewithal to live – their main hunting grounds and water supplies. (Roth 1905, 28)

Roth distinguished carefully, however, between those Aboriginal people in the "unsettled districts" who should be granted reserves, and those living in settled areas who no longer needed hunting grounds, but rather smaller reserves to serve as "sanctuaries and asylums for the indigent, the infirm, the children, and others on whose behalf it behoves the State to make special provision" (Roth 1905, 28). The parallels with Meston's recommendations in Queensland are obvious. Roth noted the

dangers to Aboriginal people in settled areas of alcohol, and deplored the levels of "immorality and prostitution", as well as high rates of venereal disease and the growing number of children of mixed descent. Following the example of Queensland, he recommended much greater control of the movement and freedom of association of Aboriginal people, with legislated powers to remove "undesirable" individuals out of white townships (Roth 1905, 28).

As the report's legislative recommendations were debated by parliament, it is interesting to note the response of the Chief Protector, Henry Prinsep, to Roth's recommendations regarding removal of Aboriginal people in settled areas. Prinsep noted despondently of Roth's report:

> He suggests the collection of indigent natives on the more settled parts of the State on to reserves. I have tried this over and over again, but under the present law I cannot keep them there. They will have their own way and will wander where they like. Under the new law, we may do something of this sort, but I feel sure that for a time the relieved natives, however kind we may be to them, will look upon us as cruel gaolers. (Aborigines Department 1905, 6)

The *Aborigines Act* which was passed in 1905 by the Western Australian government in response to Roth's inquiry was particularly authoritarian. It provided for Aboriginal reserves on Crown land, but retained the interests of pastoralists holding existing leases, by limiting the size of reserves on land under lease to 2000 acres (Rowley 1970, 197). The Act reflected the popular concern with "half-castes" and racial purity: it restricted sexual contact between people of different races, in particular targeting the Asian fishermen regularly visiting settlements on the coast. It allowed for removal of all Aboriginal and "half-caste" children to missions or reserves, and placed them under the guardianship of the Protector, with the expectation that they would be trained for employment (Broome 2010, 154). It also required permits from the Protector to allow Aboriginal people to undertake employment, but did not force those in employment to live on reserves.

Western Australia differed from the Queensland model in that the missions were given far less responsibility for the management of large reserves on the frontier. A number of missions had been established in the north of the state around the turn of the century, but while most of these endured, new ones were not set up. The Chief Protector, AO Neville, who governed Aboriginal affairs in Western Australia from 1913 through to 1940, saw missions as lacking in accountability, and preferred to implement government-run cattle stations on reserves, in order to train productive Aboriginal workers rather than focus on their spiritual welfare (Rowley 1970, 253-4).

South Australia and the Northern Territory

In South Australia, the Protectorate had been abolished in 1856, but in 1860 a Select Committee on the Aborigines was asked to consider government expenditure and the efficiency of land allocations

for Aboriginal people. The Committee took a strongly pessimistic view of the plight of the Aboriginal people, observing the rapidly declining population, which it decided was due to disease, immorality, infertility and traditional customs such as infanticide (Select Committee 1860, 1). No mention was made of frontier violence or loss of food sources due to settler activity. In considering the allocation of reserves to Aboriginal people, chiefly for the purpose of leasing them to fund Aboriginal services (as had been the intention following Buxton), the Committee noted: "The melancholy fact has frequently forced itself upon the minds of the Committee, during their examinations, that the race is doomed to become extinct, and it would only be a question of time when those reserves would again revert to the crown" (Select Committee 1860, 5). While up to 10,000 acres had been provided as Aboriginal reserves in the colony, the allotments had been small, and the 1860 Select Committee observed that Aboriginal people had not made use of them (Rowley 1970, 203). The Committee recommended the reappointment of a Protector with a limited role of distributing rations and blankets to Aboriginal people who were deemed unable to look after themselves (Brock 1993, 14; Raynes 2002, 18). The Committee also supported the continuation of missionary work aimed at educating and civilising Aboriginal children, separated from their parents. With the frontier contact still continuing in this period, up into the Northern Territory, the under-resourced Protector relied on police working alongside the settlers, poorly supervised by the government in Adelaide (Rowley 1970, 205). When South Australia was granted control over the Northern Territory in 1863, it chose to appoint a part-time Protector of Aborigines in the Northern Territory, but this was insufficient to address the mistreatment and malnutrition of the Aboriginal people in the further reaches of the northern districts (Raynes 2002, 18-20).

The government saw no reason to pass legislation following this unhappy evaluation of the Aboriginal situation, and were slow to take action on the recommendations of the Committee. Raynes describes this period as one of "laissez-faire" as the government chose to do little about the rapid decrease in the Aboriginal population, and even failed to fill the position of Protector between 1868 and 1880 (Raynes 2002, 21). Missionaries and church organisations thus moved into the space vacated by the government, and established a number of missions between 1850 and 1898 in an effort to protect the Aboriginal people in their apparent decline. One of the most well-known was Hermannsburg, near Alice Springs, by that time under the control of South Australia. The missions at Poonindie, Point Pearce and Point McLeay also gathered significant permanent Aboriginal populations, and like those at Coranderrk in Victoria, many formed strong attachments to the locality. Settler demands for access to land continued to threaten Aboriginal security on these missions, however, and the depression in the 1890s saw Poonindie mission being subdivided and

released for sale, even after decades of Aboriginal occupation, and unrewarded labour clearing and farming the land (Brock 1993, 55-9).

Brock (1993) emphasises the strategic behaviour of Aboriginal people in South Australia in this period as they sought to remain close to their traditional land, and close to employment opportunities. For many, the choice to stay on their country meant that they were forced to submit to the control of the missionaries who established institutions in the area (Brock 1993, 141). *Access* to land for food and ceremonial purposes was increasingly restricted by pastoral leases and frontier conflict, but the missions provided rations, and allowed continued kinship connections. Many Aboriginal people worked on pastoral stations but returned to the missions for rations and support when seasonal work dissipated. Missions clearly did not offer the autonomy or self-reliance which the Aboriginal people would have preferred. Indeed, they were instrumental in undermining traditional social structures, discouraging customary rituals, and limiting the transmission of essential skills and knowledge of living off the land, thus narrowing the options available to their residents over time (Brady and Palmer 1988, 240). Brock observes, "Had they been provided with their own reserve land, they would have had no need of the mission. They could have run their own stock and continued working on pastoral stations" (Brock 1993, 161). Aboriginal people made many such requests of the South Australian government, as was occurring in New South Wales and Victoria at the time, and did so again at the South Australian Royal Commission on the Aborigines in 1913, but this was rejected firmly by the government, and where land was granted, it was given to missionaries, not directly to Aboriginal people (Raynes 2002). One exception to this lack of responsiveness to Aboriginal requests was the special mining reserve created in 1905 for Aboriginal people to continue to mine ochre at Parachilna for traditional purposes (Brock 1993, 127).

The church organisations had their own objectives for the missions, and their work arguably served the interests of the government and settlers more than those of their Aboriginal charges (Alroe 1988, 40). As missionaries extended their reach into more remote areas, they continued to establish missions with the *purpose* of "civilising" the Indigenous people and preventing them from continuing their "savage" traditions and culture. Their objective was to protect the Aboriginal people by preparing them for the inevitable contact with white settlers, providing them with Christian beliefs, and industrial training (Edwards and Clarke 1988, 187). This was clearly in accordance with the humanitarian ideals proposed by the Buxton Committee in 1836. The nature of this project is clearly illustrated by the "principal aims" of the Point McLeay Mission, which were quoted as follows by the South Australian Aborigines Royal Commission in 1913:

1. To instruct the natives in such industrial pursuits as may make them useful on the land, and enable them to earn their own living.
2. To encourage and assist native families in forming civilized homes.
3. To instruct them in the doctrines, precepts, and duties of the Christian religion.
4. To maintain a boarding school, where the children of the natives may receive gratuitously the ordinary elements of an English education, and be trained in civilized habits.

(Royal Commission 1913, vi)

Civilising, in this sense, clearly had strong assimilative intentions, and the missionaries were prepared for resistance from the Aboriginal people. In many cases, they induced Aboriginal people to abandon their nomadic customs and live on the missions with the offer of food rations, tobacco, education and land security. Having done this, some missionaries were then able to control the lives of their residents, by imposing a segregated dormitory system and Christian education for the children (Alroe 1988). In time, the missions had created a dependent, inward-looking population which had very few links to the outside economy and society, and many were active in crushing traditional Aboriginal customs and beliefs in the process (Rowley 1970, 205; Gale 1987, 139).

The South Australian government was slow to legislate in Aboriginal affairs. In the 1890s calls to legislate for the protection of Aboriginal labourers in the pastoral districts, and to provide secure reserves for Aboriginal people were rejected, and proposed legislation along these lines was protested vigorously by pastoralists, and dismissed by parliamentarians as a "sentimental fad" (cited in Raynes 2002, 30). The *Aborigines Act* which was eventually passed in 1911, was modelled on the similar acts in Western Australia in 1905 and Queensland in 1897. It established the office of Chief Protector and the Aborigines Department, and provided for leases of land for Aboriginal people, to be governed through missions or reserves, but did so within a political climate which favoured segregation. All Aboriginal and part-Aboriginal children were under the guardianship of the Protector, and removals to reserves or missions were authorised under the Act (Raynes 2002, 35-6).

When the South Australian government eventually held its own Royal Commission on the Aborigines in 1913, the inquiry deplored the failure of the missions to help their charges to integrate into wider society. Instead, they noted of Point Mcleay for example, that "the Mission is languishing, the aborigines and half-castes are being reared for the most part in idleness, and instead of the natives being trained to useful work, they have, to a great extent, become dependent on charity" (Royal Commission 1913, vi). This disapproval of the effectiveness of the missions was arguably prompted by the Chief Protector at the time, William South, although Aboriginal residents of the missions made similar requests to end the control of the missions (Foster 2000, 19-20). The Commission visited the

missions and heard evidence from the staff and residents as well as local pastoralists (Raynes 2002, 36).

The Royal Commission noted the decreasing number of "full blood blacks" and the increasing number of mixed race Aboriginal people, and argued that the role of the government with respect to the Aboriginal population was no longer to protect, but rather to assist their integration into the community as self-reliant individuals (Royal Commission 1913, vii). This new task was seen as being beyond the missions who lacked the necessary resources or will. The Commission recommended that the government appoint a "board of disinterested and qualified gentlemen" to direct this new policy. This was eventually implemented with the appointment in 1918 of the Advisory Council on Aborigines (Raynes 2002, 41). The Royal Commission also urged the separation of Aboriginal people from those of mixed descent, provided for the removal of all children over the age of ten years from their parents, and recommended the imposition of strict controls on reserves including inspections, discipline and "good order" (Royal Commission 2013, x; see also Brock 1995).

In the years following on from the Royal Commission's report, the government took over the two former missions, Point McLeay and Point Pearce, and proceeded to introduce a much harsher range of measures to control residents on the reserves, including cutting rations, imposing stiff penalties for misdemeanours, and stepping up the removal of children. All Aboriginal males over the age of 14 were forced off the reserve to find employment, and were no longer provided with rations. Given the high rates of forced removals from the missions, it is not surprising that the government soon felt justified in dismantling the reserve system altogether (Foster 2000; Brock 1995). The economic drivers of this policy should not be ignored, however: Raynes (2002, 44) observes that by the 1920s the government-run stations were running at very substantial losses.

Northern Territory and Commonwealth control

The Northern Territory was separated from South Australia and handed over to the Commonwealth government in 1911. The South Australian government had been responsible for the first pastoral leases and land sales in the Territory from the 1860s onwards, but the distance from the settled areas in the south, and the ferocity of the frontier battles meant that the government did little to inhibit the violent collisions between settlers and Aboriginal people (Rowley 1970, 211). The South Australian reluctance to take responsibility for Aboriginal affairs noted in the earlier section also applied to the Territory, and missions stepped in to fill the void in government service provision in many areas (Read 1995, 275). The Territory was a very difficult terrain for the pastoralists, and many of the stations established in the 1880s and 1890s were abandoned by 1900 due to the conflicts with the significant numbers of Aboriginal occupants (Rowley 1970, 212). Similar disappointments

resulted from early mining and agricultural ventures. This meant that settlement of the Territory was a more challenging process than in many parts of the south of the continent. As Peter Read observes, "the domination of the Whites was completed neither easily nor quickly. Many areas officially known as 'pastoral stations' were not completely controlled until half a century after the first incursions by Whites" (Read 1995, 273). White settlers were few in number, and often used the land without necessarily displacing the Aboriginal people, as they pursued their own purposes as miners, doggers (dingo hunters), pastoralists or missionaries, in interdependent, and occasionally exploitative, relationships (Rowse 1998, 59).

This shared occupation of the land also allowed important continuities in terms of Aboriginal customs, ceremonial activity and traditional hunting and gathering. Aboriginal labour was critical to the development and viability of the pastoral industry across the Territory, but the seasonal nature of this form of employment allowed Aboriginal people to retain much of their pre-colonial lifestyle and social structures (Read 1995). Frontier violence was brutal in many places, but Aboriginal people also exercised considerable agency in choosing when to engage with the white settlers, in search of food rations, tobacco and other stimulants, trading goods, obtaining paid employment, accessing health services, and satisfying their own curiosity about the European settlers (Baker 1990).

Soon after the Commonwealth assumed responsibility for the Territory, it appointed Professor of Biology and eminent scholar of Aboriginal society and culture Baldwin Spencer as Chief Protector of Aborigines. An important product of his brief period in office was his *Preliminary Report on the Aboriginals of the Northern Territory*, published in 1913. Spencer's report begins with a long anthropological study in which he makes disparaging remarks about the lack of economic and industrial development by the Aboriginal people, and dismisses any prospect of true integration into white society, reflecting commonly held attitudes to race of the period. As an evaluation of the Aboriginal problem at the time of the change of jurisdiction, however, the report is interesting for its more fine-grained categorisation of Aboriginal people into groups, going beyond the binary of untouched remote tribes and corrupted urban groups of Meston and Roth. Spencer structured his report around four groups: those in urban areas, those on land which would soon be claimed for pastoralism in closer settlement, those living relatively undisturbed on large pastoral leases, and the final group, largely unknown, living on "wild, unoccupied land" beyond the reach of settlers up to that point. The categories are clearly separated but the continuum is implicit for Spencer: the groups range in terms of their exposure to white settlers, and while this exposure is inevitable in the long term for all Aboriginal people, the different groups are at different stages of the unavoidable moral corruption, exploitation and degradation which results from interaction with white society. The

urban Aboriginal people in Darwin and Alice Springs were most at risk of drug and alcohol dependence, and the sexual exploitation of Aboriginal women was another obvious danger.

Spencer's recommendations concentrated on the first two of his categories: urban Aboriginal people and those in areas where contact with settlers was inevitable as pastoralism expanded. His inquiry lasted less than a year, during which time he was unable to travel widely due to injury, limited resources, and weather conditions. His limited purview may therefore be explained by his lived experiences in Darwin, though he had travelled more extensively through remote areas on earlier research expeditions. Urban dwelling Aboriginal people were often engaged in employment in domestic or manual labour, and the problem was defined as one of controlling their movement in settled areas outside the demands of their employment. Spencer recommended curfews, preventing Aboriginal labourers from being in the urban areas of Darwin and Alice Springs between sunset and sunrise, explaining the need to keep them away from the temptations of alcohol and opium (Spencer 1913, 15; Rowley 1970, 237). The *Aboriginals Ordinance 1918* put this apartheid-style policy into effect.

For the Aboriginal people in regions of interest to pastoralists, Spencer proposed the creation of large reserves, in order to allow them to continue to live in or near their own country, with their own tribal groups, and gradually engage in agricultural and industrial activity, under supervision of white staff (Spencer 1913, 15-6). This proposal led to the creation of many of the significant Aboriginal reserves in the Northern Territory, including the reserve around Oenpelli in Arnhem Land, and Port Keats (Wadeye) in the Daly River reserve, as well as the Central Australian Reserve which stretched across borders into Western Australia and South Australia, and was created in 1920 (Rowley 1970, 251). These extensive reserves allowed many Indigenous people to maintain their traditional system of law, customs and subsistence-based lifestyle long after first contact with settlers.

Spencer's recommendations are noticeably different from those of Meston in Queensland, as they acknowledged the Indigenous attachment to specific areas of land, and the potential for inter-tribal conflict for groups forced to live together on the same land. Even more significantly, perhaps, Spencer deliberately framed Aboriginal issues as government responsibility, not properly delegated to others, such as missionary organisations (Spencer 1913, 23; Rowley 1970, 248). He boldly proposed a dramatic increase in the number of Protectors and other government-funded staff required to manage reserves and stations in the difficult conditions of the Territory, where distance and poor infrastructure made communications and operations very difficult (Spencer 1913, 17). In particular, he saw the new Commonwealth interest in Aboriginal welfare as appropriate, as Aboriginal people were a national, not a local, responsibility (Spencer 1913, 23). This acceptance of

state responsibility, rather than private or mission responsibility, for the welfare of Aboriginal people, contrasted strongly with the paths chosen by Queensland and South Australia, but implicitly evokes the Buxton Committee's insistence that care for Indigenous people was a moral responsibility for the state which derived benefits from their dispossession.

The economic development of the Northern Territory was disrupted by World War 1, but as European settlers pursued opportunities in the wilder parts of the nation, the frontier violence continued and more Aboriginal groups came into contact with settlers for the first time, and then became dependent on rations provided at stations and missions. The Commonwealth had begun to take a more active interest in the "Aboriginal problem" in its own jurisdiction, after a period of neglect and policy failure (Rowley 1970, 258), and in 1928 the government commissioned the Queensland Protector, Bleakley, to conduct a comprehensive inquiry into the Aboriginal population and its welfare in the Northern Territory.

Bleakley delivered his report *The Aboriginals and Half-castes of Central and North Australia* in 1929. This ambitious evaluation exercise presented an important opportunity for policy transfer, based on the lessons learned in other jurisdictions. Bleakley applied many of the ideas which were in place in Queensland, but was also particularly aware of the different needs of the categories of Aboriginal people that he identified in the Territory, and he travelled widely in his investigation. He was supportive of continued protection for remote populations, and encouraged the ongoing role of missions in providing services, care and support of Aboriginal people on isolated missions. As in other states, the attitude towards Aboriginal people living in settled areas was much more restrictive, and children of mixed descent were recommended for removal to institutions for training. He noted the very poor conditions and wages of Aboriginal workers on many pastoral stations (Read 1995, 277-8), but observed generally that there was "no evidence of serious ill-treatment", in what Rowley described as an "obvious understatement" (Bleakley 1929, 7; Rowley 1970, 264). Bleakley's investigations were taking place at the same time as the notorious Coniston Massacres, but he makes no mention of this in his report.

Bleakley made a number of far-reaching recommendations with respect to Aboriginal access to land, for the benefit of those Aboriginal people he categorised as "nomadic" or "primitive tribes". These people had been largely neglected by Spencer in his 1913 report, as he had concentrated on the more visible issues of Aboriginal people living alongside settlers. Bleakley reinforced the existing provisions under the *Land Ordinance* of 1927 which ensured continued access to land under pastoral leaseholds for Aboriginal people to hunt, access water sources, and to set up camps at will (Bleakley 1929, 32). For those with access to land which was not in use by white settlers, he recommended

that reserves be designated where they could be "left to live their own life", under "benevolent supervision" (Bleakley 1929, 33).

Bleakley identified a number of specific areas of the Territory, including Arnhem Land, as large areas which could be reserved, and in some cases, managed by missionaries who would protect the residents from exploitation by traders and fishermen. His proposed reserves were more extensive than those suggested by Spencer, and they followed the model of Cape York in Queensland. Bleakley explained the purpose of the reserves explicitly: "It should be clearly defined that the aim, at the beginning, is not to draw the people away unnecessarily from their tribal life, but to win their trust by kindly ministrations, relieving them in distress or sickness and guarding them from abuse" (Bleakley 1929, 33). Eventual contact, and adaptation to white settler demands, was nevertheless inevitable.

Bleakley was not alone in making such suggestions regarding "inviolable reserves" for those Aboriginal people still largely untouched by white settlement. This was increasingly seen by anthropologists such as Donald Thomson and AP Elkin as an important policy measure to allow Aboriginal people to preserve their culture and escape the corruption and violence of contact with settlers (Attwood 2003b; Peterson 2003; McGregor 2005). The anthropological argument for these extensive reserves was very much based on preservation and valorisation of Aboriginal cultural *difference*, though there were disagreements over whether this could be permanently preserved, as Norman Tindale believed, or merely delay the inevitable, as Elkin advocated (McGregor 2011, 10 and 22). For these expert advocates, extensive reserves would allow Aboriginal people to retain their social structures and traditional culture, primitive as they were understood to be, and thus avoid the otherwise inexorable fate of degradation and corruption which had been inflicted on Aboriginal people in the settled areas of the continent. Some, like Thomson, were also particularly concerned to provide Aboriginal people sanctuaries where they could escape the brutal treatment of protectors, settlers and police, and the injustices associated with settler law (Peterson 2003). Segregation was thus portrayed as a positive means of protecting a fragile culture, and allowing the maintenance of language, ceremonies and collective links to the land, including the Indigenous "nomadic habits" (Thomson 2003, 118-9; Attwood 2003b, 104). This was very different from the bureaucratic view of reserves as a means of distancing the "full-blood" Aboriginal people from the white population, thus avoiding the risks of expanding the population of mixed descent (McGregor 2011, 10).

It is interesting to note that this was a point on which many humanitarian activists began to hold divergent views. Maynard argues that the humanitarian activists in the 1920s and 1930s were

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essentially focused on assimilation as their policy goal, because "the non-Aboriginal humanitarian ambition was still to save, to Christianise, to civilise, and to protect Aboriginal people" (Maynard 2005, 33). In this sense the humanitarian frame had changed little since the Buxton Committee in the 1830s. Thus, while anthropologists were calling for reserves in the hope that they would protect traditional Aboriginal culture and save the race from extermination, humanitarians tended to argue in favour of the educative role of missions, and concentrated efforts on protesting against abuses and inhumane treatment by protectors, police and others (Holland 2005). As Holland argues, this began to change in response to the changing frame of absorption which became clear at the 1937 Initial Conference of Commonwealth and State Aboriginal Authorities. Differences of opinion emerged, and some humanitarians looked to land ownership as a means of protecting the Aboriginal people. The importance of land had been detected earlier than this, however, amongst key activists. Rowley (1970, 270-7) describes a meeting convened by the Commonwealth Minister for Home Affairs, CLA Abbott, in 1929, in response to the Bleakley Report, where a number of mission organisations and voluntary advocacy organisations raised concerns about Bleakley's report. At this conference, one prominent humanitarian Colonel JC Genders of the Aborigines' Protection League in South Australia reiterated his earlier call for an Aboriginal state (an idea which Bleakley had explicitly rejected in his report) and recommended that large reserves such as the Central Reserve should be handed over to the Aboriginal people "in perpetuity", with support to allow them to govern themselves and prevent white people from entering the land without permits (Rowley 1970, 271). These suggestions would only receive serious consideration from government many decades later.

The 1937 Initial Conference of Commonwealth and State Aboriginal Authorities attempted to evaluate the state of Indigenous affairs at that point in time across the nation, and it marked an important moment in the Commonwealth government's engagement with Indigenous issues. It was attended by senior bureaucrats with responsibility for Aboriginal affairs in all mainland states and the Commonwealth. The conference came at a critical time as humanitarians had been arguing for the Commonwealth to intervene in Aboriginal affairs (McGregor 2011, 33), and the Commonwealth had also received negative attention on the international stage for its treatment of Aboriginal people. Many of the state actors were concerned to draw the Commonwealth into Indigenous affairs more substantially, calling for financial support of the policies they already had in place (Commonwealth of Australia 1937, p 33-34).

The conference provides us with an instructive insight into the views of many of the key decision makers in Indigenous policy of the period, including Chief Protectors Neville from Western Australia, Bleakley from Queensland and Cecil Cook from the Northern Territory. The conference also reveals

the clearly identifiable gap between the northern and southern jurisdictions in terms of the policy problems they faced. The conference has been described by McGregor as "the high-water mark of official endorsement of biological absorption" (McGregor 2011, 16), and much of the discussion focused on the place of the "half-castes" in society, and the appropriate methods of encouraging their absorption into the general population. Racial ideology dominates the discussion: Rowley observes ruefully of the statements made at the conference that "At the level of stock-breeding, perhaps only at such a level, it was possible to bureaucratise the complicated issues of social change" (Rowley 1970, 321).

Policy on reserves received relatively little formal attention in the Initial Conference proceedings, but the significant debates turned on the future of the "full-blood" Aboriginal people, and the appropriate management of the growing "half-caste" population. The conference declared forcefully that it believed that "the destiny of the natives of aboriginal origin, but not of the full blood, lies in their ultimate absorption by the people of the Commonwealth" (Commonwealth of Australia 1937, p 3). Bleakley presented his four categories of Aboriginal people to the conference, and observed that "with the encroachment of civilization on their hunting grounds, it is only a question of time when the nomadic life will be impossible (Commonwealth of Australia 1937, 9). He thus proposed that Aboriginal people required "benevolent supervision" to train them to change from nomadic to sedentary lifestyles, cultivating the soil (Commonwealth of Australia 1937, 18). Chief Protector of the Northern Territory Cecil Cook and Chief Protector of South Australia MT McLean both warned that protection of part-Aboriginal people on reserves resulted in unwelcome population growth (Commonwealth of Australia 1937, 14-15), and South Australian Chairman of the Advisory Council Professor JB Cleland suggested that allowing "detribalisation" through increased contact between settlers and Aboriginal people in untouched remote areas would ultimately increase the costs to the government (Commonwealth of Australia 1937, 13). In all these cases the solution centred on the distinction between "full-blood" and "half-caste", where the first was deserving of protection, and the second group expected to leave reserves, and integrate into the general community.

The expectation that the "full-blood" population would die out within several generations meant that the permanence of reserves was under question. In all cases the Crown retained ownership of the land, and reserves could be reclaimed at will (Rowley 1970, 250). A further dilemma related to whether the reserve lands should be economically developed, and if so, by whom (Commonwealth of Australia 1937, 29). The participants in the conference saw the dangers of allowing economic development by white settlers, as this would work against the segregation purposes of the reserves. With some jurisdictional differences, they agreed that economic development should be limited, and access to the land should be strictly controlled, despite the difficulties of enforcing this. The chief

concern was prospecting by miners. The areas of land which had been designated as large reserves were already defined as "remote and apparently useless", with little economic value to pastoralists or anyone else (Rowley 1970, 250).

Despite calls for the Commonwealth to provide additional financial support to the states for reserves, the Commonwealth was reluctant to assume responsibility outside the Northern Territory. The 1937 Initial Conference considered the issue of Commonwealth social security benefits such as widow's, invalid and old-age pensions which were not payable to people with "a preponderance of aboriginal blood", or to "half-castes" living on reserves, as they were deemed to be receiving support in the form of rations and accommodation from the state governments (Commonwealth of Australia 1937, 26; see also Murphy 2013, 211). Benefits were only payable to those Aboriginal people who applied for a "certificate of exemption" from the state laws related to Aboriginal people (Murphy 2013, 224-5). This was a clearly coercive form of individual assimilation. Exemption from the act required individuals to show good character, and to leave the mission or reserve and cut off contact with other Aboriginal people, family or friends living on reserves or missions (Hume 1991, 18). This began to change from 1941 when the Commonwealth agreed to pay child endowment to mothers living on reserves, albeit through the states, but the other benefits continued to be restricted until the late 1950s.

Conclusion

By the time of the 1937 conference, government policy on Aboriginal land across Australia had become less controversial, as the frontier conflicts ended in the north, and complete isolation from settler incursions was no longer possible for Aboriginal people. The protective policies emanating from Buxton's Committee had come to fruition, especially in the form of the extensive reserves adopted in the far north, but the humanitarian concern for civilising Aboriginal people in order to share the benefits of European lifestyle, religion and technology had in many places become an obsession with control, containment, and isolation. Racial ideology focusing on Aboriginal people of mixed descent became an overriding concern in areas where the dominance of white settlers was less secure, and government budgets were constrained.

This chapter has examined the evolving policy paradigm of protection which first emerged from the humanitarian critique of colonisation in the 1830s. The chapter has explained the application of humanitarian ideals in each mainland jurisdiction between the 1850s and the 1930s, noting similarities and differences across jurisdictions as each responded to local concerns and opportunities. It will be clear that while the timing differs, broad patterns are identifiable across all these jurisdictions. The following table provides a summary of the shift in the frame of "protection"

in the time period covered by this chapter, with respect to the core themes of *purpose*, *access*, *difference* and *governance*. The shift is represented by two columns showing the evolution of the frames between the *middle* protection era and the *later* application of the ideas. The most telling evidence of the shift in the purpose of protection is found in the distinctions between "full-blood" and "half-caste" people, and the power to force Aboriginal people either on to the reserves, or out into the wider community, against their will. The exact date of this shift varies across the jurisdictions, ranging from the earliest in Victoria in 1869, to 1897 in Queensland and 1911 in South Australia. This table extends the comparison between the early colonial and early protection eras which were outlined in the previous chapter.

Table 4.1   Framing Indigenous reserves: middle protection and late protection eras

	Middle Protection Era	Late Protection Era
Purpose	Reserves served as • Compensation for loss of land, and fulfilment of a moral obligation • Refuge for a "dying race" • A place for training and education • Sufficient land for farming, not traditional hunting and gathering	Reserves served as • A means of saving the Aboriginal race from extinction • A place of segregation and control, out of sight of settled areas • A place for training and education, with coercive, punitive techniques • A welfare system for "full-blood" Aboriginal people
Access	• Indigenous people excluded or expelled from settled areas, except where needed as cheap labour • Indigenous people to be confined to reserves where possible • Reserves established at distance from moral threats such as liquor suppliers, drug sources	• Governments had power to force Indigenous people onto reserves • Reserves as places of incarceration, requiring permission to access or leave • White people excluded • "Half-castes" removed in some jurisdictions
Difference	• Indigenous people expected to adapt eventually to settler lifestyle; reserves were a temporary measure in the interim • Reserves were sometimes established on traditional lands in response to Aboriginal requests	• Indigenous culture and languages often suppressed or denied • Segregation based on racial identity as determined by government authorities • Reserves a temporary measure for "full-bloods" in the expectation that they would disappear within several generations • Some Indigenous people were able to leave reserves by claiming exemption from legislation, and relinquishing contact with other Indigenous people
Governance	• Paternalist • Indigenous people on reserves lived under supervision of officials or missionaries • Reserves were Crown land given in trust, and reclaimed if improperly used, or demanded by settlers	• Authoritarian, coercive, punitive • Indigenous people on reserves lived under supervision of officials or missionaries • Reserves were Crown land given in trust, and reclaimed if improperly used, or demanded by settlers

While the frames around protection followed the same broad pattern across these jurisdictions, the final outcome in terms of reserves was markedly different for the parts of the continent which were last to be settled. The states in the south, particularly Victoria and New South Wales, had embarked on a policy of integration (or assimilation) relatively early, but by the 1930s the few remaining small reserves were no longer seen as achieving their intended objectives, and many were reclaimed. In the north, the recent memory of the frontier and the more sparsely settled regions meant that Aboriginal people in many places had retained a distinct culture and traditional lifestyle which anthropologists, humanitarians and policy makers saw fit to protect, for a range of conflicting reasons. These jurisdictions continued to expand the number and size of their reserves, even as reserves were closed in the south. The following table summarises the distinctive policy outcomes with respect to Indigenous reserves in the south and north:

Table 4.2 Comparison of policy outcomes for Indigenous reserves in south and north of Australia

Reserves policy in the south	Reserves policy in the north
• Small reserves • Temporary • Economically viable land, subject to settler demand • Close supervision • Many Indigenous people removed from traditional lands, and lost culture • Reserves as a path to assimilation • Many Indigenous people were dispersed from reserves in order to assimilate	• Large/extensive reserves • Inviolable • Unviable, useless land of little economic interest to settlers • Close supervision by missions within enclaves, but freedom to move at will • Allowed many Indigenous people to stay on their traditional lands and maintain culture • Reserves as a path to segregation • White people forbidden access without permission

The path dependency in terms of reserve policy in the north and south would prove to be extremely important in enabling the Commonwealth government to redefine the problem of Indigenous land, and respond to the growing demand for land rights. With a significant area of the Northern Territory designated as inviolable reserves, traditional Indigenous culture was safeguarded and Indigenous people were able to continue to claim their difference and identity as a people distinct from the Australian settler population. The extensive reserves which were established in the north of the continent in this period formed the basis of the land rights legislation which would be passed four decades later, using very different frames and rationales, as we shall explore in more detail in the next chapter.

Chapter 5: From reserves to rights

The shift from protection to assimilation was not as marked and clearly identifiable as earlier shifts in Aboriginal policy, but it had already begun by the time of the 1937 Initial Conference of Commonwealth and State Aboriginal Authorities. Assimilation was based on a notion of sameness, rather than difference, and aspired to the ultimate inclusion of Aboriginal people in the broader Australian society. This new approach would present a significant challenge, then, to the policy of Aboriginal reserves.

This chapter examines the period of assimilation policy and its implications for Aboriginal land, in particular, policy around reserves in the Northern Territory. The period between 1937 and 1972 is significant because of the way in which the frames based on protection, which had been attached to Aboriginal land since the early colonial period, at last began to shift. The Commonwealth government developed a coherent and robust ideology of assimilation which was the basis of its policy making throughout the post-war period, up until the election of the Whitlam Labor government in 1972. Much of the new approach was based on evidence being brought to the attention of policy makers by experts, particularly anthropologists, in the late 1930s. As the expert views changed in the post-war period, in response to new circumstances and new research, however, the government was less interested in new ideas, and instead became more resolutely committed to its assimilationist approach. Other important factors were the growing influence of international ideas around rights, decolonisation, and race relations, and the role of advocacy by and on behalf of Aboriginal people in favour of special rights. Each of the frames under examination in this thesis came under sustained challenge during this period, as we shall explore, and the settled ideas around *difference*, *purpose, access* and *governance* were gradually redefined, in an important incremental process with prepared the way for the critical juncture of the Aboriginal Land Rights Commission in 1973-4, which is the subject of the next chapter.

This chapter will begin by outlining the emergence of anthropology as a source of expert advice on Aboriginal affairs, a vitally important foundation of the overarching policy of assimilation. It will then briefly consider the debates around difference, purpose, access and governance of Aboriginal land in the post-war period, focusing particularly on the dominant ideas of Paul Hasluck, Minister for Territories in the Menzies Government. The chapter will observe a number of external challenges to the government's ideology which were beginning to emerge in the 1960s, noting the government's resistance to new thinking. The chapter then traces the gradual adjustments to each frame's policy change through a temporal sequence which began with the dispute over bauxite mining around the

Yirrkala mission on the land of the Yolngu people, near Gove in Arnhem Land, and which ended with the Woodward Royal Commission and the passage of the Aboriginal Land Rights Act, the subject of the next chapter.

Redefining the "Aboriginal problem": from protection to assimilation

The era associated with the frame of "Protection" was nearing an end at the time of the 1937 Initial Conference of Commonwealth and State Aboriginal Authorities which was discussed at the end of the previous chapter. It was already clear in the way the different jurisdictions were categorising and treating Aboriginal people of mixed descent that the seeds were being sown for a shift to assimilation, rather than segregation and protection. Protection was increasingly seen as a policy failure, and the changing economic and political climate also demanded a change in policy objective. This was reflected also in a change of policy venue, with the intervention of the Commonwealth government.

One of the features of policy making for Aboriginal people in Australia in the Protection eras had been its decentralisation, as each state pursued its own independent objectives without the supervision of the Colonial Office from the earlier period. The regional variation was reflected in the Constitution which established the Federation in 1901, as states retained control of Aboriginal affairs as one of their residual powers, and the Commonwealth was precluded from making specific laws with respect to Aboriginal people as a race (*Australian Constitution* s 51 (xxvi), later amended). The Commonwealth's assumption of responsibility for the Northern Territory in 1911 provided an avenue for federal politicians to take an interest in the portfolio, and this interest had been clearly reflected in the 1937 conference. As Rowley observes, the Commonwealth's activities were influential because it was "inevitably looked to by informed opinion, if not by State governments, to set the best example to the States" (Rowley 1970, 241), even though the challenges of governance of Aboriginal affairs in the Northern Territory, with its recent experience of the frontier, were not necessarily applicable to the other jurisdictions. Little energy was expended in the area until World War 2 and the immediate aftermath, as Aboriginal land and personnel were called upon to join the war effort, and many remote areas benefitted from substantial investment in infrastructure. Aboriginal affairs in the post-war period would continue in this more energetic and interventionist vein with the appointment of a new Minister for the Territories, Sir Paul Hasluck, in 1951.

The assimilation period in Indigenous affairs was not a settled one, in terms of ideas about Aboriginal policy, though it is often understood as an all-encompassing, oppressive period. The variety of interpretation of the policy's objectives and target populations is one explanation for the scholarly debate about the exact date at which the policy became officially adopted (Rowse 2005). One key

issue, which had been much debated at the 1937 Conference, was how assimilation would be achieved. There was an expectation in some jurisdictions of an eventual absorption of the Aboriginal race in biological terms, over time. This scenario was advocated by AO Neville, in Western Australia, among others. As each of the jurisdictions gradually moved away from protection and adopted assimilation, there were also divergences in the way in which they dealt with issues such as the role of the state and the role of the church in providing for Aboriginal welfare, the definitions of Aboriginality and the restrictions which followed for some but not others, and the extent to which freedom of movement, association and employment were curtailed for those living "under the Welfare Ordinance" or other legislation (Haebich 2008; McGregor 2011; Rowse 2005).

A more optimistic perspective was offered during this period by anthropologists including Professor AP Elkin. These scholars promoted the notion of social assimilation, which allowed for continued Aboriginal identity rather than complete erasure of the race. Elkin recognised the need for Aboriginal people to make an eventual transition away from their traditional lives, but he could see that there were fundamental elements of Aboriginal identity which would not disappear. As he insisted in a speech to anthropologists before the war:

> We must guarantee the aborigines in the future a livelihood, justice, the opportunity to maintain and develop their social life, and a real share in the land which is their spiritual home as well as the source of their economic necessities. (Elkin 1934, 18)

Elkin also vividly described the continuities he observed in Aboriginal spirituality and observance of customs, along with a strong connection to specific areas of land, and it is significant that his recognition of customary land ownership was articulated so clearly during the assimilation period.

The key paradox of this assimilation period is the treatment of reserves. As noted in the previous chapter, already there were substantial differences of approach across the jurisdictions. Reserves were being revoked, reclaimed and sold in the south of the continent, as local landowners and other interest groups such as repatriated soldiers demanded access to the arable land at the expense of the Aboriginal people who in many cases had cleared and cultivated it over a period of decades (Goodall 2008). This policy was vigorously protested by the Aboriginal residents of the reserves, but it was supported by the overarching policy of assimilation and the expectation that Aboriginal people would integrate into the white communities over time. In the north, however, reserves were retained, and new ones were gazetted, even though they were a policy instrument which had been closely associated with the abandoned policy of protection and segregation.

The persistence of the reserves in the north was a consequence of the residual effects of frontier conflict, the enduring presence of Aboriginal communities living traditional lifestyles in the north,

and the lack of economic interest, up to that point, in the reserved land from settlers. It is noteworthy that other aspects of assimilation, such as the introduction of certain welfare payments, were nevertheless implemented in the north during this period, as in the south. The significant contribution of Aboriginal people in the northern parts of Australia in the war effort during World War 2 also stimulated higher expectations of the capacity of Aboriginal people to integrate into white society than had been held before the war. As the different jurisdictions gradually converged with their policies on social and welfare policy in Aboriginal affairs, the resilience of the reserves policy in the north remains an anomaly, then, in the tension it created with the otherwise broadly consistent ideology of assimilation during this period.

In the next section we shall explore this tension around reserves within the circle of anthropologists who advised governments on Aboriginal policy, before considering the government's own shift in policy around reserves in the north through the Menzies era, notably under Minister for Territories Paul Hasluck.

Experts, evidence and new ideas

The interwar and post-World War 2 periods were notable for the development of a more scientific source of expert policy advice in Aboriginal affairs, with the emergence of a new academic field of anthropology in Australia at this time. The origins of the academic study of anthropology have received extensive scholarly attention within the discipline itself (eg Cowlishaw 1990, 2010; Peterson 1990; Mulvaney 1993; Altman and Rowse 2005). From the very beginning, the relationship between evidence derived from anthropological research and policy decision making in Aboriginal affairs was far from straightforward (Cowlishaw 1990; Finlayson 2001) – and this relationship continues to be intensely examined and questioned today (Hinkson 2010; Peterson 2010; Austin-Broos 2011). Anthropologists were at times included in the inner circle of policy makers, directly advising and contributing to policy decision making (such as Professor AP Elkin and McEwan's "New Deal" policy in 1939, or Professor WEH Stanner and his role in the Council for Aboriginal Affairs in the late 1960s and early 1970s); at other times anthropologists have been influential in shaping public debate, advocating alongside activists and interests; and over time, anthropologists have helped to change societal attitudes and values more indirectly. All three of these aspects are in evidence in this period.

Anthropological expertise was relatively slow to develop in Australia. Governments in the Protection era had commissioned reports from a range of individuals with some particular knowledge of Aboriginal people in remote areas, as we saw in the previous chapter. Many of these experts possessed some ethnographic skills, often alongside other scientific training (including medical practitioner WF Roth and biologist Baldwin Spencer). There was no formal academic study of

anthropology in Australian universities at this time, however, unlike in England and the United States, and the field "remained the preserve of a few amateurs, particularly public servants, clergymen and pastoralists" (Mulvaney 1993, 114).

In Australia the discipline only became "professional" in the 1920s (Peterson 1990), with the appointment of the first Professor of Anthropology, AR Radcliffe-Brown, at the University of Sydney in 1925. Funded in the initial stages through the Depression by the Rockefeller Foundation, and later by the Carnegie Corporation and the Nuffield Foundation, the discipline was slow to develop research independence, and was tightly controlled through to the 1960s by a small number of individuals, particularly Professor AP Elkin, who succeeded Radcliffe-Brown in 1933 and continued his distinctive approach to the subject matter (Mulvaney 1993; Wise 1985). Radcliffe-Brown came to Sydney from England via Cape Town, and was known for his functionalist, applied approach to anthropology. Much of the research work begun under his supervision was intended to improve knowledge of disappearing cultures in order to inform and provide training for administrators and policy makers (Peterson 1990; Mulvaney 1993). The focus of this research was on Papua New Guinea, rather than on Aboriginal people in Australia, as the latter were considered to be already too compromised culturally to be managed as "independent functioning societies" (Peterson 1990, 12; Mulvaney 1993, 111). As Silverstein notes, Radcliffe-Brown's conception of the Aboriginal "horde" or "tribe" as the "social organism" which should be the target of policy intervention was critically important in shaping the policy around reserves, where tribes were to be left to govern themselves under distant supervision, rather than active intervention by the state (Silverstein 2011, 21).

Elkin was especially dominant in the early crafting of the new policy approach of assimilation from the 1930s onwards, beginning with advising on the formulation of the early Commonwealth government articulation of assimilation, the "New Deal" for the Northern Territory in 1939 (Stanner and Barwick 1979, 37). He maintained a remarkable authority over the policy area for several decades, even indirectly, having educated many of the policy makers at the University of Sydney (Wise 1985). McGregor describes Elkin's approach to policy advocacy thus: "A prim and proper professor, Elkin preferred to work with, rather than against, the established authorities, imagining that reform could be effected through reasoned argument and positive proposals" (McGregor 2005, 183). Elkin was frequently disappointed, however, at the policy directions chosen by the government, particularly following the appointment of Paul Hasluck as Minister for Territories in 1951 (Wise 1985). Elkin was not welcomed into the inner circle of the new minister, and he was forced to exert influence by less overt means, through academic and general publications, speeches and private correspondence (Haebich 2008; Wise 1985).

Elkin developed an "anthropologically informed model of assimilation" (McGregor 2005, 170), which contrasted with the biological approach to assimilation and its assumptions of "breeding the colour out" over time, an approach which was enthusiastically followed by administrators such as AO Neville in Western Australia and Cecil Cook in the Northern Territory. Drawing on anthropological studies of Aboriginal communities in remote parts of the continent, Elkin presented a more optimistic view of the future of Indigenous people than one of "absorption", and gradual disappearance (Haebich 2008). He was convinced that social change was inevitable for Aboriginal people, as European settlers encroached on the few remaining areas of the continent where Aboriginal people lived undisturbed. This did not mean that Aboriginal people would vanish: as Elkin explained it, assimilation "had no reference to miscegenation or absorption and loss of racial identity. It meant that Aborigines should be similar to other members of the Australian community, with regard to all the privileges and responsibilities of citizenship" (Elkin 1940, cited in McGregor 2011, 16).

Elkin advocated a gradual assimilation, at a pace chosen by the Aboriginal people, not by government, allowing for "cultural blending" and "bridge building" as Aboriginal people retained significant aspects of their culture and identity while moving towards modernity and civilisation as enjoyed by the white population. A key element for Elkin was the need to preserve Aboriginal autonomy with respect to the pace at which they managed the necessary transition, and adjusted to the "rapidly changing conditions" (Rowley 1970, 308). Elkin's version of assimilation was thus more of a synthesis of two cultures than a complete replacement of one by the other (McGregor 2005). McGregor observes that while Elkin is often criticised as the author of the later deplored assimilation policy, his insistence on the slow pace and blending rather than annihilation of Aboriginal culture meant that later critics of assimilation in the 1960s were in fact adopting arguments he had foreshadowed at the outset (McGregor 2005).

The expert arguments about reserves

The question of Aboriginal reserves was a contentious issue among anthropologists in the late 1930s, and this is reflected in the contradictory advice offered to policy makers. The debate revolved around conflicting conceptualisations of *purpose* and *access*, and reflected very different theories about the future of Aboriginal people as a distinct race, and the likely prospect of successful assimilation.

The notion of creating large "inviolable" reserves had originally been suggested for the Northern Territory by Baldwin Spencer, following earlier proposals made by Meston and Roth in Queensland and Western Australia. The idea was also supported by anthropologists such as Norman Tindale and JB Cleland on the basis that this would allow "primitive" remnant tribes to live "unmolested", with

the expectation that the race would eventually disappear, and that nothing more could be done for them (Stanner 2010a, 198-9; McGregor 2011, 9-10). Other views were more optimistic about the viability of Aboriginal culture but just as pessimistic about the potential for assimilation. Anthropologists such as Donald Thomson and Olive Pink, for example, were convinced that Aboriginal culture could survive, and be maintained, with appropriate safeguards, within designated reserves where the traditional lifestyles, social and economic practices could flourish without undue interference from missions (Holland 2005; Thomson 2003).

Thomson was an active advocate for policy change around reserves, though little regarded by the government he sought to advise at the time (Peterson 2003). He urged administrators and missionaries to accept, rather than seek to stifle, nomadic behaviour, and to stop removing children from their families and preventing them from learning their own culture (Thomson 2003, 118), observing that there was no real prospect of social equality for those Aboriginal people who gave up their culture to become "black white men" (Thomson 2003, 186). Thomson's expeditions to Arnhem Land in 1935-37 convinced him that Aboriginal culture was already threatened and corrupted by contact with outsiders, such as pastoralists, doggers, railway construction labourers, and especially fishing fleets, and he noted grimly that "at every point where [the Australian Aboriginal] has come into prolonged contact with a European or Asiatic population, his culture has commenced to decay, and degradation and racial extinction have followed" (Thomson 2003, 114). Thomson fervently recommended that governments do more to protect their culture and social structure "*in toto*", by implementing "absolute segregation", with missions serving as buffer zones on the boundaries, and regular patrols to prevent unwelcome access and exploitation (Thomson 2003, 118-119; see also Rowley 1970, 314). This view allowed little agency for the Aboriginal people themselves, however, and restricting access to the reserves from outsiders did not take into consideration the choices made by Aboriginal people to seek contact with others outside their communities and traditions, with the associated material and social benefits as well as risks (Rowley 1970, 317). Thomson's recommendations were not adopted by the government, and he described his despair in his own record of the period, saying "I felt I had failed utterly" (Thomson 2003, 193).

Other experts noted the apparently irreversible "drift" of Aboriginal people off reserves into white settled areas, suggesting that Aboriginal culture and traditional lifestyles were already compromised as Aboriginal people chose to move closer to white settlements, in search of steady food supplies and stimulants such as tobacco or tea (Stanner and Barwick 1979, 44). Elkin similarly observed the inevitable attraction of a secure supply of water and food for those Aboriginal people living in the harshest arid regions of Central Australia, and remarked "the lure of the white man is great and effective. Reserves without institutions to keep the aborigines on them will not avail much" (Elkin

1933, 33). Elkin believed reserves should serve as places where the transition to assimilation could be encouraged safely, and under government and mission supervision: "The reserves must be part of a positive policy of giving the natives new interests and training in stock-work, agriculture and various crafts", with "wages paid in money or kind to natives employed, the provisions of subsistence rations for the aged and medicine for the sick, and in some cases, punishment of white men for consorting with native women" (Elkin 1933, 33). Assimilation may have been inevitable but it was not to be rushed.

The crux of the issue, then, was the fact that reserves were no longer the "hermetically sealed" form of protection that they were intended to be, and the *purpose* of the reserves policy was thus under threat. As Stanner wrote in 1938 in his recommendations to the government on behalf of his colleagues in London, "The provision of inviolable reserves is a cardinal point in all Australian native policies. In no case known to anthropologists, however, are the reserves inviolable or unviolated…[thus] the reserves may soon cease to be of any practical use" (cited in Stanner and Barwick 1979, 58). The Commonwealth government demonstrated an ambivalence about reserves as the era of protection came to an end, and policy was forced to catch up with shifting frames. The Commonwealth government was continuing to gazette Aboriginal reserves during this period, but was not prepared to deploy the resources necessary to prevent settler incursions on the reserved land (Rowley 1970, 309-311). There were pragmatic as well as ideological limits on what governments could do to control access to reserves. As Rowley remarks, "I think it is fair to say that generally governments have been more keen to keep the Aboriginal in the distant reserve than to keep the prospector, dogger, or other entrepreneur out" (Rowley 1970, 250).

Stanner observed with hindsight the paradox at the heart of the reserves policy during this period in his Boyer lectures, noting that "the effort to preserve the Aborigines within inviolable reserves was the last ditch of an older policy, and we were then beyond the last ditch. I do not recall that we asked ourselves at all clearly: what comes *after* a policy which *by definition* is one of *last* resort?" (Stanner 2010a, 191, emphasis in original). It was clear that the Aboriginal population could no longer be protected and isolated in remote sanctuaries, in an effort to "soothe the dying pillow", but Stanner points out that the alternative of real social equality and integration was yet to be clearly articulated, or imagined. Famously describing the wilful and neglectful ignorance of Aboriginal Australia across government, academia and the public as the "great Australian silence", he observed that policies for Aboriginal people at this time were "optimistic" and "positive" but they were made in ignorance and misunderstanding, and thus had little actual impact (Stanner 2010a).

The policy challenge was becoming more evident to policy makers, nevertheless, as contrary to predictions, the population was not diminishing or dying out, but was in fact increasing (Rowley 1970, 311). Significantly, while the growth included a large portion of Aboriginal people of mixed descent, these people chose to stay in Aboriginal communities. Contributions to the war effort in World War 2 had also revealed to doubting policy makers that Aboriginal people had the capacity to work on an equal basis with non-Aboriginal soldiers, especially when treated on an egalitarian basis and given the same rations, sanitation, housing, medical care, law enforcement and responsibilities (Rowley 1970). For Rowley, the World War 2 experience was responsible for "accelerating the processes of social change" (Rowley 1970, 339). The old objectives of the reserves policy were no longer relevant, as the rationale for protection and segregation was being undermined, and societal values were changing. Governments were nevertheless slow to abandon them, and hesitant to consider alternatives.

The maintenance of large reserves in the Northern Territory allowed for the retention of an enormous social, political and economic potential for the future, though the government was unwilling to exploit it. Rowley (1970) analysed the government's objectives in retaining large reserves in the Northern Territory in this period, and identified a number of conflicting purposes. Firstly, he notes that while American examples of large reserves were well understood by policy makers in Australia, they chose not to transfer the limited self-government within the tribal governance systems of the American Indians: indeed, they imposed such strict controls and lack of autonomy on the Aboriginal people living on the reserves that the policy achieved the opposite (Rowley 1970, 248). Secondly, Rowley notes that the large reserves had the capacity to "offer basic security to those whose 'country' it was" and yet the government gave no recognition of Aboriginal claims to ownership of the land, and retained full control of the permissive lease conditions of what was still defined as Crown land (Rowley 1970, 250). Moreover, the land which was granted in large reserves was believed to have little economic value, and when economic potential was occasionally identified, those sections of land were excised for the use of miners or pastoralists. While missions and government stations had long used Aboriginal labour to supplement government rations by cultivating food and herding stock, demonstrating clear economic value, the benefits were not understood as properly belonging to the Aboriginal people on whose land the mission or settlement was established, but rather were returned to the mission or the government, as the "legitimate" title holders of the land.

The frames applied to Aboriginal reserves were thus newly contested in this immediately before and after World War 2, as anthropologists responded to the government's adoption of assimilation as official policy towards Aboriginal people. The reserves were seen as either a sanctuary where

assimilation and even contact with white society could be avoided, or as a site for a controlled transition to social and economic integration. Access was contentious, as while the porous nature of reserve boundaries was acknowledged, there was a growing awareness of the choices being made by Aboriginal people to seek contact with white settlers on their own terms. The next section will examine the government's response to this debate during the tenure of Paul Hasluck, who as Minister for Territories was the chief architect and champion of assimilation policy.

Hasluck's new frame: citizenship, assimilation and reserves

Paul Hasluck was appointed Minister for Territories for the Menzies Government in 1951, and held the position for twelve years. His portfolio included responsibility for the political and economic development of the Northern Territory along with Aboriginal affairs. This combination of portfolios had the potential to create friction within the ministry as the policy objectives could be contradictory (Taffe 2005, 171). As Minister, Hasluck reconciled the two policy priorities within the new ideology of assimilation. He clearly articulated the objectives and rationale of assimilation through many speeches in parliament and in public, as well as through booklets published by his department for wide consumption, informing the public about the changing policy and exhorting them to welcome Aboriginal people as full citizens into the Australian community (see Haebich 2008, also McGregor 2011). Hasluck was adept at framing his policy towards Aboriginal people with clear binary choices, and his message was powerful and almost unquestionable.

Reflecting that two thirds of the Aboriginal population had "already come so closely in touch with the ways of European life that their future cannot be considered any longer as being that of a primitive people living their own tribal life in remote parts of the country", Hasluck unambiguously rejected protection as a doomed and outdated policy (Hasluck 1953, 6). He presented the alternative policy options before government into the future as one of either "social advancement" or "social degradation", living as "pariahs and outcasts", unaccepted by white society. As he argued:

> In the old days when they were a primitive people living under primitive bush conditions, the problem chiefly was to set up a barrier between them and the invading white community. Those days have gone, and the nation must move to a new era in which the social advancement rather than the crude protection of the natives should be the objective of all that is done in this sphere. (Hasluck 1953, 6)

Hasluck thus presented his approach in terms of the binary frames of segregation and degradation, the policy legacy of the protection era, on one side, with the far more palatable future for Aboriginal people in the modern era built around assimilation and welfare.

Hasluck's overriding concern was to eliminate the focus on racial distinction which he believed was condemning Aboriginal people to lives of degradation and poverty. Marilyn Lake (2005, 253)

observes that Hasluck had a "horror of difference" because "Difference meant disintegration, division and deformity". Hasluck saw the preservation of *difference* as a path to an unacceptable permanent division in society. He feared a future where Aboriginal people would not exist "as a separate society but … more in the nature of a series of castes within our own society" (Hasluck 1953, 35). Rowse (2005, 238) argues that "[f]or Hasluck, 'difference' was relevant to policy only to the extent that it was the task of policy to overcome difference". Importantly, Hasluck also felt strongly that government policy should not be allowed to create opportunities for difference (Moran 2005, 188-9). Hasluck's policy thus began by redefining racial difference as cultural or social, rather than biological (following Elkin's ideas), abandoning definitions based on "blood", with the associated distinctions between "full-blood" and "half-caste". His next priority was then to work towards reducing the degree of social difference by changing Aboriginal and non-Aboriginal behaviours, to ensure social harmony and acceptance.

Sanders (1998, 107-8) interprets Hasluck as motivated by a desire to return to the "early ideals" of "civilising" Aboriginal people, as had been articulated in the Buxton report. Hasluck thus reveals the barely discernible path dependency flowing from the original humanitarian precepts of the need to improve and care for the helpless, "primitive" colonised people. He firmly believed in the superiority of the white settler way of life, and was convinced that "the blessings of civilisation are worth having", and assimilation for the Aboriginal people would represent a "change for the better" (Hasluck 1982, 17). Significantly, Hasluck was following the Buxton report in acknowledging an important role for the government, which had been abandoned over time. As governments had become preoccupied with protection of Aboriginal people from European settler violence, they had failed to consider the importance of giving Aboriginal people full status as British citizens, and neglected to provide adequately for the welfare of Aboriginal people. Hasluck thus recognised that this required greater intervention by the Commonwealth government, in cooperation with the states, and a more substantial financial commitment to address the stark needs in Aboriginal welfare. The old approach of protection and segregation was no longer viable, and so Hasluck argued:

> …any person who seriously addresses himself to the social questions which are posed by the condition of aborigines in Australia today is no longer satisfied by a policy of preventing cruelty to them, as to animals, or the restricted hope of smoothing the pillow of a dying race. He thinks of the advancement of their welfare. (Hasluck 1953, 34)

As Minister Hasluck oversaw a significant increase in financial support for Aboriginal welfare, but he framed it very carefully in terms of need, rather than in terms of race (Sanders 1998). Hasluck

explained in the House of Representatives that his new legislation would redefine the target of particular attention from the government: "the ground on which a person will be brought under the legislation will not be colour, or a fraction of colour, or any other racial or genealogical reason, but the test whether he or she stands in need of special care or assistance" (Hasluck 1952, 45). As a social liberal, Hasluck understood the necessity for some people to be cared for by the state, on the basis of their incapacity to take on their responsibilities as citizens. This was not considered to be a permanent situation, but a transitional one, with individuals to be given paternalist guidance by governments in order to adjust to the demands of living in society (McGregor 2011, 81-2). This particular group, for Hasluck, "must be regarded as wards of the State standing in need of guardianship and tutelage" (Hasluck 1952, p44). As McGregor wryly observes, Hasluck's liberalism was manifested in his "assumption that many Aboriginal people were not merely individuals but (for the time being) extraordinarily incompetent individuals" (McGregor 2011, 81). Assimilation demanded that this temporary incompetence be distinguished from racial identity. Hasluck thus replaced the Native Affairs Branch in his department with a Welfare Branch, and recast the Northern Territory Welfare Ordinance 1953 to remove all references to Aboriginality, following the example of the Universal Declaration of Human Rights (as noted by Lake 2005). The legislation's targets were clearly still Aboriginal people, and the implementation of the Ordinance by administrators in the Northern Territory was no less racially focused than its predecessor, but the new definitions marked a new step in the shift away from a focus on definitions of Aboriginality based on blood. This debate would take on new dimensions later, with the question of "authenticity".

Hasluck and the policy on Aboriginal reserves

Within a year of taking over as Minister for Territories, Hasluck had begun to adjust his policy on reserves in line with his emphasis on the welfare of the Aboriginal people. Reserves in the past had been designated for the "use and benefit" of Aboriginal people, but as Hasluck noted in a file note "the phrase 'use and benefit' should not be interpreted only to mean wandering over the reserves for the purpose of hunting, food gathering or practising tribal rites, even if those were the only uses to which the reserve was put at the time of its creation" (file note dated 1952, cited by Hasluck, Hasluck 1963). Times were changing, and reserves, Hasluck noted, were no longer being used as before by those living a "fully tribalised life". Therefore while reserves would be maintained for the foreseeable future, he argued that "the Government believes that reserved land which is not in fact being used by the natives should not be closed for ever to exploration and development" (Hasluck 1953, 28). This was a pragmatic response to the growing demands of the mining industry, which was gradually becoming aware of the vast and valuable mineral deposits across the northern part of the continent. The Menzies government moved to open up access to reserves for mining, which was

deemed to be clearly in the national interest, on identified sections of reserves where the land was not needed by Aboriginal people. This was the first time mining had been permitted on Aboriginal reserves in the Northern Territory (Altman 1984, 475-6). In line with Hasluck's emphasis on Aboriginal advancement, the policy was to be implemented on the proviso that the welfare of the Aboriginal people be taken into account, employment prospects for Aboriginal people be considered, and royalties would be paid into a special trust fund for Aboriginal welfare, controlled by the Minister (Hasluck 1953, 29; Hasluck 1952). The Aboriginals (Benefits from Mining) Trust Fund notably required the payment of double royalties, as a means of discouraging mining ventures where profits were likely to be small (Altman 1984).

Hasluck explained the retention of reserves as a temporary policy measure, which he did not expect would be required for many more generations. Hasluck argued that only a third of the Aboriginal population could still be considered "untouched", and this status was already under threat. In particular he noted that the reserves allowed older generations of Aboriginal people the space to continue their traditional customs and practices, but he did not see this as relevant to younger generations. In a speech reporting to parliament on the Native Welfare Conference in 1951, Hasluck observed that the large reserves in central and northern Australia had not protected their Aboriginal residents, as these people had chosen to interact with white people, and were further prompted to do so by contact with missionaries, government officials and anthropologists. Thus, "[e]ven if we wished to place the remnant of tribal natives into some sort of anthropological zoo in the isolated corners of the continent, it is extremely doubtful whether we could arrest the curiosity that is daily extending their knowledge of white ways" (Hasluck 1953, 17). Thus, in Hasluck's mind, reserves should be viewed as temporary:

> The settlement and the mission station can be used for the advancement of the native peoples and as a refuge for those of them who need protection during a transitional period. Some of those who cannot complete the transition may live and die on settlements, but those who have the strength and capacity to develop their abilities more fully should have freedom to enter into a larger life in the general community (Hasluck 1953, 18).

Hasluck had a further argument about reserves which linked closely to his defence of assimilation: allowing ongoing segregation would produce inequality, and ultimately a form of apartheid. As he argued, "we will build up in Australia an ever-increasing body of people who belong to a separate caste, who live in Australia but are not members of the Australian community" (Hasluck 1953, 18). This human concern for equality, in terms of opportunity, rather than separation into castes and ghettos, was widely supported by liberal, progressive thinkers in this period, who believed that the examples of segregation in South Africa and in the United States were deplorable extremes of

discrimination. As Attwood (2005, 278) comments, this negative example of segregation was combined with a confidence in European cultural superiority over Aboriginal people, and thus "it was difficult to conceive of, let alone to concede, the advantages that segregation offered Aboriginal people". This frame of reserves as segregation therefore denied any aspect of choice on the part of the Aboriginal people, and furthermore, implied that a choice to stay in the protective reserves was one of weakness and moral incapacity.

Hasluck's views were reflected in government policy to maintain the reserves, but to allow for excision of reserves when land was required by others, particularly mining interests. The *purpose* of the reserves was decidedly temporary and transitional, and any suggestion of Aboriginal people choosing to remain permanently isolated from white society on reserves was rejected as morally and socially repugnant. Ownership and control of reserves was held firmly in the hands of the government, and issues around *access* to the land or use of the land for non-Aboriginal purposes were the responsibility of the Minister, in consultation with the missions rather than engaging with the Aboriginal residents themselves. These principles were to come under public scrutiny, and direct challenge, with the dispute over mining rights around the Yirrkala mission in Arnhem Land.

Yirrkala

The Gove land rights dispute created the circumstances for a critical juncture in the policy making around Aboriginal land, in a temporal sequence which took over a decade to reach its conclusion with the legislation of Aboriginal Land Rights in the Northern Territory in 1976. The dispute started with a relatively unremarked proclamation in March of 1963, when the Menzies government excised a section of land around the Yirrkala Mission within the Arnhem Land Reserve, in order to allow the French company Pechiney Aluminium to mine bauxite in the area. The proclamation was entirely in accordance with the policy earlier articulated by Hasluck for mineral exploration and extraction on Aboriginal land. The only consultation the government had undertaken with those affected by the excision was with the General Secretary of the Methodist Board of Missions, which ran the mission at Yirrkala (Attwood 2003a, 215-217). The alarm was raised by the missionary stationed at Yirrkala, Edgar Wells, against the wishes of his superiors within the Methodist Board of Missions, and the issue quickly gained publicity in the south as a result of a coordinated campaign begun by the Federal Council for Aboriginal Advancement (FCAA), church and trade union activists (Attwood 2003a; Taffe 2005, 164-66).

Hasluck responded to the critics in a speech in the House of Representatives on 9 April 1963, in which he reminded the House of the original protective *purpose* of the reserves, and observed the

distinction between the needs of the older people living on the mission, and the younger generation, who might have very different aspirations. As he argued,

> In negotiating the terms of the mining leases we have kept in mind several different interests of the aborigines. Basically we have tried to ensure that no social evils will have a harmful effect on the aborigines either as individuals or as a community, and that the work of the Yirrkala mission, in sheltering, guiding and inspiring them, can continue undisturbed for the benefit of the community centred on the mission. We have also been conscious on the one hand of the need for ensuring that those of the older generation, for whom the ancient traditions are strongest, shall not lose access to their totemic sites or spirit centres; and on the other hand that those of the younger generation shall obtain the greatest possible benefit from any new opportunities of employment and training that may be created. (Hasluck 1963)

It was entirely appropriate, in Hasluck's view, that all negotiations with respect to the *access* to the land by the mining company be negotiated by the Director of Welfare, in consultation with the church, through the General Secretary of the Methodist Board of Missions, the Reverend CF Gribble. Only the immediate area around the mission itself was protected from incursion by the mining company, and questions of access to arable land around the mission, or sites of religious significance for the Yolngu people, were to be negotiated through the Administrator of the Northern Territory. Under no circumstances were the Indigenous people expected to be directly consulted or accorded any authority over the land in question. Hasluck emphasised the generous provision of royalties on minerals from Gove which would be placed in a trust fund "for the sole benefit of aboriginal wards of the Northern Territory", but he acknowledged that little benefit would be enjoyed by the current generation of Aboriginal people living on the land.

Hasluck's speech demonstrated very clearly the shift which had occurred in government policy with respect to the purpose of Aboriginal reserves. Not only were reserves no longer useful as sanctuaries where Aboriginal people could live protected, in isolation: instead, the reserves were now expected to assist with the larger project of assimilation, providing opportunities for Aboriginal people to engage with the non-Aboriginal society, and providing the basis of some economic development. He expressed confidence that the younger Aboriginal people would enjoy economic benefits into the future, through employment and increased opportunities to interact with white people, as mining companies and associated workers established themselves close to their communities.

The Labor Party in opposition was already starting to move in a very different direction with their policy on Aboriginal land, and they built on the Menzies government's new focus on economic benefits in formulating their case for a new *purpose* and new *governance* for Aboriginal reserves. The opposition had been given very little chance to debate the issue in parliament, as they observed

with irritation, especially as the original announcement of the excision had been made out of the parliamentary sitting session. When the debate finally resumed in late May, Kim Beazley (Senior) noted the Minister Hasluck's intention of allocating royalties to the Aboriginal people of Yirrkala and reinterpreted it as a recognition of ownership of the land by the government. Beazley then proposed a "revolutionary approach to the question", announcing that "the time has come to create an aboriginal title to the land of the reserves of the Northern Territory" (Beazley, 1963a). This was a significant step for the Labor Party, not yet supported by the Labor Party Platform, but as Taffe observes, it was not reported in the media at the time, though the speech was later circulated around activist meetings (Taffe 2005).

Activists within the FCAA, trade unions and churches were increasingly concerned about the fate of the people at Yirrkala, and they were anxious to publicise the imminent impact on the Yolngu as widely as possible. In his capacity as vice-president of the FCAA, Labor member of the House of Representatives Gordon Bryant was accompanied by fellow Labor parliamentarian Kim Beazley on an investigative trip to Yirrkala in July 1963. They produced a brief report which analysed the economic and social situation at Yirrkala, reflected on the views of the Aboriginal residents about their land and their connection with it, and examined the potential impact of the proposed mining activity on the area and the people.

This external evaluation of the government's treatment of the Yolngu people living on the Yirrkala mission was very critical, remarking that "The Government have acted with a complete insensitivity to the economics and the social structure of the community." Bryant and Beazley argued that the presence of Aboriginal people on the land "since time immemorial" meant that "the right of the Aborigines to some form of collective ownership is unchallengeable" (FCAA 1963, 6, 3). Ongoing use of the land around the mission for hunting and fishing, as well as potential for agricultural development, showed that the people had real economic uses for the land, which would be threatened by the bauxite extraction. Bryant acknowledged the process of assimilation but insisted that this should happen at the pace chosen by the Aboriginal people themselves: "It does not need to be forced" (FCAA 1963, 8). In contrast with Hasluck's statement, Bryant noted that the people were not as quick to give up their "ancient traditions" as expected: "The people are not Stone Age neither are they sophisticated, although they still live 'close to the ground'. The old tribal laws still have a great deal of influence…" (FCAA 1963, 2).

It is significant that the FCAA placed such emphasis on the economic needs of the people at Yirrkala, in this report, rather than their spiritual connection with the land, which was not mentioned at all. Instead, the simple fact of ownership of the land as the Aboriginal people understood it, was taken

to be sufficient claim: "they all regard the land as theirs and can define their traditional boundaries. There would be no practical difficulties in establishing a title to the land they have occupied for so long and <u>no one else has ever claimed it</u>" (FCAA 1963, 3; emphasis in original). In this observation, the FCAA report echoed Beazley's earlier speech in parliament. Ownership rights stemmed from historical possession, and ongoing economic dependence on the land.

Following the parliamentarians' visit to Yirrkala, the people of the mission presented a petition to the House of Representatives on 28 August 1963. This petition was extraordinary, not simply for its demands, but for its format. Painted in traditional Yolngu style on two large pieces of bark, the petition was presented in both Yolngu Matha and English, with marks or signatures of community members and leaders. Yolngu leader Galarrwuy Yunupingu, the son of one of those who signed the petition, later described the petition as similar to "the Magna Carta of Balanda [white] law because it was the first time Yolngu had ever set our law down for others to see" (cited in Patton 2000, 29). Hasluck chose to dismiss it as unrepresentative of the true community leaders, but for others, it was recognisable as "an authentic expression of the Yolngu voice" (Clark 2008, 110). The petition specifically requested that the parliament appoint a committee which would allow the government to hear the concerns of the people of Yirrkala on the excision of the land, and it also noted the anticipated impact on their hunting and gathering and their sacred places (petition as translated in Select Committee 1963).

The parliament's response to the petition and the growing disquiet around the mining development impacting the Yirrkala people in Arnhem land was to arrange for a House of Representatives Select Committee to hold an inquiry. The government held only a slim majority in the parliament and was subjected to sustained pressure from the opposition, led by Bryant and Beazley, both of whom were nominated to be members of the committee. Beazley declared in the House of Representatives that "[t]he moment the petition was presented to this Parliament, this Parliament was put on trial. In fact, I think, the Australian nation is on trial" (Beazley, 1963b).

The Select Committee was highly unusual in that the members travelled to Darwin and Yirrkala to hold public hearings, and heard from a number of Aboriginal witnesses, through interpreters. This practice had been insisted upon by Beazley, who described his own experience of consulting with elders of the Yirrkala community, observing the cultural awareness and time it required: "I do not think they are people who can be interrogated very successfully… if you sit quietly with them for a long period of time they will begin to say the things that are in their hearts" (Beazley, 1963b). This effort was essential, however, in Beazley's view, if the parliament was to take seriously the declared policy of assimilation and full citizenship for Aboriginal people. In this first experience of hearing

Aboriginal witnesses in a parliamentary inquiry, then, as Clark observes, "[t]he Committee was forced to engage with an alternative authority when the Yolngu spoke" (Clark 2008, 113).

The Committee presented a unanimous report to parliament, recommending limited measures to prevent the intrusion of mining activity on sacred sites, and several forms of compensation for the loss of access to land around the mission, including small grants of land for agricultural purposes and monetary grants "for any loss of traditional occupancy" and to enable local commercial ventures in fishing (Select Committee 1963, 12). These recommendations represented a significant acknowledgement of the illegitimacy of the mining lease in the minds of the Aboriginal people who understood themselves to own the land. Clearly the Committee otherwise assumed that the excision of the reserve was in place and the mining would proceed, however, along with a likely relocation of the Yirrkala mission itself. The Committee sympathetically acknowledged each of the grievances presented in the petition, but it was conflicted in its treatment of the questions of *purpose*, *access*, *difference* and *governance*.

The Committee was clearly impressed by the complexity and sophistication of the mythology and use of the land as it was presented to them (through interpreters) by the Yirrkala Aboriginal witnesses, yet it presented them as a "primitive" people with a savage recent past. The Committee reported briefly on the history of the Aboriginal population in the Arnhem Land area including the establishment of the mission in 1934 and the construction of an airstrip and base during the Second World War by the Royal Australian Air Force. The Committee observed that there had been "occasional spearings and massacres" in the interwar period, and remarked on the enmity between various groups living on the peninsula, but considered that "[t]he conduct of the people of Yirrkala has been good in the post-war years" (Select Committee 1963, 8). Cultural and religious difference was not declining as fast as might have been expected, they noted:

> It is safe to state that the traditional nomadic characteristics of the people began to diminish with the establishment of Yirrkala Mission although it would be false to give the impression that traditional ceremonial and ritual does not still play a large part in their lives (Select Committee 1963, 8).

Acknowledgement of this level of *difference* was important as it meant that the Committee took seriously the apparent firm belief of the Aboriginal people that they were in fact owners of the land. It was on this basis that the Committee went beyond Hasluck's promise of royalties and recommended that "a direct monetary compensation" should be paid to the Yirrkala people, despite the fact that their ownership rights had no foundation in the law of the Northern Territory.

The Select Committee reflected on the historical *purpose* of the designated Aboriginal reserve of Arnhem Land as providing "sanctuaries for nomadic tribes" and recalled the importance of

designating sufficient areas of land for the Aboriginal people to be able to continue traditional hunting and gathering. Having heard the evidence presented at Yirrkala, the Committee concluded that "the people of Yirrkala still need the protection that the proclamation of reserves gives them from the intrusion of Europeans who have no good reason for going among them" (Select Committee 1963, 11). While the purpose was still deemed to be valid, the Committee acknowledged the government's assimilation policy also required the Aboriginal people to learn to adapt to white ways of living, and to derive economic benefit from the land. The Committee noted approvingly the statement of the Administrator of the Northern Territory promising to offer "training and employment opportunities for wards in the area, which would not otherwise be forthcoming and will contribute towards their assimilation in the Australian community" (Select Committee 1963, 9). It also recommended additional training in agricultural skills to enable more effective use of the land. The Committee was concerned that unlike past cases, this development should be a model of assimilation, avoiding "for the first time in history" the common fate of other dispossessed Aboriginal communities who were reduced to "fringe-dwellers". The Committee assumed that Aboriginal people would choose to live in the new town which would be built as part of the mining venture, and thus suggested that "[a]dult education in home making and home maintenance is urgently needed" (Select Committee 1963, 11).

This confused blending of protection and assimilation was also evident in the Committee's approach to the issue of *access*. The report's recommendations focused on the importance of preventing "unauthorised" access by either proclamation or Ordinance to specifically identified sacred sites, hunting grounds, the quarry used for pigments, and the mission itself (Select Committee 1963, 12), however it accepted the incursion of mining personnel and associated town residents on the rest of the reserve land, and expected interaction between Aboriginal and non-Aboriginal people to flourish at the new town. This was all merely part of the "challenge" of assimilation policy in practice (Select Committee 1963, 13). Practicalities around enforcement of the boundaries of the Aboriginal sites were not mentioned, nor were resources for patrols or policing considered. The Committee would have been aware of Hasluck's insistence on the floor of parliament that the conditions imposed on the mining companies as part of the lease were strict on matters of unimpeded access for Aboriginal people to the leased sections of land, and no doubt assumed that these conditions would be respected. Notably, the conditions cited by Hasluck included the provisions which were intended firstly " 'to permit and protect completely the rights to free ingress, egress and regress to, from and across the land leased' at all times by the aboriginal people" and secondly protected "the access of the mission and officers of the Government to all parts of the leases" (Hasluck, 1963).

The core grievance raised in the Yirrkala petition was the secrecy surrounding the mining lease and the lack of consultation with the people in the communities affected. The Select Committee observed that the only consultation took place between government officials and the Methodist Mission authorities, and representatives of the Welfare Office were poorly equipped to explain the decision after the event, as they did not have interpreters. In its recommendations the Committee recognised the importance of consulting the residents about the position of sacred sites, and the site of the new town to be constructed, during the implementation of the mining venture, but did not in any sense recognise them as decision makers or key stakeholders who should have been informed of the planned excision earlier. Nothing that the people of Yirrkala could say to the Committee would discourage the mining development, or persuade the government that the mining should not go ahead. The Commonwealth and Northern Territory governments were firmly in control of the land, and all decisions about how it could be used, and while they held discussions with the Methodist Mission, the Aboriginal people themselves were treated as nothing more than transitory. As a concession in the final sections of the report, the Committee suggested that some sections of the land could be leased to Aboriginal individuals for agricultural development, giving them a stronger claim over the land under Northern Territory law – a claim which was entirely superfluous and meaningless under traditional Yolngu law.

Given the ambivalence displayed by the Committee with respect to *purpose*, *difference*, *access* and *governance*, it is hardly surprising that the Menzies government chose to broadly disregard the report, arguing that the recommendations were already satisfied by existing policy and provisions around the mining lease. Compensation was not paid and leasehold grants were not put in place. Two years later, in 1965, the Labor Party in opposition continued to question the government's inaction in response to the Committee's report. Labor members of parliament also expressed concern that increasing control was being handed over to the Northern Territory Legislative Council, which Labor suspected of lacking capacity and responsibility (Cross, 1965), and indeed bearing some hostility towards the people of Yirrkala and their supporters, including the members of the Select Committee, seeing them as "Communists or ratbags, or, at any rate, very irritating people" (Beazley, 1965). The government's response was dismissive, arguing that the recommendation regarding grants of land to Aboriginal people was inappropriate given the communal rather than individual basis of ownership as the Aboriginal people understood it, and the further concern that "there is not much sense in making grants to the Aboriginal people if they do not know how to use the land" (Kelly, 1965). No mining lease had yet been signed, though negotiations were continuing throughout this period with new mining interests. This lack of genuine engagement by the Menzies government with the demands and dissatisfaction of the Yolngu would prove critical as the dispute eventually took on

a different form in the courts. As Clark observes, both the Methodist Mission and the Minister Hasluck "continued to miss the significance of the entire Yirrkala episode" (Clark 2008, 117).

The rise of "land rights": activism and the Aboriginal social movement

It is appropriate at this point to consider briefly the wider policy environment outside the parliament and the Ministry, as new ideas were emerging around Aboriginal land, conceptions of justice and equality, and the limits to assimilation. The period of 1962 to 1968 was a particularly vibrant one in terms of activism around Aboriginal issues in Australia, and coalitions formed between many disparate groups of activists, including Christians, trade unions, communists and feminists (Holland 2005). Indigenous people were also increasingly able to speak for themselves, as restrictions on movement and education were lifted with the expansion of civil rights associated with assimilation throughout the decade. As a result of media attention, meetings and conferences, and the circulation of activist publications and expert opinions, many of the long settled policies in Aboriginal affairs came under critical scrutiny.

The focus of most activism in Aboriginal affairs during this period was unquestionably around civic rights, and the campaign leading up to the 1967 Referendum which saw the amendment of the Constitution to formally allow the Commonwealth the power to legislate with respect to the Aboriginal race (Chesterman 2005; Attwood and Markus 2007; Taffe 2005). In the popular understanding, the Referendum would allow Aboriginal people to become "citizens" and to be considered equals in Australian society, and in these terms it is easy to understand the constitutional change as the culmination of decades of assimilationist policy making. This was an unsatisfying outcome for many Aboriginal activists, however, and as McGregor observes, the "immediate consequence among politically active Aborigines was to foster cynicism about mainstream political processes and to induce disenchantment with the referendum campaigners' avowed objective of national inclusiveness" (McGregor 2009, 347). Their desire to go beyond the apparent achievement of formal civic equality and demand specific rights on the basis of their Aboriginality presented some challenges within the broader Aboriginal social movement. The Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI), as the FCAA was known from 1964 on, was one organisation in particular which struggled with internal divisions over campaign priorities, and this came to a head when Aboriginal members ultimately seized control of the agenda and the executive positions in 1970 (Taffe 2005). In the years before this, the Aboriginal focus on land justice, as distinct from civil rights, had been an awkward issue for the FCAATSI to work on, as it challenged deep-seated notions of formal and civic equality, and initially no members of the organisation were prepared to take leadership responsibility for the Land and Reserves Committee which was responsible for fact-finding and campaigning on the issue (Taffe 2005, 188).

Assimilation was gradually coming to be seen to be flawed as an approach, and there was a growing recognition of the assumed but questionable superiority of the European lifestyle, and the impossible expectation of true equality for Aboriginal people without a means of addressing the entrenched poverty which was the result of dispossession and discrimination. Critiques were articulated by expert academics, church leaders and activists, and land ownership was frequently identified as a policy solution which would ensure the "economic viability and cultural survival of the Aborigines" (Holland 2005, 95).

From the academic realm, for example, Charles Rowley's address on "Aborigines and Other Australians", published in the journal *Oceania,* presented a comprehensive critique of assimilation, drawing on experiences of indigenous peoples in the United States to show the dangers of the government's approach (Rowley 1962). He observed the understandable reluctance of many Aboriginal Australians to assimilate, and called on the government to address the issue of Aboriginal poverty based on the deprivation of their inheritance by granting land to Aboriginal groups, through a system of trusts (Rowley 1962; see also Attwood 2003a, 208 and Haebich 2008, 59-60). Anthropologist Ronald Berndt, who had carried out extensive field work in Arnhem Land with the Yirrkala people, argued in 1964 that Aboriginal rights to land ownership should be legally recognised "where Aborigines are still associated with their own traditionally-inherited land", on the basis of their own traditions of hereditary rights and inalienability of land (Berndt 1964). Berndt acknowledged the challenges of extending compensation for the injustices of dispossession to those who no longer had strong ties to land, however, and treated an Australia-wide application of "land rights" with caution (Berndt 1964, 293).

Outside academia, similar arguments were articulated within activist and church circles. Frank Engel, general secretary of the National Missionary Council, called in 1963 for the granting of reserve land to Aboriginal tribes under a system of "corporate freehold ownership" and the purchase of other areas of land for Aboriginal use, as a remedy for the moral wrong which had been committed in dispossession (quoted in Taffe 2005, 182; also Attwood 2003a, 209). Barrie Pittock, from the Society of Friends, and later the director of the FCAATSI Land Rights Campaign, applied research on the granting of title and self-government to Amerindians to the Australian case, and argued in 1965 for a new policy of transferring ownership of areas of land to Aboriginal people, allowing them to use mining royalties and make their own decisions about allocating their funds, as a form of compensation for the historical dispossession (Taffe 2004, 196-7). Clearly these ideas were having an impact, if not on the Menzies government, certainly on the Labor Party in opposition, and they were echoed in parliament by Beazley and Bryant.

International attention was another important factor in this period, as activists compared the Australian example to race relations and segregation in the United States and apartheid in South Africa, and deplored the Australian failure to sign the International Labour Organisation Convention 107, the Indigenous and Tribal Populations Convention of 1957 (McGregor 2011, 100; Clark 2008). The ILO Convention 107 was a significant international convention of its period, calling on national governments to recognise indigenous customary law and ownership of land, and proposing compensation for dispossession (Russell 2005, 144). Australia was falling out of step with international ideas around decolonisation and racial equality under the Menzies government, as Haebich (2008, 51-52) argues:

> Australia was on the wrong side in this new world and its race-based policies and old-boy networks of empire now constituted a hindrance rather than a sign of white superiority and solidarity. Discriminatory immigration and Aboriginal policies, together with criticism of its colonial role in relation to the Trust Territory of Papua New Guinea, which was not granted autonomy until 1975, made Australia vulnerable to exclusion from new trade and political networks developing within its geographic region… The Menzies government did not immediately appreciate the extent of change.

The Labor Party in opposition was more attuned to the international changes, and repeatedly referred to Australia's international obligations throughout the decade, particularly with respect to Aboriginal Australia as well as Papua New Guinea. The Yirrkala dispute was one with international dimensions, given the Commonwealth's constitutional responsibility for the Northern Territory, and the international interest in the traditional art and craft produced by the communities in Arnhem Land. Gough Whitlam, as newly instituted leader of the opposition, campaigned on the 1967 referendum with an argument about the need to acknowledge Australia's international obligations, including signing the ILO convention (Hocking 2009, 298).

The campaign in support of the people of Yirrkala was fought within this contested environment of new ideas and new definitions of the policy problem around Aboriginal welfare and Aboriginal rights. Other disputes over Aboriginal land soon attracted the focus of activist groups, including the campaign for Lake Tyers in Victoria, Mapoon in Queensland, and the Wave Hill protest by the Gurindji people, which began in 1966. For activists within FCAATSI, these conflicts consolidated into a campaign demanding that reserves be granted to Aboriginal owners, Aboriginal ownership of Crown land be recognised, and Aboriginal consent be required before development of their land (Lippmann 1979, 174). There were differences between the circumstances of each specific dispute, but the campaigns were clearly linked for Aboriginal activists in the south, and shared important commonalities with their own protests through the post-war period as their reserves were revoked, leased and sold against their will. This fostered a pan-Aboriginal movement which drew activists from

the north and south into common campaigns, though appealed less to the non-Aboriginal observers. As Goodall observes, when the Gurindji people walked off and established their camp at Wattie Creek,

> [f]or Aboriginal people in New South Wales, the Gurindji demands were immediately recognisable. The demand for restoration of their lands echoed the desires which most of them had grown up with… For white Australians in the south-east, the parallels between the remote conditions of central Australia and the 'settled' rural lands of New South Wales were much harder to perceive. (Goodall 2008, 385).

This action marked the beginning of the land rights movement, according to Attwood (2003a, 216). In a noticeable break from the past struggles over land, the earlier pattern of local struggles over land came to be seen, and coordinated, as part of a larger, national campaign. This was significant because it allowed for a transfer of a particular notion of the legitimacy of land claims by "traditional" Aboriginal people in unsettled areas in the north to the claims over long-settled areas in the south. The Yirrkala case in particular had a resonance which was very valuable:

> Northeast Arnhem land was a remote place that was, in the eyes of non-Aboriginal campaigners, inextricably connected with 'tribal Aborigines' and 'Aboriginal tradition', symbols that authenticated indigenous rights to land. A national campaign for 'land rights' originated in protest over this site as it could never have emerged around reserve lands in settled, Southeastern Australia…the Yolngu's hold upon the land had not been challenged and so it was easier for non-Aboriginal people to accept and assert the proposition that these Aboriginal people were the owners of the land. (Attwood (2003a, 222)

Elsewhere Attwood observes that the earlier campaigns against the loss of reserve lands in the south had been based on "historical relationships to the lands", the new campaigns around Wave Hill and Yirrkala were focused on "timeless" or "prehistorical" relationships to "tribal land", adding a new dimension of legitimacy (Attwood 2000, 27). Southern activists, both Aboriginal and non-Aboriginal, were keenly aware of the consequences of lost culture and tradition, and the economic and social impact of loss of land in the south, and so they fought hard to save the groups in the north who had not yet suffered this treatment, in an effort to prevent them sharing the fate of poverty and marginalisation (Holland 2005). For Aboriginal activists themselves, the land rights movement motivated a strong interest in their own past and culture, and "the land rights agenda bonded a legal right (to land ownership) to Indigenous culture which validated that ownership) in a way that anti-discrimination protests did not" (McGregor 2009, 354). The land rights cause was thus also closely entwined with the critique of assimilation (Attwood 2003a, 283).

In summary, the Menzies government during this period was resolute in its commitment to assimilation, but equally firm in its unwillingness to contemplate notions of Aboriginal land ownership or political agency. Within the galvanised Aboriginal social movement, however, assimilation was diminishing in credibility as a policy approach, and land ownership was gradually being accepted as a promising path out of poverty for Aboriginal Australians. The basis for land ownership was still much contested, and provoked discord between some Aboriginal and non-Aboriginal members of the movement, but the acceptance of the legitimacy of the Yirrkala cause was widespread. Significantly, there was a growing sense that Aboriginal people should be able to control access to their reserved lands, especially by foreign mining companies, and also to claim rights to occupy land where they had longstanding traditional connections. Aboriginal people were at last receiving recognition as capable political actors, with grievances warranting government action, and the right to be heard.

Resistance, and reaction

Prime Minister Menzies stepped down in early 1966, and his successor Harold Holt oversaw the 1967 Referendum to amend the Constitution. Many members of the Coalition government were ambivalent about the vote on the constitutional amendments, favouring states' rights over an apparent expansion of Commonwealth power, but they were forced to respond to the particularly successful activist campaign which had run for the previous decade (Attwood and Markus 2007). As Marilyn Lake remarks, "Hasluck's worst fears were realised" with the terms of the amendment which would allow the Commonwealth to legislate with respect to the Aboriginal race, thus strengthening the difference and division in society that he had worked to eliminate (Lake 2005, 269). Attitudes to Aboriginal people and their welfare were clearly changing in Australian society, as the strong vote in favour of the Referendum illustrated. The Coalition government had no intention of changing its approach to Aboriginal policy, however, and it held determinedly to its objective of Aboriginal assimilation into one homogeneous society. Despite the expanded powers to legislate on Aboriginal affairs in the amended Constitution, the Commonwealth preferred to leave the prime responsibility for Aboriginal affairs to the state governments, as before (Chesterman 2005, 92-93). For many observers, including the Labor opposition, this inaction was a disappointing missed opportunity.

The Holt government made one very important decision, in appointing the Council for Aboriginal Affairs (CAA), a small advisory body made up of three eminent individuals: HC (Nugget) Coombs, the former Governor of the Reserve Bank and public servant mandarin, WEH Stanner, Professor in Anthropology, and Barrie Dexter, former diplomat and senior public servant. This highly skilled advisory body had direct access to the Prime Minister, initially, but following Holt's sudden disappearance, the next Prime Minister John Gorton appointed the first dedicated Minister for

Aboriginal Affairs, WC Wentworth in 1968. The CAA's policy advice to Cabinet was thus filtered through the Minister Wentworth, and from 1971 onwards, his successor Peter Howson.

The CAA was to have far-reaching impact on Aboriginal policy, particularly with respect to Aboriginal land, but this would not become clear until much later in the temporal sequence, following a change of government. Drawing on Stanner's anthropological expertise, and extensive consultation with Aboriginal communities and activists from all over Australia, the Council developed a coherent new approach to Aboriginal affairs over time, developing an alternative to the assimilation policy which had become so firmly entrenched. The CAA played a cautious hand in advising the Coalition government, avoiding direct confrontation with the government over its policy stance, and working slowly and patiently on incremental reform of Aboriginal affairs (Rowse 2000a, 90-91). Wherever possible, the CAA was careful to couch their policy advice in terms which they believed the government would find palatable (Rowse 2000a, 40).

The Council's advice on the question of land rights built carefully on Hasluck's policy objective of encouraging economic development of Aboriginal reserves on the condition that financial benefits be directed towards Aboriginal welfare. The CAA supported economic development in the same terms, and more optimistically could envisage entrepreneurial development by Aboriginal people themselves. Departing from Hasluck, the Council also sought special recognition of Indigenous people and their traditional ownership of the land, and placed most emphasis on the need for Aboriginal control and decision making power (Rowse 2000a, 34-35). Although the Council's records show that they deliberated privately on the potential for giving Indigenous people some legal title to land on the basis of long term occupancy as early as 1968, these challenging ideas were not presented to the government at the time (Rowse 2000a, 35). In 1968 Coombs proposed a Lands Trust which would include the Minister and an appointed council of which the majority would be Aboriginal, a considerably more restrained proposal than that made by Rowley in 1962 (Rowse 2000a, 50). The Gurindji protest attracted widespread media coverage, and the public response was positive, prompting the CAA to advocate more strongly for some governmental recognition of land rights, but to no avail (Rowse 2000a, 48).

The Gorton government's Minister for the Interior Peter Nixon responded emphatically to the Wave Hill dispute in a speech in the House of Representatives in 1970, strongly defending assimilation and denying any possibility of recognising rights to land based on difference:

> The Government believe that it is wholly wrong to encourage Aboriginals to think that because their ancestors have had a long association with a particular piece of land, Aboriginals of the present day have the right to demand ownership of it… This does not mean that Aboriginals cannot own land.

> They can, and do. But the Government believes they should secure land ownership under the system that applies to the Australian community and not outside it. (Nixon, 1970)

The government's focus continued to be on unity and homogeneity, with temporary special measures based on need, rather than acceptance of difference, which would result in permanent societal divisions based on race. As Nixon argued,

> Measures which are based on racial qualification are divisive in any community. It is important for Australia's future that we work towards minimising race consciousness and avoid steps which tend to emphasise divisions on a racial basis. Of course, where there is need for special educational, social or economic measures to help a section of the community which requires assistance, appropriate assistance should be provided. (Nixon, 1970)

A member of the Country Party, Nixon was adamant that living on the land was not for everyone. Recognition of Aboriginal land ownership based on "so-called tribal land claims" would lead to segregation and blighted futures for "those whose future by inclination and aptitude ought to be away from the land", as they would be "impeded and hindered in realising the best that they can achieve in a single Australian community" (Nixon, 1970).

The Coalition's fixed ideas on assimilation and economic development of the land meant that they were not receptive to the ideas emerging from the CAA or the activist community more broadly. Their resistance to change was echoed by politicians in the Northern Territory and bureaucrats in the Department of the Interior (Riddett 1997). This intransigence would soon be disturbed by the next episode of the Yirrkala dispute, with the handing down of the long-awaited Blackburn decision.

The *Milirrpum* decision

Dissatisfied with the government's response to the Yirrkala dispute, and increasingly anxious as the government made moves to sign a lease allowing bauxite mining with a new mining company, Nabalco, the Methodist Commission sought legal opinions on whether the Yolngu people of Arnhem Land might have a legal claim over the land on which they lived. Following advice from John Little and Edward Woodward QC, the Yirrkala clans issued a writ against the mining company Nabalco in December 1968, and the trial was scheduled to be heard in the Northern Territory Supreme Court by Justice Richard Blackburn in May 1970. As Attwood (2003a, 303) observes, "This was a watershed in Australian legal and political history… it had long been assumed that Aborigines had no legal grounds to challenge the dispossession that had occurred since 1788. As recently as the mid-1960s campaigners like Davey and Pittock had concluded that Aborigines had a moral case for land rights but not a legal one." The Methodists were under no illusions about the uncertain outcome of the case, but they could see the political benefits of publicising the issues, and set about raising money

to fund the action. The CAA was far from sanguine about the political ramifications of the case, and recommended to the Minister that the government should settle with the Yirrkala clans out of court, rather than risk either the embarrassment of a loss or the political cost of negative coverage (Rowse 2000a, 51). Once again the Cabinet rejected the CAA's advice, and the court case went ahead. As the case proceeded, the Commonwealth decided to support the plaintiffs by funding their case, in order to allow the court to make a "definitive ruling" on the question of communal native title (Watson 1994, 99).

The dispute over mining rights around the Yirrkala mission in Arnhem Land was a powerful turning point in terms of the conflict over recognition of Indigenous land ownership, both in terms of the methods used by the Aboriginal people, and the new stance that they adopted. It was the first attempt to contest ownership rights over the land at common law, through the court system. As Russell remarks, "Indigenous people would now see whether they could use the white man's legal magic to begin to reverse their dispossession" (Russell 2005, 156). Furthermore, the plaintiffs were demanding recognition of their land rights, and security of their tenure, rather than simply an acknowledgement of permission to occupy the land (Russell 2005, 156-7). In addition, the petition and the court case were presented under the names of the leaders of the community, separate from government and mission representatives, and in this sense they were demanding to be recognised as actors with political and cultural authority - thus "the government and the church were forced to engage in political dialogue with Aborigines for the first time" (Clark 2008, 94).

Blackburn's decision went against the Yirrkala plaintiffs, and was greeted with outrage and disbelief when it was handed down on 27 April 1971 (Russell 2005, 158; Williams 2008, 207). In his judgement, Blackburn explicitly acknowledged the Yolngu people's spiritual connection to the land, and their own traditional law with its system of communal-based ownership of the land, both important aspects of Aboriginal difference, but he refused to recognise their legal ownership rights under Australian (or English) property law. For Blackburn, Aboriginal *difference* could not be a justifiable basis for claims of ownership over land according to the common law. Though sympathetic to the Yolngu people's earnest explanations of their customs and law, Blackburn would not overturn the Crown's pre-emptive rights over the land, which were assumed from the arrival of the first colonisers, and which had extinguished any "native title" over the land. Blackburn considered the circumstances of the arrival of the European settlers carefully, and compared the Australian history of colonisation with that of New Zealand and the United States, but concluded that the precedents "all affirm the principle, fundamental to the English law of real property, that the Crown is the source of title to all land" (17 FLR 141 at 245). The Arnhem Land reserve thus remained the property of the Crown, and the government could continue to make decisions about how the land was used, with

no recourse for the Aboriginal occupants. The creation of reserves was simply an act of "official benevolence" and did not constitute a statement of rights of ownership (17 FLR 141 at 256), nor did the clans' demonstrated connection to the land according to their system of customary law warrant recognition as a proprietary relationship. The essential basis of the decision was the difference between Aboriginal and Australian law: thus Blackburn determined

> In my opinion, therefore, there is so little resemblance between property, as our law, or what I know of any other law, understands that term, and the claims of the plaintiffs for their clans, that I must hold that these claims are not in the nature of proprietary interests. (17 FLR 141 at 273)

Stanner had been actively involved in the case as an expert witness (along with Ronald Berndt) and had followed the case closely throughout, writing a scathing account of the arguments put by Nabalco and especially the government. As he commented in 1970, not long before the decision was handed down, this particular case had changed the frame applied to Aboriginal people in an important way:

> … no one who took part in the Yirrkala land case came out of it without a heightened respect for Aboriginal life, ideology and values. What we all saw there were black men who, in the very process of failure, won white minds to a new point of view. Their only failures were against 18th century law, 'history' as we construct it, and some rather intractable European superstitions about land. (Stanner 2010b [1970], 247)

This positive construction of Aboriginal people and the legitimacy of their claim to land ownership was an important precursor to the policy changes which would eventually be implemented by the Whitlam government.

Once the decision was handed down, Woodward wrote advice to the Yirrkala plaintiffs advising them against an appeal of the decision, on the basis that it would be more effective to work towards legislative change (Williams 2008, 207). No doubt the fact that the Labor Party by this time had included the legislation of land rights as part of its Party Platform was a factor in this advice, as the Coalition government under the new Prime Minister William McMahon continued to resist the pressures of public opinion and CAA advice.

A window of opportunity

In a climate of growing agitation about Aboriginal land rights, following the decision on the Gove Land Rights case, the McMahon government was under pressure to make concessions on Aboriginal land. Prime Minister McMahon made a speech on Australia Day, 26 January 1972, which was to trigger the most dramatic and eye-catching Aboriginal protest to date, with the establishment of the Aboriginal Tent Embassy on the lawns in front of Parliament House in Canberra.

McMahon's speech, entitled "Australian Aborigines: Commonwealth Policy and Achievements", responded directly to the *Milirrpum* decision, and presented a stubborn reaffirmation of the assimilation approach. He reiterated the government's objective that Aboriginal Australians "should be assisted… to hold effective and respected places within one Australian society, with equal access to the rights and opportunities it provides and acceptance of responsibilities towards it" (McMahon 1972, 1). *Difference* continued to be intolerable to the Coalition government: "the concept of separate development as a long-term aim is utterly alien to these objectives", and special measures for Aboriginal people should be based exclusively on need, and be considered "temporary and transitional" (McMahon 1972, 1-2). The Coalition continued to insist on the same principles which had been articulated by Hasluck in 1952.

The Prime Minister outlined the changes which his government had already introduced, including provisions for pastoral and agricultural leases for Aboriginal people on reserves (as recommended by the Select Committee in 1963), and the creation of an advisory committee allowing Aboriginal communities to present their views to the Minister for the Interior. With respect to Aboriginal reserves in the Northern Territory, McMahon continued to believe in encouraging economic development of the land, not only for the benefit of the Aboriginal people, but also "making a significant contribution to the growth and development of Australia generally" (McMahon 1972, 4). McMahon's key announcement, therefore, was the proposal to create a new form of "general purpose lease" over reserve lands, for up to fifty years, at a nominal rent, to allow Aboriginal people "security in their relationship with the land" provided they demonstrated the intention to develop the land "for economic and social purposes". McMahon explained that the government had chosen to offer leases, rather than a new form of Aboriginal title, as this would be readily recognisable in Australian law, and the government was reluctant to "introduce a new and probably confusing component".

McMahon demonstrated a remarkable unwillingness to change the parameters of Aboriginal land ownership in his speech. Rowse (2000a) details the advice which McMahon had received from the CAA, most of which was rejected. Among other points, the CAA advised the McMahon government after the *Milirrpum* decision to grant leases over reserve lands on the basis of traditional connection with the land, reflecting *difference*, but the government rejected the advice in favour of proposing leases on the familiar basis of social or economic use of the land, just as had happened in the early colonial period (Rowse 2000a; Russell 2005, 159). The McMahon government was prepared to countenance a form of communal leasehold, using a "simple, flexible form of incorporation for Aboriginal communities", following CAA advice, but it reinforced government control of the land under the new lease system by putting potential revocation of reserves under the review of the

Legislative Council of the Northern Territory and the Commonwealth parliament. The government recognised the insecurity of Aboriginal people who did not live on reserves, and its preferred solution was for the government to purchase appropriate areas of land and then lease them to the Aboriginal communities, retaining control once again in government hands. *Access* to land held under the new Aboriginal leases was considered in some detail in the speech, with respect to mining. The government promised to consult with Aboriginal communities who would be negatively affected by mining, and insist on employment opportunities for local Aboriginal people on mining projects, but it retained the power to negotiate mining rights, in the national interest.

The McMahon statement revealed clearly how little distance the government had been able to move on Aboriginal land despite the substantial changes in ideas and advice outside the government. In exasperation, a small number of Aboriginal activists travelled from Sydney to Canberra and set themselves up under a beach umbrella, behind a sign marked "Aboriginal Embassy", and proceeded to lead a campaign for land rights (Robinson 1994). Up to two thousand supporters from all of Australia, including Yirrkala, joined the protest over the six months that it was maintained. As Smyth describes it, "the embassy proved to be a physical and psychological rallying point for Aborigines from all over Australia" (Smyth 2006, 106). At various points during that period it received considerable media attention, especially when police were ordered to move the protesters away, with a use of force which shocked the public.

The window of opportunity was thus opened by the strong political response to the McMahon statement. Whitlam, as leader of the Labor Party in opposition, was able to exploit the situation to his political advantage, using the issue of Aboriginal land rights as a substantial point of difference between his own party and the government. He visited the Tent Embassy with his wife Margaret and his spokesman on Aboriginal affairs, Gordon Bryant on the first parliamentary sitting day of the year, and his visit was instrumental in giving the protesters credibility and standing in front of the media (Hocking 2009, 391). Whitlam subsequently announced his party's policy, based on the Labor Party's elaborate party platform, calling for communal ownership of Aboriginal reserves and other areas of sacred significance, and the conferral of the rights to minerals on Aboriginal land. In October 1972, two months before the election, Whitlam announced his intention to establish a commission to inquire into land rights for all of Australia (Russell 2005, 161). The Whitlam Labor policy clearly adopted many of the recommendations made over the years by the CAA, in direct contrast to the McMahon government, and it is interesting to note that the McMahon government had given express permission to the CAA to meet with the ALP Parliamentary Committee on Aboriginal Affairs. This exchange of ideas was clearly important in shaping the ALP's election policies in this area (Brennan 2013, 257).

The election was held in December 1972, and the Labor Party's election provided the opportunity for a substantial change in Aboriginal land policy, and a rejection of the assimilation policy which had been the basis of Aboriginal policy making for almost four decades. The next chapter will consider in detail the work and recommendations of the Woodward Aboriginal Land Rights Commission, and the subsequent passage of the legislation for Aboriginal land rights in the Northern Territory.

Conclusion

The policy dynamics of the assimilation period were clearly very slow moving, and resistance to change was strong. Hasluck's ideals of assimilation and advancement for Aboriginal people were dominant throughout the period, though subject to challenges from beyond the inner circle of government, as activists and experts sought to reframe Aboriginal policy. The following table provides a summary of the Hasluck position on the four themes, and identifies challenges to each of these from a range of different sources during this temporal sequence.

Table 5.1: Comparison of Hasluck and alternative views on Aboriginal land

Theme	Hasluck's position on Aboriginal land	Challenges

Purpose	• Aboriginal reserves as transitional places to assist eventual assimilation
	• Land to be for "use and benefit" of Aboriginal people, including economic development, as defined by government, in accordance with the national interest
		Aboriginal ownership of land might be recognised on the basis of
		
		    • historical connection,
		    • spiritual relationship,
		    • economic need
		    • justice

Difference	• Aboriginal (racial) difference not a legitimate basis for special treatment; special treatment to be temporary, on the basis of need • Difference to be eliminated through assimilation	• Aboriginal people do not necessarily choose to assimilate and should be allowed freedom to choose • Difference in culture is valued and should be protected and allowed to flourish
Access	• Government control of access to reserves • National interest to prevail especially with respect to mining ventures	• Aboriginal people should be consulted and engaged in decision making about the use of their land
Governance	• Government control of all decision making around reserves; no expectation of consultation; no recognition of Aboriginal people as political agents	• Aboriginal people have capacity and interest in representing themselves to government, and taking control of their own affairs

This chapter has told a story of a period of remarkable stability in Aboriginal policy, with the dominance of assimilation as an ideology, and its refusal to countenance recognition of Aboriginal rights or ownership of the land. This account has emphasised the strong path dependency throughout this period, as the ideals of integration into a single homogenous nation outweighed any

prospect of special treatment for Aboriginal people. As we have observed, some small, incremental adjustments to the policy settings did take place, and these were important in preparing the ground for the critical juncture which would occur with the Woodward inquiry under the Whitlam government. Within government, the resolve on assimilation was strong, but outside government, it is clear that there was a growing tension between the policy objectives of assimilation and alternative views. Ultimately these objectives and ideals were impossible to sustain.

Chapter 6: From Land Rights to Legislation

The previous chapter explored the growing pressures on the Commonwealth government, in the form of expert advice, international attention and changing demands and tactics on the part of Indigenous activists in the 1960s, and considered the challenges that these posed to the dominant policy paradigm of assimilation, in terms of Aboriginal land policy. This chapter considers the response of the Labor Party to these challenges, first from the opposition benches and then from government, as the window of opportunity opened with the election of the Whitlam Labor government in 1972. The resulting Royal Commission into Aboriginal Land Rights is the critical juncture which marked the beginning of a new policy paradigm in terms of land policy, and indeed, Indigenous policy more broadly. The chapter will outline the form in which the recommendations of the Woodward Commission were ultimately legislated for Aboriginal land rights in the Northern Territory, and will observe the consolidation of these as reflected in the subsequent reviews of the legislation by Rowland and Toohey. The themes of *purpose*, *access*, *difference* and *governance* will be traced throughout to show how the paradigm shifted.

In arguing that the Woodward Commission represented the critical juncture in policy making around Aboriginal land in Australia, it is useful to recall some of the theoretical points drawn from Pierson, and outlined in Chapter 2. Specifically, the identification of a specific temporal point as the critical juncture, in hindsight, does not mean that the significance of the event was obvious to the policy actors at the time. In many cases, as Pierson observes, some outcomes can take a very long time to take effect, or become obvious due to feedback processes such as increasing returns. Thus, relatively insignificant decisions at one point in time can have very large consequences, and not all of these are intended or foreseen at the moment of the critical juncture. Furthermore, there is nothing inevitable about the decisions made at a critical juncture: it is simply a point in time at which certain decisions are made which then affect what is possible later. Thus the process of institutionalisation following a particular policy decision will mean that actors adapt their behaviour to suit new circumstances, and this will reinforce the impact of the initial decision. Another important aspect of temporality and policy making is the issue of relative timing, especially around critical junctures. This means that we must pay attention to policy dynamics in terms of the sequencing of events, as this can affect what is possible at each point in time. These theoretical aspects will underpin the analysis in this chapter.

Preparing for the window of opportunity: A new policy direction for Labor

The last chapter ended by observing the opening of a window of opportunity for Aboriginal land rights policy with the election of the Whitlam Labor government in 1972, after a notably long period of conservative government in Australia. The change of government brought a new approach to Aboriginal affairs at the Commonwealth level, and carried a different set of advisors, interests and ideas into the inner circle of decision making in this policy area, allowing new frames to be applied to the policy problem, as the Labor Party assumed power. This new policy direction was a response to the Yirrkala and Gurindji protests, which were characteristic of the more widespread tensions over competing claims over land between pastoralists, miners and Aboriginal people, and it also reflected the changing ideas among experts and activists both internationally and within Australia.

It is commonplace in policy studies to describe a change of government at an election as the opening of a window of opportunity (eg Kingdon 2003), but this can mask much of the necessary activity which precedes the change of personnel, and give an appearance of inevitability about the outcome. In this particular case, it is possible to oversimplify the story of the development of land rights policy by focusing on the charismatic new leader, Gough Whitlam, who turned the Labor Party's fortunes around and in the process, announced Aboriginal land rights as one of many other modern and far-reaching policies which profoundly changed Australian society. Such an account overlooks the role of many other individual actors, the protracted process of policy formulation within the ALP, and the importance of the policy dynamics which led to Whitlam's bold policy statement about Aboriginal land rights in the 1972 election campaign. In this section, we will explore the sequence of events which resulted in the ALP's substantial change of policy, focusing on the internal workings of the party, before examining the path to legislation through the Woodward inquiry.

The Yirrkala dispute marked an important redefinition of the issue of Aboriginal land, as we observed in the previous chapter, and the Labor Party was embroiled in the dispute from the first instant. The plight of the people of Yirrkala in the face of encroaching bauxite mining was brought to the public's attention in 1963 by a telegram sent by the Methodist missionary in the community, Edgar Wells. He sent his telegram to the FCAA, a number of church leaders and two newspaper editors, and also to Arthur Calwell, then Labor leader of the Federal Opposition (Clark 2008, 95-6). Calwell is remembered by most for his enthusiastic promotion of the White Australia policy, but his attitude towards Australian Aboriginal people was sympathetic rather than prejudiced (Brawley 2003; Kirk 2008, 58), and his "staunch Catholicism… combined with his socialist ideals to produce a strong commitment to social justice for the poor and dispossessed" (Tavan 2012, 211). It must be assumed that he supported the Yirrkala cause, especially as it was pursued by members of his party through the parliamentary process. The subsequent efforts of two policy entrepreneurs sitting on the

opposition benches, Kim Beazley (Snr) and Gordon Bryant, ensured that the Australian parliament took note of the issue, and the narrow majority held by Menzies' government in the House of Representatives in that parliament meant that opposition agitation was especially effective. Bryant's role outside parliament in the FCAA had given him further insight into the issue of land rights which was receiving increasing attention alongside the campaign for civil rights (Taffe 2005; Chesterman 2005), and as noted in the previous chapter, it was through the FCAA that Bryant and Beazley travelled to Yirrkala to investigate the situation which had prompted the telegram first hand.

The federal parliament responded by establishing the Select Committee inquiry. Gordon Bryant observed that the Yirrkala Select Committee helped to develop a bipartisan "sensitivity" to land rights, affecting the Liberal committee members as much as the Labor members, but this was not sufficient to provoke a change in policy by the Menzies government (Bryant 1966, 415). Bryant was encouraged nevertheless by the fact that the committee "went to great pains to hear Aboriginal people in their own language on their own land through the medium of skilled interpreters, with Hansard in attendance to take down every word" (Bryant 1966, 415-6).

This spirit of bipartisanship was short-lived, and this was the point in time where the Labor Party first began to develop an independent approach to Aboriginal land, though the issue had little salience for voters at election time (Goot and Rowse 2007). As noted in the previous chapter, Beazley was prompted by the Yirrkala controversy to speculate on the floor of parliament about the need for some form of Aboriginal title to land, though this idea was not taken up in public by his fellow Labor parliamentarians, and it was not included in the Labor Party's policy platform. Calwell was nevertheless willing to acknowledge the guilt that Australians felt for past treatment of the Aboriginal people, in particular the theft of their land, in a debate in 1964 on his own private member's bill aimed at amending the Constitution by referendum, as follows:

> Not only do we inside this country... feel guilty and feel that we should apologize to the aborigines for the treatment they have received from the Commonwealth over 60 years in the deprivation of their rights, but we cannot divorce ourselves from the international scene today... (W)e are vulnerable in the United Nations Organization, for it will be said against us, and quite truly, that we are discriminating against the aboriginal inhabitants of this country... We took this country from them and they have been badly treated for many generations in all States of the Commonwealth. That is on our consciences too... The aborigines are not a dying race; they are not being absorbed, or assimilated, however you like to describe it, and there are many educated and sophisticated aborigines who want to see their race preserved intact... (Calwell, Hansard, 14 May 1964)

Furthermore, Calwell was prepared to countenance an amendment to the Constitution which would provide for special legislation for Aboriginal people, a notion which was specifically rejected by Prime

Minister Menzies in a later parliamentary debate on a referendum in 1965. This approach was in line with the campaign being pursued by the FCAA at the time (Attwood and Markus 2007, 27-29). As Calwell remarked, the Prime Minister "believes that to give this Parliament a specific power to legislate for Aborigines would itself be a form of discrimination. There may be a literal and legal sense in which this is true: I cannot see that it is true in any real or practical sense. The statute books are full of special legislation" (Calwell, Hansard 23 November 1965). Calwell referred to repatriation legislation and age and invalid pensions as examples of special treatment for those in particular need, yet which are not viewed as discriminatory.

Already under Calwell, then, there was a growing awareness of the Aboriginal cause, and an emerging confidence in the value of striking a different policy stance from the Menzies Liberal government on these issues. This point of difference was perhaps more in rhetoric than in fact, as Brett (2003) observes, as the Liberal Party had certainly made advances in establishing specific civil rights during this time. Nevertheless, the Liberal Party's fear of outwardly acknowledging shifting attitudes and incremental changes within their own policies allowed Labor to exploit the symbolic differences and capture a new constituency of middle class younger voters (Brett 2003, 146-7). This is particularly evident in the 1966 election campaign. In Prime Minister Harold Holt's election campaign speech for the Coalition government he made no mention of Aboriginal affairs, although supplementary material furnished with his campaign speech referred to the equal wages issue, Aboriginal education, and the Coalition's policy to allow Aboriginal people to lease parts of the Aboriginal reserves in the Northern Territory (Holt 1966). For the ALP's election speech, on the other hand, Calwell made substantial reference to the proposed referendum to amend the Constitution, and the need for the Commonwealth to extend its responsibility for Aboriginal affairs over the states (Calwell 1966). Calwell was also vocal in his criticism of the government's handling of the Gurindji protest in parliament.

Whitlam had been Deputy Leader of the parliamentary Labor Party since 1960, working closely alongside his leader Calwell. The contrast between these two individuals was marked in approach, background, and attitude to the workings of the party machine and policy development, and these differences created clear tensions. Nevertheless, their combined efforts were valuable for the party which was rebuilding after the 1955 split (Hocking 2009, 196). As Freudenberg (1993) observed, "Despite the disparity in age, background and outlook, Calwell and Whitlam were able to create an effective partnership; Whitlam's fresh style and energy neatly complemented Calwell's earthier robustness." The combination of their very different sets of policy interests and ideas also enabled the Labor Party to appeal to a wider section of the electorate than in the past, with Whitlam's openness to international influences and post-materialist issues such as gender and racial equality

complementing Calwell's adherence to older labourist policies (Hocking 2009; Clark 2008). The partnership broke down during 1966, with profound disagreement over the issue of state aid for Catholic schools, and the divergence between the parliamentary and the executive wings of the party, and the crushing electoral loss at the end of the year was the trigger for Whitlam's successful leadership challenge in February 1967.

The change of leadership was more than simply generational: Whitlam brought a modern perspective to the party, working quickly to reform the party organisation, and to develop new policy which reflected the changing values and ideas in Australian society (Freudenberg 1977; Irving and Scalmer 2000). Calwell's public image had been closely tied to his earlier role as Minister for Immigration overseeing the White Australia policy, wedded to the values of "British race patriotism" (Meaney 1995), whereas Whitlam was a strong critic of racial discrimination, and recognised the geo-political pressures to engage more positively with Australia's Asian neighbours (Curran 2004, 93). Calwell's earnest fidelity to the party organisation and the democratic, though opaque, role of the Federal Executive in formulating policy was another point of contrast, as Whitlam agitated for substantial changes to the party's practices. In 1965 he had fought for, and obtained, an increased policy role for parliamentary members, especially the parliamentary leaders, in the National Conference and the Executive, and also ensured broader participation by party members with relevant expertise in the policy committee system (Hocking 2009, 245). He moved determinedly to consolidate these reforms to the policy structures within the party once he assumed the leadership (Irving and Scalmer 2000).

Policy development in opposition is arduous for any party, given the lack of staff and resources enjoyed by the government, and the inability to access the policy knowledge of the public service. As leader of the opposition, Whitlam promoted a Fabian approach to policy development based on research and evidence which would be used to persuade voters of the merits of the policy program at election time (Hocking 2009, 246; see also Mathews 1992). He was the first Labor opposition leader to establish his own shadow cabinet (Hocking 2009, 275), and he supplemented this within his own office by assembling a small group of close advisors who worked on developing new policy for approval and adoption into the National Party Platform (Freudenberg 1977; Nethercote 2013). Whitlam paid careful attention to research and detail, and also made very effective use of questions on notice through parliament in order to obtain key data from the government which could be instrumental in shaping new policy ideas (Mathews 1992). Whitlam also sought advice from journalists and experts in specific policy areas outside the Party, and deliberately drew on a wider range of information and expertise beyond the party membership as he worked to revise and revitalise the entire party platform in a sustained effort over several years.

Whitlam had a personal interest in Aboriginal policy. He had spent six months based at Yirrkala during his active service in World War 2, and met with members of the Yunupingu and Marika clans, and this experience was certainly instrumental in shaping his views on land ownership and the impact of state-sanctioned racism (Hocking 2009, 103-4). As leader of the opposition, Whitlam was also introduced to author and activist Frank Hardy, who was a vocal and high-profile defender of the Gurindji cause, and also met Gurindji leader Vincent Lingiari (Hocking 2009, 325). Whitlam was also keenly aware of the newly emerging international focus on indigenous rights, particularly with the passage of the International Labor Organisation's Convention ILO 107 in 1957, and the Liberal government's reluctance to ratify it, placing Australia at odds with many of its international peers (de Costa 2006, 84).

Emerging political alternatives: the importance of sequencing

The Labor opposition under Whitlam was also presented with two key sources of inspiration during this period, with the 1967 Referendum and the legislation for Aboriginal land rights in South Australia in 1966. The relative timing of these is significant, as they opened up new possibilities for the Labor Party as it developed its policy on Aboriginal land in particular. We shall examine each of these in turn.

Whitlam assumed the position of party leader only three months before the constitutional referendum on 27 May 1967. Labor had enthusiastically supported the campaign for the referendum to amend the Constitution under the leadership of Arthur Calwell, and continued to do so when Whitlam took his place. When the Holt government finally decided to put the proposed amendments to referendum in 1967, there were continuing tensions within the Coalition with respect to section 51 (xxvi). This sub-section provides for the Commonwealth to make "special laws" to legislate with respect to "people of any race" , and the proposed amendment would remove the qualifying clause "other than the aboriginal people in any State". The Holt government recognised the popular perception of the discriminatory nature of this clause, but some members feared that newly allowed "special laws" might be detrimental towards Aboriginal people rather than beneficial, and others objected to the expectation that the Commonwealth would interfere in state government management of Aboriginal affairs as a result of an amendment (Attwood and Markus 2007, 40-43). The Holt cabinet agreed that the Commonwealth would allow the referendum on the understanding that the Commonwealth would continue its existing practice of working through the states, rather than pass legislation in its own right on Aboriginal issues.

Whitlam presented the case in favour of the amendment with a very different reading of the potential for Commonwealth action. In his public statement for the ALP supporting the referendum, he explained the need for reform:

> The Commonwealth can pass laws for the people of any other race, but not for the aboriginal race. Yet the aboriginal race in many respects is more deprived than any other identifiable racial group in the world. They have the greatest incidence of infant mortality, leprosy and tuberculosis. The Commonwealth alone has the finances, and, in many cases, alone has the facilities to permit aborigines to have an equal opportunity in education, housing, health, employment, and all the social capital that Australians enjoy and expect. (Whitlam 1967 in Attwood and Markus 2007, 125)

Following the successful referendum, Whitlam and other members of the Labor Party repeatedly endorsed the ALP's view in parliament that the Commonwealth had been given the mandate, and indeed a "moral authority" to overrule the states, and to address Aboriginal disadvantage on the basis of *difference*, given their special status (Attwood and Markus 2007, 62-64). By 1969, the Labor Party's Platform declared its intention that "the Commonwealth assume the ultimate responsibility for Aborigines and Islanders accorded it by the referendum of 1967" (ALP 1969, 26). This "ultimate responsibility" was tendentiously expanded to include a mandate to legislate on land rights, even though there had been no explicit link between the land rights campaign and the "Yes" campaign for the referendum (Goot and Rowse 2007, 55-59). As Rowse (2000a, 48) observes, "Land rights had not been an issue in the referendum campaign, but it was not beyond Whitlam's ingenuity to recall it as if it had". Whitlam declared in parliament:

> "The referendum was not designed merely to remove discrimination against Aboriginals; its purpose was to give the National Parliament and the National Government authority to grant especially favourable treatment to them to overcome the handicaps we have inflicted on them. Ninety-one per cent of the formal votes cast favoured the proposal. This was more than a mandate: it was a virtual command by 5,700,000 Australians that the National Government should take a lead to promote the health, training, employment opportunities and land rights of Aboriginals" (Whitlam 1968).

Whitlam further insisted in this same speech that the Holt government's response to the demands of the Gurindji was wilfully limited in the light of the Referendum's mandate to make special laws for Aboriginal people. He argued that the government's response was restricted by an assimilationist logic of treating all Australians with a stake in land ownership in exactly the same way. The notion of making special provision for Aboriginal people on the basis of their *difference* was by this time clearly supported in the Labor Party, and was an important precursor to the development of a policy on land rights.

The land rights issue had been prominent on the public agenda with the Yirrkala and Gurindji disputes in the Northern Territory, but the southern states were not immune from debates about Aboriginal land rights. The South Australian Labor government under Premier Don Dunstan had been prompted to pass the first land rights legislation in 1966, providing an important model of land rights legislation for the Federal Labor Party to consider. The *Aboriginal Lands Trust Act 1966* was significant, as Rowse (2012) observes, because it was the first time that an Australian government contemplated changing the long-entrenched frame attached to Aboriginal reserves, in particular by redefining Aboriginal reserves as the property of Aboriginal people, rather than merely "the Crown's benign provision" (Rowse 2012, 67). This secure ownership would also form the basis of economic advancement of the Aboriginal people living on the land, perhaps through their own activities in agricultural development or establishment of artisanal industries, but also because the state government would pay royalties to the Trust on all minerals exploited on the Aboriginal land (Peterson 1981b, 118). This substantial shift in the understanding of the purpose of Aboriginal reserves was further amplified by the Dunstan government's decision to grant ownership with a fee simple title on a *communal* basis, thus affirming Aboriginal *difference*, in a direct contradiction of the dominant ideals of assimilation (Rowse 2012, 68). Rowse does note, however, that the Dunstan government's understanding of difference was not based on cultural or ethnic identity, but rather on the historical fact of mistreatment and dispossession which gave the Aboriginal people a legitimate expectation of redress.

The South Australian legislation was no less ground-breaking with respect to its handling of the issue of *governance* of the newly recognised Aboriginal-owned land. The government established an Aboriginal Lands Trust which would hold the land title for all the former reserves, and would have the power to sell, mortgage or lease the land (ALTA section 16). In practice, the land would be leased back to the Aboriginal communities who lived on it on renewable ninety-nine year leases (Peterson 1981b, 116). This Lands Trust was an oversight body which was understood to be made up of members of Aboriginal descent, nominated by residents of the Aboriginal reserves, to serve alongside the government-nominated Chairperson and two government-appointed members.

This conceptual leap in terms of governance of Aboriginal land was substantially compromised in the implementation, however. The Dunstan government was cautious about granting control to Aboriginal people from the reserve lands who may lack the education or capacity to assume such responsibilities. Parliamentary approval was required for decisions to sell or mortgage areas of land, and approval by the minister was necessary for decisions to lease areas of land (Peterson 1981b). In addition, the Minister had oversight of all appointments to the Trust and a ministerial representative was entitled to attend all meetings of the Trust (Rowse 2012, 71-73; Peterson 1981b; Lippmann 1981,

60). These safeguards did ultimately undermine the legitimacy of the Land Trust, as residents of the more remote reserves such as the Pitjantjatjara people viewed the members of the Land Trust as "part-Aboriginal people from the southern parts of the state" who had "lost their traditional law", and had little in common with those who had retained a strong traditional culture in relative isolation (Edwards 1983, 296-8). Furthermore, the Act stipulated that ownership of specific areas of reserve lands would not be transferred to the Trust until the parliament was satisfied that an Aboriginal Reserve Council was properly constituted, and Peterson (1981a, 6) shows that very little land was transferred by 1975, for this reason.

The question of *access* to the land was problematic at the time of the passage of the legislation as there were numerous mining agreements already in place over South Australia's reserve lands (Peterson 1981b, 119). Later policy developed by the Lands Trust confirmed the need to negotiate access for mining companies to obtain consent from the local affected communities who were the relevant leaseholders.

To summarise, the Federal Labor Party had been able to take a number of important steps in its policy development, in response both to internal changes of personnel and approach, and to external opportunities presenting new ways of solving the problem of Aboriginal land. While the conservative government under the leadership of Menzies and then Holt had been slow to move away from assimilationist thinking, the Labor Party had absorbed new ideas from a range of sources, challenging old ideas about purpose, difference, governance and access. The ground had been softened in preparation for new policy solutions, and these would be debated and then presented to the electorate in the form of the Labor Party's federal policy platform, which is the subject of the next section.

Revising the Labor Party Platform: putting Aboriginal land rights on the formal agenda

At the Australian Labor Party's national conference in 1967, shortly after the successful 1967 Referendum on constitutional change, the approved ALP platform included mention of the intention to make "special provisions for aborigines to reside in reservations where they prefer" and "forms of titles and land ownership to be investigated" (ALP 1967, 26). This was a cautious initial step towards policy making around Aboriginal land rights, given the context of the high-profile Yirrkala and Gurindji protests, and Whitlam's brief spell in the leadership role at that point in time.

By the time of the following national conference, two years later, the Labor Party's policy development in this area had moved on considerably, and the 1969 Platform presented some more elaborate, and far-reaching, policy objectives:

All Aboriginal lands to be vested in a public trust or trusts composed of Aborigines or Islanders as appropriate. That exclusive corporate land rights be granted to Aboriginal communities which retain a strong tribal structure or demonstrate a potential for corporate action in regard to land at present reserved for the use of Aborigines, or where traditional occupancy according to tribal custom can be established from anthropological or other evidence. No Aboriginal lands shall be alienated except with the approval both of the trust and of Parliament. Aboriginal land rights shall carry with them full rights to minerals in those lands. (ALP 1969, 27)

Furthermore, the ALP platform took note of the Gurindji protest and proposed that the dispute be taken before the United Nations (ALP 1969, 38).

The Labor Party had thus publicly declared its support of a special form of land ownership for Aboriginal people, based on their *difference*, that is, their connection to land or their ongoing need and utilisation of land. It also demonstrated its awareness of a new purpose for Aboriginal land, with the possibility of Aboriginal landowners profiting directly from mineral rights. Control over the land was also subject to a shift, with authority to make decisions about the alienability of the land being shared between Aboriginal people in the Trust, and the parliament.

These objectives remained relatively constant then, at the following bi-annual national conferences, with some minor changes to the language. In 1971, the conference in Launceston added a further objective, that "[t]he sacred sites of the Aborigines will be mapped and protected", and also linked funding of a "vigorous housing scheme" to the notion of "compensation for loss of traditional lands" (ALP 1971, 31). The Platform in 1973 was approved in almost identical form only a few months after the release of Woodward's first report. By this time, the debate around mineral rights had shifted, however, and this was reflected in the more cautious policy recommendation with respect to mineral rights on Aboriginal land: the ALP Federal Conference in 1973 declared "All Aborigines jointly to share the benefit from the development of natural resources, including minerals, on Aboriginal lands" (ALP 1973, 41). This was a more explicit articulation of an economic purpose of Aboriginal land rights, but details on the proposed mechanism for delivering the benefits, and sharing them more widely across the Aboriginal population, were not spelled out.

The 1972 election policy promise

In his six years as leader of the opposition, Whitlam and his small team of advisors had overseen the rewriting of the party platform and had it endorsed by the National Conference. In the 1972 election campaign, these policies were distilled into the campaign policy speech which was formally presented to the electorate at a televised public meeting in the Blacktown Civic Centre. In both the

televised and written versions of the speech, the Labor Party's promises on Aboriginal land rights featured prominently.

As Freudenberg has observed, this campaign policy speech was "the most thoroughly prepared document of this peculiarly Australian genre ever produced in Australia" (Freudenberg 1977, 226). In preparing the speech, Labor in opposition had the benefit of advice from the Council for Aboriginal Affairs (CAA), as Prime Minister McMahon had granted the Labor Party's Parliamentary Committee on Aboriginal Affairs access to the government advisory body in September 1972 (Brennan 2013, 257). This access is highly unusual in ordinary Westminster politics, but the McMahon government was already distancing itself from the CAA's advice over the response to the Aboriginal Tent Embassy and other issues during this period, and relations between the CAA and the Minister Peter Howson were particularly tense (Dexter 2008; Rowse 2000a). According to Frank Brennan, the CAA was instrumental in developing substantial parts of the campaign policy speech (Brennan 2013).

Crucially, the speech took on a profound significance for the government after the election, being referred to more often than the party platform. The speech was also cited as the basis of the "mandate" which the government had earned from the voters, and Whitlam himself claimed that the election had given him "a specific mandate to implement each and every undertaking of the policy speech, line by line" (Freudenberg 1977, 243). This would include the promise on Aboriginal land.

Given the developments in the ALP's Platform during Whitlam's time as Opposition leader, it is interesting to note the shift of emphasis as the policy was redesigned for public consumption during the election campaign. The policy's economic objectives were not mentioned in the campaign speech, but the importance of Aboriginal people in Australia's nationhood and its international standing were emphasised. This point is made very clear when the whole section of the policy speech is examined. Whitlam presented the plans for Aboriginal land in his election policy speech at Blacktown Civic Centre in this way:

> We shall legislate to give Aboriginal land rights – not just because their case is beyond argument, but because all of us Australians are diminished while the Aboriginals are denied their rightful place in this nation. (Whitlam cited in Freudenberg 1977, 232)

In the accompanying printed version of the campaign speech, the promise was supplemented with the following details:

> There will be a separate Ministry for Aboriginal Affairs; it will have officers in each State to give the Commonwealth a genuine presence in the States.
>
> Specifically we will:

Legislate to establish for land in Commonwealth territories which is reserved for Aboriginal use and benefit a system of Aboriginal tenure based on the traditional rights of clans and other tribal groups, and under this legislation, vest such land in Aboriginal communities;

Invite the governments of Western Australian and South Australia to join with the Commonwealth in establishing a Central Australian Aboriginal Reserve (including Ayers Rock and mount Olga) under the control of Aboriginal trustees; establish an Aboriginal Land Fund to purchase or acquire land for significant continuing Aboriginal communities and to appropriate $5 million per year to fund this for the next ten years;

Legislate to prohibit discrimination on grounds of race, ratify all the relevant United Nations and International Labour Organisation Conventions for this purpose, and set up conciliation procedures to promote understanding and cooperation between Aboriginal and other Australians; and legislate to enable Aboriginal communities to be incorporated for their own social and economic purposes. (Whitlam 1972, as cited in Lippmann 1979, 175; but see also Freudenberg 1977, 231-2)

The election campaign speech thus confirmed the ALP's new purpose of granting land on the basis of "traditional rights of clans and other groups", and elided the other potential reasons for land grants based on economic need, or a shared history of dispossession (as the South Australian government had done in 1966). This shift would prove to be a source of disappointment for many land rights advocates later on. According to the campaign policy speech, the justification of land rights would be founded on ongoing *difference*, a distinctive connection to land, which would not be shared by many of the Indigenous people living in southern parts of Australia, whose links to land had been erased over time. The promised Land Fund for the benefit of "significant communities" also held little hope for these people.

The Aboriginal Land Rights Commission

Once elected in 1972, Whitlam moved quickly to implement Labor's policy agenda, and made many substantial decisions during the few weeks of the famous "duumvirate", when Whitlam and his deputy Lance Barnard assumed all the ministerial roles between the two of them, while waiting for the Caucus to elect its ministry. Aboriginal land rights was one of the policy issues which received immediate attention, as Whitlam and Barnard concentrated on the promises outlined in the campaign speech.

Despite the clarity of the party platform and the policy speech, there was still much detail to be determined on how Aboriginal land rights might be achieved. Whitlam did not have the benefit of discussing policy decisions in cabinet or the party room, and sought little advice from the public service in the initial days of his government (Nethercote 2013), but he was able to rely on the advice of the Council for Aboriginal Affairs in the early days of the duumvirate (Dexter 2008). The

government was aware of the flurry of mining and exploration licence applications over reserve lands, and acted swiftly on CAA advice to impose a freeze on applications. Following further advice from the CAA five days later, Whitlam established a Royal Commission into Aboriginal Land Rights on 12 December 1972. The CAA also suggested the nomination of the commissioner Justice Edward Woodward, who, as a barrister, had represented the Aboriginal plaintiffs in the *Milirrpum* case. Woodward was promptly appointed, and was provided additional support by anthropologist Nicolas Peterson. Aboriginal activists were initially critical of the lack of Aboriginal representation on the Commission (Lippmann 1981, 53), but Woodward was to overcome these criticisms by establishing a radical new model of consultation with Aboriginal people, with the land councils.

The Commission's terms of reference were also largely drafted by the CAA, and reflected the years of effort the CAA had made in this area in the face of strong resistance by the Liberal government they had served (Dexter 2008, 83). The terms of reference made the point clearly that Aboriginal land rights were to be legislated, following the Labor Party's election promise, and the focus of the inquiry was to be on the details of implementation. They declared explicitly that it was no longer a question of *whether* land rights should be granted, but rather *how* to achieve it (ALRC 1973, iii-iv and 4). The Commission was constrained in the terms of reference, however, reflecting some of the political limitations on land rights which the Whitlam government confronted. Notably, the government limited Woodward's inquiry to the Northern Territory, over which the Commonwealth had clear authority under the Constitution, despite the Labor Party's clear understanding of the expansion of Commonwealth powers in the 1967 Referendum, as reflected in the Labor Party platforms discussed earlier. State governments were resistant to interference with their land management policies. The Whitlam government thus proceeded more cautiously, expecting that the state governments would be encouraged to emulate the legislation on land rights in the Northern Territory in their own jurisdictions later. In a similar retrenchment of the policy promised in the Platform, there was no space in the terms of reference for consideration of compensation for land already lost by Aboriginal people through dispossession (Lippmann 1981): instead the focus was to be on those Aboriginal people still living on lands with which they had some traditional connection. Political opposition to land rights thus curtailed the ALP's intended purpose with respect to Aboriginal land policy.

Woodward considered a range of issues which were ultimately translated into legislation, including the nature of land ownership and how it would be managed, the identification of specific areas of land (primarily existing reserves and missions) to be "returned" to Aboriginal owners, and the establishment of a process through which other areas of land could be claimed (ALRC 1974). He reflected on the basis of Aboriginal entitlement to land, focusing on traditional connections to land

which he understood to be undeniably different from those experienced by settler Australians. He also made crucial recommendations on governance and decision making about Aboriginal land, and the control of access to the land and its resources.

In all of these deliberations, Woodward's selection of recommended alternatives was inevitably shaped by the previous years of policy development both inside and outside the Labor Party. The change of party leadership, the process of policy renewal, the potential offered by the 1967 Referendum and the example of the South Australian legislation all combined to nudge policy choices in a particular direction, but it was Woodward's reports which crystallised these into a single coherent set of recommendations. His reflections were also moulded by the longer temporal sequence, the policy legacies of protection and then assimilation, as the most readily identifiable areas of land to transfer to Aboriginal ownership were those which had been reserves and former missions. This meant that land rights could provide a form of welfare to those Aboriginal people who were otherwise largely disengaged from the "mainstream" economy, but it was not able to benefit the Aboriginal people who had left their traditional lands and moved to the Territory's urban centres (Peterson 1985).

Woodward's 1973-74 Commission was the point in time at which key policy alternatives were weighed up and choices made, setting in train a pattern of positive feedback, or increasing returns, which had a significant effect on subsequent policy. This is the defining feature of a critical juncture, according to Pierson (2004). A critical juncture does not mean that subsequent departures from a policy direction are no longer possible, but simply that the range of choices is gradually reduced over time, as social capacity and political institutions become self-reinforcing. Woodward explicitly stated his concerns about trying to formulate policy knowing it would have far-reaching consequences into the future for Aboriginal people in the Northern Territory, and he attempted to build as much future flexibility as possible into his recommendations (ALRC 1974, 35). Nonetheless, the impact of the provisions laid down in his report are undeniable. The Woodward inquiry can thus be seen as the "critical juncture" for Aboriginal land rights policy. From this point onwards, Aboriginal land owners and the institutions working around them in the Territory were affected by feedback processes which would generate a remarkable stability in the policy area for decades into the future.

Interestingly, the significance of the "critical juncture" was observed at the time by at least one contemporary. Gerard Brennan (later Chief Justice of the High Court) was a barrister briefing the Northern Land Council during the inquiry. Brennan observed in his submission to Woodward that "this is a report which will for all time mark the high-water mark of possible Aboriginal aspirations.

Whatever Your Honour does not recommend in favour of Aborigines, at this stage, will never be granted" (cited in Woodward 2005, 141).

Woodward delivered an interim report in July 1973, and a final report in April 1974, and his recommendations ultimately formed the basis of the *Aboriginal Land Rights (Northern Territory) Act 1976* (referred to hereafter as the ALRA). The next section considers his two reports in detail, observing the Commission's framing of *purpose*, *difference*, *access* and *governance* in a manner which would establish the bounds of the political possibilities for Aboriginal land in Australia into the future.

Woodward's critical juncture: the "high-water mark of possible Aboriginal aspirations"

Presenting his final report for the Aboriginal Land Commission, Woodward outlined a vision for the way in which land rights would improve the living standards and opportunities for Aboriginal people in the Northern Territory, and in doing so, set out a very clear statement of a new purpose for Aboriginal land. Woodward saw the recognition of land rights as "only... a first step on a long road towards self-sufficiency and eventual social and economic equality for Aborigines"" and he insisted it was an "essential step, even though its outcome may not be fully apparent for many years" (ALRC 1974, 138).

The five aims Woodward identified for the recognition of land rights were wide-ranging in scope: for Aboriginal people, they provided the possibility of some justice after being deprived of their land, some continuation of a spiritual relationship with their own land, and the granting of land as a "first essential" for an economically disadvantaged people. For Australians more broadly, the aims included "social harmony and stability" as the demands of a minority group would be satisfied, and Australia's international reputation would thus be enhanced (ALRC 1974, 2). The economic potential of land ownership was canvassed in considerable detail in the report, with discussion of the potential for cultivation, cattle grazing, forestry and fishing, as well as royalties from mining on the land (ALRC 1974). Woodward was insistent that these uses of the land should be secondary to traditional use of land, which included the spiritual significance of the land which Woodward understood to be vital to the Aboriginal people's identity, if that was what the traditional owners decided (ALRC 1974, 74-82).

Woodward thus reframed the *purpose* of Aboriginal land in three important ways. Firstly, the land was no longer to be conceived of as Crown land which was temporarily available for Aboriginal residence or sanctuary, under the supervision of missions and government officers. Instead, the Aboriginal people were recognised as traditional owners, whose presence pre-dated the arrival of the Europeans by many thousands of years, and on the basis of that legitimate claim, they were to be given freehold, inalienable title which ensured that the land could not be owned by non-

Aboriginal interests in the future. Woodward had observed the misfortune of many Indigenous people in North America whose lands had been exchanged for welfare payments or cash, or had been divided into small allotments which were unable to sustain communities, and he sought to avoid such outcomes in the Northern Territory context with the special qualities of the Aboriginal land title he recommended (ALRC 1974, 5-8). Aboriginal communities would enjoy security in their tenure, with choices about where they could live on their traditional lands. The comprehensive nature of the land title would mean that individuals, businesses and government agents who accessed the land would be required to pay for leases or obtain permits (ALRC 1974, 16-17).

Secondly, the economic self-sufficiency which he hoped to see some Aboriginal communities develop over time using their land was another crucial aspect of the new frame he presented: no longer was the land simply to be cultivated for subsistence, to allay the costs to government of running missions or settlements in remote areas, or exploited in the interests of others. Instead, the traditional owners would be encouraged to derive economic benefits from the land, and directly enjoy the profits as a community, where it was both viable and in accordance with their capacity and willingness, as well as their spiritual relationship with the land to do so. Thirdly, the purpose of the recognition of land rights would also allow for Aboriginal people to choose to remain different, and continue to live separately from the rest of the Australian population, if that was their desire.

Aboriginal *difference* is the next frame which Woodward challenged with his inquiry. Woodward refused to deny or stifle difference, but sought to understand and to accommodate it in a variety of ways. His extensive consultation and travelling to almost all Aboriginal communities as part of his inquiry gave him a strong foundational grasp of the resilience, integrity and value of Aboriginal culture, and the determination of the Aboriginal people to protect it. A substantial section of his first report drew on anthropological studies to explain the special and highly complex relationship between Aboriginal people and their land, and Woodward remarked that "some Aboriginal concepts related to land-owning have no parallel in European law" (ALRC 1973, 12). He observed with some sympathy the desire of some Aboriginal people to move away from settlements and live more traditional lives, albeit supported by modern technology and services when appropriate (ALRC 1974, 75-76). Woodward also emphasised the importance of protecting sacred sites and observed that "[b]ecause of the Aboriginal's personal identification with his land, such places are even more important to him than are places of worship to members of other religions" (ALRC 1974, 100).

The form of land title which Woodward devised was therefore a careful blend of recognisable features of property law (such as freehold title, or fee simple), and the more innovative provisions designed to protect the specific, different nature of Aboriginal land ownership. He recognised the

imperative of creating communal, rather than individual, title (ALRC 1973, 37), and also applied an additional protection in the form of the requirement that the title be inalienable (that is, unable to be sold or mortgaged) (ALRC 1974, 13). Interestingly, this expression of difference could reduce rather than exacerbate political resistance amongst non-Indigenous Australians, as Peterson (1981) observes. Communal ownership, as a marker of difference, was a particularly important measure which could make land rights palatable to the wider Australian community: "Had land rights been sought in terms of individual entitlement, it would surely have foundered amongst electorates where too many non-indigenous people do not own land either" (Peterson 1981a, 4).

The report recommended the immediate grant of land title over those lands which were already reserves or missions designated for Aboriginal people. This reflected the advice given by WEH Stanner in a written statement to the Commission, arguing that that the reserves allowed for the highest degree of "continuity" with respect to traditional conceptions of land, in terms of there being a clearly identifiable group of "right people" to whom each particular area of land is understood to belong, and also the authority that these "right people" have to determine who may access the land (Williams 2008, 208). These preconditions would ensure that the land grants would be relatively uncontested, in both the Indigenous and non-Indigenous populations, as these lands and their traditional owners were otherwise disconnected from the cash economy (Rowse 1998; Peterson 1985).

More controversially, Woodward allowed for a further concession of difference, in recommending that those Aboriginal people who did not live on reserves or missions with which they had a traditional connection should also receive land on the basis of need. In particular, Woodward referred to those "fringe dwellers" living in camps or transitional housing on the edges of Darwin or other major towns such as Alice Springs and Katherine, and to communities living on areas of land which were subject to pastoral leases. Woodward's report recommended that "Aborigines should be provided for in the places where they are used to living. Even if no traditional rights are involved, these areas are often important to them from long association" (ALRC 1974, 51). Woodward's intention was that town planning decision makers consider Aboriginal interests a priority, thus avoiding the arbitrary displacement of Aboriginal residents when areas of land were selected for development and construction. In most cases special leasehold would be sufficient to protect Aboriginal residents. Where compensation was necessary, he suggested that it would be appropriate for land to be purchased on their behalf. For those communities living on pastoral leases, he proposed special purpose leases or government purchase of the land, through the proposed Aboriginal Land Fund, to allow security for long-term residents (ALRC 1974, 39). The proposed excisions were not large: as Woodward described them, they would be "large enough to ensure

privacy and provide an opportunity for small farming ventures… to supply the needs of the community (ALRC 1974, 49).

Woodward was not prepared to allow difference to mean disadvantage, and he expressed his concern that communities on Aboriginal land would still receive essential services: "I certainly assume that funds will be made available for Aboriginal housing and for the supply of the basic community services such as sewerage, water supply and, in due course, electricity, which today are normal for any established Australian community" (ALRC 1974, 45). Furthermore, he recommended that mining royalties continue to be allocated by government to communities through the land councils, in order to address the most urgent needs in improving living conditions and employment (ALRC 1974, 113). Again, as Peterson observes, these special provisions for Aboriginal people would only be politically acceptable because they would be allocated at the community level, not to individuals (Peterson 1981a, 5). These royalties and compensation payments associated with mining on Aboriginal land would provide land councils with considerable independence from the government, in a pattern of positive feedback, as we shall explore further later.

Another significant recurring theme in Woodward's report is concerned with the frame of *governance*. Woodward reflected extensively on the forms which governance would take in the new era of recognised Aboriginal land ownership, and while his advice reflected earlier suggestions made by Rowley and the CAA, his innovative approach provided a clear way forward for the government, and was very quickly acted upon. Governance, for Woodward, involved two different functions: consultation and decision-making.

An essential part of Woodward's task, in conducting the inquiry, was to engage in a process of consultation with Aboriginal people, as well as with anthropologists and advisors. Consultation proved difficult at the outset, and Woodward acknowledged the need for Aboriginal people to organise themselves, to receive information and independent advice about the proposed land rights legislation, and to be able to represent themselves in negotiations about land which affected them. His preliminary report thus recommended the creation of two regional land councils which would between them represent communities over the entire Northern Territory (ALRC 1973, 41-44). The resulting Northern and Central Land Councils were established, with administrative support and funding from the Department of Aboriginal Affairs (DAA), and were immediately involved in the inquiry process. The Councils were made up of Aboriginal representatives chosen by the different dialect groups, tribal or ethnic groups, and communities, and were designed to reflect "traditional leadership and traditional rights" (ALRC 1974, 66). By the time of writing his second report, Woodward was able to pronounce the two land councils "an unqualified success" (ALRC 1974, 66),

though he acknowledged the challenges for land council representatives in establishing legitimacy across a large geographical area, and in consulting equally with the many different communities and clans. The speed with which the land councils were formed and put into action meant that they did not have time to integrate Aboriginal decision-making structures and authority, and this did impact on their legitimacy both within the Aboriginal communities and outside them (Russell 2005, 168). The significance of these apparently small decisions in the early stages of Woodward's inquiry would become more apparent over time, as the feedback process took hold, and the role and significance of the land councils became clearer.

In making his initial recommendations on the land councils, Woodward explicitly recognised the range of different interests across the communities and the traditional, very localised forms of land ownership and decision making in Aboriginal culture, but argued that the larger councils would provide both strength and practical benefits, simplifying the already extremely difficult process of ensuring effective consultation (ALRC 1973; see also Woodward 2005, 135). In his report, Woodward noted the "contemptuous" treatment of the Oenpelli people by Queensland Mines, and such cases reinforced the need for traditional owners to be better represented in such negotiations. This was a point recognised with concern by others in the Aboriginal policy network at the time, including the CAA (Rowse 2000a, 146-148). Woodward did not necessarily see this arrangement as permanent, however: the report's recommendations envisaged the potential to form smaller regional land councils later, should it be desired by the Aboriginal people themselves (ALRC 1974, 66-68).

The second function of governance for Woodward was similarly groundbreaking. He explicitly supported the notion of allowing Aboriginal people to make their own decisions about their land, and especially, for flexibility to be built in to the land rights legislation to allow them to modify and adapt their uses of the land, as their needs and desires change over time (ALRC 1974, 10 and 137). In this sense Woodward was articulating a new direction in terms of governance, allowing for Aboriginal people to control their own land, and participate in the decision making which would determine their own future. As he observed in the first report, engaging the Aboriginal people in the decision making was essential to the success of the policy around Aboriginal land, thus

> I am convinced that an imposed solution to the problem of recognizing traditional Aboriginal land rights is unlikely to be a good or lasting solution. Although a result reached, so far as possible, by a process of consultation and agreement will undoubtedly take longer to achieve, it is far more likely to be generally acceptable and to have permanent effect. (ALRC 1973, 8-9)

Woodward went further in his second report, identifying as one of his "main principles" the necessity of genuine consultation underpinned by recognition of the Aboriginal people's rights as interlocutors. He affirmed, therefore, that

> *The Aboriginal people themselves must be fully consulted about all steps proposed to be taken*. They must be given every opportunity to consider and criticize the proposals and to negotiate with the Government for changes in those proposals. (ALRC 1974, 9; emphasis in original)

He encouraged Aboriginal people to adopt their own appropriate mechanisms to ensure decision-making practices reflected Aboriginal culture, political behaviour and leadership structures, and observed the importance of allowing Aboriginal people to adapt their structures to suit their own needs as they evolved (ALRC 1974, 11). Woodward did not use the term "self-determination", but he clearly recognised that there was a substantial range of issues about which Aboriginal people "should be permitted and encouraged to regulate their own lives instead of having all such decisions made for them as in the past" (ALRC 1974, 74).

Woodward understood the importance of providing land councils with adequate resources not just to be able to hold meetings and engage in consultation, but also to obtain appropriate legal and other advice and professional support in negotiations (ALRC 1974, 111). He was also concerned with the need for land councils to have guaranteed funding which was not dependent on government benevolence. He therefore proposed that funding from leases and permits over areas of Aboriginal land be given to the land councils, along with a fixed portion of the funding received from mining royalties on Aboriginal land, through what was then called the Aborigines Benefits Trust Fund (ALRC 1974, 114).

The function of the land councils was not to own the land, but rather to act as agents for the Land Trusts. These were bodies which would be formed specifically to hold the inalienable communal land title, and which would more closely reflect tribal ownership in each locality (ALRC 1974, 71). Land councils would be required to consult with traditional land owners and represent their interests, to government and to mining companies or others seeking access to the land. Woodward recommended that the land trusts be funded through the land councils (ALRC 1974, 114).

A further facet of governance which attracted Woodward's attention was the problem of communal ownership which would need to be accommodated in the Australian system of property law, in addition to providing for a form of accountability for funding and decision making purposes. His solution to this was to recommend that the Commonwealth create a special type of Aboriginal incorporation which would provide simplicity and flexibility, allowing for adaptation to changing needs, along with "a good deal of administrative discretion" (ALRC 1973, 54; see also ALRC 1974, 65-

66). The Whitlam government concurred with Woodward's recommendations in his first report, and proceeded on this basis immediately, drafting the legislation, though the *Aboriginal Councils and Associations Act 1976* was not passed until after the Whitlam government had lost office.

In a final aspect of governance, Woodward linked the Aboriginal forms of self-governance outlined above to the non-Aboriginal systems of accountability and disputes resolution with the proposal to establish a government body, the Aboriginal Land Commission. This authority would consider potential expansion of claims of Aboriginal ownership over areas which were subject to pastoral leases, and investigate other claims for grants of land for Aboriginal purposes. The Commission was also designed to investigate and assist in the resolution of disputes over Aboriginal land ownership, to negotiate with the Northern Territory government on urban planning and the settlement of secure living areas for Aboriginal people in town areas, and to make recommendations to the Minister on the purchase of land for Aboriginal communities who had no claim over land where they lived. Woodward carefully stipulated the decision making powers of the Minister, affirming the importance of ministerial responsibility in the governance of Aboriginal land and its interaction with the demands of non-Aboriginal interests (ALRC 1974, 46-49).

Woodward introduced another new frame for Aboriginal land with respect to *access*. His report recognised control of access as an essential feature of ownership, and thus consolidated the new, inverted construction of access which had begun to emerge following the presentation of the Yirrkala bark petition. No longer was it a matter of preventing Aboriginal people from leaving reserves, nor was it a matter of missions and government superintendents controlling access by non-Aboriginal people who may corrupt or endanger the Aboriginal residents. Access followed Woodward's insistence on Aboriginal control of the land, and thus the terms of access were to be entirely in the hands of the Aboriginal land owners. As Woodward argued, "One of the most important proofs of genuine Aboriginal ownership of land will be the right to exclude from it those who are not welcome" (ALRC 1974, 18).

Part of the concern with access as Woodward understood it was still to protect Aboriginal people from unwanted contact with non-Aboriginal intruders, though he presented it in terms of privacy and protection of property, rather than contamination or corruption, with the notable exception of the supply of alcohol. This was reflected in his discussion of the possibility of allowing for commercial fishermen using waters extending beyond Aboriginal land (ALRC 1974, 81), and the potential for communities to choose to encourage tourism on their land (ALRC 1974, 92-93). It was also noted in connection with the construction of roads across Aboriginal land, as this could result in "easier access to alcohol that is not controlled by the community, unwanted visitors unaware of or infringing permit

requirements, increased demands for entry as of right, the desecration of sacred sites close to roads and unregulated hunting" (ALRC 1974, 87). Woodward recommended that land councils be given the legislative power to restrict access to land by non-Aboriginal people through the granting (and revoking) of permits. He listed a small number of exceptions of categories of people who should be allowed access without permits, including police officers, parliamentary representatives, government officers, judicial officers and medical staff requiring access to be able to carry out their duties (ALRC 1974, 18-19).

The most important aspect of access concerned mining on Aboriginal land, the subject of the Yirrkala protest and the *Milirrpum* case which had been the catalyst for the Whitlam government's change of approach to Aboriginal land, and a notable part of Woodward's terms of references for his inquiry. Mining companies pressed their concerns very firmly on the Aboriginal Land Rights Commissioner, and he considered them at length in his second report (ALRC 1974, 106-7). He observed the national economic interest stemming from mining, and recognised that Aboriginal people had little traditional use or claim over the minerals beneath the surface of the land, concluding that minerals under Aboriginal land belonged to the Crown, as in all other parts of the continent (ALRC 1974, 115 and 127).

A key aspect of the mining industry's reasoning was based on the temporary nature of Aboriginal "special requirements for assistance" which meant that any measures currently in place to protect Aboriginal interests (based on difference) should be terminated in the foreseeable future to prevent undue advantage or "privilege" over non-Aboriginal Australians (ALRC 1974, 106). Woodward rejected this assimilationist argument, concluding that "I believe that to deny to Aborigines the right to prevent mining on their land is to deny the reality of their land rights" (ALRC 1974, 108). He presented a fundamental caveat, therefore, insisting that Aboriginal landowners have the power to veto exploration, and thus the subsequent mining activities, on their land, with cases of exceptional national interest to be overruled by the Minister alone (ALRC 1974, 108). He noted the substantial benefits which could be derived from mining royalties for Aboriginal communities, but prioritised the Aboriginal rights to withhold access as a manifestation of their ownership of the land. This was a substantial leap from the policy of the previous Liberal government, which had given preference to mining company access over Aboriginal interests.

From the critical juncture of the Woodward Commission, we can observe the far-reaching impact on the policy environment. Traditional Aboriginal ownership of land was at last positively constructed, and the landowners themselves, as the target population, were treated as important and deserving of proper consultation. Recognition of land rights was seen to have benefits for the Aboriginal

communities, but also for Australia as a whole. Over time, the land councils developed expertise in making land claims and other aspects of land ownership, and as their resources grew, they were able to draw on legal and anthropological advice in dealing with government and others with interests in their land. Successful land claims provided further positive feedback, despite the consistent opposition of the newly formed Northern Territory government. Land councils soon came to be recognised as authoritative and legitimate representatives of Aboriginal people in the Northern Territory, and their growing status ensured that their submissions to government, and their contributions to public debate, were treated seriously. As early models of what was to become the Indigenous Sector, as Rowse has called it, the land councils demonstrated the potential of self-determination, and the capacity of Indigenous people to control their own affairs, even if reliant on government funding (Rowse 2002). As we shall see in the next sections, the self-reinforcing nature of the policy around land rights and land councils ensured that key decisions made by Woodward, and translated into legislation by the Fraser government, were amplified and strengthened over time, making later attempts to reverse the decisions very troublesome.

From recommendations to legislation

Woodward's aims and guiding principles were particularly influential in shaping and constraining subsequent policy making on Aboriginal land rights. However, it is important to note that not all his recommendations were adopted when the land rights policy was finally legislated in 1976. The legislation fell victim to a remarkable period of unstable politics in Australia, having just failed to pass the final hurdle in the legislative process when the Whitlam government was dismissed in November 1975, and succeeded by the Liberal government under Prime Minister Malcolm Fraser. Despite the Liberal Party's persistent hostility to Aboriginal land rights over the previous decade, Fraser was convinced of the importance of the legislation, but there were political and ideological caveats to be applied. By the time the legislation was reconsidered and passed by the new government, it had been modified in several key respects.

Aboriginal affairs had received minimal attention during what was an especially divisive election campaign in 1975. During the campaign, the Liberal Party promised that there would be "no change in policy or funding" for Aboriginal communities (cited in Eames 1983, 270), and this was interpreted to mean that the land rights legislation would be left unscathed. Not long after the election, the tensions within the coalition over Aboriginal land were becoming hard to conceal, and Fraser was wrestling with objections from members of the National Party, the coalition partner, and also within his own party room (Fraser and Simons 2010, 170). Interest groups had mobilised against the legislation of land rights, notably the Australian Mining Industry Council, and the Northern Territory government was also vocal. As Dexter recalls, "In January 1976 [the CAA] submitted the lapsed land

rights legislation to Fraser in some trepidation, as we were not at all sure he would pick it up… Fraser wavered under pressure from the right wing of the Liberal Party; but this was countered by strong pressure from Senator Fred Chaney and colleagues" (Dexter 2008, 85).

Eames describes fears within communities in the Northern Territory during this period that the new government intended the "virtual abolition of the land councils" with the removal of their anticipated role in making land claims, and the reduction of their role to administrative tasks. Reports circulated that the Commonwealth intended to hand the land rights legislation to the Northern Territory Assembly to enact (Eames 1983, 270-1). Neither of these changes to Woodward's governance recommendations was acceptable to the Central Land Council. Land councils had not been in existence for long but already the positive feedback process was working to create expectations within the Aboriginal communities of their right to be adequately represented and treated with respect as political actors. Activists were also horrified at the proposed weakening of Woodward's recommendations on access, in particular with the softening of the power to veto mining activities, and the suggested handing of control over access to Aboriginal land, including roads, to the Northern Territory government (Lippmann 1981). Most significantly, observers were deeply disappointed at the removal of the provision within the legislation of the ability to claim land on the basis of need, a substantial revision to Woodward's recommendation on the *purpose* of Aboriginal land rights (Howie 1981; Lippmann 1981). The last three of these proposals were ultimately included in the legislation, despite fierce protests.

The land councils and Aboriginal leaders were quick to make their views known to the Fraser government, making representations directly to Fraser and his ministers. The institutional arrangements around Woodward's inquiry and his recommendations had given these leaders a confidence in their right to engage critically with government on matters which were to affect them. They were also much better informed about policy decision making processes in Canberra than they had been before Woodward's inquiry, another important product of the new land council structures which Woodward had helped to create. Protest marches were also held in Alice Springs as well as in the southern states. As Charles Perkins observed, the protest march in Alice Springs in March 1976 revealed the strength of the views of Aboriginal people on the promised land rights legislation: land rights were not simply the product of activism by well-meaning supporters in the south, but were an urgent necessity for Aboriginal people who were still being pushed off their land and losing sacred sites to miners, pastoralists and developers (Perkins 1998, 18-19). This show of strength was also important in reinvigorating the land councils as more than simply a creature of the government designed to simplify consultation with Woodward. The feedback processes had taken hold, and the

consequences would stretch far beyond anything imagined by Woodward or the Whitlam government.

The broad purpose of Fraser's legislation was the same as that of the earlier version drafted by Whitlam's government. Neate (1989, 12) observes the strong similarities between the second reading speeches of the respective Ministers for Aboriginal Affairs when presenting the Labor and then the Liberal versions of the Aboriginal land rights bills to the House, especially with respect to the "general purposes of the legislation", and notes the remarkable level of bipartisanship which these speeches captured during this period of time, despite the adversarial political atmosphere more generally. The purpose for the Liberal government was narrowed in a substantial manner, however, with the decision to remove the possibility of claiming land on the basis of need. Instead, as the Minister Ian Viner argued in his second reading speech, the beneficiaries of land rights would be restricted to those who retained a traditional cultural connection to areas of land which remained unalienated, that is, still Crown land.

This was a particularly disappointing outcome for many in the land rights movement (Howie 1981). By excluding those who had moved (or been moved) away from their traditional lands, or those who could no longer access their traditional land, the Fraser government was withholding land rights from many Aboriginal people in the Northern Territory who lived in town camps, or who lived on land which was subject to a pastoral lease (ALRC 1974, 32-64). The Liberal government's legislation also effectively excluded areas of land which had been deserted as traditional owners were no longer alive and able to claim them (Lippmann 1981). For those whose lands were not already identified reserves or missions, the prospect of an adversarial and contested claims process was a daunting one. The Liberal government's reframing of the purpose of the land rights legislation also pointed to a more restricted understanding of difference, compared to the earlier version drafted by the Labor government. Where the ALP had sought to use the legislation to positively acknowledge the Aboriginal system of law around land ownership, which had been the subject of the *Milirrpum* decision, for the first time, the Liberal legislation in contrast adopted a more protectionist tone in awarding land rights as a means of allowing traditional culture to continue, in isolation and out of sight (Neate 1989 13).

The Northern Territory was granted self-government from 1 July 1978, and the relative timing of this initiative is significant. The Commonwealth passed the ALRA before authorising Northern Territory self-government, and the Territory government was bound by the Commonwealth legislation from the beginning, unable to amend or repeal it. The Fraser government decided to give responsibility for essential elements of access to the Northern Territory Legislative Assembly, though it continued

to take an active interest in the practical implementation of any resulting legislation. In particular, the Assembly was given power to legislate on the management of Aboriginal land, a permit system to control access to Aboriginal land, the protection of sacred sites, and also wildlife conservation and the management of coastal waters (ALRA Section 74; see also Lippmann 1981, 54). On being granted self-government, the Northern Territory government passed the *Aboriginal Land Act 1978* and the *Aboriginal Sacred Sites Act 1978* to fulfil these objectives. These Acts had come under the scrutiny of the Commonwealth parliament in their drafting, with the Commonwealth parliament's Joint Select Committee on Aboriginal Land Rights in the Northern Territory (JSC), chaired by Senator Neville Bonner, conducting a critical review in 1977. Bonner's review noted a number of unsatisfactory aspects of the Territory's legislation, especially where it departed from the Commonwealth's legislation or Woodward's recommendations, but the government-dominated committee did not question the role of the Territory in making its own legislation (JSC 1977). A dissenting "Protest" by the ALP's Gordon Bryant deplored the delegation of power to the Territory, however, pronouncing it "an abdication of the responsibilities imposed upon the Parliament by the people of Australia by the referendum of 1967", and "a failure" (JSC 1977, 71).

Consolidation

The legislating of Aboriginal land rights in the Northern Territory did not immediately calm the divisive politics around the issue, and protest and resistance continued in a number of policy venues for years after the ALRA took effect. The mining sector was especially vocal in criticising the land rights legislation and its impact on exploration and access to minerals in the Northern Territory (Altman and Peterson 1984; Rowse 1986; O'Fairchealleagh 1988). Other interests which depend on access to land were also mobilised against the legislation, including those engaged in pastoralism, fishing, tourism and agriculture (Altman and Dillon 1988). Public opinion in the Northern Territory was also hostile, as Lippmann noted in 1981:

> Parts of the Land Rights Act have been implemented and parts rejected: the political fight goes on. Innumerable public statements are made in the Territory and letters to the editor are published in the press claiming that Aborigines are secretly practising apartheid in reverse and restricting whites from entering Aboriginal territory. (Lippmann 1981, 58)

The key sources of tension were thus *access* and *difference*, with respect to the treatment of Aboriginal and non-Aboriginal Territorians.

The establishment of the new level of government in the Northern Territory provided an additional political arena for those opposed to land rights. It was widely recognised at the time that the electoral politics in the Northern Territory were very different from those in the states (Jeansch and

Loveday 1979). The political culture in the Northern Territory in the 1970s was observed to be especially conservative, being the product of isolation and poor transport and communications, a distinct frontier pastoralist economy, and an unusual political environment where there was no urban working class, no large metropolis, and no labour movement (Rumley 1979). The Territory was heavily reliant on Commonwealth funding to support its weak economy, and self-government was bestowed by the Fraser government, after seven years of debate in Canberra, despite relative apathy on the part of Territorians and active opposition from the Darwin-based public service (Heatley 1996, 55-56). This culture generated a new legislature which was effectively a one-party polity for a remarkably long, uninterrupted period, with the Country Liberal Party holding government in the Territory from self-government in 1978 through to 2001.

The Country Liberal government was a consistent critic of land rights, challenging land claims through the Aboriginal Land Commission and the court system at every opportunity, and arguing tenaciously against ceding to Aboriginal ownership a growing proportion of Territory land. Altman and Dillon (1988, 133) describe the CLP government during this period as the "natural adversary of the land rights legislation", though they contend that the economic development of the Northern Territory would depend on a more cooperative relationship between the government and the Aboriginal land councils.

Despite differences of opinion within the Federal government, notably between the Liberal Party and its coalition partner the National Country Party, Prime Minister Fraser's support for the broad policy directions outlined in the ALRA was unwavering (Heatley 1980, 45). The ALRA was amended several times during the Fraser years, partly to address operational issues emerging as the Act took effect, and partly to address the demands of mining companies, particularly around the Ranger Uranium mine, but the core principles of the legislation remained unchallenged. Meanwhile, the land councils were growing in capacity and experience, by this time, and were active in negotiations between mining companies and Aboriginal communities, and also engaging in disputes between the Northern Territory and Commonwealth governments (Altman and Dillon 1988). This period of consolidation was essential in establishing the patterns of positive feedback which would later reinforce the land rights regime and the land councils which were its primary defenders.

In 1978, Coombs was cautious about the success of the land rights legislation, in the face of the negative public opinion and the sustained campaign by interests and the Northern Territory government. He questioned the permanence of land rights:

> The present situation has a transitory air. It seems likely that either political pressure will generalise
> more widely the proposals established by the Woodward Commission, or the present backlash will

whittle them away, returning Aborigines to their former dependent and powerless condition. (Coombs [1978] 1994, 40)

It was certainly true that the *Aboriginal Land Rights (Northern Territory) Act* had significant enemies, and the Coalition parties later came to see the legislating of land rights as a mistake (Bennett 1989, 31; Goot and Rowse 2007, 67). Nevertheless, the critical juncture of the Woodward report and the legislation which followed had set in place a path dependency which would make the policy difficult to turn back.

Rowland: Evaluation as a "Working Paper"

Woodward recommended in his report that the land rights policy be reviewed after three years, and then every seven years afterwards (ALRC 1974, 137). In 1980, the Fraser government's Minister for Aboriginal Affairs, Senator Fred Chaney, commissioned a review of the ALRA by a fellow barrister from Perth, Mr B W Rowland QC. Rowland wrote a short report, which he described in his conclusion as having "turned out to be more of a working paper than an attempt to give definitive answers" (Rowland 1980, 73). As an evaluation report, the Rowland report is certainly unusual, as it makes few clear recommendations, rather presenting a meandering discussion of issues and reporting of submissions made, perhaps reflecting some ambivalence about the policy itself, and the premature timing of the evaluation. Where there were questions which Rowland deemed to be "political", he was quick to recuse himself from the discussion, as, for example with the evolving relationship between the Commonwealth and the newly established Northern Territory government. As Rowland expressed it, "The political and legal connotations of the relationship between the Northern Territory Government and the Commonwealth government involve considerations with which, in my belief, I should not be embroiled" (Rowland 1980, 69).

The evaluation's terms of reference requested a review of the "practical operation" of the ALRA, and Rowland interpreted these in a most constrained fashion, declaring that "most of the matters which were put to me involve questions of policy which is for the Government to resolve, not me" (Rowland 1980, 4). The terms of reference listed a number of specific issues requiring consideration, but insisted that these be reviewed "without detriment to the basic principles of the act" (Rowland 1980, 75 Appendix 1). Rowland made a point of determining for his own benefit the "basic principles" in a strict, legalistic manner, focusing on the text of the legislation and refusing to consider external documents such as ministerial statements or even the Woodward Report itself (Rowland 1980, 2), and this allowed room for some departure from the original frames around *purpose*, *access*, *difference* and *governance* as Woodward had developed them.

Rowland lamented the lack of submissions from the Northern Territory government and from the Northern Land Council, and the limited submission received from the Central Land Council (Rowland 1980, 73 and 1-2), and clearly the absence of contributions from these key interests limited the effectiveness and the legitimacy of the evaluation process. In parliament, the Liberal Minister Ian Viner was obliged to defend the extent of consultation Rowland had engaged in against claims that he was too focused on mining interests at the expense of Aboriginal stakeholders, and he insisted that Rowland had "met with both land councils… and visited many Aboriginal communities" (Viner, Hansard 30 April 1980). The report was the subject of further controversy the following year when the Federal Labor Opposition tabled a submission by the Northern Territory Government in the Australian Parliament, revealing the Northern Territory Government's marked hostility to the ALRA and its perceived impact on economic growth in the Territory (Bennett 1982, 18). It may be assumed that Rowland was aware of these views, even if the submission had not been formally presented, as he records having had discussions with many Northern Territory public servants, with the support of the Chief Minister (Rowland 1980, 1).

Rowland's evaluation was conducted early in the life of the legislation, and many practical implications were still being discovered. The evidence he considered was focused on these difficulties of implementation, in particular from the point of view of the mining companies with interests in the Northern Territory, and the newly-created Northern Territory government. The contestation over the legislation was about details, however, rather than about the existence of land rights themselves. In providing a detailed summary of the submissions he received during the course of his inquiry, he noted that "despite expressions of disquiet at what some considered to be the divisive nature of the legislation, most who made submissions to me did so on the basis that the legislation existed and efforts should be made to make it work" (Rowland 1980, 24). Rowland thus acknowledged that the ALRA was not itself under challenge; the critical juncture of the Woodward inquiry had passed and the policy choices available to him, and to the government which had commissioned his review, were already constrained.

Rowland's interest in the operational functioning of the Act shaped his consideration of the land councils and their role. With the path-dependent pattern of increasing returns flowing from the passage of the legislation, land councils were by this time implicated in rapidly growing numbers of land claims processes, as well as actively lobbying government and negotiating with mining companies. Rowland expressed disquiet, therefore, at the "ability of the Land Councils to cope" given their limited financial and human resources (Rowland 1980, 36).

Somewhat contradictorily, Rowland revealed misgivings at allowing the land councils to expand their influence and scope too far, suggesting that "care should be taken to ensure that the Land Council structure does not develop into a type of mini government" (Rowland 1980, 36). Interestingly, this risk had arguably materialised by 1988, when the land councils were described as "para-governmental in nature", in view of their ability to effectively represent Aboriginal interests in negotiations with mining companies and government, attracting economic development onto Aboriginal land, in marked contrast to the neglect of this by the NT government (Altman and Dillon 1988). This had been predicted in 1979 by Rumley, who observed the vacuum at the level of local government in the Northern Territory, where most areas outside the two biggest urban centres of Darwin and Alice Springs were administered by "aboriginal community councils, church missions, mining lessees or directly by the Department from Canberra" (Rumley 1979, 11). This limited development of democratic structures at the local level had allowed a gap into which the land councils could expand their influence across large areas of the Territory.

Rowland was most disturbed by the contradictory roles the land councils were given: he saw difficulties for large land councils attempting to represent the interests of conflicting groups of traditional owners within their organisation, and he warned against the potential for conflict of interest for land councils negotiating with mining companies on behalf of landowners, as the councils would benefit directly from the royalty equivalents received from mining, channelled through the Aboriginal Benefits Trust Account (Rowland 1980, 54-55). Rowland's fears for the land councils were echoed in parliament by both Labor and Liberal members during the first years of operation of the Act, and this was a highly contentious issue, though not resolved to the satisfaction of anyone by Rowland's report.

Rowland responded in particular to the criticisms from the mining sector, reflected in the media, that Aboriginal interests in land were unreasonably preventing mining ventures which would be in the national interest (Rowland 1980). He argues clearly that the responsibility for this situation should be understood to be the product of a policy decision made by a democratically elected government, rather than Aboriginal refusal to negotiate access. He observed:

> These days the press is full of reports that the wide power of Aboriginals to veto mining and to claim compensation at large is not accepted by all Australians and that it is not in the national interest that mining be stopped. The short answer to these comments is that this was a policy decision made in 1976 when, clearly, the Parliament of the Commonwealth, with a mandate from the electors, considered that it was more important in the national interest to do something for Aboriginals, even if it was at the expense of the mining industry… If the Commonwealth Government wishes now to change that policy, so be it. (Rowland 1980, 47-8)

He further notes that while the concerns expressed by the mining industry about the impact of Aboriginal land rights are potentially well grounded, all apprehensions must be recognised as hypothetical (Rowland 1980, 50). Only three agreements had been reached at the time of his review, and neither miners nor Aboriginal owners had yet been able to test the arbitration clauses in the legislation because of the freeze on land claims.

With Rowland's report, we can see the first signs of path dependency taking hold. Even though the Rowland evaluation of the land rights legislation was an early one, already the policy purpose was under challenge from interests such as the mining companies, pastoralists and the Northern Territory government, who felt they bore the brunt of the positive construction of Aboriginal land rights. Rowland's deliberations on the policy's practical workability clearly reflected concerns raised by these opponents to land rights, focusing on the negotiations around the mining veto, limitations on economic development, and the use of pastoral land. Criticisms of the land councils' propensity for conflicts of interests in dealing with mining applications also echoed the arguments of key interests at the time (Altman and Dillon 1988, 146). The politically contingent nature of the evaluation was clear in the ambivalence of Rowland's conclusions. Nevertheless, the path dependency which was already established around the role of the land councils, and the self-reinforcing successes of land claims, ensured that future evaluations would be unable to shake their position at the centre of the land rights policy environment.

Toohey: "Seven Years On"

In 1983 the Hawke Labor government was elected on a party platform which included a promise to legislate for national land rights, extending the Northern Territory model into the states. With this in mind, the new Minister for Aboriginal Affairs, Clyde Holding, almost immediately commissioned a new evaluation of the land rights policy, selecting Justice John Toohey (who had been the first Land Commissioner appointed after the passage of the ALRA in 1976) to conduct the review. The government's clear intention to expand Aboriginal land rights nationally meant that the Toohey review was conducted in a much more supportive political climate than that of Rowland. The window of opportunity was only briefly open, however; fierce opposition to land rights from the Queensland and Western Australian state governments and mining and pastoral interests coincided with misgivings expressed by key Aboriginal groups, and ultimately the Hawke Government abandoned the national land rights legislation (Goot and Rowse 2007).

In setting out the terms of reference for the evaluation, the Minister stipulated a number of principles concerning Aboriginal land rights which the Government understood to be "fundamental", and thus not to be further debated in Toohey's inquiry: these included the inalienability of land title,

the continuing control by Aboriginal owners of mining on their land, along with the payment of mining royalties, and compensation for land which has been lost to Aboriginal owners (Toohey 1983, 141). Within these parameters, Toohey was asked to consider "administrative and procedural difficulties" with respect to the implementation of the legislation, and also the areas of overlap with Northern Territory legislation. The inquiry was given a very short timeframe, and Toohey's consultation was thus relatively restricted, with no public call for submissions or formal hearings, in favour of specific invitations to make written submissions or engage in informal discussions (Toohey 1983, 1-2).

It is notable that the terms of reference and thus the report give minimal attention to the prospects of economic benefits derived from Aboriginal land, apart from mining royalties. The Hawke government's understanding of the purpose of land rights had thus evolved, and this is reflected in Toohey's report: the economic uses of land are reduced to the negotiation of mining interests, and the provision of living areas for communities. Woodward's anticipated forms of land use which could allow direct engagement with the market by Aboriginal owners, such as cultivation, cattle grazing, and forestry activities, were no longer seriously considered. This reflects the paradox of land rights described by Austin-Broos, as while the policy bestows Western property rights on Aboriginal land owners, it has also encouraged the economic marginalisation of the Aboriginal people who choose to live traditionally, on their land (Austin-Broos 2009, 5; see also Peterson 1985).

The terms of reference did allow for a reconsideration of the granting of land on the basis of need, for Aboriginal people ineligible to claim under the Act. This aspect of land ownership had been important to Woodward as one of the purposes of his proposed legislation, but was removed in the Fraser government's version, as we observed earlier. Core principles still remained in place, however. Toohey observed Woodward's original unwillingness to accede to the Central Land Council's relatively militant demand that all unalienated land be transferred to Aboriginal ownership, and approved Woodward's conclusion that the transfer of such land should be subject to a claims process which established that the land had ongoing, traditional value to the Aboriginal people themselves (Toohey 1983, 20). Those without such a connection could not be eligible for land rights under the ALRA, though they may be beneficiaries of other forms of land title. As requested by the Hawke government, Toohey examined the issue of Aboriginal community living areas on land covered by pastoral leases, and town camps where Aboriginal people required secure title to community living areas within, or near, towns such as Alice Springs. In both cases he proposed stronger forms of communal title for the residents of these areas, though he did not recommend that they be included under the *Aboriginal Land Rights Act* (Toohey 1983, 3-13).

The limits of land rights were becoming clearer by the time of Toohey's evaluation of the legislation. Despite submissions demanding a time limit on land claims, Toohey concluded that this was unwarranted, and furthermore, ruling against repeated land claims over the same area of land would be unreasonable (Toohey 1983, 31-34). He reflected on the high costs of land claims, in terms of time and resources, but proposed more collaborative preparation by the land councils before the hearing in front of the Land Commissioner as a way of limiting these (Toohey 1983, 41-42). The mechanics of the claims process were clearly functioning well in the broader sense, in Toohey's eyes, reflecting Woodward's original intentions.

Toohey addressed the matter of governance through the land councils in considerable detail. He acknowledged that the large size of the two major councils, and thus their inability to adequately represent divergent interests and views within their council areas, was an important issue. However, following Woodward, he also recognised the ongoing need for strong, well-resourced organisations to continue the work of presenting land claims and negotiating with mining companies. Rather than recommending the creation of more land councils, Toohey saw merit in creating regional committees within the councils in order to devolve some of the functions to those most directly affected (Toohey 1983, 48-9).

Toohey's evaluation paid particular attention to the disjuncture between Aboriginal decision-making authority and traditions and the model of land councils imposed by the land rights legislation. He pointed to the lack of representation of women on the land councils, a consequence of the formalised nature of the institutions and their dealings with government, and he recorded the advice received from the anthropologist Peter Sutton on the land councils' inappropriate blurring of the traditional division between the secular and the spiritual role of land ownership (Toohey 1983, 46-50). Nevertheless, Toohey concluded that land councils were ultimately "European institutions", necessarily governed by the demands of the legislation, not by customs of traditional Aboriginal land ownership and decision making (Toohey 1983, 57). Toohey thus echoed the original decisions made by Woodward, in first establishing the land councils, but he was responding to the positive feedback emanating from that critical juncture, as the land councils had become institutionalised, and their growing capacity and influence ensured that the neither the government nor other actors in the policy area could ignore their views or the constituencies they represented.

Given the passage of time since the granting of self-government to the Northern Territory, Toohey was able to assess the compatibility of the ALRA with the Territory's more recent legislation. He pointedly explained the difference between concurrent legislation between the Commonwealth and a State government, and between the Commonwealth and the Northern Territory, observing the

absolute pre-eminence of the Commonwealth where there was any inconsistency (Toohey 1983, 16). It was in this context that he considered the specific areas of conflict between different legislative measures, and he made many recommendations clarifying responsibilities and removing ambiguities. He also remarks on the Northern Territory government's request to "patriate" the ALRA, by replacing it with legislation passed by the Northern Territory parliament, but he observed that his inquiry "assumes the continuance of the Act as Commonwealth legislation", thus relieving him of any obligation to comment further (Toohey 1983, 18).

The issue of *access* in Toohey's evaluation was framed entirely in terms of access for mining companies wishing to engage in exploration and extraction. Toohey was relatively optimistic about the likelihood of Aboriginal groups accepting mining on their land, given attitudes expressed in agreements up to the time of his inquiry. He observed:

> Experience to date, limited though it is, does not suggest that the bulk of Aboriginal land will be closed to mining activity. In saying this I do not discount the very real control which Aboriginals have and may exercise over mining on their land. (Toohey 1983, 62)

Toohey noted the opportunities which several communities had already enjoyed with mining payments going towards improved infrastructure and services on their land, with clear benefits in terms of health, education and even spiritual wellbeing, as "improved transport has led to increased ceremonial activity" (Toohey 1983, 62).

Toohey gave extensive attention to the question of the provision for Aboriginal consent to mining exploration and whether this should be combined with consent to subsequent mining activity. Noting the dangers of "uncertainty" for mining companies who would be reluctant to engage in costly exploration if there was no guarantee of later exploitation of the minerals, he also recognised that the true impact of the development of a mine could be difficult to predict prior to the exploration itself. This would thus put pressure on Aboriginal owners to give consent without sufficient information. Toohey recommended therefore a choice of schemes to suit the different circumstances, allowing Aboriginal people to make informed decisions, while recognising that mining had the potential to generate substantial benefits for the Aboriginal communities (Toohey 1983, 83).

Finally, with respect to *difference*, Toohey accepted the premise of Woodward's report and the subsequent legislation which focuses on granting land rights on the basis of ongoing, recognisable difference. He discussed the ALRA definition of "traditional Aboriginal owners" whose rights to land were based on two distinctive characteristics: they were distinguished by their spiritual connection with, and responsibility for, the land, and also by their entitlement under customary Aboriginal law to use the land for hunting and food gathering. This definition of difference was not only the basis of

claims to land, as Toohey observed, but it was also of continuing importance when it came to later negotiations about access and use of Aboriginal land, and payments of rents and royalties, as the "traditional owner" is the decision maker and beneficiary of these through the intermediary of the land councils. Toohey noted that the definition of "traditional owner" in the ALRA was not "free from difficulty", but he insisted that "[t]he definition in the Act has been treated as flexible and responsive to the situation of particular claimants, with its specific elements not constrained by any rigid anthropological or legal doctrine" (Toohey 1983, 37). There was no need therefore to change the legislation's encapsulation of difference, according to Toohey.

The Toohey report provided a very substantial and thoughtful evaluation of the land rights policy, seven years after its implementation. The report recommended a number of legislative amendments, which the Hawke government undertook to act on following consultation with the Northern Territory government and other interested parties (Holding, Hansard 5 March 1984). Toohey emphasised in his conclusion, however, that these amendments did not mark a significant change in policy direction, commenting that "Given the legislative novelty of the subject matter of the Act and the need to marry complex notions of traditional Aboriginal law and culture with European institutions and administrative procedures, the Act has worked surprisingly well" (Toohey 1983, 139). Decisions made at the critical juncture of Woodward's report continued to hold sway over land rights policy.

Conclusion

The previous chapter focused on the stability of the post-war period with respect to the dominance of assimilation as a guiding principle in Aboriginal affairs, constraining the government's response to the problem of Aboriginal land ownership. By examining the policy dynamics of the long period of conservative government, primarily under Prime Minister Menzies, we could observe the path dependency around assimilation which was difficult to challenge. The dominance of assimilation began to be shaken in the aftermath of the 1967 Referendum, and activist campaigns as well as international pressures began to take their toll.

This chapter has examined a temporal sequence which overlaps with that of the previous chapter, but focuses on a different set of actors, working initially in opposition, outside the government. By tracing the gradual emergence of Aboriginal land rights as a policy direction adopted by the Australian Labor Party through the 1960s, we can identify the incremental steps in policy development which led to the critical juncture which was the Aboriginal Land Commission inquiry by Justice Edward Woodward. The change of government, with the election of Whitlam's Labor Party in 1972, provided the opening of a window of opportunity for a new approach to land rights. As we

have observed, the change of government was preceded by careful but innovative policy development inside the Labor Party, over several years, building on the social movement activities and activist and expert debates outside parliament during the decade of the 1960s.

The two temporal sequences intersected with the 1972 election and the Woodward inquiry, and the policy changes which resulted would come to be described as "the most significant legislation that this parliament has ever passed". The frames which were applied by Woodward to Aboriginal land rights, with respect to purpose, access, governance and difference, would take on a particular significance over time, as his recommendations and conclusions generated a particular institutional response. The impact of Woodward's decision making and reflection can be seen to have sparked feedback processes which enabled the *Aboriginal Land Rights (Northern Territory) Act 1976* to become institutionalised, changing the status and power of Aboriginal people in the Northern Territory in significant and permanent ways.

The table on the following page summarises the evolution of the frames of purpose, access, governance and difference through this period, as explored in this chapter:

Table 6.1 Comparison of frames around Aboriginal land rights

	ALP under Calwell	ALP under Whitlam	Woodward Royal Commission	Fraser's ALRA legislation (including amendments)	Toohey evaluation
Purpose	• Failure of assimilation recognised • Australia's guilt over past treatment of Aboriginal people	• Land should be granted on basis of traditional connection and ongoing use • Reserves to be handed over to Aboriginal ownership • Aboriginal owners should profit from resources and minerals	• Land rights should be permanent, inalienable • Land granted on basis of traditional spiritual connection and also need • Land will help address economic disadvantage, social justice, harmony • Minerals belong to Crown but royalties payable to Aboriginal land owners through councils	• Land rights should be permanent, inalienable • Land granted on basis of traditional connection and customary law • Mining royalties payable to Aboriginal land owners through NT government and land councils	• Land rights should be permanent, inalienable • Land granted on basis of traditional connection, but different rights on the basis of need • Mining royalties payable to Aboriginal land owners through NT government and land councils
Access	• Limits on mining access to Aboriginal reserve land	• Land trusts to approve access for mining	• Land owners have right to veto mining exploration and development • Land owners have power to control access to land	• Land owners have right to veto mining exploration and development • Land owners control access to land and protect sacred sites through NT legislation	• Land owners have right to veto mining exploration and development • Land owners control access to land and protect sacred sites through NT legislation
Governance	• Commonwealth must take responsibility from states for Aboriginal affairs	• Commonwealth must take responsibility from states for Aboriginal affairs • Aboriginal land to be controlled by land trusts • Alienation of Aboriginal land to be approved by land trust and parliament	• Powerful, well-resourced, large land councils as representatives of Aboriginal interests • Aboriginal control over land • NT legislation as model for states to follow	• Powerful, well-resourced land councils as representative of Aboriginal interests • Commonwealth retains control of Aboriginal land law after NT self-government	• Powerful, well-resourced land councils as representative of Aboriginal interests • Commonwealth retains control of Aboriginal land law after NT self-government
Difference	• Special treatment for Aboriginal people is appropriate to address inequality	• Aboriginal cultural difference is valued, including connection to land • Exclusive communal/corporate land rights	• Aboriginal culture is resilient and land rights will help maintain it • Communal land title in accordance with Aboriginal tradition	• Communal title to land • Land rights based on traditional cultural connection with land, narrowly defined • Emphasis on "traditional owners"	• Communal title to land • Land rights based on traditional cultural connection with land, narrowly defined • Emphasis on "traditional owners"

The path dependency of the assimilation era was dramatically shaken with the election of the Whitlam government. As Table 6.1 shows, the gradual shifts in policy during the Calwell and Whitlam periods in opposition were ultimately crystallised in the Woodward Commission's recommendations, and these were in large part then legislated and consolidated. Land rights and the institutions which developed around them, including the Aboriginal Land Commission, the land councils, and the payment of mining royalties, built on the foundations of Aboriginal land ownership soon stretching across almost half of the Northern Territory land mass, developed a path dependency which was to remain largely unshaken until the Coalition government of Prime Minister John Howard was elected in 1996.

Chapter 7: A new generation?

Toohey's review of the land rights legislation in the Northern Territory demonstrated the consolidation of Aboriginal land rights in the Northern Territory, but it remained a highly contested policy area during the Hawke and Keating Labor governments. Land and land rights were contentious issues for the Hawke government, not least because the Liberal opposition ensured that they were highlighted as a key point of divergence between the parties, and this stance was supported by the state governments in Western Australia and Queensland.

The Hawke government passed amendments to the Act in 1987, after several years of tense debate following the Toohey review, with the land councils and mining sector locking horns over the issue of access for mining exploration and exploitation on Aboriginal land (Bennett 1989). Despite Hawke's expressed intention to remove the mining "veto", the legislative amendments ultimately allowed for a five year moratorium after refusal of access, and reduced the veto rights to the exploration stage, rather than allowing opportunity to veto before exploration and again before establishing the mine. The legislation also imposed a "sunset clause" on land claims, preventing further claims after June 1997. Neither of these measures departed significantly from the institutionalised form of Aboriginal land rights which had been consolidated by the early 1980s, as we observed in the last chapter.

The problem of Aboriginal land was given a new urgency with the lead-up to the Bicentennial celebrations in 1988, with the expectation that Aboriginal activists would try to embarrass the government with public protests against the "invasion" (Griffiths 2006, 89). Prime Minister Hawke sought to present Indigenous/settler relations in Australia as harmonious and progressive, and acknowledged the call for a treaty when attending a ceremony with Aboriginal elders at Barunga in 1988. The issue of national land rights was thus linked with sovereignty and self-determination.

The Labor government found itself unable to make concessions on either national land rights or the treaty, having persuaded itself of a potential backlash among voters in "middle Australia" (Goot and Rowse 2007, 94; Griffiths 2006), and facing undeniable resistance from the Premiers of Queensland and Western Australia. Instead, the Hawke government made the concession of creating the Aboriginal and Torres Strait Islander Commission (ATSIC). This organisation blended the functions of the former government Department of Aboriginal Affairs with a directly elected Commission with the responsibility for directing funding and determining priorities (Dodson et al 2003, 308).

Land rights in the Northern Territory would not reach the formal policy agenda again until the election of the Howard Coalition government in 1996. This chapter is concerned with the

amendments made to the *Aboriginal Land Rights (Northern Territory) Act 1976* (the ALRA), late in the final term of the Howard government. These amendments indicate a punctuation in the policy around Indigenous land rights in the Northern Territory, and signs of a breakdown of path dependency, as the government criticised the communal nature of Indigenous land ownership and expressed its intention of moving Indigenous land, and its owners, into the mainstream property market. A key feature of this policy change was the move to obtain long-term leases over Indigenous land, in order to foster individual participation in the market economy, in the form of business ventures and home ownership. As we observed in the Introduction, the negative frames which were used by the government suggesting large-scale policy failure in Indigenous affairs would have a significant impact on Indigenous land policy.

The chapter thus focuses on a new temporal sequence in Aboriginal land rights which began with the election of Prime Minister John Howard in 1996. The chapter begins with a brief review of the relevant theoretical literature around temporality and path dependency, before examining the political context of debates around Indigenous land during the Howard era. The chapter analyses the comprehensive evaluation of the ALRA conducted by John Reeves QC (the Reeves Review) and considers the critical response to the review within parliamentary and academic circles. It then looks at the legislative amendments to the ALRA which were passed in 2006, and further amendments which were passed in the context of a "National Emergency" as part of the Northern Territory Intervention in 2007. Through each of these the significance of the changes under the Howard government will be revealed through a close examination of the four themes, *purpose*, *difference*, *access* and *governance*.

Temporality and policy: review

We have paid considerable attention to path dependency in the last chapter, but it is important to remember that policy dynamics are subject to many different factors associated with temporality. As we have already shown, policy making consists of multiple processes with different temporal scales, intersecting and overlapping each other (Kay 2006). Some processes are subject to path dependency, and others are more exposed to contingency and changing circumstances. Policy choices are made in a particular historical context, and therefore "they are inevitably influenced by the legacy of the past and the uncertainty of the future. Thus the description of individual decisions requires a sense of memory and expectation…" (Kay 2006, 2). In all cases, the policy makers themselves face uncertainty and ambiguity as they make decisions, weighing up possibilities and attempting to predict consequences into the future. This uncertainty of the moment is easily overlooked when we consider policy development in hindsight. As we noted in the previous chapter,

it is important to avoid the error of assuming that a coincidence of interests and actions viewed retrospectively means that one inevitably led to the other (Kay 2006, 27; Pierson 2004).

Uncertainty at the moment of making a policy decision is also further complicated by the pressures of time and timing, as the ever changing political context makes some decisions more likely, and others more difficult to make. This is captured in the concept of "political time", which incorporates the routines and rhythms of electoral politics, budget cycles, reporting targets, and parliamentary processes, and notes the impact that these rhythms have in shaping the behaviour of the actors working within the political timescape (Goetz and Meyer-Sahling 2009). Actors make strategic and tactical decisions based on their sense of the length of time they have available to them, and their changing perceptions can increase the urgency of some policy actions and encourage the postponement or neglect of others. Preferences are shaped by perceptions of available time, and priority, and time can thus be seen as a resource which contributes to the power, legitimacy and effectiveness of key actors, often at the expense of others (Goetz and Meyer-Sahling 2009).

Kay (2006, 25-28) usefully draws our attention to the little examined distinction between intention and action, in policy decision making. Both are frequently bundled together in analysis of the policy process, but Kay distinguishes between the reasons which policy actors have for addressing a policy problem (the intention) and the reasons which they have for enacting a specific policy (the action). These sets of reasons may be markedly different from each other, and this is a function of the passage of time, and the changing contingent circumstances. The shift in reasoning might be affected by a mobilisation of opposition, or a shift in allegiances, or the institutional context.

This slippage between intention and action is therefore illustrative of another aspect of the impact of temporality which alerts us to the complexity of the policy process. While many rationalist accounts of policy making emphasise policy as a clearly defined "authoritative choice" (Colebatch 2006; Althaus, Bridgman and Davis 2013), the true picture is rather more fluid. Policy in a given area can be made up of multiple, incremental micro-decisions and tactical responses, as policy makers muddle through, examining and re-examining preferences and seizing opportunities in an ever changing context.

The passage of time between intention and action opens up opportunities for changes in three important contextual factors: participation, mobilisation and resources. Over time, the participation of key actors will change, with a turnover of staff, a ministerial reshuffle, an election, or the arrival of an influential policy entrepreneur (Cohen, Marsh and Olsen 1972; Kingdon 2003). Mobilisation will also change as stakeholders shift their attention to new policy proposals, but often require time to organise membership, engage in consultation, and reflect on and respond to policy options (Pralle

2006). A policy which is presented for rapid decision will often prevent the mobilisation of key opposing interests, both inside and outside parliament. Finally, the resources which are available to decision makers may change over time, as political capital, public opinion and media attention shift, or parliamentary prospects change with changing membership following elections.

Given these contextual factors, there may be considerable slippage between intention and action, as we shall uncover in this chapter. Preferences will change over time, especially if there is a considerable lag between intention and action. In some cases, the action may be able to go further than the intention. In others, it may be more limited. Purposes and objectives may shift, arguments for or against a proposal may evolve, stakeholder support may move, and the policy decision itself may thus take on a new frame or image (Baumgartner and Jones 1993). This theoretical understanding of policy dynamics supplements our earlier application of path dependency, and will help to explain the slippage between the Reeves Review recommendations, and the later legislative outcomes in 2006 and 2007, as we shall now explore.

Aboriginal land under scrutiny

When the Howard Coalition government was elected in 1996, the government's policy priorities for Aboriginal affairs were focused on "practical" concerns such as improving housing, health and economic participation, with a particular focus on remote communities (Robbins and Summers 1997, 522). There was growing public awareness of the profound social and economic disadvantage experienced by Indigenous people, especially in the light of the detailed report of the Royal Commission into Aboriginal Deaths in Custody, released in 1991, which linked the over-representation of Aboriginal people in prison to their poverty, poor education and employment outcomes, alcohol abuse, and institutionalised racism (RCADIC 1991). The Human Rights Commission's inquiry into the "Stolen Generations" was also coming to a close after many months of public hearings, and taking into account many hundreds of submissions, and the report was completed in April 1997 and tabled in parliament in May (HREOC 1997). Howard's reluctance to apologise to the Stolen Generations was poorly received by Indigenous leaders (Dodson 2008).

The first few years of the Howard government were also marked by deep conflict over Indigenous land, in the form of the native title debate. This was a new frame for Indigenous land ownership which had been a prominent and high-risk feature of the previous Keating government's approach to Indigenous affairs. The High Court's decision *Mabo v Queensland* in 1992 had overturned the *Milirrpum* decision and deliberately recognised the existence of native title, or indigenous ownership of the land prior to European settlement, and the continuing nature of that title where the Crown had not explicitly taken it away. The Labor Prime Minister Paul Keating welcomed the decision with

enthusiasm (Watson 2002, 405), and the greater public understanding of the circumstances in which the land had first been removed provided some optimism for the long-term project of Reconciliation, which had started under Hawke. However, the process of turning the common law decision into workable legislation proved to be a disappointing one for the Aboriginal leaders involved in the consultations, as the demands of the mining industry, state governments and public opinion obliged the government to make substantial compromises (Russell 2005).

While native title was a highly emotive issue in the public arena, and powerful interest groups fought fiercely against it, the actual extent of the change was minimal, and carefully controlled by the Commonwealth government. The end result was that the problem of access to Indigenous land was circumscribed into a more manageable issue of legal property rights, which would be determined in the court system, through an adversarial process, with a difficult onus of proof of connection with the land being placed on the Indigenous claimants. The symbolism of *Mabo* and the *Native Title Act 1993* was very powerful, however: the Keating government was able to use the *Mabo* case as a basis for the acknowledgement of the traumatic history of settler/Indigenous relations in Australia, yet at the same time put the issues of Indigenous land ownership and contested sovereignty to rest (Reilly 2006, 46). It also brought a new group of Indigenous leaders into the public policy fray, and "their steel was tempered and honed in a new bargaining situation in which governments were compelled to listen" (Sharp 1996, 213).

The *Mabo* decision and the *Native Title Act 1993* were soon overshadowed by the more alarming High Court decision on *Wik* in 1996. The newly elected Liberal-National Coalition government's strong stance against Aboriginal claims to native title, in favour of protecting mining and pastoral interests, was widely publicised. The Coalition seized the opportunity to wind back the provisions of the *Native Title Act 1993*, publicly promoting its "ten-point plan" as a means to ensure native title would be extinguished by the "bucket-load", especially with respect to pastoral leases. The Howard government finally amended the *Native Title Act* in 1998 in order to address the concerns of pastoralists and others at the potential impact of the recognition of Aboriginal native title.

The Howard era thus witnessed a notable change of policy direction in terms of native title which foreshadowed a similar shift around Aboriginal land rights in the Northern Territory. The recognition of land rights and native title had both been seen as great achievements for Indigenous people, but the Howard government portrayed them in a very different light. Linking the separate status of Indigenous land ownership to the widely recognised problems of entrenched disadvantage and dysfunction in remote Indigenous communities, the Howard government depicted Indigenous land ownership as no longer a solution, but rather as a problem. In the next section we will trace the

origins of this new causal story, beginning with the Reeves Review in 1998, before considering the process of translating Reeves' recommendations into policy change years later, in 2006 and 2007.

The Reeves Review: *"Building on land rights for the next generation"*

The Howard government's Minister for Aboriginal and Torres Strait Islander Affairs, John Herron, engaged a barrister and former Labor politician from the Territory, John Reeves QC, to review the ALRA in 1997. Reeves was viewed with some suspicion by some observers as a partisan appointment, given his closeness to the Northern Territory government and his friendship with the Chief Minister of the Northern Territory, Shane Stone (Altman 2001a; Mowbray 1999a, 10). Reeves' report, entitled *Building on Land Rights for the Next Generation*, was tabled the following year, and was notable for its acceptance of the Northern Territory government's negative constructions of the Aboriginal landowners, and particularly, of the land councils (Reeves 1998).

Reeves' far-reaching recommendations on reforms to the land rights regime in the Territory were widely rejected at the time by critics (Altman et al 1999), and by parliament, in a review conducted by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HORSCATSIA 1999). This parliamentary review was commissioned by Minister Herron in response to the controversy surrounding the Reeves report. In this section we will first consider the Reeves Review's terms of reference before analysing his recommendations, and the critics' responses, in terms of *purpose*, *difference*, *access* and *governance*.

There is no doubt that the Reeves Review is the most comprehensive review of the *Aboriginal Land Rights Act* to date. In the fifteen years since Toohey's review, several political and policy obstacles had prevented a timely revisiting of the Act as had been recommended by Woodward, and many issues had become pressing (Reeves 1998, 5). Reeves was given a nine month timeframe to complete the review, and during this time he released an Issues Paper, sought out expert commentary, conducted public meetings in Aboriginal communities, as well as receiving written and oral submissions (Reeves 1998, 5-8). Reeves claimed that his review was "the first full public review of the Act since it became law" (Reeves 1998, 6), though others have noted the lack of transparency around the treatment of submissions and consultants' evidence (Altman 2001a; see also Altman et al 1999). Reeves' lengthy report includes many extracts of submissions and interviews, demonstrating the range of views among stakeholders in the land rights policy area, and this may be seen as a valuable effort in recording the views of Aboriginal people in the evaluation process. The selective nature of the reporting of these and other views provoked some strong criticisms of the lack of validity of the evidence upon which his recommendations relied (for example, Galligan 1999, 20).

The lapse of time since the passage of the legislation in 1976, and the most recent review in 1983, were causes for reflection for Reeves. He observed that "the Act has now been in operation for more than a generation" (Reeves 1998, 5) and suggested that this represented an opportunity to redefine its objectives into the future, and consider the changing needs and desires of the Aboriginal landowners. Younger residents of Aboriginal communities, he noted, were exposed to education and media which "sits uneasily with their Aboriginal traditions and customs" (Reeves 1998, 2), and this implied a potential desire to move away from the limitations of traditional life and culture in remote communities on Aboriginal land.

Reeves was keenly aware of the weight of the past, however, and explicitly acknowledged the limitations of his review, as opposed to the relative freedom of his predecessors at the time of the critical juncture:

> When he commenced his Aboriginal Land Rights Commission 25 years ago, Justice Woodward was able to start with a fresh canvas. That obviously cannot be so now with a piece of legislation that has been in force for over 21 years. People have acquired rights under the Act, bureaucracies have developed and expectations have been raised. This Review must, therefore, take the status quo into account in making any recommendations for change. (Reeves 1998, 4)

He carefully observed, and approved, the "basic principles" which had guided Woodward (Reeves 1998, 11) and frequently referred back to the Woodward, Rowland and Toohey inquiries as authoritative statements of policy and practice. Interestingly, his report also included a substantial historical account of the development of land rights in the Northern Territory, reaching back to the first European settlement in the 1820s (Reeves 1998, Ch 2).

Reeves departed from his predecessors in several important respects. In accordance with the terms of reference provided by Minister Herron for his inquiry, Reeves chose to measure the success or failure of the land rights policy by very different criteria from those of his predecessors: he conducted a cost/benefit analysis for the policy, and gave particular consideration not just to the Aboriginal beneficiaries, but to the non-Aboriginal Territorians, including miners and pastoralists, who he saw as unreasonably burdened by the Act (Reeves 1998, Ch 25). Reeves explained that he was following the economic approach to "competing interests", following the advice of the economic consultant to the Review, Professor Richard Blandy (Reeves 1998, 66). This therefore introduced, and gave equal weight to the non-Aboriginal population who were excluded from "vast areas of the Northern Territory", thus creating "distrust, resentment, hostility and lack of support" for the land rights legislation (Reeves 1998, 66-67, and *passim*). This emphasis on the interests and concerns of non-Aboriginal Territorians was rejected by the HORSCATSIA inquiry, which noted pointedly that its own

report was tailored for ample consideration by Aboriginal people, as "it is after all, their Act, their land and their future" (HORSCATSIA 1999, x).

Reeves noted that the original *purpose* of the Act had been to grant traditional land to Aboriginal people, and this had been remarkably successful, but a new purpose was now required (Reeves 1998, Ch 4). Reeves' understanding of the policy directly connected the land owned by Aboriginal people to their social and economic wellbeing, and he consequently found the existing land rights legislation to be inadequate for the purpose. This theme was consistent with the Howard government's approach, and was reflected in later debates around policy failure and the need to derive economic benefit from Aboriginal land. Reeves' report was thus an important precursor to the frame applied to Indigenous land when the policy was debated in 2005 and 2006 (as expressed, for example, by Brough (2006, 5-7), because he linked policy failure in terms of entrenched Indigenous dysfunction and disadvantage to the land rights policy. Critics of the Reeves report were scathing about this bid to shift the legislation's objectives. Galligan (1999) described it as irresponsible, speculative and invalid. The HORSCATSIA review similarly rejected the attempt to update the ALRA's purpose, observing that while some of the recommendations aimed at addressing Indigenous disadvantage were commendable, they were not within the remit of the land rights policy. As the Committee noted, "The Land Rights Act currently deals with land ownership and management, and that focus should remain undiluted" (HORSCATSIA 1999, 19).

As he outlined an updated purpose for land rights, Reeves was in fact drawing on aspects of Woodward's initial conception of the potential link between land rights and Aboriginal economic wellbeing, which had been largely overlooked in the intervening years of policy development. Reeves' grip on the Woodward model was somewhat tenuous, however. Altman (1996) argues powerfully that the economic purpose of Woodward's vision for land rights is poorly understood but vital to the economic development and wellbeing of Aboriginal people in the NT. As Altman observes, the economic advantages up to that point in time have been drawn directly from mining on Aboriginal land, through the payment of mining royalty equivalents, but future prospects are more varied:

> Whether the millions paid to the Northern Territory land councils to claim and manage Aboriginal land have been optimally spent is a complex question. But there is little doubt that the transfer of land to Aboriginal interests via the claims process is a redistribution, or restitution, of a land base that has the potential to be of immense future significance. (Altman 1996, 5)

Altman identified the opportunities which could be developed on Aboriginal land in tourism, agriculture and pastoralism, but noted that the lack of capital was an important issue. This could be

addressed with joint ventures with non-Aboriginal business interests, however (Altman 1996, 5). These ideas had been first suggested in Woodward's report, as we observed in Chapter 6. Reeves did not address the issue of the injection of capital to assist development, as his focus on the failure to lift socioeconomic outcomes using Aboriginal land cast the blame in the direction of land councils who had misspent their funding on administration and acquisition of pastoral leases.

One final aspect of the purpose of the land rights legislation received relatively little attention in the Reeves Review, but would become far more significant for the Howard government later. Reeves noted that one community in Arnhem Land had "expressed the desire to be able to own their houses" (Reeves 1998, 500), and he recommended adoption of the headlease practice which already existed in the mining town of Nhulunbuy, where the mining corporation leased houses to residents. This practice was already in place under the existing provisions of section 19 of the ALRA. Reeves noted the potential benefits of home ownership under a leasehold system both for the householders and for the community, as he believed it would help to address the well-recognised housing shortage on Aboriginal land.

Next, with respect to *governance*, Reeves provided a far more strident and negative assessment of the role of the land councils, compared to the earlier evaluations. Recognising the bureaucratic structures which had grown around the land councils, and the political and organisational strength that they possessed, Reeves was critical of what he saw as an inflexible and wasteful system, out of touch with the wishes of the Aboriginal people in the communities, and imposing unnecessary "transaction costs" for miners and others wanting access to the land (this will be discussed further with respect to *access*).

Another key failing of the land councils according to Reeves was that they were unhelpfully focused on an antagonistic and "acrimonious" relationship with the Northern Territory government (Reeves 1998, Ch 9). Mowbray (1999a, 7) observes that this hostility was a key factor in Reeves' recommendations to reduce the power of the large land councils: "It is assumed that by abolishing Land Councils free to contest issues with the Territory government, and locating their much weaker replacements within a line of authority to a Territory minister, conflict will disappear and harmony should prevail". Mowbray points to the responsibility of the Northern Territory government for the animosity, manifested in the persistent and costly challenges to every land claim, and the spread of misinformation about the land councils, two factors not canvassed by Reeves (Mowbray 1999a, 8). Similarly, Fletcher (1998) recounts the NT government's intensely adversarial response to the ALRA, challenging every claim at great cost to both the government and the land councils, and refusing to provide services and infrastructure on Aboriginal land on the basis that it is deemed "private" not

"public". Fletcher further argues that this is a chief cause of the socioeconomic disadvantage of Aboriginal people in the Northern Territory:

> The costs of maintaining a dysfunctional relationship between governments and Aboriginal communities are enormous. The system has failed to meet the needs of the Aboriginal population. Unstable community economic and social conditions, unemployment, community health problems and overall impoverishment have historical causes but are modern phenomena. (Fletcher 1998, 23)

Reeves therefore recommended breaking up the land council structure and establishing eighteen smaller regional land councils, limiting their responsibilities, but inevitably also diminishing their political and organisational strength (Reeves 1998, Ch 10; cf. Pollack 1999 and Mowbray 1999b). Reeves intended that the new smaller regional land councils (RLCs) would replace the Land Trusts and serve both functions of holding title to the land, and also making decisions about management of the land. He also proposed an overarching Northern Territory Aboriginal Council (NTAC) which would be appointed by the Minister and would control the allocation of budget to the RLCs. Most significantly, the RLCs would include both traditional owners and permanent residents of the specific region, thus working directly against the understanding of local decision making authority and ownership under Aboriginal law (Morphy 1999; Williams 1999). Sutton (1999) warned that this would "sow the seeds of serious conflict" in the communities in question.

The HORSCATSIA report rejected the proposed regional land councils altogether, observing the inappropriate imposition of regional structures which were not generated from Aboriginal knowledge of regional differences and boundaries (HORSCATSIA 1999, 30-31 and 36-39), and the impracticality of dividing land councils into smaller organisations which would lose economies of scale and bureaucratic efficiencies (HORSCATSIA 1999, 32-34). The Committee also noted the reluctance of representatives of the mining industry to negotiate over mining agreements with multiple inefficient land councils instead of the stronger, larger ones.

Another important aspect of *governance* which Reeves tackled was the question of funding of Land Councils through the Aboriginal Benefits Reserve (previously called the Aboriginal Benefit Trust Account) (Reeves 1998, Chs 15 and 16). Under section 62 of the ALRA, government funding of the land councils based on "mining royalties equivalents" had been broadly consistent with Woodward's original recommendations, with 40 per cent allocated to land councils for administrative expenses, 30 per cent for communities in areas directly affected by mining activity, and the remaining 30 per cent to be distributed for the benefit of Aboriginal people across the whole of the Northern Territory, whether or not they were traditional owners or affected by mining. Reeves scrutinised the use of funds, noting that they were "public monies" but also that "[s]ince its inception, Aboriginal bodies

have administered all of the monies paid into the ABR" (Reeves 1998, 350). Reeves criticised the lack of accountability in the use of funds, and the "inequitable" distribution of funds to Aboriginal Territorians not affected by mining (Reeves 1998, 353-358). Altman (1999) provides a strong critique of the assumptions made by Reeves that the ABR money should be used for specific purposes related to social and economic advancement, and observes the importance of retaining adequate funding for land councils and sufficient incentives for communities affected by mining to willingly negotiate mining access to their land.

Governance presented a new dimension with the issue of the government's power to compulsorily acquire land for public purposes. This was an issue raised by the Northern Territory government, which was aggrieved that the Commonwealth alone had this particular power over Aboriginal land in the Territory (Reeves 1998, Ch 17). From the Northern Territory government's perspective, the current governance arrangements represented an unwarranted interference in proper governmental powers, as "it remains a fact that the Land Councils have ultimate control in relation to the provision of essential services over aboriginal land" (Reeves 1998, 377). At the time that Reeves was conducting his review, the Northern Territory was once again discussing the prospect of statehood, and his report reflects the Northern Territory government's ambition to "patriate" the ALRA, on obtaining statehood, making the ALRA Territory rather than Commonwealth legislation, thus open to amendment by the Northern Territory parliament. Soon after Reeves tabled his report, the referendum on statehood was narrowly rejected by voters in October 1998 (Horne 2007). Given the failed referendum, the HORSCATSIA was not convinced of the necessity of allowing the Northern Territory government power to compulsorily acquire land, but did recommend alternative solutions such as improved consultation and recourse to leases over Aboriginal land for specific purpose (HORSCATSIA 1999, 125-126).

The issue of *access* to Aboriginal land was one of the most controversial in the Reeves report. The first aspect of this was the permit system which controls access to Aboriginal land by non-Aboriginal people. Woodward had affirmed the right of Aboriginal land owners to determine access to their land, and the ALRA recognises the links between this process and Aboriginal tradition. The permit system itself is established under the *Aboriginal Land Act 1978* (NT). Reeves was critical of the transaction costs for non-Aboriginal Territorians who seek access to Aboriginal land, and also linked the permit system in the present with the negative image of segregation in the past, and the requirements for Aboriginal people living on reserves and government settlements to obtain permission to leave (Reeves 1998, 32). This is a surprising invocation of historical precedent as a justification for a complete abandonment of a system which Aboriginal people recognise as reflecting their own customary law (Williams 1999). Reeves therefore recommended the replacement of the

permit system with simple trespass under the Northern Territory's *Trespass Act 1987*. This was spurned by the HORSCATSIA, and the Committee noted that Aboriginal people "clearly rejected" the amendment and "issues of access to Aboriginal land should always take place with proper consultation and negotiation with the Aboriginal people who rightfully own the land under inalienable freehold title" (HORSCATSIA 1999, 121).

Reeves raised specific concerns with respect to access to Aboriginal land for the mining sector, as had each of his predecessors in earlier reviews of the land rights legislation. He expressed incredulity at the complexity of the procedures required for mining companies to obtain permission to explore on Aboriginal land, and blamed the institutional arrangements controlled by the land councils for the delays which could stretch over many years (Reeves 1998, Ch 24). His recommendations about the RLCs were part of his solution, as this would reduce the bureaucratic delays, but he also sought to simplify the process by allowing direct negotiations between mining companies and land owners without land councils as intermediaries. Furthermore, while he supported the mining "veto", he proposed a less onerous "reconnaissance licence" which would allow short periods of access for prospective miners wanting to conduct low-impact exploration. Reeves' report was widely criticised for his inaccurate and unfair interpretation of data on delays and costs for mining companies, and observers were able to present alternative explanations for delays including under-resourced land councils and poor market conditions for minerals (HORSCATSIA 1999, Ch 6; Quiggin 1999). The HORSCATSIA made several recommendations designed to simplify the approval process, and allow Aboriginal communities to make choices about how they would be represented in negotiations, thus relieving the burden on the land councils and devolving decision making to the local region. It rejected the "reconnaissance licence", however, on the basis that the permit system already provided sufficient flexibility.

The treatment of Indigenous *difference* in the Reeves Review is especially significant. Reeves explicitly accepts the customary basis of land rights, and notes that the provision of land rights has been a net benefit to Aboriginal Territorians (Reeves 1998, Ch 4). Nevertheless, his overriding preoccupation with the poor socioeconomic outcomes of Aboriginal people in the Northern Territory leads him to accord less value to land ownership than the Aboriginal landowners do themselves. In particular, he links the choice to retain traditional lifestyles on Aboriginal land with poverty and limited opportunities:

> A recurring dilemma for Aboriginal people is the relative weight to be given to maintaining aspects of their traditional way of life, on one hand, and improving mainstream economic, health and educational outcomes, on the other. These desirable objectives are often in tension. Aboriginal

Territorians often have to judge between such alternatives, and how to make an appropriate accommodation under less-than-ideal circumstances. (Reeves 1998, 586)

Reeves thus poses a binary frame which values "mainstream" outcomes and devalues the benefits attained through a "traditional" way of life. His negative construction of Indigenous difference pays no heed to the appeal and meaning which Aboriginal people living on traditional country may derive from the maintenance of languages and culture (Taylor 1999, 103). Nor does it take into account the many economic activities which occur on Aboriginal land but have no associated price in the mainstream market economy, such as hunting, gathering, fishing, ceremonial activities and art and craft (Taylor 1999; see also Altman 2001a).

Reeves is also very critical of the dependence on government welfare, a consequence of the exclusion from the mainstream economy, which he sees as a dominant feature of Aboriginal Territorians, something which sets them apart from other Territorian residents. He makes a sweeping judgement based on a remarkably limited notion of the market:

Economic activity consists of the production and consumption of goods and services. Aboriginal Territorians find themselves in a position where the value of their consumption greatly exceeds the value of their production. They are significant borrowers from the rest of the Australian community. They find themselves In a state of dependency on the rest of Australia. (Reeves 1998, 581)

One might observe the fact that all Territorians, Aboriginal and non-Aboriginal, are beneficiaries of the largesse of the other states through the horizontal fiscal equalisation principle which is the basis of a substantial portion of untied Commonwealth funding of states and territories (CGC 2015). Furthermore, Reeves chooses to disregard the economic benefits of mining on Aboriginal land, which extend well beyond mining royalties, and also fails to acknowledge the employment of many Aboriginal people in the Northern Territory at the time through the Community Development Employment Projects (CDEP) (Morphy and Sanders 2002).

To summarise, as we have seen with the earlier evaluations, the Reeves Review provides a clear illustration of both contingency and continuity in policy making. The Howard Coalition government had strikingly different views on Aboriginal land rights from those of its predecessors, and these shaped the findings of Reeves' evaluation of the policy, enabling him to craft a new purpose for the twenty-five year old policy. No longer satisfied with the granting of land to traditional Aboriginal owners as an end in itself, the policy was reframed around economic development and the alleviation of welfare dependence and disadvantage. The original policy objectives were dismissed as flawed and anachronistic, and the views of the authors of the original policy, including Woodward, were discarded as irrelevant, being from another era altogether.

The recommendations made by Reeves, combined, amounted to a revolution in land rights policy for the Northern Territory, but path dependency was still strong, as we have demonstrated. Reeves came under almost immediate fire from a number of quarters for his inappropriate conclusions on the role and structure of land councils in particular (Altman et al 1999; HORSCATSIA 1999). The land rights policy itself had become institutionalised, over time, and the expectations and behaviours which formed around it became self-reinforcing. Proposals to change policies with respect to *purpose*, *access* and *governance* were strongly resisted. Twenty-five years of increasing returns for the land councils had given them considerable support, especially in academic circles, and their earlier positive construction by the Commonwealth government and others had ensured their position in the centre of land rights policy, making them very difficult to dismantle. The frame of Aboriginal *difference* was more obviously under challenge, however, as Reeves linked land rights to poverty and exclusion, thus laying the ground for the Howard government's later refrain of "land rich, dirt poor". The next section analyses the Howard government's eventual attempt to move from intention to action with the legislation to amend the *Aboriginal Land Rights (Northern Territory) Act* in 2006.

From intention to action: Seizing the political opportunity

The critical response to the Reeves Review was a deterrent to the Howard government with respect to making changes to the legislation on land rights in the Northern Territory. This is not to say that Indigenous affairs received little attention during this period, however. As Minister for Indigenous Affairs, Amanda Vanstone was responsible for instigating the "quiet revolution" in the management of Indigenous issues, and this included the abolition of ATSIC, the mainstreaming of Aboriginal services across all government departments, and the introduction of Shared Responsibility Agreements between the government and specific communities (Sanders 2008a; Sullivan 2011). These SRAs were contracts implemented at the community level, providing funding and services in exchange for specific community actions, as a mechanism to expand government influence in place of ATSIC (Strakosch 2009). Land rights in the Northern Territory were low on the policy agenda, however, until the 2004 federal election, when the Howard government won a majority in the Senate as well as the House of Representatives. This unusual circumstance presented an open window of opportunity for the government to introduce a legislative program without opposition. One of the pieces of legislation which was included in this program was the *Aboriginal Land Rights (Northern Territory) Amendment Act 2006*.

The delay of eight years between the intention expressed in the Reeves Review and the action in the form of legislative amendment is significant, and had a substantial impact on the policy outcomes. It is helpful to consider this first in terms of participation, mobilisation and resources. An obvious factor

with respect to participation is the appointment in January 2006 of an energetic new Minister for Indigenous Affairs, Mal Brough, replacing Amanda Vanstone who had held the portfolio along with the far more prominent portfolio of Immigration and Multicultural Affairs for the previous three years. The reshuffle included a change in the machinery of government, with Indigenous Affairs moved to the Department of Families and Community Services. This encouraged Brough to present Indigenous Affairs through a prism of community services, and he was quick to turn his attention to dysfunctional Indigenous families in particular. Another factor in participation is the party numbers in the newly elected Senate, where the government majority meant that there was little in the way of meaningful opposition and scrutiny to legislation passing through both houses of parliament.

In terms of mobilisation, Vanstone had abolished ATSIC in 2004, and this meant that there was no longer any independent and coordinated Indigenous opposition to respond to government policy (Maddison 2009). The early mobilisation against Reeves in 1999 had dissipated and few expected the question of Aboriginal land rights to re-emerge, thus many were caught off-guard when Brough introduced the bill in parliament in May 2006. The balance of resources had also shifted, with the Howard government enjoying the Senate majority. The outcome of these factors was the passage of the amending legislation with relatively little parliamentary debate and inquiry, and with almost no consultation, thus allowing the passage of legislation which could be seen as far-reaching and coercive.

The intention to reform Aboriginal land rights in the Northern Territory as expressed by Reeves in 1998 had been focused on reducing the power of land councils, and reassessing policy failure in terms of socioeconomic development opportunities for the residents on Aboriginal land, and non-Aboriginal Territorians seeking access. An important factor was the influence of the Northern Territory government, and this had been accommodated with the expectation that statehood was imminent. By 2006, when the legislation was being finally enacted, the context had changed, and the action reveals substantial slippage from the original objectives. Relations with the Northern Territory government had deteriorated, as in 2001a the Territory changed the party in government for the first time since self-government under the leadership of Labor Chief Minister Clare Martin. This may have reduced the level to which the Howard government was prepared to support devolution of powers to the Northern Territory government, especially given the recent appointment of a more interventionist federal Minister in Brough.

Much of the commentary on the 2006 ALRA amendments has focused on the process by which the legislation was enacted (eg Brennan 2006). With the Howard government obtaining a majority in the Senate in the 2004 election, by the time this legislation was put before parliament, the government

had begun to enjoy the benefits of limited parliamentary scrutiny. Numerous complaints from the Opposition, voiced in the parliamentary debates as well as in the Senate Community Affairs Legislation Committee's (SCALC) report on the legislation, expressed concern at the limited amount of time given to proper parliamentary process, especially considering the important nature of the reforms. Parliamentary debate in both houses was given very little time, and the Senate Committee was given a very limited timeframe. With only one day of hearings, and a very short timeframe for submissions, the Committee noted the paucity of submissions with dismay (SCALC 2006a, 1).

Critics have described the *purpose* of the new scheme to allow headleasing of townships on Aboriginal land as an attempt to wrest control of Aboriginal land back to the government (Brennan 2006; Terrill 2010). Leon Terrill (2009) interprets the policy on township leases under section 19A as a product of government expanding its power over Aboriginal communities rather than a genuine interest in increasing private home ownership, thus he describes the amendments as "a bureaucratic rather than an economic reform" (Terrill 2010, 3). This is thus a substantial difference from the objective as it was expressed by Reeves in 1998, revealing the gap between intention and action.

The government explained its intentions using the rationale offered by Reeves: the amendments were designed to encourage the introduction of business enterprise and private home ownership on Indigenous land, and also to facilitate the provision of government services. The government's focus, in promoting and debating the legislation, was on the unusual nature of Indigenous land ownership, when compared to property ownership across the rest of Australia, as Indigenous land held under the land rights legislation is held under communal rather than individual title. This aspect of *difference* had become untenable from the government's perspective. By leasing sections of Aboriginal land for ninety-nine-year periods, the government intended to sub-lease plots of land back to individual home owners and businesses. In this sense, the government saw itself as "normalising" the property ownership regime on Indigenous land, making it the same as for other Australians, in that it was able to be part of the mainstream economic market.

More broadly, a number of observers and participants expressed concern at the lack of proper consultation with Aboriginal land owners, and indeed the lack of adequate information given to affected parties, beyond the land councils themselves (Brennan 2006, Altman et al 2005, Dodson and McCarthy 2006, 23). This was an important illustration of the Howard government's attitude towards *governance* in terms of genuine engagement with Indigenous viewpoints. It would appear that the government had a very narrow understanding of what consultation should mean in this context. In a remarkably frank admission, when the public servants from the Office of Indigenous Policy Coordination (OIPC) were questioned about their limited consultation, they explained that

they did not see the traditional owners as key stakeholders, rather they understood the Northern Territory government itself to be the primary stakeholder (SCALC 2006b, 101) Responding to the criticisms of poor consultation, Minister Mal Brough argued that this legislation was the end of a nine-year consultation process, including three substantial inquiries: the Reeves review of the ALRA in 1998, the HORSCATSIA response later that year, and the Manning report, conducted by the Productivity Commission into rights over mineral exploration, reporting in 1999 (Brough 2006a, 3). Nevertheless, as it was noted in the parliamentary debates on the bill, the most controversial part of the legislation, township leasing, was clearly a very recent addition to the legislation which had not been discussed even with the land councils. It would appear that the initiative for the township leasing idea originated in the Northern Territory government very late in the preparation of the legislation (Snowdon 2006, 85; see also LCA 2007, 6-7).

Another key criticism of these reforms to the ALRA is the lack of an evidence base to support the push towards opening Indigenous land up to the "normal" property market. Brennan (2006) argues that the legislation displays the triumph of ideology over good policy making, while others have drawn attention to the lack of real economic prospects for increased home ownership in remote communities (Altman et al 2005). Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma pointed to research which revealed that individual rather than communal ownership of indigenous land in the experience of New Zealand and United States had produced very disappointing results (ATSISJC 2006), similar to Woodward's findings in 1973.

As will become clear, the Reeves evaluation was not translated directly into legislation with the 2006 amendments, and indeed, many of his recommendations were not included in the legislation at all. Reeves had been very significant, however, in helping to lay the foundations for a change in attitudes with population, by associating Aboriginal land rights with the negative images of bureaucratic ineptitude and welfare dependence. We shall explore the shifts in attitudes and the new problem definitions which were therefore able to be applied to land rights by the government in the following short sections.

Shifting problem definitions: Overview

The most notable feature of the 2006 amendments to the ALRA is the way in which Aboriginal land ownership was shifted, from being framed as the solution to "the Aboriginal problem", to a new framing as the cause of the problem. This marked a very significant revision of the *purpose* of Aboriginal land rights. The entrenched disadvantage experienced by Indigenous people was linked by the Howard government with the nature of land ownership under the land rights regime. The Howard government identified two objectionable features of Indigenous land ownership under the

ALRA: firstly, that grants of land rights involved inalienable freehold title, which cannot be bought or sold, unlike other forms of property ownership; and secondly, that land rights are granted to groups (in the form of Land Trusts representing traditional owners), not individuals. For the Howard government, this communal ownership is responsible for stifling initiative and entrepreneurialism, and thus prevents Aboriginal people from joining the economic mainstream.

The new solution to Indigenous disadvantage, as the Howard government saw it, was based on the market, and an emphasis on economic development. This was to be best achieved by opening up possibilities for individual home ownership and business investment, not necessarily for the Indigenous residents in the remote communities, but perhaps to outsiders. In this sense Indigenous land rights lost their legitimacy as special rights based on *difference*, and were instead combined with mainstream economic and property rights, the same as for the rest of the Australian community. The emphasis was no longer on self-determination, allowing Aboriginal landowners to live as they chose on their own land, without interference, but rather on opening up access to the mainstream market, "normalising" or even "privatising" Indigenous land.

This new construction of Indigenous land was expressed by the Howard government in public statements, media releases, and parliamentary debate around the 2006 legislative amendments, and a number of key themes can be identified. The remaining part of this section will consider the language used by the government around themes of "communal ownership", "normalisation" and "choice", all of which add further layers to the understanding of the changing problem definition with respect to *difference*.

Communal ownership, and "communist enclaves"

The communal ownership of Aboriginal land under the ALRA was depicted by the Howard government as a fatal flaw, and the product of misguided ideology rather than respect for cultural *difference*. The Minister for Indigenous Affairs, Mal Brough, declared in his second reading speech to parliament that the amendments to the ALRA would provide for individual property rights under the new leasing system, as "It is individual property rights that drive economic development. The days of the failed collective are over" (Brough 2006b, 5). Brough further insisted in a later parliamentary debate that Aboriginal people living in remote communities in the NT were "living in what many people would now recognise as little communist enclaves" (Brough 2006c, 31).

Brough's construction of Aboriginal land rights clearly sought to associate the landowners and the remote communities with the most negative ideological image at his disposal, that of communism. This was dismissed by members of the Labor opposition as a laughable association, but the purported links between land rights and communism were not new in conservative commentary on Aboriginal

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affairs. Similar suggestions had been made earlier, for example, by Peter Howson (2005) and Helen Hughes (in Devine 2005) in *Quadrant* magazine. Hughes contended

> The traditional sharing of hunter-gatherer societies has been transmuted into socialist utopianism that denies individual Aborigines, alone among Australians, any chance of saving and investing. The solution to this is long leases of the land – to outsiders as well as members of the communities. (cited in Devine 2005, 50)

Similarly, Bob Beadman in *Policy* magazine (published by the Centre for Independent Studies), wrote:

> Collectivism has failed around the world, and the evidence is before our eyes that it hasn't worked here either. Communal home ownership dictated by the Land Rights Act is just another manifestation of the removal of individual responsibility. (Beadman 2004, 24)

Links between the Aboriginal movement and communist sympathisers during the course of the twentieth century have been well-documented, and the land rights issue had certainly been a part of their campaign (Attwood 2003, Burgmann 2003, Boughton 2005). Nevertheless, there has been little suggestion that the recommendation from the Woodward Commission to grant land rights on a communal basis was anything other than an attempt to accommodate Indigenous understandings of land, and reconcile anthropological knowledge of Indigenous systems of law and custom on land ownership with the Australian property law system.

The links between land rights and communism, as emphasised by Brough and other conservatives, were not simply a matter of guilt by association. They pointed to a new causal story around land rights, which placed responsibility for economic disadvantage in Indigenous communities in the communities themselves. As "communist enclaves" they were responsible for their own economic backwardness, and their inability to participate in the mainstream economy was thus understood as being the fault of the traditional owners and land councils who perpetuated the system of communal land ownership. This deflected responsibility, clearly, from the many other factors which contributed to Indigenous disadvantage, including decades of neglect by the Commonwealth and Territory governments, resulting in inadequate roads and infrastructure, limited access to health services, education and training, alongside the remoteness and the poor quality of the land. It also pointed to the very Westernised, culturally-specific assumptions made about the inevitability of economic development and the importance of private property ownership in that progress.

Normalisation, and the mainstream

A second theme which emerged clearly in the debate around the 2006 amendments to the ALRA was the Coalition government's frequent call for the "normalisation" of Indigenous land ownership. This was a clear signal that *difference* was no longer acceptable. The language of "normalisation" referred

not just to the communal aspect of land ownership, but also the inalienable nature of the title. The Howard government's priority was to allow land to be opened up to the market, by establishing long-term leases on parts of the Aboriginal land and then subletting lots to individuals. This would encourage enterprise and initiative, as well as allowing leaseholders to borrow from banks. Thus, according to Minister Brough, Aboriginal communities would at last be able "to operate like normal Australian towns" (Brough 2006d).

A key feature of the normalisation of townships involved allowing private home ownership. Prime Minister Howard had pointed to the importance of individual home ownership the year before when briefly visiting the remote NT town of Wadeye. In a widely reported statement, Howard argued:

> I believe there is a case for reviewing the whole issue of Aboriginal land title, in the sense of looking more towards private recognition… I certainly believe all Australians should be able to aspire towards owning their own home and having their own business… Having title to something is the key to your sense of individuality, it's the key to your capacity to achieve and to care for your family, and I don't believe that indigenous Australians should be treated differently in this respect… I'm not talking here about reducing opportunities for indigenous people, I'm talking about giving them the same opportunities as the rest of their fellow Australians. (Howard 2005)

The value of rewarding individual effort by promoting home ownership fits neatly with the Howard government's ideological preference for economic liberalism, and the experience of many Australians in the mainstream economy. Home ownership is also often considered by economists and demographers as a useful indicator of economic development and viability (eg SCRGSP 2011).

However, Howard had apparently given little consideration to the aspirations of the Indigenous people themselves. As the Northern Land Council argued in the Senate Committee hearing into the 2006 ALRA amendments, home ownership was an appropriate aspiration for other parts of Australia, for those who were better off. As Norman Fry, CEO of the NLC pointed out:

> Private home ownership is not high on the lists of priorities of poor people, whether they are Aboriginal or non-Aboriginal… For us, basic services such as education, health, roads and infrastructure are where we are at. Owning homes is something only for those Australians, black or white, who can afford them. (SCALC 2006b, CA11)

Howard's preference for Indigenous home ownership ignored the very tangible obstacles which make home ownership a far more difficult prospect in remote Indigenous townships. The practical realities associated with home ownership in remote communities have more to do with low household income, scarce employment opportunities, and the limited viability of a property market in areas of extreme remoteness, than with matters around land title (Altman et al 2005, 14-16;

Sanders 2005b). The well-recognised shortage of existing housing stock and the high costs of building in remote communities would also render home ownership particularly difficult to achieve.

The notion of normalising townships was not limited to individual home ownership, but was extended to include business ventures and the provision of services. Again, limitations due to remoteness, small population, and the quality of the land were dismissed as factors contributing to the limited range of economic development on Indigenous land, in favour of pointing to the lack of incentive resulting from being cut off from the mainstream market economy. In a sweeping critique of the dearth of economic activity in remote communities, David Tollner, Country Liberal Party Member for Solomon, noted in the parliamentary debates that:

> When you travel around community after community on Aboriginal land in the Northern Territory, nowhere do you see a market garden that grows fresh vegetables; nowhere do you see a butcher shop or a small abattoir; nowhere do you see bakeries. You do not see hairdressers; you do not see clothing stores – let alone a McDonald's or an Irish theme pub. The reason none of that exists is that it is impossible to get those businesses up and running unless there is an incentive for people to make that investment in those communities. (Tollner 2006, 93)

Leaving aside the cultural insensitivity within these remarks, the problem definition outlined by Tollner is important as it points once again to the insistence on the market as the solution to the problems faced by Indigenous communities. According to this market-driven assessment, the lack of investment is not explained by difficulties of access, language, education levels, the viability of businesses in small communities (all of which were described by Indigenous leaders at the Senate Committee hearing), nor deliberate choices on the part of some of the Indigenous communities to eschew the trappings of mainstream city life, but rather by the limitations on borrowing money against a property lease under the ALRA. The government's argument revealed a concern for the lack of services available in remote communities, but pointed to the need for investment and an emphasis on the private provision of services, rather than improvements in government service delivery (supported by the Labor opposition), or government support for capacity-building in the communities.

Indigenous leaders have, in fact, repeatedly expressed interest in increased participation in the mainstream economy, and several representatives of the land councils pointed this out repeatedly during the Senate hearing around the 2006 legislation (SCALC 2006b). They rejected the government's depiction of remote communities as ignorant of the market, or unwilling to participate. Moreover, they emphasised their current engagement in the economy through the negotiations of mining access, and other uses of the land, but pointed out that the main obstacles to

increased involvement in the market into the future were not to do with the inalienable title on their land. Indeed, they saw the opportunities of using their secure ownership of the land as an asset, which had the potential to be lost altogether through leasing. As David Ross of the Central Land Council asserted:

> Any business person in this country and around the world knows that one of your greatest assets is always your land… You are going to take that land off them. It is the best asset they could ever have in being able to negotiate any business opportunities, employment et cetera into the future. (SCALC 2006b, CA30)

In this sense the Howard government's problem definition around inalienable land title was clearly rejected by the land councils. The problem was not *difference*. Rather, their alternative problem definition pointed to poor delivery of essential government services, particularly by the Northern Territory, such as education and basic infrastructure including roads, as the cause of the limited potential for economic development. This alternative causal story clearly casts responsibility, or blame, back onto the government, rather than onto the Indigenous communities themselves, and their traditional form of property ownership.

Normalisation for the Howard government entailed moving the Aboriginal communities on ALRA land into the mainstream, denying the right to *difference*. As has been noted elsewhere, this rhetoric extended far beyond land rights in the Howard government's approach to Indigenous affairs (Sullivan 2011; Sanders 2008b), including a number of other measures aimed at eliminating special or different treatment of Indigenous Australians. The winding back of native title rights, the abolition of the Aboriginal and Torres Strait Islander Commission, and the shift away from Indigenous-specific delivery of government services to general government departments, were all examples of the same conservative philosophy, which denied difference and special status. In this way, the culpability for disadvantage and dysfunction in Indigenous communities was transferred onto the Indigenous people themselves, and their traditions, culture and claims to special status were constructed negatively, as deviant, rather than positively.

Choice, and coercion

A final theme which is evident in the government's discussion of the 2006 amendments is that of choice. The Minister for Indigenous Affairs, Mal Brough declared in his second reading speech that the amendments would "provide more choices in life for Aboriginal people in the Northern Territory" (Brough 2006b, 5). His view of the limits on choice was narrow in its focus. As Brough described the problem, most residents of townships

have no choice but to live as tenants in these townships. If they want to own a house or start a business, they have to move. They are mostly marooned in unsafe settlements devoid of economic opportunity and hope for the future (Brough 2006b, 5).

Choice is clearly associated with the liberal concept of freedom, particularly freedom of the individual. Brough refused to acknowledge that the Indigenous people who live in townships which are not on their own traditional lands have in many cases made deliberate choices to reside in the townships, and are certainly not "imprisoned" as Brough and other Coalition members suggested in the parliamentary debates. As Warren Snowdon, the Labor member for Lingiari (which covers the remote parts of the Territory) observed during the parliamentary debate, reflecting on the research of anthropologist David Martin, many of the Indigenous residents have made a little-acknowledged choice: that of "resistance… to what they see as attempts to assimilate them into the dominant society" (Snowdon 2006, 83). The choice being presented by the Howard government was a far more restricted choice: the choice to be "normalised", to join the mainstream, and to be assimilated. Alternatives were not to be recognised as valid choices.

Once again, in adopting the language of choice, the Howard government was not factoring in the range of structural factors which were contributing to the lack of home ownership and business opportunities in remote communities. The extreme remoteness and poor quality of the land, in most cases having been granted in land rights claims precisely because it was unviable as pastoral land, clearly hold down the market value of land (Altman et al. 2005). Extremely low population density combined with low levels of infrastructure such as roads, transport, and access to services, also limit the attraction for business or other investment. Real choices about participation in mainstream economic activities were clearly restricted by more than simply the form of land title.

Despite the rhetoric of choice used by Brough and other members of the Coalition, a number of critics of the legislation pointed to a lack of real choice in the manner in which the government was already implementing leasing arrangements for certain remote communities. The Senate Committee hearing into the legislation examined several examples of leases being negotiated over Aboriginal land in exchange for the delivery of infrastructure and services which were seen by many as being essential, not optional, such as the building of additional housing, or a school (SCALC 2006b). In this sense the government was accused of being coercive, or of "blackmailing" and "bullying" the Indigenous communities (SCALC 2006b, 7). As Snowdon asserted in the parliamentary debate:

> The Commonwealth is imposing its will as to how Indigenous people use and deal with their land in order to obtain the benefits that other Australians see as their rights as citizens: access to reasonable housing, health, education and other services. (Snowdon 2006, 86)

Choice, then, was constrained, not expanded by the Howard government's changes to the ALRA. As with the language of individual rather than communal land ownership, and the emphasis on normalisation, the underlying message was about the need to adopt the culture and practices of the dominant culture. The construction of Indigenous land as *different* from mainstream forms of property ownership had thus shifted from being a positive to a negative. Where Aboriginal land rights had once been seen as an opportunity for justice and self-determination, allowing Indigenous people the choice to live where they chose in the manner they chose, now the choice had become a miserable one of living in "a sanctuary, a preserve of living prehistory within modern Australia" (Tollner 2006, 92), or "cultural museums" (Vanstone 2005b). The security of land tenure offered in the original ALRA, with inalienable freehold title, had now become a choice to remain in economic isolation and entrenched disadvantage. Responsibility for continuing disadvantage was thus in the hands of the Indigenous land owners and their representatives, the land councils.

Alternative causal stories point to a much wider range of factors contributing to Indigenous disadvantage and the real economic and social problems experienced in the remote Indigenous communities of the Northern Territory. These include serious and long-term institutional failure, in particular resulting from dysfunctional relations between the Commonwealth and NT governments, and bureaucratic incompetence (Dillon and Westbury 2007). The resulting neglect and underfunding of these communities, over decades, has produced extremely poor results in terms of the provision of infrastructure, education, health and housing, with dire results in terms of the capacity of Indigenous communities to participate in the "economic mainstream".

As we have seen, when the Howard government seized the opportunity presented by its Senate majority to amend the ALRA in 2006, the and councils were not abolished, as suggested by Reeves (and indeed, in marked contrast to the fate of ATSIC, which had been disbanded just the year before in 2005). Path dependency was still influential, though weaknesses were emerging, as frames changed. The land councils were certainly potentially weakened by a number of reforms, including changes to the guaranteed funding arrangements from mining royalties through the Aboriginals Benefit Account, increased powers for the Minister to delegate land council functions to external bodies, and the easing of voting requirements to allow the formation of smaller breakaway councils (Brennan 2006). The Howard government's reform agenda was not complete, however, and the following year would present a new window of opportunity.

The Northern Territory Intervention: Crisis manipulation

The Howard government's sudden announcement of the Northern Territory Emergency Response (the "NTER" or the "Intervention") in June 2007 triggered an extraordinary period of Australian politics, as far-reaching measures were implemented without warning in remote communities on Aboriginal land across the Northern Territory and enabling legislation was pushed through both houses of parliament in a remarkably short timeframe. The events leading up to the Intervention and the wide-ranging program of policy measures have been amply recorded elsewhere (for example, Altman and Hinkson 2007; Macoun 2011; Toohey 2008; Langton 2008; Nancarrow 2007). This thesis is concerned with two key aspects of the Intervention only, related to the theme of *access* to Aboriginal land: the abolition of the permit system, and the compulsory acquisition of land around townships on Aboriginal land. We will analyse these in terms of access, but will also note the implications in terms of *purpose*, *governance* and *difference*. First, we will consider the impact of the frame of "crisis" on policy making for Aboriginal people in the Northern Territory.

The heightened emotion and drama surrounding the announcement and initial roll-out of the Intervention echoed previous "crises" in Indigenous affairs, such as those around the High Court decisions of *Mabo* and *Wik*, the handing down of the *Bringing them Home* report on the Stolen Generations, or the Royal Commission into Aboriginal Deaths in Custody. In this particular case, the "crisis" would herald a dramatic change to the Commonwealth's approach to Aboriginal communities in the Northern Territory (Altman and Hinkson 2007), and would provide the Howard government with political cover for the coercive introduction of two policies related to Aboriginal land which had been on the policy agenda for some time already, township leasing and the permit system.

Political actors choose to frame a situation as a "crisis" for many different reasons, as we observed in Chapter 2. A crisis can be valuable in drawing attention to a policy problem, putting it firmly on the policy agenda. Crisis can be used to denigrate opponents, identifying scapegoats and casting blame for past neglect or failure. A crisis can also provide opportunities for governments to demonstrate their skills in decision making, crisis management and problem solving to the electorate. In all cases, a crisis provides an opportunity to break out of normal decision-making patterns, and to move away from incremental, or path-dependent, policy processes. Crisis exploitation is thus increasingly recognised in policy literature as an important factor in explaining policy change (Boin et al 2005; McConnell 2010).

The Northern Territory Intervention has been identified as a clear example of crisis exploitation ('t Hart 2008; Watson 2009), presenting both political and policy opportunities for the Howard

government. In particular, it allowed the government to challenge the path dependency which had been in place for decades in Aboriginal land rights. The immediate catalyst for the "crisis" was the release of the *Little Children are Sacred* report by Anderson and Wild (2007) which identified widespread child abuse in remote communities. This report was seized upon by the Howard government, which was impatient at the slow response of the Northern Territory government which had commissioned the initial inquiry (Brough 2007a). Critics quickly observed the absence of any clear link between the recommendations made by Anderson and Wild (2007) and the measures included in the NTER, and questions were raised about the extent to which the Intervention was ideological or evidence-based (eg Behrendt 2007). The looming federal election was seen by many as a factor driving the government's decision to take sudden and dramatic action in remote communities in the Northern Territory (Toohey 2008). The Howard government's tense relationship with the Labor Northern Territory government under Chief Minister Clare Martin was also a motivating factor (Brough 2007a).

In terms of social construction, it is clear that the Howard government was able to impose the compulsory acquisition of land, alongside other punitive policy measures such as welfare quarantining, the prohibition of alcohol and pornography, and the abolition of the permit system, because the target population (the remote Indigenous communities), were constructed as *deviants* (Schneider, Ingram and de Leon 2007). The apparently widespread cases of child sexual abuse, combined with high levels of unemployment and alcohol and substance abuse, were linked to all Indigenous communities in the Northern Territory, without differentiation (Macoun 2011). Thus the township leasing policy, which had been relatively unsuccessful to that point, was legitimately and justifiably imposed on communities, rather than negotiated.

The rushed nature of the decision to intervene, through both executive and legislative channels, allowed little scrutiny and debate, and policy decisions which would otherwise be considered extremely controversial were incorporated into the Intervention with little comment. This is a clear example of the impact of political time and the effects of contingency, as the Howard government exploited its Senate majority to push through controversial law. A suite of legislation, including the *Northern Territory National Emergency Response Act 2007*, the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007*, and other Acts which governed appropriations, were presented to parliament as a package. The passage of the legislation through both houses of parliament was extraordinarily fast, with the Senate Legal Affairs and Constitutional Affairs Committee permitted to hold an inquiry with only one day for public hearings and a weekend to deliver its report (Rimmer et al 2007).

We turn now to the two aspects of the Intervention which illustrate the changing government understanding of *access* to Aboriginal land. The first of these is the revocation of the permit system, which allowed traditional Aboriginal owners to control who came onto their land. The changes to the system simplified the system and allowed access without permits to the areas on Aboriginal land deemed to be "public areas", primarily around townships. As Minister Mal Brough explained the new policy in his second reading speech,

> Permits will no longer be needed to access common areas in the main townships and the road corridors, barge landings and airstrips connected with them. The current permit system has not prevented child abuse, violence, or drug and alcohol running. It has helped create closed communities which can, and do, hide problems from public scrutiny. (Brough 2007b)

This policy had been first raised in the Reeves Review but rejected in the immediate aftermath, as we noted earlier in this chapter. Following the passage of the 2006 legislative amendments discussed in the previous section, Minister Brough's Department of Families, Community Services and Indigenous Affairs (FACSIA) issued a Discussion Paper in October 2006 which referred approvingly to Reeves' recommendations on the permit system, and described the current system as "anachronistic", being "a vestige of the former protectionist system of Aboriginal reserves under which entering or leaving Aboriginal land was restricted" (FACSIA 2006, 4). The government sought submissions in response to the Discussion Paper but did not release them publicly, nor had it formally released a report on the consultation process before the announcement of the Intervention. The submissions were later released as a result of an application under the *Freedom of Information Act 1982* made by the Law Council of Australia, which went on to publicise a summary of the submissions (LCA 2008). The Law Council had already condemned Brough's Discussion Paper in its own submission, describing it as being unbalanced and lacking an evidence base (LCA 2007). The Council saw no advantage to Aboriginal communities in allowing journalists on to Aboriginal land with risks of disruption to ceremonial business or causing offence. Other submissions were equally damning of the proposed changes to the permit system, and notably, none of the 80 Aboriginal communities consulted about the Discussion Paper supported any change to the system (LCA 2008, 7). This evidence was clearly not adopted by the government in its subsequent decision about the permit system for the Intervention. In fact, Brough had decided to disregard the submissions and consultations because "numerous people" had been frightened to speak publicly but had approached departmental officials after the consultation meetings in Aboriginal communities, asking for the permit system to be removed (Brough 2007b).

We can observe two new problem definitions being associated with restricted access to Aboriginal land in the FACSIA Discussion Paper, and these were reinforced in the Intervention. The first problem

definition is the need to open up Aboriginal land to the scrutiny of the media, in an effort to expose the apparent levels of sexual crime, illicit drug use and alcohol-related violence. The second problem definition blamed the permit system for a lack of openness to economic activity for residents on Aboriginal land. The Discussion Paper stated:

> The Minister put the view that, on balance, increased external scrutiny would be in the interests of victims of crime and the disadvantaged or vulnerable in what are now closed communities. Liberalisation would also bring economic benefits that would help to promote the self-reliance and prosperity of Aboriginal people in remote communities. (FACSIA 2006, 2)

The Discussion Paper also set out guiding principles for a proposed "new system" which included the following conditions for a revised permit system: it should "ensure the normal interactions of society can occur, including external scrutiny" and "allow individual Aboriginal people to engage with and benefit from the market economy without hindrance". More surprisingly, the Discussion Paper stipulated that the system should "be simple to administer, preferably by government, to ensure transparency and accountability" (FACSIA 2006, 5-6). The first two of these recall statements made by Liberal members during the debates on 2006 amendments about normalisation and participation in the mainstream economy. The last reveals an underlying urge to seize back control of Aboriginal land, a significant departure from earlier reflections on *governance* in the era of land rights.

Brough's explanation of the need to abolish the permit system was emotional rather than rational, and was based on a tenuous causal story linking child abuse to "closed communities". Speaking at the National Press Club on 15 August 2007 as the NTER legislation was being debated in parliament, he argued:

> We can talk about land rights, we can talk about permit systems, or we can actually deal with the difficult core issues of children being raped, babies with gonorrhoea, children having their absolute hearts ripped out by people who are supposed to be people of authority, and we can say, no more. (Brough 2007a)

The problem definitions presented by the Howard government in the Discussion Paper were unconvincing, and yet the recommendations based on "unsubstantiated allegations" were incorporated without modification into the Intervention (Altman 2007a, 8). As the Police Federation of Australia observed in a 2008 submission regarding the proposed restoration of the permit system, "the Australian Government has failed to make the case that there is any connection between the permit system and child sexual abuse in Aboriginal communities", and the Federation further noted the value of the permit system as a "useful tool in policing the communities, particularly in policing alcohol and drug-related crime" (PFA 2008, 6). The land councils were also unimpressed, noting that

the government's problem definitions had little to do with the Aboriginal owners' perspective of the permit system, which worked effectively (SCLCA 2007, 46-48). In 2008, the Northern Land Council noted that in the 2005/2006 financial year, approximately 22,600 permits were issued by the NLC alone, free of charge, and of these "over 80% of NLC permits were issued within 48 hours" (NLC 2008, 5). Furthermore, the NLC explained:

> From a policy perspective, the scheme is intended to ensure that Aboriginal communities and people are not subject to breaches of privacy, or inappropriate or culturally insensitive actions by unauthorised persons on Aboriginal land, as well as ensuring that persons with a legitimate or justifiable interest may enter Aboriginal land. (NLC 2008, 4)

With respect to the gap between intention and action, it is clear that the original Discussion Paper released by Minister Brough had garnered very little in the way of positive support from stakeholders and experts (LCA 2008). However, the contingent circumstances presented by the NTER allowed the government to introduce its preferred option of lifting the permit system for access to "public areas" on Aboriginal land as part of a bundle of extreme policies, justified by emotional references to the vulnerable children at risk of sexual predation in remote communities. The rationale for the intention to modify or roll back the permit system was far more cautious than the rationale for the action itself, and the response from Aboriginal communities, land councils and other observers was predictably horrified. The outwardly rational process of seeking comments and consulting on the planned changes through the Discussion Paper had been quickly abandoned in favour of policy making *in extremis*, in the context of a crisis, and Aboriginal perspectives and values with respect to *access* were entirely swept aside.

The issue of compulsory acquisition of land around townships was similarly controversial, and reveals a similar opportunism in the leap from intention to action. As part of the Intervention, the Commonwealth government legislated to allow itself the power to impose compulsory five-year leases over the identified remote townships which were the subjects of the Intervention. The government claimed that this measure was necessary to allow the provision of infrastructure, repairs and the delivery of services. The boundaries around the townships were initially determined by aerial survey, thus requiring no direct consultation with the affected communities. The government promised that "compensation" for the acquisition of the land would be payable, on negotiation, in due course.

The ALRA amendments relating to township leases which had been implemented in 2006 could not be considered a spectacular success. The Minister and his department had considerable difficulties in persuading communities to take up the opportunities offered, especially for the expected full term

of ninety-nine years, and few leases were signed after the legislation was passed. The Labor opposition continued to question the apparently coercive tactics used (as raised in SCALC 2006b), but other obstacles have been noted, including the costs associated with surveying and administration, and the lack of engagement with the wishes of traditional owners (Dalrymple 2007, 215; Tilmouth 2007).

Almost a year after the passage of the ALRA amendments, the Intervention targeted the same remote communities which were most affected by the town leasing arrangements. As part of the crisis-driven policy response to the *Little Children are Sacred* report, the land around the targeted townships was compulsorily acquired by the Commonwealth government. In this case, the leases which were imposed were of five years, rather than ninety-nine years, in line with the overall commitment of the Emergency Intervention through to 2012. A number of critics at the time described this compulsory acquisition of Indigenous land held under the ALRA as a "land grab" (eg Turner and Watson 2007).

The debate around the long-term impact of the compulsory acquisition of these areas of land is far from settled. It is worth noting, however, a number of observers at the time believed that the compulsory imposition of township leases would push more communities to accept the section 19A leases under the amended ALRA once the Emergency Intervention was past. Dalrymple suggested, for example:

> The five-year compulsory acquisition is an interim measure, during which term Brough, if he is still Minister for Indigenous Affairs, will probably seek to put in place in all the prescribed communities an 'appetiser' version of the section 19A land tenure model. (Dalrymple 2007, 214)

The importance of crisis exploitation and timing is clearly evident, then. The Howard government had seized the opportunity presented by the Senate majority to implement a wide range of policies in the Emergency Intervention, and in doing so, forced the issue of land tenure over townships. While the Howard government had clearly had ideological concerns over the special nature of Indigenous land ownership since first taking office in 1996, these had been slow to take form and difficult to implement, until the window of opportunity opened in the last two years of office. The impending election in late 2007 also added urgency to the issue, and it is arguable that the punitive measures imposed on remote Indigenous communities were thought by the Howard government to be a potential electoral winner, because, as Schneider and Ingram (2005) have observed, voters like to see "deviants" punished.

In terms of the leap from intention to action, it is clear that the context of the "emergency" of the Intervention drastically limited the participation in the decision making, with parliamentarians

sidelined and consultation avoided altogether. The mobilisation of opponents to the Intervention was too slow to have an impact on the rushed legislation, and the government justified its refusal to listen to critics by reaffirming its resolute response to the "urgency" of the situation in remote communities. The resources enjoyed by the government in the "crisis", in the form of supportive blanket media coverage, and limited parliamentary or interest group opposition, allowed Brough to push the intended policies of township leasing and removal of the permit system much further than would have been possible in "normal" times.

The Intervention received bipartisan support, in the lead-up to the federal election in November 2007, and following the election, the incoming Rudd government continued the implementation of the Intervention policies, and publicly supported both the rationale and the objectives of the former government's response. The crisis frame which linked child sexual abuse with the remote Indigenous communities arguably allowed little political room for dissent, and Rudd's election strategy was clearly focused on differentiating his party from the Howard government in policy areas which had more salience across the broader non-Indigenous community, such as industrial relations and climate change. The permit system was an exception to this bipartisanship, however. The Labor Party promised to reinstate the permit system during the election campaign, and introduced legislation during its first parliamentary sitting to this effect. The legislation did not manage to pass the Senate, however, as the Coalition in opposition continued to defend its legacy of protecting vulnerable children in remote communities.

Conclusion

This chapter has considered the temporal sequence which begins and ends with the Howard government's term of office, running from 1996 to 2007. It is clear that this period of time saw a radical rethinking of Aboriginal land rights in the Northern Territory, compared to the earlier frames proposed by Woodward and legislated by the Fraser government in 1976. The Reeves Review marked an important shift in the government's understanding of Aboriginal land. Each of the themes of *purpose*, *difference*, *governance* and *access* have been challenged and overturned, as summarised in Table 7.1.

Table 7.1 Comparison of frames around Aboriginal land rights, Woodward to 2006

	Woodward Royal Commission	Reeves evaluation	2006 and 2007 amendments
Purpose	• Land rights should be permanent, inalienable • Land granted on basis of traditional spiritual connection and also need • Land will help address economic disadvantage, social justice, harmony • Minerals belong to Crown but royalties payable to Aboriginal land owners through councils	• Land rights granted on the basis of traditional connection should be used for the socioeconomic advancement of Aboriginal people • Costs of land rights for non-Aboriginal Territorians must be taken into account • Mining royalties payable to Aboriginal land owners should be used for specific purposes for the benefit of wider Aboriginal community	• Land rights should no longer be permanent, inalienable, communally owned as this prevents economic participation • Mining royalties payable to Aboriginal land owners, but funds withheld for township leasing at the discretion of the Minister
Access	• Land owners have right to veto mining exploration and development • Land owners have power to control access to land	• Land owners have right to veto mining exploration but process needs simplification • Permit system should be abolished and replaced by Trespass Act	• Land owners have right to veto mining exploration and development, but land councils are diminished in strength • Permit system lifted for all "public areas" on Aboriginal land to allow public scrutiny, media and business access
Governance	• Powerful, well-resourced, large land councils as representatives of Aboriginal interests • Aboriginal control over land • NT legislation as model for states to follow	• Land councils should be broken into regional councils to be more responsive to localised needs of traditional owners and residents • NT government should have greater control over Aboriginal land	• Land councils weakened through reduced funding and potential for "breakaway" councils • Commonwealth retains control of Aboriginal land law and intervenes in Northern Territory politics as needed • Consultation with Aboriginal landowners is of minimal importance in crisis
Difference	• Aboriginal culture is resilient and land rights will help maintain it • Communal land title in accordance with Aboriginal tradition	• Emphasis on "traditional owners" should not exclude other Aboriginal residents • Aboriginal culture is associated with dependence on government welfare • Difference is negatively constructed	• Communal title, inalienable title to land both negatively constructed • Land rights should be used for economic development to avoid welfare dependence • Difference is negatively constructed, Aboriginal land is "closed", and traditional cultures are unviable

As is evident from comparing the Woodward Commission's recommendations with those of the Reeves review and the eventual legislative amendments, the evolution of the frames around each of the key themes is significant, and potentially far-reaching. The policy design outlined in the 2006 amendments to the ALRA and the 2007 Intervention created a new institutional framework, and a new set of cultural expectations for the Indigenous land owners in the Northern Territory. Where the security, inalienability and inviolability of Aboriginal land rights were once accepted as normal, now the form of land title came to be challenged, and portrayed as damaging and unsuitable in the twenty-first century. The Indigenous land owners themselves, through their representatives the land councils, were re-cast as rigid, bureaucratic, and economically backward. The very premise of granting sections of land to Indigenous people came under attack, as existing Indigenous land was increasingly subjected to the demands and requirements of mainstream property ownership. At a time when Indigenous disadvantage was high on the policy agenda, the only available solution which remained, according to the Howard government's problem definition, was to open Indigenous land up to the market. The consequences for the future of Indigenous land ownership are potentially far-reaching, as these changes have the potential to take the form of a new critical juncture. The Rudd and Gillard Labor government's continuation of negotiations over township leases and inability to reinstate the permit system, followed by the return of a Coalition government, suggests that the changes are here to stay, and the new policy design may go unchallenged for some time.

Chapter 8: Conclusion

"The Northern Territory Aboriginal Land Rights Act… was ever a Commonwealth Act, born out of a long struggle by Aboriginal leaders across Australia and the Northern Territory, from Yirrkala in East Arnhem Land to Wave Hill over in the Victoria River District. And, as we approach its 40th anniversary, it remains a beautiful thing – a beacon that marks the high point of recognising dispossession, of customary ownership and enduring practice of an ancient culture rooted in the land and waters of the Northern Territory."

Joe Morrison, Chief Executive Officer, Northern Land Council
Address to the National Press Club, Canberra, 15 February 2015

The legislative account of Aboriginal land rights in the Northern Territory can be traced back over four decades, but policy development for Aboriginal land in the Territory has a much longer history. By tracing the story of Aboriginal land policy back to the early colonial era, we have a deeper understanding than ever before of the origins of land rights as a settler colonial policy, and a greater appreciation of the potential and the limitations of land rights for Indigenous people. This novel study has used a policy studies approach to illuminate the processes of government decision making, paying careful attention to politics and power, and to the role of institutions and interests in determining possible policy outcomes. In this concluding chapter, we will review the main arguments presented in the thesis, in terms of framing, evidence-based policy and path dependency, and briefly reflect on current politics and future challenges for Aboriginal land rights policy.

Framing Aboriginal land: evidence, interests and values

This thesis has answered the research question about framing and development of Aboriginal land rights policy in the Northern Territory through time, observing the small and large-scale changes which occurred as governments responded to challenges, engaged in experimentation, and drew on new and old evidence in formulating policy. These frames have been used and elaborated by government actors as they define and re-define the policy problem of Aboriginal land in the Northern Territory.

It is clear that the settler perspective has dominated the frames, as non-Indigenous claims on land have persistently taken precedence over the interests of the original inhabitants. For most of the history of Indigenous-settler relations in Australia, the settler perspective has been supported by very limited knowledge and understanding of Indigenous economic and social systems, and a disregard for the connection to land based on religious beliefs and customary law. The evidence that was taken into account in policy making about Aboriginal land was primarily filtered through missionaries and government officials, and later anthropologists, and while many of these isolated voices were fierce defenders of Aboriginal interests in land, they reported to non-Indigenous

authorities who chose to disregard the authentic Aboriginal voices they represented. As noted in Chapter 5, the events of the 1960s, including the Gurindji walk-off, the Yirrkala petition and the *Milirrpum* case, presented a significant turning point as Aboriginal perspectives were at last recorded and directly considered by policy makers.

The study of how the problem of Aboriginal land has been framed has allowed us to explore the different ways in which evidence and research are used to support policy formulation. Indigenous policy is an area where deep rooted and often competing ideas are often especially influential, and this has compromised the adoption of evidence-based policy on many occasions. The role of government in the promotion of particular evaluative frames, such as "land rich, dirt poor", can be very powerful in shaping debates and justifying certain policy decisions. The exploitation of crisis is also a prominent feature of Indigenous affairs, and the Northern Territory Intervention was a clear example of the neglect of evidence in favour of predetermined ideological programs.

This thesis has paid particular attention to the translation of evidence into policy decision making, and has used formal government evaluations and inquiries wherever possible to identify potential links between expert and other advice received by government authorities, and the policy directions which are subsequently adopted. It is obvious that the quality of evidence received by governments has not been consistent over time, and government authorities have frequently been prepared to make far-reaching decisions on the basis of weak and partial evidence.

The immediate application of knowledge to decision-making is only one aspect of evidence-based policy, as we explored in Chapter 2. In line with a structured interaction account of policy, we have observed the selective use of evidence as ammunition in a highly contested policy debate, such as in the interventions of churches, anthropologists and civil rights activists in the 1960s, or the instrumental use made by the Howard government of the *Little Children are Sacred* report in justifying the Northern Territory Intervention. We have also noted the longer-term, value-shaping impact of new knowledge and understanding, including highly publicised stories such as the Gurindji and Yirrkala disputes, and the prominent Land Rights Commission held by Justice Woodward, which have called into question dominant values and assumptions and led to a gradual shifting of public attitudes, ultimately observed and reflected by key parliamentary decision makers. In the same manner, the very substantial effects of the Buxton Committee's recommendations in 1837 were to be felt in policy decisions based on the humanitarian impulse to protect for many decades afterwards. A narrow authoritative choice-based view of the relationship between evidence and decisions does not allow us to discern these much more important long-term consequences of new knowledge and understanding, which are essential to constructivist accounts of policy making.

Tracing the themes: purpose, difference, governance, access

In examining the frames applied to Aboriginal land, this thesis has traced the evolution of four specific themes through each time period. The theme of *purpose* has seen Aboriginal land become a positively recognised basis of political and cultural identity, though it has shifted most recently into a more negative frame for its association with poverty and exclusion from the mainstream economy. The second theme of *difference* has followed a similar path from a positive to a negative frame, as the traditional connection which Aboriginal people have for land has been overshadowed by a frame of welfare dependence and social dysfunction. *Governance*, the third theme, allows us to sketch the progress of Aboriginal people in terms of self-determination and autonomy on Aboriginal land, and while the strength of land councils has been challenged recently, these bodies have developed resilience and earned respect, a positive frame overall. Finally, *access* to Aboriginal land has come under scrutiny, but access has been protected as a fundamental element of land ownership. Indigenous traditional owners retain their right to refuse mining exploration and the permit system, though weakened, continues to control non-Aboriginal access to most Aboriginal land.

Each of these four themes has thus evolved through positive and negative constructions, and these constructions reveal much about the changing power balance between Indigenous people, the state, and key interests. This thesis has argued that the positive constructions of *governance* and *access*, reflecting an acceptance of Aboriginal traditional ownership of significant areas of land, and their right to make decisions with respect to the land, remain precarious, given the negative constructions of the other two themes, *purpose* and *difference*. The language and frames used by key members of the Howard government reveal glimpses of an abiding sense of illegitimacy surrounding Aboriginal land rights, and a resentment of ownership rights which exclude non-Aboriginal interests from uninhibited access to opportunities to pursue economic development. Colonial-era assumptions remain firmly in place in some parts of government, and continue to influence policy directions.

Aboriginal land: power, policy dynamics, and path dependency

The problem of land and land ownership is at the heart of Indigenous-settler relations in Australia, but as this thesis has argued, the problem is unquestionably defined in terms which serve the interests of the state. In this asymmetrical relationship, Aboriginal interests, objectives and fears have received little attention over time. This is particularly evident when we consider the persistent problem definition of Aboriginal land in economic terms. Land ownership is understood to be a vital component of the national and Territory economy, and historically, governments have defined and redefined the "problem" of land rights in ways which balance competing demands on Aboriginal land, often to the detriment of the Aboriginal owners and residents. The mining boom of the 1950s and 1960s played an essential role in pushing Aboriginal land rights to the top of the policy agenda,

and the same phenomenon has occurred in the 1990s with a resurgence of mining interest in Aboriginal land. Economic interests, often framed as equivalent to the national interest, have taken priority in deliberations about land policy.

This thesis adopted a policy dynamics approach in order to explore the complexity of policy making, where policy actors are "situated agents", working within and responding to a specific policy environment, interpreting rules and making strategic decisions within the limits of the institutional setting. Policy dynamics is thus concerned with context, and the ways in which opportunities change through history. This approach thus draws attention to temporality and the existence of multi-layered temporal sequences which can overlap and influence each other.

In the story of Aboriginal land rights in the Northern Territory, we have identified five different temporal sequences: (a) the early decades of colonial settlement in the south where frontier conflict and fear shaped decisions about living alongside Aboriginal people; (b) the humanitarian period following the Buxton Committee report in 1837 which recommended "civilising and Christianising" of indigenous peoples, applying the rule of law and Christian values in caring for Aboriginal people who had endured dispossession and mistreatment; (c) the "protection" era which expanded the Buxton interest in protection on reserves with the new push for extensive reserves across the north and the centre of Australia, where Indigenous people could remain out of contact with the European settlers; (d) the "assimilation" era where changing values around civic rights and formal equality for Aboriginal people coincided with growing economic interest in Aboriginal land, particularly from mining and pastoral interests, placing reserves in northern Australia under increased political scrutiny, and (e) the era of land rights, where the extensive reserves in the Northern Territory were returned to Aboriginal owners in the form of legislated land rights. The thesis also observes the beginning of a new temporal sequence, in the past two decades, with the growing influence of market-based principles applied to Aboriginal land, and the state's initial attempts to regain control over areas of Aboriginal land.

The study of these temporal sequences has revealed the effects of path dependency, and we have been able to identify several critical junctures at which vital decisions have been made, shaping policy for long periods of time afterwards, and making particular policy decisions hard to unwind. The critical junctures of the Buxton Committee and the Woodward Inquiry have established feedback processes which have been identifiable, often increasing in strength over time. The most recent shift in policy direction under the Howard government, marked by the Reeves Review and the subsequent legislative amendments, may prove to be a critical juncture also, but the true impact of these remains to be seen.

Concluding observations

In closing, it is important to note that many of the reforms of Aboriginal land rights in the Northern Territory which were initiated under the Howard government, following the Reeves Review, are still on the Commonwealth government's agenda, and questions about township leasing, mining access, welfare dependence and the role of the Northern Territory government are all still very much in play. While path dependency is a significant factor which explains much of the development of land rights policy in the Northern Territory, it is not a protection against future attempts to undermine the legislation by determined actors.

In his speech earlier this year to the National Press Club in Canberra, Joe Morrison from the Northern Land Council quoted the former Fraser government Minister for Aboriginal Affairs, Ian Viner QC, who wrote of his fears for Aboriginal land rights in the Northern Territory today, saying:

> The whole framework and security of traditional Aboriginal land is in danger of being subverted by government, bureaucracies and people who have no real understanding or sympathy for traditional communal land ownership. (Viner in Morrison 2015, 8)

The spectacular achievement of the legislation in 1976 of Aboriginal land rights covering the Northern Territory is easily overlooked from Canberra. It has been a long journey, not just for the Aboriginal people who campaigned persistently for land rights, but also for the Australian government. What happens over the next four decades of Aboriginal land ownership is still an open question, but the stakes are high. This thesis has sought to reveal something of the choices made and knowledge used by the governments and bureaucracies in making policy for Aboriginal land rights in the Northern Territory over the past two centuries. These policy decisions and discursive frames have had real consequences for Aboriginal people in the Northern Territory, and these are ongoing. It can only be hoped that policy making in the future may be even better informed.

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