Indigenous Housing Rights and Colonial Sovereignty: Self-Determination and Housing Rights beyond a White Possessive Frame

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ABSTRACT

Through the lens of Aileen Moreton-Robinson's 'white possessive logics', this article addresses a series of legal cases concerning inhumane Aboriginal housing in the Northern Territory of Australia. It critiques successive government policies in relation to First Nations people since the colonisation of the Northern Territory in the nineteenth century, setting the cases in their historical context of ongoing subordination of First Nations people to the interests of white possession of land and governance. We argue that domestic law pertaining to First Nations housing rights manifests white possessive logics. Such control can only be overcome through affording First Nations communities self-determination over housing in accordance with international law and First Nations claims. Self-determination and sovereignty are antidotes to the colonial histories that underlie inadequate housing for Indigenous peoples not only in Australia, but across settler colonies. In developing this argument we draw on international law and honour the advocacy of Northern Territory Aboriginal communities who have struggled for community-control over housing and homelands over successive generations.

KEYWORDS

housing, self-determination, whiteness, Australian racism, First Nations, Aboriginal, Indigenous, Northern Territory Intervention, social control, human rights, right to housing, United Nations Declaration on the Rights of Indigenous Peoples, UNDRIP.

I. Introduction

* Thalia Anthony is Professor, and Jessie Hohmann is Associate Professor, University of Technology Sydney Faculty of Law. This paper was written on the lands of the Gadigal People of the Eora Nation, and the Wadi Wadi People of the Dharawal Nation. Thalia is also a Senior Fellow at Charles Darwin University on the land of the Larrakia People in Darwin. These lands were never ceded by those Peoples and we acknowledge it always was, and always will be, Aboriginal Land. We are grateful to the participants in an Economic, Social and Cultural Rights Annual workshop, co hosted by UTS Law and UNSW Sydney; the participants in the seminar on Housing as Social Control at the University of Asterdam; the editors of the special issue; and two generous anonymous reviewers. Any errors remain our own.

In September 2020, the remote Aboriginal[1] community of Ltyentye Apurte (Santa Teresa) in the central Australian desert won a significant Supreme Court case against the Northern Territory (NT) government, their landlord. The community argued they were entitled to more than 'safe' housing – that did not endanger human health – but also 'humane housing' (*Young & Conway v Chief Executive Officer (Housing)* [2020] NTSC 59 '*Young & Conway')*. The government immediately announced it would appeal the finding that the residents of Santa Teresa were entitled to humane housing (Bhole, 2020). The case was the latest in a line of strategic litigation brought by residents of Ltyentye Apurte, stretching over six years, in which they have sought to hold the government to account for their dire housing conditions. The case was a landmark ruling in determining the right to humane housing for remote Aboriginal communities in the NT.[2]

This paper is prompted by our critical engagement with judgments from these cases, asking *why* a ruling that upheld the right to humane housing for remote Aboriginal Communities is a legal feat? Why would a government in a wealthy country not guarantee this right in the twenty-first century? Having been exposed for its failure, why would the government challenge First Nations court claims and lodge appeals against the right to humane housing? We argue that the Santa Teresa cases are a striking example of the colonial state's management of First Nations peoples' housing in Australia through the rubric of white possession. The cases, as part of the ongoing struggle for self-determination and rights, can only be understood as part of a longer colonial history of white possessive logics in which control of housing has been a central, but little discussed, aspect. Thus, the denial of rights to housing for First Nations people in remote communities is intermeshed with broader colonial practises and policies to control and racially subordinate Aboriginal people.

[1] Terms used in this paper are based on current acceptance by First Nations people in the relevant jurisdictions. The term 'Aboriginal people' is used in relation to the Northern Territory; First Nations people is used in relation to Australia; and Indigenous people is used in relation to the international stage. We use both the colonial name 'Santa Teresa' (naming the Catholic mission) and the Arrernte name Ltyentye Apurte to refer to the community at the heart of this struggle.

[2] In late 2023, Australia's highest court, the High Court of Australia ruled in *Young v Chief Executive Officer (Housing)* [2023] HCA 31 that the tenants in Santa Teresa are entitled to compensation for distress or disappointment suffered as a result of the landlord's failure to take reasonable steps to maintain a secure premises. This article is concerned with earlier applications and appeals in the lower courts that found inhumane housing. The High Court decision did not address this issue, but instead found that the distress and disappointment was linked to the landlord's breach of a term of the tenancy agreement.

Our theoretical framing draws on the important work of Aileen Moreton-Robinson, and applies it to remote Aboriginal housing. Moreton-Robinson (2015) argues that 'white possessive logics' serve to 'circulate sets of meanings about ownership of the nation'. These logics and power relations structure a racial hierarchy in which First Nations people are legitimately and lawfully dispossessed and oppressed by the state. It is these logics that animate and explain the history, and ongoing, government control of Aboriginal housing in Santa Teresa. We can understand the community's struggle for self-determined and humane housing against the backdrop of Moreton-Robinson's white possessive logics. We regard international law – namely the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the International Covenant on Econoimc Social and Cultural Rights (ICESCR) and reports by the UN Special Rapporteur on the Rights of Indigenous Peoples – as upholding self-determined First Nations rights to housing to counter the white possessive logics that dominate the Australian housing lawscape.

Our paper makes a number of key contributions to the literature. First, it offers a critical analysis of the Santa Teresa cases within housing and land law in the NT, and situates them within the longer and wider history of colonial control of First Nations living conditions. Second, by focussing firmly on housing, it brings the inherent links between housing, land and self-determination for First Nations communities in remote Australia into view. Third, it contributes to the literature on housing by framing it as a symptom of white possessive logics. By engaging Moreton-Robinson's concept, we identify First Nations community housing as a form of colonial control to undermine First Nations peoples' sovereignty of their land. Finally, it considers the self-determined right to housing in international law and the possibilities for imagining housing in First Nations communities as a source of strength rather than deficit.

In section II, we explain Moreton-Robinson's theory of white possessive logics, and how it adds to the literature on housing as social control. Within this framing, section III turns to the historical colonial context in which Aboriginal people have been forced to live in Santa Teresa as a result of shifting phases of legally sanctioned social control. The following section (IV) addresses the legal cases and critiques the white possessive logics in the judicial interpretation, that denies Aboriginal people control over their housing and yet excuses the government's failure to maintain the property. Section V turns to the international legal standards, and particularly to the interplay of the right to housing in international law under ICESCR with the right to self-determination and land under UNDRIP, to offer an escape from the white

possessive logics of colonial control of housing for Aboriginal people in Santa Teresa. We adopt the broad reading of the right to housing posited by the former UN Special Rapporteur on Housing and understood within the overall self-determination framework of UNDRIP (UN Special Rapporteur 2019). The UN Special Rapporteur takes a strong stance that the right to housing for Indigenous peoples cannot be meaningfully enjoyed without both self-determination and the material fulfilment of land rights (including access to resources, infrastructure and services to support livelihoods). The Rapporteur presents a picture of a self-determined right to housing for Indigenous Peoples as a counterforce to state-controlled Indigenous housing that has enforced colonisation, racism, poverty and assimilation. In section VI, we conclude by contending that understanging the right to housing for Indigenous peoples requires a reading of international law in terms of housing rights *and* Indigenous rights. This in turn requires an engagement with white possessive logics that have structurally and epistemologically denied such rights.

II. Housing, 'White Possessiveness' and Social Control

Johnsen, Fitzpatrick and Watts, drawing on Cohen, define social control as 'the organized ways in which society deploys various modes of power in responding to behaviour and/or people it regards as in some way problematic, spanning criminal justice responses to the enforcement of norms via social interactions involving praise or blame' (Johnsen, Fitzpatrick and Watts 2018: 1109 see also Cohen: 1985). This broad definition is wide enough to encompass the forms of control experienced by the residents of Santa Teresa, however, current literature on housing and social control needs to be complemented by work that illuminates the colonial, racialized, and Indigenous context. The scholarship on housing and social control tends to focus on the urban, with particular reference to shelters (Hartnett and Postmus 2010; Katuna and Silfen-Glasberg 2014) and street homelessness (Johnsen, Fitzpatrick and Watts 2018). This literature provides important insights into the nuance of forms of social control, and how they shade from force to tolerance while remaining morally and legally problematic. It also focuses attention on the intersectional analyses of power (Katuna and Silfen-Glasberg 2014) which are also evident in the Indigenous context in Australia. However, in order to understand housing as social control over remote Aboriginal homes in Australia, we need a frame that explicitly engages with race and racialization, colonialization, and property. For this, we turn to the work of

Goenpul woman and Indigenous critical race and whiteness studies scholar Aileen Moreton-Robinson.

According to Moreton-Robinson (2015), the Australian nation is socially, culturally, and legally constructed as a white possession. Disavowal of Indigenous sovereignty is the foundational act: the notion that Australia was *terra nullius* – land belonging to no one – justified the otherwise unlawful British occupation of Australia. It carried with it logics of white possession and racialisation, whereby 'whiteness operates possessively to define and construct itself as the pinnacle of its own racial hierarchy' (Moreton-Robinson, 2015: xx). Whiteness signifies not simply white occupation of land but the ideology that naturalises the occupation as uncontested and sovereign. Thus, white possessive logic has the effect of enshrining the exclusivity of white possession to diminish all other claims, especially those made by sovereign First Nations (Moreton-Robinson 2015: 81). It continues to structure Indigenous subjectivity across three relationships with property, according to Moreton-Robinson (2015). These relationships are owning property, being property, and becoming propertyless. In this context, only white ownership and possession is validated as a basis for property rights (Moreton-Robinson 2015: 30), and law and policy are organised around the assumption that the 'real interests in the nation are white, and they must be protected' (Moreton-Robinson 2015: 70). As Moreton-Robinson writes (2015: 30), 'The assumption that the nation is a white possession is evident in the relationship between whiteness, property, and the law, which manifested itself in the latter part of the nineteenth century in the form of comprehensive discriminatory legislation tied to national citizenship.' Aboriginal people, among other 'non-white' people, were denied this status and the rights that went with it (Wewer 2017/18).

Whiteness, for Moreton-Robinson drawing on critical race theory (eg Harris: 1991), operates to maintain social control (Moreton-Robinson 2015: 77), while blackness is 'congruent with Indigenous subjugation and subordination' (Moreton-Robinson 20015: 30). As Moreton-Robinson argues 2015: 81), the law is one of the main institutions through which the nation is maintained as a white possession, and through which social control of Indigenous peoples is assured. However the relationship of control and subordination to power and property is not one achieved merely *under* the law. Moreton-Robinson characterises colonization and the social control of Indigenous peoples as 'the historical conditions of [] possibility' for modern states of exception, arguing that reserves, privately owned pastoral stations, and missions such as Santa Teresa were places where the majority of Indigenous people in Australia lived under

the control of white managers and missionaries appointed by government and subject to a racist regime of laws which continue to echo in current housing and living conditions (Moreton-Robinson 2015: 153-4). We raise the context of possessive white sovereignty to explain the logics that are alive in decisions relating to the provision of housing for Aboriginal people in remote NT communities, including Ltyentye Apurte/Santa Teresa. The housing conditions at Ltyentye Apurte are revealed as part of a colonial continuum that has pervaded the lives of central Australian Aboriginal people since invasion, as we now turn to illuminate.

III. Remote Aboriginal Housing in Ltyentye Apurte in the Context of Colonial Dispossession and Control

As alluded to above, the landlord for the Aboriginal residents of Ltyentye Apurte/Santa Teresa is the Government of Australia in the specific authority of the NT Department of Housing, Local Government and Regional Services on behalf of the Commonwealth (*Cavanagh v Chief Executive Officer (Housing)* [2018] NTSC 52 No. 33 of 2017: para 17). This arrangement, where the landlord is the Commonwealth government, characterises the residency arrangements for all Aboriginal people living in Ltyentye Apurte, and most other remote NT communities. The residents of Ltyentye Apurte, who found some success in 2020 from litigating their housing rights, had been bringing legal actions for a number of years to remedy their dire housing conditions and make their homes habitable. They consistently met with government opposition.

It is difficult to understand the housing conditions in Santa Teresa, the legal struggles of the residents to redress them, and the government response, without a deeper examination of the historical circumstances for Aboriginal housing, land and self-determination in the NT. In this section, we provide this historical context, in which the social control of housing must be understood. We begin (a) with the occupation and dispossession that characterized colonization; and the important policy phases within which government control of Aboriginal people and their housing unfolded: protectionism; assimilation; the Constitutional reform of 1967; and *Aboriginal Land Rights (Northern Territory) Act 1976* (*ALRA*). We then turn (b) to address the most significant recent effort at social control, the highly controversial and discriminatory Northern Territory Intervention ('the Intervention'), a set of Federal laws and

policies implemented in 2007 to restrict the rights of Aboriginal people in the NT. We concentrate specifically on the way that the Intervention enabled new forms of social control over housing, and led to the Santa Teresa cases.

a. Colonial Occupation and Settlement: Dispossession of the First Peoples of Central Australia

Although eastern Australia was claimed as a British possession in 1770, colonial dispossession and settlement of central Australia was still occurring in the early twentieth century (Anthony and Tranter, 2019: 299) and some homelands remain untouched by colonial settlers. For tens of thousands of years Aboriginal people thrived in the central Australian dessert based on sophisticated systems of land management, law and governance. The white possessive logics of colonisers recognised Aboriginal people as neither sovereign people nor land holders and denied them citizenship. Rather, colonisers treated Aboriginal people as requiring the imposition of Western civilisation and Christianity for their own good (British Parliamentary Select Committee & Aborigines Protection Society, 1837).

Today there are two categories of communities in which Aboriginal people live in the NT which have legal relevance with respect to social control of housing for the purposes of our analysis. The first are Aboriginal 'remote communities', such as Santa Teresa/Ltyentye Apurte. Across the Territory's wide expanse of land (six times the size of Great Britain) the NT is home to over half of Australia's remote communities (Terrill, 2011: 161), which can be home to up to 1000 people. The second are 'homelands' and 'outstations'. Homelands and Outstations are very small communities of Aboriginal people, usually only a few families, who live on Country and in accordance with Aboriginal customs (Parliamentary Standing Committee on Aboriginal Affairs, 1987). In the 1970s the government provided infrastructure and housing to make them viable during their establishment (Marks, 2014/2015: 46). Homelands are located outside of the remote Aboriginal communities, such as Santa Teresa (Marks, 2014/2015; Amnesty International, 2011: 11). A key aspect of the Outstations and Homelands is that, unlike remote communities (which are a product of colonial control and white possessive logics) they are Indigenous driven. As Marks puts it, Homelands and Outstations represent 'purposeful decentralisation' that was 'very much an Aboriginal initiative' in response to the social harms and disfunction that accompanied policies of forced assimilation and relocation from traditional lands to those larger settlements (Marks,

2014/2015: 46). Approximately 10,000 Aboriginal people continue to live in Homelands and Outstations (NT Government, 2022). They continue to be an example of self-determined housing by Aboriginal communities in the NT, and Homelands are reported to have some of the best health outcomes for Aboriginal people and are a retreat from the pressures of colonial society (Amnesty International 2011).

Notwithstanding the resurgence of culture on Aboriginal communities, especially Homelands, since the 1970s, the devastation of colonisation to all Aboriginal communities has been substantial. By the twentieth century, Aboriginal people were forcibly relocated to ration depots, missions and cattle stations to restrain their mobility (Briscoe, 2010: 18). This provided pastoralists with a source of enslaved labour and facilitated patoral endeavours to take over Aboriginal land and overrun in with cattle (Austin-Broos, 2009: 3). Cattle and other introduced species depleted water and destroyed vegetation on which people and native animals relied, while introduced diseases, especially smallpox, caused wide-scale infections (Cleland, 1914; Austin Broos, 2009: 8). The result was the alienation of local Arrernte people from their lands, shelter and food sources. On cattle stations, Aboriginal people were made to live in 'humpies' – an improvised dwelling made out of scraps of materials. Aboriginal people who resisted the invasion faced summary punishment by police and settlers, including beatings, shootings and massacres (Anthony, 2004).

From 1911, the *The Aboriginals Ordinance* (NT) made Aboriginal people in the Northern Territory subject to the control of an Aboriginal 'protection' regime. The regime gave sweeping power to white Aboriginal protectors over Aboriginal lives, including marriages, customs, employment, movements and living conditions. Other than cattle stations, protectors sent Aboriginal people to missions to facilitate their containment, control and enslavement. Crucially, missionaries were at the forefront of the indoctrination of Aboriginal people in accordance with White possessive logics and norms (Mikhailovich and Pavli 2011).

When Aboriginal protection was repealed in the 1950s, the Federal Government introduced a policy of assimilation. This went hand in hand with a decreased reliance on Aboriginal labour on a large scale in the cattle industry.[3] Missions and government settlements became key sites

[3] Increased pressure to pay Aboriginal people wages and the mechanisation of the industry reduced the industry's need for Aboriginal labour (Anthony 2007).

of Aboriginal sedentation, indoctrination and assimlation. Under *The Aboriginals Ordinance 1953* (NT), Aboriginal people became wards of the state and were forced onto missions and settlements. Missionaries, rather than Aboriginal Protectors, had control over Aboriginal peoples' children, movements and living arrangements until they attained the status of 'citizen' (*The Aboriginals Ordinance 1953* (NT): cl 17). Moreton-Robinson explains that the idea that First Nations people had 'equality of status' under colonial law did not preclude them from becoming 'Indigenous possessions' who were subject to differential treatment (Moreton-Robinson 2015: 118). It was at the time of the assimilation policy that Santa Teresa, the first Catholic mission in the Northern Territory, was established in central Australia (Robson, 2018: 107).

When, in the 1960s, Aboriginal people acquired hard-fought rights to citizenship, equal wages, education and housing there were no substantive improvement in living conditions (Jardine-Orr et al, 2003). Moreton-Robinson argues that even the landmark constitutional reform of 1967, which was lauded for its removal of discriminatory provisions from the Australian Constitution, was primarily about shifting control of Aboriginal peoples from the States to the Federal Government (Moreton-Robinson 2015: 154). The white possessive logic and its 'colonial matrix of power' (Mignolo, 2007: 445) remained fiercely intact to ensure that Aboriginal people were denied economic and political empowerment to remediate coloial injustices

Following the landmark *Aboriginal Land Rights Act 1976* (Cth) (*ALRA)*, which granted large areas of land to Aboriginal people to self-govern, missions and government settlements were transformed into self-governed remote Aboriginal communities. For some Aboriginal people, living in remote communities has enabled them to retain their connections to Country. For others, however, they have been unable to return to their Country because it is occupied by pastoralists or not serviced by basic infrastructure, rendering remote community living a continuation of their dispossession. Across remote Aboriginal communities, people continue to speak Aboriginal languages and practise Aboriginal ceremonies, laws and cultures (Marks, Albrecht and Stoll: Nd). This embodies a form of sovereignty.

Fifty per cent of the NT's land mass is held as Aboriginal land (Northern Land Council 2023) thus most remote communities in the NT are situated on Aboriginal land under the ALRA, which means that the land is communally held by a single legal entity, and cannot be sold, only

leased (ALRA; Terrill 2022: 192). From the 1970s to 2007 housing and services in remote communities were managed by Aboriginal-controlled bodies, who have made important decisions with respect to housing and other living conditions. However, even under the ALRA they remained dependent on the crumbs of government funding to sustain their housing (Grealy et al 2022): the best pastoral land and waterways and consequent economic opportunities were excluded from lands granted under the ALRA (Moreton-Robinson, 2015: 121). As Moreton-Robinson's work reminds us, within a framework of white possessiveness, legal entitlements are tenuous and conditional.

The cumulative impact of discriminatory laws and policies is the ongoing conditions of poor housing, overcrowding and poverty for First Nations people across the NT. With specific reference to housing, for example, Grealy et al (2022) note that housing in remote Aboriginal communities is 'predominantly substandard government-provided housing, constructed with limited attention to the quality of materials and inadequate maintenance over time'. Aboriginal communal tenure held under *ALRA* is managed by the local Aboriginal Land Council, giving the community a measure self-government and management of land. However self-government is limited in important ways, such as the capacity for Australian government override. One instance in which this occurred is the Intervention, which demonstrates the Federal Government's exceptional powers over the Aboriginal population of the NT, which we discuss in the following section.

b. The Government Intervention and White Possessive Logics over Aboriginal Land

The NT's Aboriginal population (79,000 people) comprise 32 per cent of the overall NT population (Australian Institute of Health and Welfare, 2022). Yet the Federal Government has powers over the Northern Territory that give it exceptional control over Aboriginal people, in addition to (and often in conjunction with) the Northern Territory Government. Under the Australian Constitution – the 'territories power' and the 'races power' – the Federal Government can make laws in the NT in relation to Aboriginal peoples (*Commonwealth Constitution Act 1900* (Cth): s 122, s 51(xxvi)).). One of the most striking examples of the use of these powers is the Intervention.

The Intervention was a Federal Government policy and set of laws from 2007 that sought to take control of 80 remote Aboriginal communities and the livelihood of Aboriginal peoples. It

did this through suspending Aboriginal peoples' protections under the *Racial Discrimination Act* 1975 (Cth) (Minister for Families, Community Services and Indigenous Affairs: 2007), which was enacted to give effect to Australia's obligations under the International Convention on the Elimination of all forms of Racial Discrimination. This enabled the government to initially introduce the *Northern Territory National Emergency Response Act 2007* (Cth) (*NTNER*). The *NTNER* empowered the government to restrict Aboriginal people's access to social security, prohibit alcohol and pornology, and increase police presence in communities. It also enabled the government to compulsorily lease Aboriginal land. The premise for the laws, according to the conservative Government at the time, was to "save" Aboriginal children and women (Blagg and Anthony, 2019: 216-17). The Federal Government deployed the military to central Australia to impose the laws and mark the commencement of what is known as the Intervention. The Intervention's measures have been widely condemned as a violation of human rights law and UNDRIP (Jumbunna Indigenous House of Learning, 2008; Amnesty International, 2021; United Nations Special Rapporteur on Indigenous Peoples, 2010).

One of the lesser remarked upon implications of the Intervention is the way that, in overriding the *ALRA*, it enabled the Federal and NT governments to exert control over Aboriginal housing, manifesting new forms of social control that continue a history of white possession of land, sovereignty and power over the Arrernte people. While seldom the focus of critiques of the Intervention, these changes have been radical in effect (Terrill 2022: 190; Moran et al 2016: 27). The first relevant move was the government's imposition of compulsory leases of Aboriginal communities, overriding the *ALRA* so the NT Government could take control of housing from Aboriginal-controlled housing service providers. The second was the cease in support – both financial and ideological – for Homelands and Outstations.

The Intervention's measures contained the, still undelivered, promise of new and upgraded housing in 'settled' remote communities in exchange for compulsory leasing (Gibson, 2007). The government compulsorily leased Santa Teresa on the day after the Intervention legislation (NTNER) received Royal Assent on 17 August 2017. This took away self-determined housing options under the *ALRA*. This act of coercion represented a violation of UNDRIP's provisions on free, prior and informed consent, rights to land and rights to self-determination (see further our discussion in Section V). A further blow to self-determination of Aboriginal housing was the abolition of elected local Aboriginal community councils that managed the delivery of remote housing services, through a relationship with Indigenous Community Housing

Organisations (Porter 2009: 10). At the same time Commonwealth financial support for housing in over 500 Aboriginal Homelands and Outstation communities was discontinued (Marks 2014/2015). This pressured Aboriginal people to move off homelands (Marks 2022; Marks 2014/2015), and placed unprecedented strain on the remote settlements and their housing stock. The result is fewer self-determined housing options for the Northern Territory's First Nations. These developments embody the coercion, neglect, and disempowerment over housing that the Ltyentye Apurte Community complained of in its litigation.

IV. The Santa Teresa Housing Cases – No Right to Humane Housing?

The untenable nature of housing at Santa Teresa was identified by four of Santa Teresa's residents who represented over 70 matters that had initially been raised before the Northern Territory Civil and Administrative Tribunal (NTCAT) (*Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7: para 2). They alleged that their landlord, the government, had provided houses with defective electrical equipment and infrastructure, inoperative appliances (including cookstoves, air conditioners, and sockets), uninstalled doors, locks, window glass and screens – presenting a safety issue (*Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7: para 159, para 212). They also complained of broken perimeter fences and defective plumbing including leaking toilets and showers. As one of the Santa Teresa claimants, Ms Cavanagh, detailed, the house was a threat to her health:

> the toilet was blocked and leaked sewerage into the water leaking from the shower. Water was everywhere in the back area of our house. This started soon after I moved in. I complained about it many times to Housing. ... When it was leaking, we would have to mop up dirty water about every four hours. I would mop it up at 8pm, then get up at mid-night and mop it up again, and then get up in the early morning and mop it up again. I used to have to go and have a shower at my mum's house. We would also wash the kids there (*Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7: para 140).

The effort that Ms Cavanagh went to maintain a liveable environment for her family is evident in her testimony. Another resident, Ms Young, noted that 'I had no backdoor on the house

until about March 2016. When they put a door there, they left a hole on the side between the door and the frame. We had a snake come through the hole, so we had to block off the door' (*Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7: para 160). A third claimant[4] noted the failure to provide functioning air-conditioning, in an environment where temperatures regularly top 40 Celsius:

> [a] big problem was the window air-conditioner that was there since we moved in. It was leaking for about 6 years from about 2011. We complained to Housing. They said they don't fix air conditioners. In the meantime my bed and blanket get wet. There was another air conditioner in [my daughter's] bedroom when we moved in. It stopped working. Housing took it out and just closed up the window. This house is all concrete, like a box, and it's too hot with just fans. … Me and my wife slept in the kitchen and our daughter had to move out to my sister-in-law, [name provided] house because they have air conditioning there … About that time [2012], Housing said that they would put in a new air conditioner. It never came (*Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7: para 202).

The evidence produced by the applicants before the Tribunal detailed a litany of small, and large, defects to housing from the beginning of their tenancies. The Tribunal waded through these matters sequentially, treating each one as a separate instance of breach of the Residential Tenancies Act (RTA), and in effect failing to see the cumulative and multidimensional harm and distress caused by living in profoundly, manifestly inadequate housing. The NTCAT ruled that the RTA did not require that a landlord must provide housing that is humane. However, it held that the conditions of the claimants' housing were so poor they failed even the lower standard of habitability it found the RTA to impose, and were a 'threat to the tenant's safety' (at [120]). The NT government appealed that decision to the NT Supreme Court.

The Supreme Court ruling found that it was not sufficient that 'habitable' housing be merely 'safe', as the Government had submitted (*Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7). Rather, the habitability of housing should include 'an overall assessment of the humaneness, suitability and reasonable comfort of the

[4] not referred to by name due to Aboriginal protocols and laws around the deceased.

premises, even if only basic amenities are provided, judged against contemporary standards.' (para 80). The government again announced it would appeal the finding that Ltyentye Apurte residents have a right to humane housing. The NT Court of Appeal dismissed the appeal. The Court of Appeal determined that habitability went beyond mere health and safety considerations, and extended to the dweller's reasonable comfort (*Chief Executive Officer (Housing) v Young & Anor* [2022] NTCA 1 para 44 – 46). The Court noted that this construction was not only consistent with common law and legislative intention, but also international law on the right to housing under Article 11(1) ICESCR (*Chief Executive Officer (Housing) v Young & Anor* [2022] NTCA 1: para 46). Consequently, the Santa Teresa claim for humane housing was upheld.

The reasoning of the Tribunal and courts projects white possessive ideologies by separating Aboriginal housing conditions from histories of colonial control. The prior related 2018 case of *Cavanagh* (*Cavanagh v Chief Executive Officer (Housing)* [2018] NTSC 52 No. 33 of 2017) is a relevant example. In that case, which the Santa Teresa applicants had brought to ascertain who their landlord was in the wake of the Intervention's compulsory leasing of ALRA lands, the court was forced to a finding that, the effect of the NTNER was to give the government control over land and housing in Santa Teresa, even if the government then acted with total neglect in its position of power. The court ruled despite the fact no one had taken any responsibility for housing in Santa Teresa over a number of years, including failing to collect rent, renew leases or maintain housing. This exemplifies Moreton-Robinson's tripartite structure of the white possessive logic. Aboriginal people are denied any sovereign ability to govern themselves, are rendered propertyless, and are put in the position of property for the government to maintain or exploit as it sees fit. In the 2018 *Cavanagh* case, the Court refrained from finding that the Federal Government failed in its duty as landlord despite taking control of housing, because no one had claimed responsibility in law (*Cavanagh v Chief Executive Officer (Housing)* [2018] NTSC 52 No. 33 of 2017 paras 19-26 and 37).

This decontextualized reading is also performed on a micro-level in the Tribunal's reasoning in the 2019 case. For instance, the Tribunal failed to interpret the failure to provide the homes with a lock as a breach of the RTA because there was no door to install the lock on (*Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7). This blinkered approach is a metaphor for the broader strategy of colonial social control: the

government does not breach First Nations sovereignty because there is no legislation to recognise it.

In the following section, we present a fuller picture of the legal obligations held by the Australian government for Aboriginal housing. We invoke international law, specifically the right to housing under ICESCR, and the rights contained in UNDRIP. We read these in conjunction with each other, following the former UN Special Rapporteur on the right to housing, to conclude that to comply with its international obligations, the Australian state must recognise a right to self-determined housing for Australia's First Peoples. While the Anglo-Australian state can be forced to acknowledge some rights (e.g. humane housing) it fails to account for the denial of rights arising from the 'colonial matrix of power', because such rights call into question white sovereignty. We argue that a full understanding of UNDRIP and ICESCR has the capacity to challenge this matrix of white possessiveness.

V. International Standards on the Human Right to Housing

Despite the Australian government projecting a veneer of humanity through its ratification of ICESCR and its endorsement of UNDRIP, alongside its claims to compliance, (UNCESCR, 2016: para 24-27) its coercive and neglectful treatment of Aboriginal Australians in remote communities tells another story. In this section, we draw out the government's obligations for housing rights under both ICESCR and UNDRIP. Drawing on Hohmann's work (2013, 2022) in which she argues that a full interpretation of the right to housing pushes toward radical social change (2013 Ch 9), we argue that a wide interpretation of the right to housing responds to totalising conceptions of property (Hohmann, 2022) and offers a radical critique of government failures to recognise, and support, self-determined housing for Australia's First Peoples, including Aboriginal housing in Ltyentye Apurte/Santa Teresa. We submit that this rich conception of the right to housing is a way to move beyond the white possessive logics identified by Moreton-Robinson, and at work in the government's control of housing in remote communities such as Santa Teresa.

a) The Right to Housing under ICESCR with a Focus on Habitability as an aspect of the Human Right to Housing

A right to housing is included in international law in a range of human rights treaties. (Hohmann, 2013: Part 1) Australia bears international obligations for the right under ICESCR,[5] where the right is included in Article 11(1):

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. ....

The broad brush strokes of the right have been given detail by the work of the Committee on Economic Social and Cultural Rights (UNCESCR), which has clarified that the right is to adequate housing, not mere shelter; that at root, it is a right to live somewhere in peace, dignity and security; and that it includes the right to access to land as an entitlement (UNCESCR, 1992), an aspect of the right with particular resonance for Indigenous peoples (UN Special Rapporteur on Housing, 2019: para 17).

The UNCESCR has interpreted the right under ICESCR as requiring seven essential elements, all of which must be present for housing to be adequate (UNCESCR 1992:8(a)-(g)).[6] An argument can be made that the housing conditions of the plaintiffs in Santa Teresa breach many, even all, of the seven elements of the right to housing (discussed below). However, we focus here on the requirement that housing be habitable, given that this was the legal standard that the Santa Teresa residents sought to rely on.

For housing to be habitable, 'the dwelling must provide adequate space, protect the occupants from excessive cold or heat, damp, rain, wind and other threats to health, structural hazards and disease vectors' (UNCESCR 1992: para 8(d)). Habitability is often seen as a minimum standard for physical aspects of housing adequacy (Marquez et al, 2022). However, as it is directly related to quality of life, 'it refers to the possibility of satisfying an individual's needs of well-being in a specific physical context' (Rondienel-Oviedo et al, 2019). For these reasons, habitability as an aspect of the right to adequate housing should also consider mental health, and the stress and potential trauma that poor housing conditions lead to (Hohmann, 2019: 6-8).

[5] The ICESCR was ratified by Australia on 10 December 1975, at which point Australia became subject to the obligations under the Covenant in International Law.
[6] For a discussion of each of the elements see Hohmann (2013): 20-29.

While the UNCESCR's definition of habitability (1992: para 8(d)) mainly focuses on the physical safety of inhabitants, it must be read in light of the overall definition of the right to housing under ICESCR: as a place to live in peace, dignity and security. The right to habitable housing must also be read in light of all seven elements of adequate housing. These are availability of adequate services, materials, facilities and infrastructure; accessibility; location; cultural adequacy; security of tenure; and affordability (UNCESCR 1992 Para 8). Collectively, these elements are relevant to understanding the adequacy of housing for displaced Indigenous people whose right is sorely tested. They impel a broader reading of habitability than suggested on the face of the UNCESCR's definition reflecting the multifaceted lived experience of a habitable house, which also requires, for instance, services (such as energy and drinking water) and cultural adequacy (the expression of cultural identity) (UN Habitat 2005 p 21). In *Chief Executive Officer (Housing) v Young & Anor* [2022] NTCA 1, the Australian Human Rights Commission (AHRC) made submissions to the NT Court of Appeal, in which it also stressed that habitability under ICESCR is informed by the centrality of dignity and humaneness to human rights law. Further, as Paglione (2006: 130) notes, habitability as an aspect of the right to housing is strictly linked to protection, and thus implies a proactive or positive aspect to its fulfilment.

There are a number of immediate obligations under the ICESCR that are of particular relevance to the housing rights of First Nations people. They include the following. First, the obligation to end any discrimination in housing law and policy, reflecting non-discrimination as a norm of customary international law (UNCESCR 1991; UNCESCR 2009). Second, the obligation to take all steps that do not impose significant resource implications on the state – that is, any aspects of the right that can be realised through 'negative' measures (UNCESCR 1991), such as measures that allow freedoms around housing – freedoms that include where to live, with whom, and in what circumstances. Third, the obligation to ensure the 'minimum core' of *each* of the seven elements of the right to housing (UNCESCR 1991, para 10). The minimum core focusses on the 'satisfaction of, at the very least, minimum essential levels of each of the rights' (UNCESCR 1991: para 10). Because the minimum core focusses on 'minimum essential levels' of the right to housing and its seven elements, it is directly targeted to issues such as minimum standards of habitability, as at issue in Ltyentye Apurte.

The state is held in prima facie violation of the ICESCR when it pursues backward steps ('retrogression') in enabling the enjoyment of ICESCR rights. That is, the quality of peoples' housing conditions should improve over time, not worsen. Stripping away rights to humane housing and rights to control or choose one's own housing conditions by living on Country, in Homelands, or in self-determined housing, would amount to violation of the right to housing. Moreover, although ICESCR Article 4 allows states to limit rights, this must be determined by law, consistent with the Covenant's aims as a whole, be compatible with the nature of the rights at issue, and solely for promoting the general welfare in a democratic society. The highly discriminatory nature of the government's housing policy under the Intervention, lack of consultation and participation, lack of proportionality, and the sweeping executive action, are unlikely to provide justification under this article (UNCESCR 2009). Such moves are an 'act of racial discrimination' that is illegal under international law (Marks 2022).

b) The Right to Housing under UNDRIP

UNDRIP is the most significant standard achieved at the international level for First Nations peoples. Its negotiation and adoption moves beyond a state-centric framework that still dominates international law, including the meaningful participation of Indigenous Peoples from across the world, and it contains the minimum standards for the realisation of Indigenous Rights (UNDRIP Art 43). As a Declaration, UNDRIP itself does not have the status of binding law, however it is widely recognised that much of its legal content reflects already existing international law (Anaya, 2004), while elements of UNDRIP that represent soft law remain relevant as interpretive tools and raise expectations of conforming behaviour (Barelli 2009). Australia was among a handful of outlier states that initially voted against the Declaration and despite later endorsing, it, Australia's overall compliance with and attitude to UNDRIP remains poor, as the discussion in this article has already made clear.

UNDRIP mentions housing twice. Article 21(1) provides that:

> Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, housing, sanitation, health and social security.

Article 21(2) imposes obligations on the state to take special measures to ensure continuing improvement of economic and social conditions in these areas. Article 23, the second reference to housing, mentions housing within a framework of development:

> Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

These provisions are embedded in UNDRIP's 'underlying framework of Indigenous rights to self-determination and autonomy, as the context from which everything else flows' (Perez-Bustillo and Hohmann 2018: 483, see also 484-5). That is, the overall emphasis on self-determination and autonomy in UNDRIP means that we must understand Articles 21 and 23 as resting on self-determination as a pre-condition for the free pursuit of economic, social and cultural development (Perez-Bustillo and Hohmann 2018: 484) including in housing. As Xanthaki notes, Indigenous peoples' vision of self-determination is the heart of the Declaration and key to the realisation of other rights (Xanthaki, 2022: 75). Even before UNDRIP, international law responded to *imposed* development on Indigenous lands, peoples, and territories, recognising the crucial need for cooperation and participation (ILO Convention 169 Art 7(2)), though these standards are superseded by UNDRIP's stronger standards of self-determination, autonomy, and free, prior and informed consent.

UNDRIP's provisions mentioning housing must also be understood as reflecting an inherent connection between the socio-economic and cultural rights of Indigenous and First Nations peoples, which are based on inherent connections to traditional land and territory 'as the basis not only for individual survival, but cultural survival, development, and flourishing' (Perez-Bustillo and Hohmann 2018: 536). Following this interpretation of UNDRIP, we cannot understand its references to housing without also considering a number of other provisions. These include Article 8(1) and the right not to be subjected to forced assimilation or destruction of culture and Article 8(2) which requires that States provide effective mechanisms for prevention and redress for actions that deprive Indigenous peoples of their integrity as distinct peoples, their cultural values or ethnic identities, dispossession from their lands, territories and

resources, population transfer which has the aim or effect of violating rights, and forced assimilation or integration (Hohmann 2018: 171-6).

Further, Article 10 requires that 'Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.' As has emerged in our discussion it is clear that poor housing at Santa Teresa fits within broader colonial state strategies, within a frame of possessive whiteness, which rely on forced or coerced relocation from remote communities and to cities and towns, coupled with the defunding of homelands with the effect of pushing Aboriginal people into remote communities and thereby placing pressure on remote community housing, in the service of colonial control.

Because the enjoyment of housing, access to and control over resources, and access to land are entwined, 'housing must be understood as an integral component of the rights to land and a cornerstone of indigenous peoples' struggles around the world' (United Nations Human Settlements Programme, 2005; Kothari, 2006: para 97; Xanthaki, 2022: 88). Thus UNDRIP Article 26's protection of land rights also underpins the enjoyment of adequate housing conditions. Crucially, Article 26 protects the right to lands traditionally owned or occupied, but also the right to use, develop and control such lands. Violations of Articles 8, 10, and 26 reverberate in the housing conditions at Ltyentye Apurte and in relation to homelands, evidenced in the government's moves to defund these self-determined spaces. We turn now to the work of the UN Special Rapporteur on Housing, which provides a basis for housing as self-determination beyond a white possessive frame.

c) The Right to Self-Determined Housing in the work of the UN Special Rapporteur on the Right to Housing

Bringing together the right to adequate housing under ICESCR and the rights under UNDRIP is the significant work of Leilani Farha. In her 2019 report on the right to housing of Indigenous peoples, the then Special Rapporteur provided an interpretation of the right to housing that is in conformity with UNDRIP, to underpin the realisation of the right for Indigenous Peoples. She argues (2019: para 6) that the right under ICESCR is interdependent with and indivisible

from the rights articulated in UNDRIP. For this reason, the right to housing will only be realised for Indigenous people when that housing is self-determined housing:

> the right to housing of [I]ndigenous peoples – properly understood – is an important but often neglected aspect of the right to self-determination and of the pursuit of economic, social and cultural development (UN Special Rapporteur 2019: para 10).

The UN Special Rapporteur has noted that adequacy as a whole, and the standard of habitability, must be 'interpreted by [I]indigenous peoples themselves in a manner that incorporates their lived histories, cultures and experiences' (UN Special Rapporteur 2019: para 6). Likewise, what it means to be homeless should not be narrowly defined, but understood 'in a way that resonates with [I]ndigenous peoples' and include attention to 'isolation of individuals, families and communities from their land, water, place, family, kin, each other, animals, cultures, languages and identities' (UN Special Rapporteur 2019: para 25).

The 2019 report sets out a number of guiding principles for realising the right to housing of Indigenous peoples. These include recognition of Indigenous peoples *as* Indigenous peoples; recognition and redress of past wrongs; rights of Indigenous peoples to lands, territories and resources; a guarantee of self-determination; free, prior and informed consent and meaningful consultation; substantive equality and non-discrimination; and that housing's adequacy must be interpreted by and for Indigenous peoples (para 46-65).

With regard to interpreting adequacy by and for Indigenous peoples, this means that each of the seven elements of the right to housing under Art 11(1) ICESCR should be defined and assessed by Indigenous peoples themselves (UN Special Rapporteur on Housing 2019: para 60), and in light of human rights standards (para 61). As an example, the UN Special Rapporteur argues that

> "cultural adequacy" means that States and Indigenous Authorities must allow [I]ndigenous peoples to construct their own housing and must respect their traditional knowledge, designs, materials and architecture (para 61).

Rather than reflecting any of these principles, Australia's housing policy for remote Indigenous communities, as reflected in Santa Teresa, points to housing as a tool of colonial control and

dispossession, within a frame of possessive whiteness. Remote NT community housing rests on explicitly discriminatory policies which required the suspension of the Racial Discrimination Act to achieve, exercised *only* over Australia's First Peoples. The policies are imposed without the consent, or meaningful participation of Indigenous Peoples. They are situated against the background of the theft of Indigenous land, and against coercion and rightlessness which persist to this day.

VI. Concluding remarks on the white possessive logics of housing law and the right to self-determined First Nations housing

Violations to First Nations homelands and housing rights have been a feature of government coercion and control since the colonisation of the NT. This reflects white possessive logics that view Australia as a white sovereign possession, where only white ownership and possession is legitimate (Moreton-Robinson 2015: 30). The intensification of discriminatory laws under the Northern Territory Intervention undermined Aboriginal communities' rights to self-determine their housing, demonstrating the contingent nature of rights under the white possessive frame. However, the Intervention's re-colonisation of housing in remote communities also galvanised Aboriginal people to pursue their rights through legal strategies. The initiative of the Ltyentye Apurte residents to seek redress for their poor housing conditions reflects their fierce determination and strength. It also reflects their prevailing rights to housing that are constantly undermined by a government seeking to reinforce its social control.

This cat and mouse game between the coloniser and First Nations people – with the former constantly dismantling First Nations rights and the latter having to struggle for morsels on their sovereign land – contributes to inhumane housing conditions in remote Aboriginal communities and Homelands. The fact that the Ltyentye Apurte residents are given no choice but to fight for humane housing in the courts reflects that the state does not act in their interests, nor does it comply with international law under UNDRIP and the ICESCR. Adjudication by the courts can provide basic rights to humane housing but courts are largely unable to push back on the 'white possessive logics' (Moreton-Robinson 2015) and often cement and protect these logics through legal narratives. In the words of Moreton-Robinson (2004):

> The law in Australian society is one of the key institutions through which the possessive logic of patriarchal white sovereignty operates. White patriarchs designed and established the legal and political institutions that control and maintain the social structure under which we now live (Moreton-Robinson, 2004).

The failure of the state and its *Residential Tenancies Act (Northern Territory)* to provide humane housing for Aboriginal people as we have illustrated with reference to the facts in *Chief Executive Officer (Housing) v Young & Anor* [2022] NTCA 1, and the cases leading up to it, compels a reconsideration of housing delivery in remote Aboriginal communities if housing justice is to be achieved. A paradigm shift towards self-determination, and away from state control, is informed by principles of international law, as we have discussed in this article. However, the design and implementation of First Nations housing rights needs to be Aboriginal community-controlled (see Central Land Council, 2020). The Ltyentye Apurte residents have proven their acute awareness of the solutions and commitment to address their needs. The colonial state now needs to relinquish its control in accordance with international rights to decolonise Australia's discriminatory housing system for First Nations people.

While the case study of this article is situated in Australia, there are broad implications for other settler colonies and for conceptualisations of housing rights. We have shown that 'habitable housing' needs to be broadly interpreted to account for all aspects of adequate housing under the ICESCR, including adequate servicing with infrastructure and providing capacity for cultural expression. Finally, it reveals that Indigenous peoples' right to housing must be read in line with both UNDRIP and the ICESCR if it is to contend with the government's social control of housing and its white possessive logic. Self-determination and sovereignty are antidotes to the colonial histories that underlie inadequate housing for Indigenous peoples.

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