Permeable Housing

Liam Grealy

Abstract:
This article explores how water acts on permeable housing and the documentary infrastructures that mitigate its impact and enable its flows. It does so through consideration of ongoing litigation brought by public housing tenants at the remote communities of Ltyentye Apurte (Santa Teresa) and Laramba in the Northern Territory of Australia for incomplete repairs and unsafe drinking water. I offer a distinction between pragmatist and functionalist housing, as competing concepts for framing, respectively, the impact of entrenched low expectations on remote housing performance and management and the minimum amenity that contemporary housing should provide. The litigation by Ltyentye Apurte and Laramba householders is notable for challenging the habitability standard that remote community housing must meet and for introducing the provision of safe drinking water as a matter of habitable housing. While water searches out cracks and refuses expulsion from the housing assemblage, necessitating repairs and maintenance, such mobility provides a challenge for allocating specific obligations to various settler colonial authorities that are collectively involved in maintaining house function. Drawing on close analyses of a series of legal decisions, the article examines how legal frameworks and intra-governmental funding arrangements are employed to eschew responsibility for safe drinking water inside remote community housing.

Keywords: housing; water; habitability; health; litigation; remote communities.

At their most elemental, houses regulate relations between internal and external environments. They are less box than living membrane: permeable, porous, pervious, and absorbent. Arterial pipes, wires, and cable networks intersect construction to distribute water, energy, and waste; while matter penetrates the house itself, searching out cracks, refusing expulsion, and exposing bodies to various harms. ‘Treating

Somatechnics 13.3 (2023): 145–165
DOI: 10.3366/soma.2023.0410

www.euppublishing.com/soma

water as a body that acts', anthropologist Tess Lea (2015: 375) writes, helps us to understand the vulnerability of housing to hydraulic metamorphoses and the entanglement of human bodies and nonhuman assemblages (TallBear 2015: 231).

Alongside essential services, housing's intersecting infrastructures include the 'documentary infrastructure' of housing bureaucracies – leases, agreements, tenders, contracts, schedules of rates, and so on. A larger suite of colonial technologies including files, records, permits, dockets, audits, petitions, letters, and lists, as well as graphic artefacts like maps and surveys, make up the documentary ecologies of settler colonial policy making, organising and reproducing its standards, routines, and pleasures. Such documents have subjectifying effects, constituting citizens, corporations, consumers, tenants, and so on, with attendant rights and obligations. Considered together, such technologies operate as the documentary infrastructure of permeable housing, as material systems that aid and impede social action (Larkin 2013), 'facilitating flows, standardizing distributions, and extending political projects' (Fennell 2016; Biehler 2009). Just as a toilet must be repaired and maintained, adequate housing can depend on the appropriate design and maintenance of this documentary infrastructure.

The need for maintenance of housing as both structure and documentary assemblage is based on empirical observation of housing's disassembly at various contexts across Australia's Northern Territory, where water plays a major role. In 2018, following the decade-long non-delivery of new housing at Borroloola town camps, a series of water contamination incidents were made public. Residents were advised not to drink household water due to high levels of lead and manganese, and while it was determined that corroded pipe fittings were the likely cause of lead leaching into drinking water, a patchwork documentary infrastructure worked to obfuscate legal responsibility (Grealy and Howey 2020). At Groote Eylandt, under the former Strategic Infrastructure and Housing Program, $28 million was expended to fund consortium Earth Connect to build much-needed housing, with attempts at construction thwarted by the monsoonal climate and termites that feasted on treated timber beams left exposed to moisture (see Lea 2012). House designs did not meet the standards outlined by the best practice *National Indigenous Housing Guide*, but neither were any houses actually constructed by Earth Connect in wet conditions. At the communities of Ltyentye Apurte and Laramba, residents have had to manage leaking roofs, broken air conditioners, overflowing toilets, and more, while facing claims that tenancy agreements were inadequate to guarantee the government's obligations as landlord. In these and like instances, the

dynamism of water and its inadequate governance compromise permeable housing's capacity to support householder wellbeing.

This article examines the under-servicing of housing at remote Aboriginal communities in the Northern Territory (NT) of Australia. Inside the NT Government, a key impetus for reforming remote maintenance services has been strategic litigation instigated by residents of the Central Australian communities of Ltyentye Apurte (also known as Santa Teresa) and Laramba, seeking compensation from the Chief Executive Officer (CEO) Housing, as landlord, for its failure to conduct necessary repairs on public housing. Seventy public housing tenants from Ltyentye Apurte filed proceedings against the CEO Housing in February 2016, alleging delays in undertaking housing repairs, and seeking emergency repairs and compensation under the *Residential Tenancies Act 1999* (RTA). Twenty-four proceedings were filed by Laramba residents in 2019 for similar remedies, but also seeking a response to high levels of uranium in community drinking water. Alongside this litigation, there has been extensive public criticism of low quality and poorly maintained housing at remote Aboriginal communities, including an evaluation of the *National Partnership Agreement on Remote Indigenous Housing* (2008–2018) that recommended the implementation of preventive and cyclic (as opposed to responsive and ad hoc) maintenance programs (Commonwealth of Australia 2017).

This litigation exposes the neglect by governments of housing in remote communities, where the state compulsorily acquired access to housing that had previously been managed by Indigenous Community Housing Organisations. Significantly, this litigation draws together obligations to provide habitable housing and safe drinking water – human rights or public goods which are typically held apart. The litigation warrants close examination for at least three reasons, considered in the following sections. First, while intervening in the ongoing underservicing of remote housing maintenance, the litigation has challenged minimum housing standards, examining what is required of 'habitable' housing. Second, the Laramba case in particular has introduced consideration of the right to drinking water as a matter of housing provision. This case has also highlighted how jurisdiction operates to obfuscate responsibility and quarantine risk for authorities that collectively fail to meet healthy housing requirements. Third, this issue of housing standards is relevant to ongoing efforts to transfer remote community public housing to Aboriginal control. The conclusion reflects on both why it is important to increase minimum standards and the potential inheritance of increased liabilities for Aboriginal housing providers.

Remote Community Housing

In the Ltyentye Apurte case, applicant Ms Enid Young submitted that her landlord, the CEO Housing, had failed to provide a backdoor when the premises was leased. Northern Territory Civil and Administrative Tribunal (NTCAT) Presiding Member Les McCrimmon found that the landlord had failed in its duty to repair under section 57(1) of the *Residential Tenancies Act 1999* (RTA), but not that the premises was rendered uninhabitable or insecure. McCrimmon reasoned as follows:

> While the absence of a backdoor is odd in an Australian context, it does not render a house uninhabitable within the test articulated above. Further, it is difficult to see how the absence of a backdoor, and hence a lock, could constitute a breach of the [landlord's] obligation under S49 (1). The [landlord] cannot be required to 'provide and maintain' a lock on a door that does not exist. (*Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [*2019*] *NTCAT 7*: [166])

McCrimmon's disarticulation of housing components (a lock and a door) from their collective function and cumulative impact (insecurity) is only rational within legal discourse. This logical approach and the wider case prompt a fundamental question about housing ontology, or, simply, what counts as a house. Houses exist as cells within data sets, as promises attached to funding announcements for a project pipeline, at a ribbon cutting ceremony or key handover, and as blockwork and steel assemblages that enable and constrain residents. I call this a pragmatist conception of housing. For the philosopher William James (1904),

> The ultimate test for us of what a truth means is indeed the conduct it dictates or inspires. But it inspires that conduct because it first foretells some particular turn to our experience which shall call for just that conduct from us. (674)

The housing object dictates or inspires various forms of social and bureaucratic action in relation to it: agreement-making, funding application and release, contract management, project approval, contract acquittal, maintenance, statistical abstraction, and so on. Entrenched low expectations for housing in remote Aboriginal communities, shared by differently positioned cohorts including public servants, tradespeople, and householders, shape the type and conduct of such action. Such low expectations extend the flexible interpretation of what might be recognised as a house in remote community contexts, with associated 'habits of action' attending repairs and maintenance (James 1904:

673). The home without a backdoor is counted as housing stock; a subcontractor is paid for its maintenance; a public servant is employed to superintend the contract; and a tribunal member determines that a landlord has not failed in its obligation to provide secure housing, whether or not the building can keep an intruder out.

This pragmatist conception can be contrasted with a functionalist conception of housing. Drawing on data from approximately 10,000 houses, not-for-profit company Healthabitat shows that much remote community housing in Australia does not effectively facilitate critical healthy living practices such as washing people, washing clothes and bedding, the removal of wastewater, and the storage of food. As Lea and Paul Pholeros (2010) write about remote community houses:

> They might look like houses, most especially when they are newly constructed or refurbished. But the appearance of new 'affordable' houses, buttressed by scripted policy announcements about dollars spent and program achievements, misdirect our interpretation away from what is literally in front of us: a cheap, partly complete steel shed or copy of a house of bare utility, which looks like, but is not, a house. It is a *nonhouse*. (original emphasis, 188)

The functionalist conception contends that a house that does not facilitate washing people, washing clothes and bedding, the removal of wastewater, and so on, is not a house. It is a shed or a non-house, though of course it may be a home. The functionalist conception is both empirical and normative, contending that a dwelling is only a house when health hardware (toilets, tubs, taps, and so on) supports the capacity of householders to perform the quotidian tasks deemed necessary to achieve reasonable health and wellbeing outcomes. The Ltyentye Apurte and Laramba litigation is useful for understanding housing's permeability, but also the sorts of inattention that allow houses to disassemble to the status of non-house.

Understanding the poor condition of Northern Territory remote community housing, and litigation that seeks to have this remediated, requires explanation of the impact of the Northern Territory National Emergency Response (NTNER), or 'The Intervention'. In June 2007, the Australian Government announced the NTNER and introduced a suite of legislative and policy reforms for governing remote communities in relation to leasing, housing and infrastructure funding, and social security payments, among other things (Howard-Wagner 2012). This included enacting various recommendations made by consultancy firm Pricewaterhouse Coopers' (2007) review of the Community

Housing and Infrastructure Program, which was critical of Indigenous Community Housing Organisations and recommended the state assume responsibility for remote community housing (23). This report also bolstered support for the Australian Government's compulsory acquisition of five-year township leases for 64 Aboriginal communities, under section 31 of the *Northern Territory National Emergency Response Act 2007* (NTNERA), expanding a recently commenced program of leasing reform. Until the early 2000s, housing and municipal infrastructure at remote Aboriginal communities was typically funded and constructed by the state without establishing formal tenure arrangements under the *Aboriginal Land Rights Act 1976* (ALRA) (Terrill 2010). An amendment to the ALRA in 2006 allowed for township leasing, whereby the land on which an Aboriginal community sits is leased to the Commonwealth (specifically the Executive Director of Township Leasing, EDTL), which can then sublease sections of that land. Subsequent amendments allowed for specific purpose leasing, such as for remote community housing head leases. Through the Intervention, funding for new houses and infrastructure became contingent on traditional owners agreeing to longer-term leasing arrangements, which by the conclusion of the compulsory-five-year leases in 2012 typically resulted in 40-year leases of remote community housing to the Australian Government, sub-leased to the NT Government to manage housing maintenance and tenancy services (Terrill 2009).

The staged reconfiguration of leasing arrangements is narrated in the Ltyentye Apurte decisions, as a matter impacting who was responsible for housing's neglect at what time. In the NT Supreme Court, the decision *Jasmine Janelle Cavanagh v CEO (Housing) 2018 NTSC 52* predominantly concerned whether a tenancy within the meaning of the RTA existed between the applicant and the CEO Housing prior to 21 September 2015, when the Santa Teresa Land Trust and the Central Land Council granted the EDTL a 40-year lease over existing housing and connected services at Ltyentye Apurte, and the EDTL granted a sublease to the CEO Housing. Applicant Ms Jasmine Cavanagh and the Commonwealth entered into a tenancy agreement on 2 July 2010, with the tenancy agreement made on a Panel Form R1 – Ags31 on NT Department of Housing, Local Government and Regional Services ('the Department') letterhead ([17]), specifying both the Commonwealth and the Department as landlord ([17]). The Commonwealth's compulsorily acquired five-year lease at Ltyentye Apurte expired on 17 August 2012, at which point the Commonwealth Government sent a letter to the NT Department outlining that 'Where long-term housing leases are not finalised by 17 August 2012, the preferred approach is to continue

on an interim "business as usual" basis, despite no formal underlying granted tenure' ([22]).

Nonetheless, NTCAT President Richard Bruxner reasoned that while the CEO Housing shared with the applicant the position that it was a landlord (along with the Commonwealth) for the purposes of the RTA across the period from 2 July 2010 to 21 September 2015, 'it was not able to grant a right to occupy premises on that land', characterising the CEO Housing as only an 'agent' of the Commonwealth (*Cavanagh v Chief Executive Officer (Housing)* [*2016*] *NTCAT 326*, [64] to [90]). In this case, the NTCAT President and counsel for the CEO Housing reasoned that the choice of landlord, following the conclusion of the five-year lease in 2012, was one of the Santa Teresa Land Trust or the Commonwealth. Subsequently in the Supreme Court, Justice Southwood determined that Cavanagh's periodic tenancy existed following the 2012 expiry of the Commonwealth lease, and that until the commencement of the housing precinct head lease in 2015 'the Santa Teresa Land Trust was a landlord in accordance with the definition of landlord in s 4 of the Residential Tenancies Act' while 'the obligations of the landlord' were undertaken by the CEO Housing (*Jasmine Janelle Cavanagh v CEO (Housing) 2018 NTSC 52*: [56]).

In short, while leasing reforms sought to increase state control over Aboriginal land on behalf of 'infrastructural normalisation' (Sullivan 2011), significant effort was made throughout this litigation to divest the government of responsibility for maintaining housing during the same period. Anthropologist Elizabeth Povinelli (2011) describes the liberal governance of the prior as 'a mode of political imaginary and manoeuvre in which priorness is not a problem but a problematic that implicates settler and indigenous subjects' (14). Povinelli describes how the historical seizure of persons, property, and territory have sought legal justifications to manage the rights of the prior – such as through the doctrine of 'terra nullius' or the Federal Constitution's treatment of Indigenous people as a 'spectral presence' (see Watson 2002) – justifying seizure via purchase, force or discrediting the prior right (Povinelli 2011: 17, 20). The arguments described above demonstrate the flexible legal significance granted to prior rights. While the Intervention exemplified the sovereign power of the Commonwealth to override legislated Aboriginal land rights, those same land rights are cited to constitute an Aboriginal land trust as landlord of a tenancy agreement established by the Commonwealth and NT Governments. This perverse citation shifts the burden of responsibility for housing maintenance to Aboriginal people where it is convenient to do so.

Habitability

In the Ltyentye Apurte case, the 70 initiating applications listed over 600 repairs that had not been completed. For Ms Cavanagh, this included 'Leaking taps in bathroom resulting in flooding of the premises and shut down of water at the mains to prevent flooding'. Cavanagh's submissions described that she and her partner would wake every few hours throughout the night to mop the floor, despite notifying the Department of the issue in 2011, 2014, and 2016 (*Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [*2019*] *NTCAT 7*: [17]): 'The main problem was the leaking shower. The toilet was blocked and leaked sewerage into the water leaking from the shower. Water was everywhere in the back area of our house' ([140]). Applicants Ms Enid and Mr Gerald Young sought compensation for the Department's failure to repair nine items, among them a 'leak under kitchen sink', 'shower head leaking and drain cover needs replacing', and 'toilet does not flush properly' ([31]). Applicant Mr Robert Conway also experienced plumbing issues, seeking compensation for a 'Leaking shower and failure to replace tiles following tap repair'. Mr Conway described that:

> When someone had a shower, the water dripped down into the wall and through the other side to the toilet in the next room. It was really unsafe and it was really easy to slip. Every time we had a shower, we had to clean up all the water on the toilet floor.
>
> I'm on dialysis and my wife was having cancer treatment, so it was really hard cleaning up water everyday just to stay safe from slipping. ([197])

Such accounts illustrate the persistence of housing dysfunction in remote communities, where many residents 'make lives in fragmented and volatile worlds rather than waiting for normalization and reconfiguration' in the form of repairs (Vigh 2008: 8).

This case involves complex litigation that has moved from the NT Civil and Administrative Tribunal (NTCAT), to the NT Supreme Court (NTSC), back to NTCAT, back to the NTSC, to the NT Court of Appeal, and most recently to NTCAT and the High Court. Among the matters subject to ongoing consideration has been what constitutes 'habitability' in the Northern Territory's *Residential Tenancies Act* (RTA). While house function should be practically determined by testing existing health hardware, habitability is one way of characterising the minimum amenity that functionalist housing provides. In the NT, the legislative criteria for habitable and safe, secure, and clean housing are undefined in legislation. Unlike other Australian states and territories, the NT has not passed healthy housing regulations that provide greater detail

regarding minimum standards for rental properties. A 2019 NT Government discussion paper related to a review of the RTA dismissed the need for such standards, granting significant confidence to industry to conform with the Building Code, to the capacity of buildings to maintain their condition, and to government and private sector adherence to undefined legislative standards for rental properties (Northern Territory Government 2019).

At NTCAT in 2019, the applicants sought compensation for the CEO Housing's failure to ensure the premises were habitable and in a reasonable state of repair (*Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [*2019*] *NTCAT 7*: [114]). Presiding Member Les McCrimmon noted that while 'habitable' is not defined in the RTA, a common law meaning could be applied to determine that habitability is not met if the premises and ancillary property posed 'a threat to the tenant's safety, going to both structural and health issues' ([120]). McCrimmon acknowledged that this is a high test for proving that a landlord has not provided housing of a habitable standard. Under this interpretation, tenants needed to demonstrate that repairs were neglected by the landlord and that the repairs were a corporeal safety threat. Based on the evidence submitted by Ms Cavanagh, McCrimmon found 'that the leaking shower, combined with the blocked toilet, did pose a threat to the health of Ms Cavanagh and the other occupants of the premises so as to render the premises not habitable within the meaning of s 48(1)(a) of the RTA' and that Ms Cavanagh was entitled to compensation ([143]). On the matter of the toilet not flushing properly at Ms and Mr Young's premises, McCrimmon found that this did not compromise the house's habitability, but that the CEO Housing failed to act with reasonable diligence to repair the issue on one occasion.

Submissions by the applicants on appeal questioned whether the term 'habitable' is properly construed to be limited to matters affecting the tenant's safety, suggesting this might be extended to include injury to health and to premises not meeting contemporary standards of humaneness and reasonable comfort. The submissions contended that the very high threshold set by NTCAT 'is a departure from the meaning of the terms of the Act' and the reasoning of superior courts of record (Albert 2019: [41]), and that 'It is equally clear that safety is not the limit of the meaning of the statutory term "habitable"' ([42]). The submissions drew attention to the 1839 English decision, *Belcher v McIntosh*, cited in subsequent Australian common law, where habitable means 'such a state that [the premises] may be occupied, not only with safety, but with reasonable comfort, for the purposes for which they are taken' ([52]). Further, the submissions argue that NTCAT failed to

consider the repair issues cumulatively, in effect mitigating the impact of compounding housing dysfunctions:

> The leak from the air conditioner in the home of Mr Conway is a good example. That leak caused Mr Conway to have to sleep on a mattress in the kitchen. Apart from being an obvious example of the premises providing a lack of 'reasonable comfort' or not being 'suitable' or 'good enough to live in', it also demonstrates that while the leak may or may not alone make the house not habitable, the leak combined with the effect of the leak (being that the kitchen was the only or next best available place to sleep) meant that, in context, the leak made the house not habitable. ([57])

The leak, compounded by the building's other shortcomings, constitutes the non-house, the improperly-permeable dwelling that despite appearances does not effectively support householders to undertake healthy living practices. Similarly, the submissions on appeal disputed the interpretation of NTCAT that, where Mr Conway was required to mop up the water on the toilet floor, 'Any threat to the health or safety of the occupants could, and was, ameliorated by the tenants wiping up the excess water' ([58]). Only a pragmatist conception grounded in entrenched low expectations for housing in remote communities could deem a tenant's perpetual mopping as sufficient to not compromise the house's satisfaction of the habitability standard.

In September 2020, Supreme Court Justice Blokland agreed that the interpretation of habitability made by NTCAT was decidedly narrow, and that the use of habitability in the RTA should not be interpreted to mean safety only (*Young & Conway v Chief Executive Officer, Housing* [*2020*] *NTSC 59*: [73]). By means of statutory construction, definition, and reliance on authority Blokland concluded that determinations of habitability required 'an overall assessment of humaneness, suitability, and reasonable comfort of the premises, even if only basic amenities are provided judged against contemporary standards' ([80]). Additionally, Blokland determined that 'The assessment of whether premises were habitable should take into account any proven inadequacies cumulatively' ([80]). Blokland remitted the matter back to NTCAT, but it was appealed by the CEO Housing.

In the NT Court of Appeal, Justices Southwood and Barr explored a long jurisprudential history concerning habitability and narrowed the interpretation of the RTA again. The Justices rejected the references to humaneness and suitability made by Justice Blokland in the NTSC, stating that those criteria 'involve the application of standards insufficiently precise to engage the exercise of judicial power in this context' (*Chief Executive Officer (Housing) v Young and Anor* [*2022*]

NTCA 1: [50]). But Justices Southwood and Barr maintained that the test for liability include consideration of reasonable comfort, by the following reasoning:

> Questions of fitness for habitation are to be judged against a standard of reasonableness having regard to the age, character, and locality of the residential premises and to the effect of the defect on the state or condition of the premises as a whole. ([50])

This ground of appeal was dismissed, subject to these observations and the revised interpretation of habitability.

At the time of writing, this matter is proceeding to both NTCAT and the High Court, as applicants seek compensation for emotional distress or loss associated with incomplete repairs. A class action has also been launched in the Federal Court, on behalf of the class of Aboriginal public housing tenants in 73 remote communities across the Northern Territory, with applicants seeking compensation for rent paid, damages for the condition of their homes, urgent repairs, and alleging racial discrimination under the *Racial Discrimination Act 1975*. For the time being, the interpretation of and test for habitability appears relatively settled, albeit open to further litigation. Habitability depends on a premises being reasonably comfortable, according to contemporary standards, and with consideration of the cumulative impact of any defects and disrepair. The cases themselves provide examples of hardware failures that might underpin a determination of not habitable housing, but this is far from comprehensive – no specific minimum standards for amenities in rental properties have been established. The question of habitability, and who is required to meet such standards, has been simultaneously tested in litigation concerning housing at Laramba, where water constitutes a different type of risk to householders.

Drinking Water

Functional housing is necessarily permeable, with the ability of householders to perform healthy living practices dependent on various intersecting infrastructures working well. The previous section provided examples where inadequate repairs and maintenance have produced unruly permeabilities that undermine habitability and produce non-houses: leaking showers, kitchen sinks, toilets, and so on. But permeability by design, where water is distributed into houses as construction intended, can also provide a threat to householder health and wellbeing, where the substance of water itself is so variable, and potentially harmful.

The Laramba litigation also involves applicants seeking compensation pursuant to the RTA, on the grounds that their housing has been uninhabitable 'because the only drinking water made available in the premises leased by the Respondent to each of them contains concentrations of uranium now three times the maximum safe level for drinking water' (Albert and Kelly 2020: [23]). From 2010 to 2018, figures provided by Power and Water Corporation (PAWC) testing measured uranium concentration in Laramba drinking water at levels between 0.02895 mg/L and 0.046 mg/L. The *Australian Drinking Water Guidelines* ('The Guidelines', Australian Government et al. 2011) specify that it is only safe to drink water with a concentration of uranium up to 0.02 mg/L (updated from 0.017 mg/L in January 2022). This standard is based on a person weighing 70 kilograms and drinking two litres of water per day, meaning a higher risk for children and for adults with chronic kidney disease. Applicant Mr Johnny Jack expressed to the Tribunal his concern about the levels of uranium in the water because he is 'old and I have to be careful and look after myself and my family, including my young grandchildren and great-grandchildren who visit my house often' ([83]).

Submissions by the applicants to NTCAT quoted the stated purpose of the RTA as 'to ensure that tenants are provided with safe and habitable premises under tenancy agreements' (section 3) and cited a formulation of 'habitable' made by Atkin LJ of the House of Lords in *Summers v Salford Corporation*:

> If the state of repair of a house is such that by ordinary user damage may naturally be caused to the occupier, either in respect of personal injury to life or limb or injury to health, then the house is not in all respects reasonably fit for human habitation. (In Albert and Kelly 2020: [37])

Further, the submissions cite case law that finds a premise is not habitable if it includes features which may cause a risk of injury to health (Albert and Kelly 2020: [39]). Building on the original Ltyentye Apurte NTCAT interpretation above, the applicants argued that the RTA does not adopt the language of 'likelihood of injury' in relation to habitability, implying determinations be made against the lower test of 'a risk or threat of injury to the health of the resident' ([40]). Applicants' submissions directed the Tribunal to consider: 'Does the toxicity make the premises uninhabitable in the sense that the toxic water gave rise to a risk of injury to the health of the particular occupants by ordinary use of the provided facilities?' ([45]). The submissions argued that the Guidelines provided a sufficient evidentiary basis to conclude the uranium concentration in Laramba drinking water underpinned a risk

of injury to householders' health and that this breached the landlord's obligation to provide habitable housing ([51], [80]).

Northern Territory remote communities are not guaranteed minimum standards for drinking water (see Grealy and Howey 2020). The NT's *Water Supply and Sewerage Services Act 2000* (WSSSA) requires that providers of 'water supply services' in specified 'water supply licence areas' are licensed by the regulator, the NT Utilities Commission. The government-owned Power and Water Corporation (PAWC) is the sole licensee under the *WSSSA* and requirements are imposed on PAWC through the legislation, its licence, and a standardised customer contract. Under the *WSSSA*, the Minister can specify minimum drinking water standards for PAWC to meet, with similar powers available in the *Water Act 1992* and the *Public and Environmental Health Act 2011*. Rather than establish such standards, the utility provider and the NT Department of Health have established a memorandum of understanding (MOU) that describes criteria for the safe treatment of water, water testing regimes, responses to public health incidents, public reporting, and so on. The unenforceable MOU concedes that 'no minimum standards for drinking water have been set', but that the *Australian Drinking Water Guidelines* 'will be used as the peak reference' for water quality (Department of Health 2011: clause 4). The MOU also allows for the Department to vary the water quality criteria drawn from the Guidelines 'in specific circumstances … as long as public health is not compromised' (2011: clause 4). Water at Laramba was exempted by the Department of Health from complying with the Australian Drinking Water Guidelines health guideline value for the concentration of uranium in drinking water of 0.017mg/L.

The limited and unenforceable protections that do exist for drinking water are not available across the Northern Territory, which is fragmented into jurisdictions with distinct protection regimes (Grealy and Howey 2020). The *WSSSA* only applies in water supply licence areas, which include 18 towns where the majority of the NT's non-Indigenous population lives, but not remote communities or homelands. Remote communities and a small proportion of homelands are serviced by Indigenous Essential Services, a not-for-profit subsidiary of PAWC that owns utility assets and is responsible for service provision in remote communities. Unlike PAWC, IES is a private propriety limited company with no legislation mandating licensing or service standards, nor is it overseen by the Utilities Commission. The standards, duties, accountability, and transparency mechanisms specified in the *WSSSA*, PAWC's licence, and its customer contract do not apply to IES; the MOU between the Department of Health and PAWC does exist as one framework for

governing remote community drinking water, although it is unenforceable.

In the Laramba case, the applicants' argument about the CEO Housing's responsibility to provide safe drinking water has thus depended on proving that the particular context of the house supersedes the absence of protections for drinking water in remote communities more generally. On 1 July 2020, NTCAT presiding member Mark O'Reilly found that the landlord is not required under the RTA to provide safe or adequate water to householders. O'Reilly suggested that 'The uranium issue raised by the applicants involves not only a question of what is meant by habitable but also a question of the extent of a landlord's responsibility under the Act' (*Various Applicants from Laramba v Chief Executive Officer (Housing)* [*2020*] *NTCAT 22*: [30]), focusing on the specification of the 'premises and ancillary property' ([31]). O'Reilly found that the landlord's obligations under the RTA applied to physical water infrastructure – domestic pipes, faucets, sinks, tanks, and so on – but do not extend to ensuring water supply or quality, where water is sourced from outside the premises ([43]). O'Reilly determined that 'the landlord's obligation for habitability is limited to the premises themselves. It does not extend to external factors that might be considered', in his terms, 'an "act of God" or a "force majeure"' ([53]). His decision distinguishes between the landlord and the service provider ([45]), with the former responsible for ensuring the 'premises', rather than the 'location', is habitable ([52]). O'Reilly cites the *Power and Water Corporation Act* as outlining the utility provider's obligation to 'acquire, store, treat, distribute, market and otherwise supply water' ([46]). In remote communities, these obligations specified in the *Power and Water Corporation Act* are not subject to any legislated minimum water quality standards.

In the Supreme Court in 2021, Chief Justice Grant considered questions referred by the President of NTCAT, including whether under the RTA the landlord had an obligation to ensure water is provided that does not contain levels of uranium that are unsafe for drinking. The cases also explored who might be constituted as the landlord and an agent operating on the landlord's behalf, including through the provision of essential services. Distinctions between the CEO Housing (a corporation sole established by section 6 of the *Housing Act 1982*), the now Department of Territory Families, Housing and Communities, Power and Water Corporation (PAWC), and Indigenous Essential Services (IES) are not so clear cut as might be assumed. IES is funded by grants from the Department of Territory Families, Housing and Communities according to a service level agreement between the two

bodies, and IES in turn pays PAWC to deliver water and power services in remote communities. IES has no direct employees and shares a Chair and Board of Directors with PAWC (Kurmelovs 2020). In other words, the Department that manages public housing tenancies at Laramba and other remote communities, funds the subsidiary of a government-owned corporation (IES), which turns to that government-owned corporation (PAWC) to deliver drinking water without a licence into housing leased by the Department. Grant determined that although these authorities have distinct legal personalities:

> the factual enquiry into funding arrangements for the delivery of essential services to the premises may conceivably inform the question of whether responsibility for the supply of water to the premises may be attributed solely to the Power and Water Corporation rather than to the department with responsibility for the provision of housing in remote communities. (*Jack v Chief Executive Officer (Housing) (No 1)* [*2021*] *NTSC 79*, [17])

The matter was referred back to NTCAT to make factual findings.

Chief Justice Grant's summary concerned the question of which authority might be attributed responsibility for supplying unsafe drinking water and whether this is an issue that impacts habitability under the RTA. This is a complicated question of jurisdiction, whereby the housing assemblage is connected to various intersecting infrastructures on which it depends to function, which are disarticulated from one another in the determination of various legal obligations. In a related Supreme Court case, *Jack v Chief Executive Officer (Housing) (No 2)* [*2021*] *NTSC 81*, Grant found that the applicants had failed to effectively make the case that the Northern Territory of Australia (the Territory) was acting as an 'agent' of the landlord, the CEO Housing ([21], [34]). Grant described that 'The Territory is the body politic established under the Crown by the name of the "Northern Territory of Australia"', variously used 'to mean either the whole body politic or the executive branch' ([35]). Importantly, a government department is not deemed to have a separate juridical personality, but is instead 'a unit of administration with responsibility for an area of government of and within the body politic' ([35]). Grant concluded that while the Territory funds Power and Water Corporation to provide essential services to the premises in question:

> It does not follow that either the Corporation and/or the Territory is thereby the agent of the landlord in relation to the management of the premises. That is because the provision of electricity, gas, water or sewerage by a public (or private) utility provider does not constitute or form part of

> the management and control of the tenancy arrangement so as to render the provider the 'agent' of the landlord in the relevant sense. ([61])

Back in NTCAT in May 2022, Presiding members Robert Perry and Ron Levy found that the intragovernmental arrangements protected the CEO Housing from failing to provide habitable housing under the RTA in relation to unsafe drinking water.

> We find that the intragovernmental arrangements between the Northern Territory (through the agency of its various departments), the Chief Executive Officer (Housing), and the Power and Water Corporation (including its subsidiary Indigenous Essential Services Pty Ltd) were wholly conventional. Each of these entities have discrete and separate functions. The Power and Water Corporation has sole responsibility for the supply of water to premises at Laramba. The Chief Executive Officer (Housing) is not legally responsible for that supply of water, whether directly or pursuant to some agency or de facto arrangement with the Power and Water Corporation (or the Northern Territory). (*Various Applicants from Laramba v Chief Executive Officer (Housing)* [*2022*] *NTCAT 3*: [44])

As O'Reilly did, Presiding Members Perry and Levy cited the statutory obligation of Power and Water Corporation to 'acquire, store, treat, distribute, market and otherwise supply water for any purpose' ([61]).

Because it is 'wholly conventional', the administrative configuration between the CEO Housing, the Department, IES, and PAWC can appear as a reasonable subcontracting arrangement by a government department without the requisite internal capacity to deliver a complex service. However, this arrangement effectively exploits a discriminatory system of drinking water protection to obfuscate accountability for delivering unsafe drinking water at Laramba and other remote communities. Two key divisions are made: first, between the house and the intersecting infrastructures used to deliver essential services, including as the premises and the location; second, between the CEO Housing, specified as landlord in the RTA, and other government authorities involved in providing household services. Following Kirsty Howey and Timothy Neale (2022), this can be understood through the concept of 'divisible governance', whereby jurisdiction is fragmented by scale, adjacent governing laws, and regulatory actors with the effect of 'deferring, forestalling or eliminating [government] accountability' (5). Jurisdiction authorises risk and its regulation within specified boundaries. For Howey and Neale, 'The trick of jurisdiction is to make incommensurate legal orders and their distinct logics and categories seem to "coexist without a great deal of overt conflict"' (Valverde in Howey and Neale 2022: 8). Legal authorities, bureaucrats, and the public

are encouraged to believe that for each risk to health there is an associated authority charged with its mitigation, rather than an incomplete and inconsistent regulatory framework with major gaps.

Thus while housing is permeable, its governance is also divisible, and strategically so. Settler colonial governance involves the establishment of jurisdictions to carve up control of legal obligations by discrete authorities. There is no guarantee that such obligations, considered collectively, will address the multiple, interactive components of functionalist housing. The delivery of safe drinking water – a service that most householders in wealthy urban settings take for granted – is a complex matter of ecological provisioning involving multiple authorities, infrastructures, documentary frameworks, and so on. Based on the legal decisions related to Laramba to date, it has not been found that the landlord has an obligation to supply safe drinking water to ensure habitable housing. The statutory obligation to supply drinking water is repeatedly noted to fall to PAWC. But in remote communities, where PAWC is contracted by its subsidiary IES to deliver drinking water, no minimum standards apply.

Infrastructural developments instigated by the litigation might provide grounds to argue that these legal matters – of determining whether safe drinking water is a component of habitability and, if so, who is responsible for providing it – are of limited practical consequence. In early 2022, a contract was awarded by PAWC to water treatment company Clean TeQ Water to construct a treatment plant at Laramba that promises to remove uranium from community bore water using its ion exchange technology. By January 2023, the treatment plant has been completed, is due to undergo product validation and operational testing, and is scheduled to commence operation in early 2024 (Oates 2023). Although residents continue to drink bottled water supplied by the local Aboriginal council, this treatment plant is a welcome development. However, water at the nearby communities of Willowra and Willora also exceeds the health guideline value for uranium content. There are many other NT remote communities where drinking water would not consistently meet various health guideline values. This wider situation underpins the NT Government's resistance to set minimum drinking water standards and illustrates the potential of this ongoing litigation that attempts to constitute safe drinking water as a feature of habitable housing.

Reasonable Comfort

This litigation involving Ltyentye Apurte and Laramba householders has thus far resulted in compensation awarded to applicants for the

landlord's failure to complete repairs. Ongoing matters could result in further compensation for emotional distress or loss and compensation, while the class action in the Federal Court could lead to compensation awarded to all Aboriginal tenants of remote community housing. The class action also holds potential to build on the 'reasonable comfort' standard that has been established for habitability under the RTA. Institutionalising this standard is one way to improve the condition of remote community housing, specifying structural requirements, setting obligations, and lifting expectations against the entrenched norms of under-investment and neglect that produce non-houses in remote communities (Timmermans and Epstein 2010).

In the past few years, NT Government policy has adopted the rhetoric of 'Aboriginal community control' and is broadly committed to growing a community housing sector. This reflects NT Government concern over Commonwealth Government withdrawal of support for remote community housing, and the attraction of alternative finance available to registered community housing providers (see Grealy 2022). In policy terms, this transition to Aboriginal control is promoted through the establishment of Local Decision Making Agreements and select tender processes that prioritise Aboriginal Business Enterprises and Aboriginal community controlled organisations for government contracts, including housing construction and maintenance. The NT Government's 'Local Decision Making' policy states it 'will partner with Aboriginal communities to assist the transition of government services and programs to community control'. This is evident in one township lease held by an Aboriginal corporation and two newer township leases held by the Executive Director of Township Leasing with provision for transitioning to an Aboriginal community entity (Central Land Council 2020: 71). This policy orientation constitutes a partial 'retreat' of the NT Government from various operational roles in remote housing provision, including as leaseholder and landlord (Grealy 2022).

Broadly, the situation for remote community housing in the Northern Territory is one where housing is being transitioned to the Aboriginal community housing sector under policies that have appropriated the language of self-determination, with limited information regarding the inherited liabilities of existing assets. The Ltyentye Apurte and Laramba litigation has clearly shown the maintenance backlog that exists in much remote community housing, which has been subject to sustained inattention and under investment for a long period, compromising house function. This transition of housing is taking place alongside possible legal reform to increase minimum standards and related maintenance requirements, and in contexts where water scarcity

and energy insecurity compound pressures on housing to protect residents from increasingly severe climates. As Aboriginal corporations assume the status of landlord for remote community housing, they assume responsibility for maintaining the assets they inherit to minimum legal standards. The Ltyentye Apurte and Laramba litigation may give greater detail to the content of those standards, and even clarify whether such bodies become responsible for attending to the presence of naturally occurring substances in drinking water, including uranium.

Funding Details

Liam is employed at the University of Sydney on the Australian Research Council Special Research Initiative project 'Staying on Country: Infrastructure Needs for Remote Community Viability' (SR200200677).

Disclosure of Competing Interests Statement

No financial interest or benefit has arisen from the direct applications of this research. Liam Grealy is employed by Menzies School of Health Research which is contracted by the NT Government to conduct an independent evaluation of its 'Healthy Homes' remote housing maintenance program. That role has not influenced the findings of this research.

Acknowledgments

I would like to acknowledge Daniel Kelly of ALRAR for supporting this research related to the Ltyentye Apurte and Laramba cases; Tess Lea for establishing the Housing for Health Incubator which partnered with ALRAR for this research; Kirsty Howey, with whom I undertook prior research on the geography of Northern Territory drinking water regulation, described in this article; and two anonymous reviewers for their useful feedback.

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