

# ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) AMENDMENT BILL 2006

## THE INQUIRY

1.1 The Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 was introduced into the House of Representatives on 31 May 2006 and into the Senate on 20 June 2006. The Senate Scrutiny of Bills Committee commented on the Bill in its Fourth Report of 2006, dated 21 June 2006. On 22 June 2006, the Senate, on the recommendation of the Selection of Bills Committee (Report No. 6 of 2006), referred the Bill to the Committee for inquiry and report by 1 August 2006.

1.2 The Committee received 15 public submissions and one confidential submission relating to the Bill. The public submissions are listed at Appendix 1. The Committee considered the Bill at a public hearing in Darwin on 21 July 2006, details of which are referred to in Appendix 2. The submissions and Hansard transcript of evidence may be accessed through the Committee's website at [http://www.aph.gov.au/senate\\_ca](http://www.aph.gov.au/senate_ca)

1.3 The Committee considers the time made available for this inquiry to be totally inadequate. The Aboriginal Land Rights (Northern Territory) Act is one of the most fundamentally important social justice reforms enacted in Australia and these are the most extensive and far reaching amendments that have been proposed to the Act. There was insufficient time for many groups to prepare submissions and a single hearing was complicated by the necessity to include a number of teleconferences within the hearing. Additionally, time constraints prevented the Committee hearing from a number of witnesses. The inadequacy of time to do justice to the complex nature of the issues involved was reinforced by a number of groups in evidence:

In view of the length of time taken to draft and introduce this legislation and the fundamental nature of the changes the legislation will make to Aboriginal land rights and tenure, it seems extraordinary that stakeholders have been given little more than 2 weeks to provide comments to the Senate Committee, which in turn must report to Parliament within 1 month.<sup>1</sup>

Further comment on the consultative processes leading to this Bill are made later in the report.

## THE BILL

1.4 The amendments of the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Act) contained in this Bill are designed to:

- provide for individual property rights in Aboriginal townships,

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1 *Submission 7*, p.4 (Law Council of Australia); also *Submission 3*, p.2 (Professor Altman) and *Submission 12*, p.2 (Central Land Council).

- streamline processes for development of Aboriginal land, and
- improve efficiency and enhance accountability of organisations under the Act.<sup>2</sup>

1.5 The explanatory memorandum indicates that the Government's primary objective in seeking to reform the Act is:

To facilitate a higher level of economic development on Aboriginal land. This is to be done without undermining the [Act's] current balance of interests under which traditional owners of Aboriginal land must consent to minerals exploration. The Government's reform proposals relate predominantly to two areas: Part IV of the [Act] dealing with exploration and mining; and provisions that will allow for more direct Aboriginal traditional owner participation in decisions about development of their land (by devolution of decision-making by Land Councils).

1.6 To achieve the Government's objective, the bill provides for a new tenure system for townships on Aboriginal land that will allow individuals to have property rights. The fundamentals of the Act such as inalienable Aboriginal land title and the role of traditional owners will be preserved. Ninety-nine year head leases over townships with individual subleases under the head lease will make it significantly easier for individuals to own their own homes and establish businesses. The bill enables the Northern Territory government to establish its own legislation to administer the scheme.

1.7 To make home ownership a reality, the government has established the Home Ownership on Indigenous Land Program and a Home Purchase Incentive Scheme to provide low interest loans and other incentives and assistance to prospective home owners. The States are also expected to move to amend their Indigenous land legislation to enable unencumbered long-term leasing of Indigenous land.

1.8 Amendments are proposed to the cumbersome and open-ended mining provisions of the Act and are based on a package agreed between all parties: governments, land councils and the mining industry. There will be expedited and more certain processes for exploration and mining on Aboriginal land and current ministerial powers will be delegated to the Northern Territory Government.

1.9 The changes include a core negotiating period in which the government expects most exploration applications to be considered. The Northern Territory mining minister will be provided with a new power to set a deadline to bring negotiations to a conclusion. Importantly, the power of traditional Aboriginal owners to withhold consent to, or veto, exploration is retained.

1.10 The Bill includes further measures to cut red tape and facilitate economic development on Aboriginal land. The requirement for ministerial approval of leases

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2 The comments in this section are from the Minister's second reading speech, 31 May 2006, Revised Explanatory Memorandum, and *Submission 1* (OIPC).

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and contracts entered into by land councils will be significantly relaxed. The minister will only need to approve leases that are over 40 years duration, rather than the current 10 years, and contracts of over \$1 million, rather than \$100,000 at present. The bill facilitates the mortgaging of leases by confirming that a lease can include agreement to future transfers.

1.11 The bill provides for the delegation of decision-making powers from land councils to regional groups, including for exploration and mining.

1.12 The provisions for the establishment of new land councils will be amended to specify that, to establish a new land council, a 55 per cent majority vote of Aboriginal people is required. The performance of land councils will be enhanced by the legislation. No longer will land council funding from the Aboriginals Benefit Account (ABA) be based on an artificial statutory formula. The guaranteed 40 per cent of annual ABA revenues for land councils will be removed and in the future, land councils will be funded on the basis of workloads and results.

1.13 The bill seeks to expedite the finalisation of a number of outstanding land claims by disposing of land claims that cannot legally proceed or which are inappropriate to grant.

## **BACKGROUND**

1.14 The Aboriginal Land Rights (Northern Territory) Act was introduced 30 years ago. It is one of the most important social justice reforms enacted in Australia. The Act provides for the granting of traditional Aboriginal land in the Northern Territory for the benefit of Aboriginal people and regulates development on that land. The Act establishes Aboriginal Land Councils to assist, consult with and protect the interests of traditional Aboriginal owners of the land and other Aboriginal residents. The Minister stated in the second reading speech that the Act has been successful in returning land to Aboriginal people with almost half of the Northern Territory now Aboriginal land; however, the Act has been less successful in facilitating the economic exploitation of that land for the benefit of its owners.

1.15 The Minister indicated that the reforms proposed in this Bill are the culmination of three major reviews of the Act and extensive consultations over a period of almost 10 years.

1.16 John Reeves QC conducted a comprehensive independent review and reported in 1998.<sup>3</sup> The central message from the Reeves Review was that the Act was not delivering economic development, as measured by mainstream social indicators, to Aboriginal land owners. Reeves recommended a range of reforms including a new regionalised structure of representative and service delivery institutions, changed institutional accountability for the use of income derived from Aboriginal land, the

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3 *Building on Land Rights for the Next Generation: The Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, John Reeves, 1998.

abolition of the permit system, and enhanced powers for the NT Government over Aboriginal land. The Reeves Review was itself reviewed in 1999 by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs<sup>4</sup> which, though concurring with some of Reeve's findings, did not fully endorse Reeve's recommendations, and also by the former Minister Ian Viner and a number of academics during a conference at ANU<sup>5</sup> who were highly critical of fundamentally all of Reeves proposals.

1.17 The exploration and mining provisions contained in Part IV of the Act were reviewed in the Manning Report in 1999 which considered the provisions needed some streamlining. In 2002 the Federal Government provided the Northern Territory Government with an Options Paper – Reform of the Aboriginal Land Rights (Northern Territory) Act 1976 to which the NT Government and Land Councils responded in June 2003 with their Detailed Joint Submission to the Commonwealth – Workability Reforms to the Aboriginal Land Rights (Northern Territory) Act 1976.

1.18 In October 2005 Minister Amanda Vanstone announced details of the proposed reforms to the Act including a new voluntary township leasing scheme. OIPC advised that since the announcement consultation occurred with the NT Government on the provisions of the Bill requiring complementary NT legislation in relation to township leasing and exploration and mining. The Land Councils were consulted on the details of the reforms affecting their operations.<sup>6</sup>

## ISSUES

### *Introductory Comments*

1.19 There was general support for the Bill from submissions and witnesses, though support for a number of the proposals in the legislation was qualified. There was recognition that the framework and principles underpinning the Bill to assist with economic development and home-ownership would be longer term propositions, although critical comment may be directed at some details in the shorter term.

1.20 The NT Government described an almost ambivalent though not inconsistent approach:

What is in the Chief Minister's letter and what we are saying here today is that we agree with the principles. We think this is part of a broad framework of things that need to be done to improve the economic lot of Indigenous people in the Territory. We think it is beneficial in that sense.

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4 *Unlocking the Future: The Report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, August 1999.

5 *Land Rights at Risk? Evaluations of the Reeves Report*, ed JC Altman, F Morphy and T Rowse, CAEPR Research Monograph No.14, 1999.

6 *Submission 1*, p.4 (OIPC)

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What we are saying here today, though, is that we always have concerns about getting people on board, because we think that is the best way to have public policy owned and implemented well. We continue to caution that there need to be discussions about the legislation. Particularly, we need to be selling the benefits of the proposed legislation to those who may want to take it up. I think those two positions are consistent.<sup>7</sup>

1.21 The Northern and Central Land Councils noted that the Bill largely adopted the amendments proposed in the 2003 Joint Submission and these were supported. The NLC commented that 'many of the amendments improve workability and are welcome, since they will remove red tape and speed up processes for mining and other developments'.<sup>8</sup>

1.22 Some groups however, held serious concerns about or expressed heavily qualified support for the Bill. The Law Council of Australia did not support the Bill 'at the present time, as there are a number of impediments to the realisation of its objectives in many communities affected by this legislation'.<sup>9</sup> The LCA was concerned that 'there is a significant risk the proposed Bill will lead to further disenfranchisement of Aboriginal people in the Northern Territory at the present time, given the vast gulf in education, wealth and basic services existing between Indigenous communities and the broader Australian community'.<sup>10</sup>

1.23 Tom Calma, the ATSI Social Justice Commissioner, had 'serious concerns' about the Bill arguing that 'the amendments make significant changes to the existing land rights legislation which has the potential to compromise the rights and interests of Indigenous people living in the Northern Territory'.<sup>11</sup>

1.24 Professor Jon Altman argued that the proposed amendments 'will result in a statutory framework that lacks internal consistency and that will make the meeting of the amendment objectives (especially with respect to mainstream economic development) less likely than the current framework'.<sup>12</sup>

### ***Consultation***

1.25 The consultative process and agreement reached with the NT Government and Land Councils is described in the minister's second reading speech, explanatory memorandum and OIPC Submission. However, the Committee received in evidence much criticism of the limited nature and direction of the consultation undertaken.

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7 *Committee Hansard* 21.7.06, p.69 (NT Government).

8 *Committee Hansard* 21.7.06, p.1 (NLC).

9 *Submission* 7, p.3 (LCA).

10 *Submission* 7, p.12 (LCA).

11 *Submission* 5, p.2 (ATSI SJC).

12 *Submission* 3, p.1 (Professor Altman).

1.26 A number of amendments included in the Bill, especially relating to the township leasing proposals, had not been part of the earlier consultative process with the NT Government and Land Councils. These groups now raised concerns over these developments outside of the earlier processes.

1.27 The NLC stated that 'some of these amendments have only recently been raised, have not been the subject of comprehensive consultations, and do not have the consent of traditional owners, as recommended by the HORSCATSIA Committee in 1999.'<sup>13</sup> The CLC commented that 'whilst these jointly-developed reforms were largely adopted in the Amendment Bill, and are supported by the CLC, there are several amendments that will detrimentally impact on the rights of traditional landowners and the functions of Land Councils'.<sup>14</sup>

1.28 The NT Government similarly noted that other elements in the Bill should have been properly considered by, and discussed with the NT Government and Land Councils prior to introduction.

It is the Northern Territory's firm view that other elements in the bill should have been properly considered by and discussed with the Northern Territory government and the land councils prior to their introduction. However the government was only provided a small window of opportunity to provide comment on the draft bill. In the time allowed, which was three days, it was only possible to provide comments on priority issues as well as technical and drafting concerns.<sup>15</sup>

1.29 The traditional owners who had not been part of the consultative process expressed their views forcefully:

Our foremost concern, which we want to convey to the Committee, is that despite our direct interest in this matter, we have not been part of any process of discussion, consultation, or information provision regarding the proposed changes to the Act. Neither the Australian Government, the Northern Territory Government, or the Northern Land Council have ever spoken with us directly about these matters... There may have been 9 years of consultation leading to these proposed amendments, but it was not with us...

The changes the Government are making to Indigenous affairs generally, and in this case Land Rights, are happening much too quickly for our people to understand let alone respond to. This is placing enormous stress on our leaders, and the sense of 'loss of control' and powerlessness to respond is resulting in demoralisation, depression and fatigue... Yes, changes are needed and new ways forward need to be carefully developed

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13 *Committee Hansard* 21.7.06, p.2 (NLC).

14 *Submission* 12, p.3 (CLC).

15 *Committee Hansard* 21.7.06, p.54 and *Submission* 14, p.1 (NT Government).

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in partnership with government and business, but the changes must be led by us, and implemented in consultation – not imposed.<sup>16</sup>

1.30 Tom Calma, the ATSI Social Justice Commissioner, reinforced these comments indicating that 'I am concerned that the ALRA amendments have been made without the full understanding and consent of traditional owners and Indigenous Northern Territorians.'<sup>17</sup> Ms Raymattja Marika, a traditional owner from Yirrkala, spoke strongly of the identity and connection with land and emphasised:

The federal Government must provide information that reaches traditional owners across the Northern Territory: As the traditional owners, we must be informed, and we **want** to be informed. This land rights legislation is **our** legislation. This is what **we** fought for. This affects **us**. We really need to be able to talk about it together.<sup>18</sup>

1.31 ANTaR referred to Commissioner Calma's comments on the importance of governments upholding the principles of free, prior and informed consent and thought that it appears that the proposed amendments fall well short of adhering to these principles.<sup>19</sup> The Law Council of Australia also believed that because what is contemplated is grounded on a change in traditional lifestyles 'the prior informed consent of Indigenous communities affected by this legislation must be obtained for all aspects of the Bill before enactment.'<sup>20</sup>

1.32 An option was canvassed that, given the consultations with the NT Government and Land Councils had not covered all the provisions of the proposed amendments, the Bill should be split so that the agreed amendments could proceed and further consultation could be undertaken on the remaining amendments, especially the leasing provisions. The NT Government indicated that they 'would not be unhappy' with such a proposal.<sup>21</sup>

1.33 OIPC described the consultative process of providing draft legislation to and meeting with the NT Government and Land Councils on township leasing and mining matters since December 2005<sup>22</sup> and indicated that:

We work with the land councils as the representatives of the traditional owners in the Northern Territory, which is the appropriate role and that is the way we would normally deal with them... We take our obligations very seriously in relation to the requirement to consult and we do that through their representative organisations in the Northern Territory. Without

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16 *Submission 6*, pp.2-3 (Traditional Owners of NE Arnhem Land).

17 *Submission 5*, p.3 (ATSI SJC).

18 *Committee Hansard 21.7.06*, p.36 and *Submission 15*, p.6 (Ms Marika).

19 *Submission 9*, p.9 (ANTaR).

20 *Submission 7*, pp.3 and 12 (LCA).

21 *Committee Hansard 21.7.06*, p.69. (NT Government).

22 *Committee Hansard 21.7.06*, p72 (OIPC).

wishing to delay the committee in a discussion on the current state of international law, I think it is fair to say that the principle of free, prior and informed consent is still a bit vague around the edges.<sup>23</sup>

### ***Township or community leasing of Aboriginal land***

1.34 The amendment that attracted most debate related to the subject of 99 year head leases to an 'Entity' which would take responsibility for granting sub-leases within an Aboriginal community. A number of groups, including the Northern and Central Land Councils, expressed considerable concern over the leasing proposal.<sup>24</sup>

1.35 The NLC noted that the purpose of the reforms included to promote housing and other development and to facilitate economically healthy Aboriginal communities including entrepreneurship and private ownership of interests in land. The NLC considered that 'there is potential for much common ground between traditional owners of communities and Commonwealth objectives'. However, the NLC expressed concern that:

in their current form the reforms include significant deficiencies and unforeseen consequences which will hamper and impede the Commonwealth's policy of promoting private investment and entrepreneurship, as well as reducing the likelihood of agreed outcomes with traditional owners.<sup>25</sup>

1.36 The CLC and NLC jointly summed up their concerns as follows:

In short, the amendments seek to promote private investment in housing and entrepreneurship by community residents, without also promoting such investment and entrepreneurship by traditional owners.

Instead traditional owners are expected to forgo their right to engage in commercial development over large areas of vacant land for 99 years, in return for a rental determined by valuation rather than negotiation.

These requirements restrict the freedom of traditional owners to bargain commercially, appear discriminatory, might invite international complaint, and may be unlawful. They are also unnecessary. Fair and reasonable outcomes will be achieved (eg the railway and gas pipeline) without imposing restrictions on the capacity of traditional owners or Land Councils to negotiate. These outcomes may be achieved through leases under s19, without amendment to the Act. The current amendments are unnecessary.<sup>26</sup>

1.37 Tom Calma submitted that the proposed 99 year leasing provision 'will have the practical effect of alienating Indigenous communal land'. He argued that:

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23 *Committee Hansard* 21.7.06, pp. 74-5 (OIPC).

24 See *Submission* 2, pp.2-4 (Professors Tehan and Godden); *Submission* 6, pp.6-9 (TONEA); *Submission* 9, pp.3-5 (ANTaR); *Submission* 11, pp.5-7 (Mr Sean Brennan, UNSW).

25 *Submission* 13, p.15 (NLC).

26 *Submission* 12, p.7 (CLC) and *Submission* 13, p.15 (NLC).

If implemented, head leases will mean that traditional owners relinquish control over decision-making processes relating to their ancestral lands for up to four generations. While a lease is not alienation in fact, there is no doubt that it will have the effect of alienation in practice.<sup>27</sup>

[He further argued that the effect of the sub-leasing provision would be] to take away traditional owners rights to carefully consider and consent to any economic development that occurs on their land. This provision effectively allows any type of unwanted or inappropriate commercial development.<sup>28</sup>

1.38 Commissioner Calma also expressed concern that, while the Bill provides that communities are free to agree or not to a head lease agreement, 'there are some serious flaws in the legislation in terms of establishing consent of traditional owners'. In particular, the Commission does not consider that proposed s19A(3) provides a sufficient threshold of protection to ensure that traditional owners give permission to head lease agreements.<sup>29</sup>

1.39 Due to the uncertainty surrounding the operation of the leasing provisions, some groups suggested that they be trialled. The Traditional Owners of NE Arnhem Lands proposed that there should not be more than two town leases negotiated within the next 3-5 years to enable these provisions to be carefully 'trialled' and monitored so the financial costs and other impacts could be properly determined.<sup>30</sup>

1.40 On the issue of the extent to which the leases are voluntary with comments about the provision of additional resources or services being made conditional on the acceptance of leasehold arrangements, OIPC responded:

The government has made it clear right from the outset that the arrangements are voluntary. I have listened to some of the questioning that was put, particularly to the Northern Territory government, around persuading groups to agree to a township lease in exchange for essential services. I flatly deny that and I think it is absolutely not the case.

[And in response to a specific example cited of housing to be provided on Elcho Island] I think it is an oversimplification of the government's position... As part of a broad plan that ultimately goes to achieving much better outcomes for Indigenous people on Galiwinku, the government is putting on the table the notion that it would like to see the community agree to a headlease as part of that broad plan... Why the government thinks a headlease is so important is that the housing is being provided on the basis that it is like public housing, which requires tendering arrangements, and in

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27 *Submission 5*, p.11 (ATSI SJC).

28 *Submission 5*, p.15 (ATSI SJC).

29 *Submission 5*, pp.11-12 (ATSI SJC).

30 *Submission 6*, p.9 (TONEA).

the longer term there might be an opportunity for people to buy and own those houses.<sup>31</sup>

1.41 In response to the issue of loss of control over land that may be sub-leased, OIPC advised that:

Under the scheme that both governments have supported, subleases can only be issued in accordance with the terms and conditions which have been agreed to at the stage when the headlease has been negotiated and agreed to by traditional owners and the land council. I think that is a very important point... The entity will not be able to act in some sort of willy-nilly way, to just start issuing subleases; it has to act in accordance with the law, in accordance with what has been negotiated in the headlease.<sup>32</sup>

1.42 The introductory comments to this section of the report note that there was recognition that the framework and principles underpinning the Bill to assist with economic development and home-ownership would be longer term propositions. OIPC expanded on this aspect of the leasing issue in additional information:

New section 19A of the Bill provides a framework for the new scheme. The Australian and Northern Territory Governments will continue to work together with interested communities and the Land Councils to decide on the more detailed arrangements including the headlease.

The scheme is evolving... It is inevitable that the first headleases will require considerable negotiations and are likely to become a model or template to follow, noting that each township is different and that traditional owners are likely to want to negotiate different terms and conditions...

The process for negotiations is the same as for any other lease over Aboriginal land. That is, the negotiations will involve the relevant Land Council who must be satisfied that the traditional owners understand the nature and purpose of the proposed headlease and, as a group, consent to it. In addition the Land Council must consult all other Aboriginal people affected and be of the view that the terms and conditions of the headlease, allowed for under section 19A, are reasonable.<sup>33</sup>

### ***Delegation of Land Council powers***

1.43 The Northern and Central Land Councils were critical of the amendments to delegate Land Council functions. The Land Councils noted that the 2003 Joint Submission had sought the capacity to delegate certain Land Council functions to regional committees established by the Land Council to allow for the functions to be performed at a regional level. However the Bill proposes to permit a Land Council to

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31 *Committee Hansard* 21.7.06, p.73 (OIPC).

32 *Committee Hansard* 21.7.06, p.79 (OIPC).

33 *Submission* 1, Additional information dated 27.7.06, p.2 (OIPC).

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delegate functions regarding land use including leasing, exploration and mining to an incorporated body.

1.44 The CLC argued that the 'delegation' mechanism proposed was unsatisfactory and unacceptable as it did not frame a proper delegation procedure 'but an ill considered process to remove core functions from Land Councils without providing for the informed consent of traditional landowners.'<sup>34</sup> The NLC argued that:

This proposal is unworkable. It will mean that Land Council decisions regarding complex issues (eg to resolve traditional owner disputes relating to lease payments) are never final and may be continually agitated by disgruntled or self interested persons. This will promote disputes and litigation.<sup>35</sup>

1.45 Both Land Councils contend that the proposal should be withdrawn.

1.46 The Minerals Council of Australia (MCA) also considered that the delegation of Land Council powers proposed in the Bill go further than anticipated in the 2003 Joint Submission. In particular, the delegation of powers to a body corporate includes the delegation of powers under the mining related provisions of Part IV. The MCA advised that:

It is the Australian minerals industry's primary interest that institutions with Land Council powers be stable, and appropriately resourced, both financially and in terms of human capacity, to effectively and efficiently carry out their responsibilities. Stability and workability can only be assured when there is a substantive majority of support for the establishment of new institutional arrangements by both the Traditional Owners of the area affected by the decision, in addition to substantive support by the Aboriginal residents of a given area...

The MCA does not support situations where a project proponent needs to negotiate with a raft of institutions that have discrete responsibilities for land issues within a given area. Under the current proposals there exists the extraordinary "unintended consequence" that a project proponent may be required to negotiate with multiple institutions each carrying different decision making responsibilities over the same land area. Such a scenario would lead to disjunctive processes, increased complexity, and inefficiencies to the detriment of all interested parties.<sup>36</sup>

1.47 The Traditional Owners of NE Arnhem Land were very concerned about giving the Minister power to override Land Councils and to delegate Land Council functions to other incorporated bodies, and to vary and revoke such delegations. They asserted that changes to the Act should increase and enforce downward accountability to the traditional owners/electors where a Land Council is not appropriately

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34 *Submission 12*, p.10 (CLC).

35 *Submission 13*, p.5 (NLC).

36 *Submission 10*, p.3 (MCA).

responsive to its constituents. 'It is not appropriate to just 'by pass' the Land Council, as this potentially subverts the governance of the Land Council and gives undue leverage to the Minister.'<sup>37</sup>

### ***Governance of Land Councils***

1.48 The NLC and CLC made some comments and suggestions in relation to the amendments proposing a number of Land Council governance improvements including disclosure of minutes, annual reporting, Land Council funding, limiting the ability to spend funds in excess of total approved expenditure and public benevolent institution status.<sup>38</sup>

### ***Establishment of new Land Councils***

1.49 The Traditional Owners of NE Arnhem Land want Land Councils to be responsive to local concerns and diversity of interests, though this responsiveness should not be at the expense of the resources, expertise and capacity necessary to strongly advocate the interests of traditional owners to government, mining companies and others when necessary. They were concerned that the amendments had potential to undermine this capacity.

1.50 The Traditional Owners believe there may be some merit in allowing a very few additional Land Councils to be formed, where they would reflect broad regional communities of interest or identity. However, they also considered:

- these new land Councils should not be smaller than the smallest of the currently existing Land Councils.
- the decision to form a new Land Council must be made only by "traditional owners", with full recognition that "traditional ownership" is a layered complex of interests held by different clans and individuals – not all of whom may be resident on the land concerned.
- the amendments should not "encourage" the formation of new Land Councils potentially representing only small sectional, but well organised interests. This situation would promote instability and conflict for our people, and is open to manipulation and potentially undue external influence by Government and business interests.<sup>39</sup>

1.51 The Act currently provides that a new Land Council may be established where a 'substantial majority' of Aboriginals living in the area is in favour of the proposal. The bill proposes that a 55% vote in favour be required. Both the NLC and CLC commented that the diminution of the 'substantial majority' test to a mere 55% of those voting is unacceptable and unworkable, and will likely establish conditions

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37 *Submission 6*, p.5 (TONEA). Also *Submission 9*, pp.6-7 (ANTaR) and *Submission 11*, pp.1-4 (Mr Sean Brennan, UNSW).

38 *Submission 13*, pp.7-9 (NLC) and *Submission 12*, p.13 (CLC).

39 *Submission 6*, pp.4-5 (TONEA).

whereby small Land Councils will find it difficult to avoid conflicts of interest. It was also important that the amendments ensure that the traditional owners would have to consent to any proposed new Land Council.<sup>40</sup>

1.52 The MCA similarly considered that a decision to establish a new Land Council should require a more substantive majority vote in favour of the proposal by persons affected by the proposal, and particularly Traditional Owners of the area to be covered.

1.53 The MCA was also concerned that the establishment of new Land Councils should not be approved where this would result in the establishment of separate institutional arrangements under the Native Title Act and ALRA which would add complexity, delays, inefficiencies and costs.<sup>41</sup>

1.54 In response to the comments surrounding a 'substantial majority' and the proposed 55% vote required, OIPC noted that over the course of the last 10 years and various inquiries, there have been different views put about what might constitute a substantial majority. All parties had agreed that the term needed to be defined, but the question was what it ought to be. OIPC observed:

I am saying that the current legislation has not proved to be very workable in trying to find a process for setting up new land councils that is transparent, fair and rigorous... I think what the government wanted to do was put in place a rigorous, transparent framework that would allow for new land councils to be set up—that is, not to just set up a whole lot of new land councils but to put in place something that was workable... There are different arguments about what the majority should actually constitute; the government chose 55 per cent.<sup>42</sup>

### ***Use of the Aboriginal Benefits Account***

1.55 The funding to establish the new leasing arrangements will initially be drawn from the Aboriginal Benefits Account (ABA). The Government estimates that this may amount to \$15 million over five years to cover the costs of surveying land, valuations and any rental payments made to traditional landowners. The CLC considered that 'by using money from the ABA traditional landowners are being asked to pay for renting their own land'. The CLC was also concerned

that the cost of surveying, valuation and rental may be far in excess of the estimates made by the Australian government, meaning that substantial ABA funds that could be used for economic development and land management projects on Aboriginal land will be diverted into the leasing scheme.<sup>43</sup>

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40 *Submission 12*, pp. 11-12 (CLC) and *Submission 13*, pp.6-7 (NLC).

41 *Submission 10*, pp.2-3 (MCA)

42 *Committee Hansard 21.7.06*, pp.81-82 (OIPC).

43 *Submission 12*, p.6 (CLC). Also *Submission 9*, p.5 (ANTaR).

1.56 OIPC advised that the figure of \$15 million was:

just our best estimate at the time of a combination of the number of communities or townships which might be interested in entering into such an arrangement, the length of time it would take to negotiate headleases, the possible terms of a headlease - given, of course, that that estimate at the time incorporated a figure, the five per cent, which it has since been announced is not continuing. It was really our best guess at the time of the level of demand.<sup>44</sup>

1.57 The MCA noted that the ALR Act had been designed to ensure that the equivalent of mining royalties paid from mining on Aboriginal land was reinvested in the administration of the ALRA, distributed to Aboriginal persons affected by mining and otherwise distributed for the benefit of Aboriginal people in the NT. The MCA expressed concern:

That the proposed amendments to the distribution of ABA and other related amendments in ALRA indicate a significant policy change towards increased cost shifting to the minerals industry for the costs of Indigenous participation in the legislative procedures related to exploration and mining under ALRA.

In the case of ALRA, the cost shifting to industry acts as a "double dip effect" against the minerals industry, given that the minerals industry already pays mining royalties whose equivalent should already be directed towards such costs. The MCA is also concerned that Government appears to be prepared to use ABA monies as a substitute for Government shortfall in funding basic social services to communities, that is, that Government may use ABA monies to fund government services that should be funded by mainstream programs.<sup>45</sup>

1.58 The use of ABA funding rather than additional Commonwealth funding was the subject of much debate. The Law Council of Australia outlined this issue:

It is concerning that the Commonwealth has not volunteered its own funding to assist in implementing the scheme it is proposing and the Law Council does not support the use of ABA funds for this purpose. The ABA has been established to assist Aboriginal communities in reaching some semblance of self-government, not to fund the implementation of Commonwealth Government policies and legislative schemes.<sup>46</sup>

1.59 Professor Altman was more critical considering that the amended Act 'will destroy the integrity of the ABA, as a unique institution of Indigenous Australia and

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44 *Committee Hansard* 21.7.06, p.83 (OIPC).

45 *Submission* 10, p.4 (MCA).

46 *Submission* 7, p.10 (LCA). Also *Submission* 11, pp.7-8 (Mr Sean Brennan, UNSW).

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will undermine the thoughtful balance embedded in the financial framework of the current ALRA.<sup>47</sup>

1.60 Commissioner Calma asserted that 'in essence, the control and administration of the ABA funds has been taken from land councils and redirected to a government entity. Not only is this a derogation of a self determining function of an indigenous entity it also contradicts the government's intention to promote a culture of enterprise and economic development amongst indigenous peoples.'<sup>48</sup>

1.61 Commissioner Calma considered that spending ABA money to pay for head lease rental will significantly reduce the overall amount available from the ABA. 'Further I am the view that the use of ABA to fund the 99 year leasing scheme is a misuse of funds.'<sup>49</sup> ANTaR made similar comments relating to the use of ABA funds.<sup>50</sup>

1.62 In response to this issue about the use of ABA funds, OIPC advised that:

The government took the view that this was a scheme which would directly benefit Indigenous people. The Aboriginals Benefit Account is set up for that purpose... [OIPC explained the funding arrangements for the ABA] Under the land rights act the equivalent amount [of mining royalties] to what has been received generally gets paid by the government into the Aboriginals Benefit Account. That is done by way of an appropriation that gets covered off in the portfolio budget statements in the process going through parliament. The Australian government takes the view, and I believe it has been the view of successive Australian governments for a very long time, that, while it is absolutely there to benefit Indigenous people and must do so, it is funding appropriated by parliament and has to be spent like any other government money.<sup>51</sup>

### ***Mining and Exploration***

1.63 The amendments aimed at providing expedited and more certain processes for mining and exploration were generally supported, though a number of comments were received.

1.64 The CLC and NLC noted that the amendments were broadly consistent with the jointly agreed package of reforms though there remained one significant omission in that the amendments do not remove the current restrictions regarding the negotiation of mining agreements. The NLC noted that the 2003 Joint Submission had recommended that there should be no restrictions on the content of agreements,

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47 *Submission 3*, p.2 (Professor Altman).

48 *Submission 5*, p.19 (ATSI SJC).

49 *Submission 5*, p.20 (ATSI SJC).

50 *Submission 9*, pp.5-6 (ANTaR).

51 *Committee Hansard 21.7.06*, pp.84-5 (OIPC).

leaving the parties to be governed by general commercial law.<sup>52</sup> The CLC advised that retaining the restrictions in the Act:

Provides a clear disincentive to enter into exploration agreements since traditional Aboriginal owners are asked to accept significant consequences arising from their consent without any compensatory framework. The Land Councils strongly believe that removing the fetters to agreements will provide traditional landowners with a greater level of confidence and greater incentive to provide their consent where appropriate and the net result will be greater certainty for both land owners and miners/explorers.<sup>53</sup>

1.65 In response to why this particular amendment had not been adopted, OIPC commented that:

This is something that has been in the act since 1987, when the mining provisions were extensively revised by the then government. I think the government just took the view that there wasn't a good reason to change those provisions. That is essentially the view.<sup>54</sup>

1.66 The MCA, while supporting the amendments to Part IV of the Act, made some suggestions that it believed could improve the Bill. The MCA considered that during the negotiation periods for the grant of exploration licences or a mining interest, there should be a requirement that the parties 'negotiate in good faith' as currently exists under the Native Title Act. The MCA also considered that the NT Mining Minister should be empowered with the right to revoke the consent to negotiate at the end of the negotiation period for the terms and conditions of exploration licences, in cases where the Land Council has not made a decision before the end of the negotiation period, rather than have the consent deemed to be withdrawn as currently proposed.<sup>55</sup>

1.67 The Traditional Owners of NE Arnhem Land were concerned about the proposal to remove the 30 day period of notification which could result in delays during the negotiating period in receiving advice about an application for an exploration licence.<sup>56</sup>

### ***Finalising land claims***

1.68 The Bill seeks to expedite finalisation of land claims which cannot proceed or are inappropriate to grant. The Aboriginal Land Commissioner, the Hon Howard Olney, gave evidence to the Committee explaining the different outstanding land

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52 *Submission* 13, p.4 (NLC).

53 *Submission* 12, p.11 (CLC).

54 *Committee Hansard* 21.7.06, p.85 (OIPC).

55 *Submission* 10, p.2 (MCA).

56 *Submission* 6, p.5 (TONEA).

claims that would be affected by these provisions and their geographic location. He advised that:

The situation is that there are numerous areas of intertidal zone that have been recommended for grant which, if the bill is passed, will no longer be capable of being granted as the areas will be deemed to be finally disposed of. Likewise, the outstanding claims to the intertidal zone will also be deemed to be finally disposed of. Most of the claims involving the beds and banks of rivers will also be dealt with in that way.<sup>57</sup>

1.69 The NLC was critical that the proposed termination of non-contiguous claims to the intertidal zone or to the beds and banks of rivers which are not adjacent to or contiguous with Aboriginal land 'is unnecessary, unfair and unprecedented, especially given that most such claims have been heard and are the subject of positive recommendations by the Land Commissioner'. The NLC also considered that the proposed termination of the claims to land vested in the NT Land Corporation is also unfair and suggested that:

Rather than terminating the claims there should be an amendment to enable them to be heard, or alternatively a settlement whereby the more significant areas are scheduled as Aboriginal land. It may be appropriate to request the Land Commissioner to assist in identifying these areas.<sup>58</sup>

1.70 The NT Government, while supporting the amendments in proposed section 67A, expressed concern that if the amendments proceed 'they are workable and/or don't result in any unnecessary continued uncertainty or protracted litigation'.<sup>59</sup> The NT Government considered that the purpose of the original Act was to create land capable of being lived on. They contend that 'an intertidal zone, the bed of a river, by its very nature is not capable of being resided upon and is in our view outside the intent of the legislation'.<sup>60</sup>

## CONCLUSION

1.71 The Committee notes the Government's positive response to feedback about some provisions in the Bill and the subsequent amendments made in the House of Representatives. The Minister also indicated in his second reading summing up speech in the House a willingness to consider further amendments to the Bill.<sup>61</sup>

1.72 The Committee believes that such fundamentally important legislation should have bipartisan support with broad consensus among stakeholders affected by the Bill.

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57 *Committee Hansard* 21.7.06, p.28 (Howard Olney, ALC).

58 *Submission* 13, p.13 (NLC).

59 *Submission* 14, p.4 (NT Government).

60 *Committee Hansard* 21.7.06, p.58 (NT Government).

61 *House of Representatives Hansard* 19.6.06, p.121.

This already exists in relation to many of the provisions in the Bill. However, it is apparent from this inquiry that there remain concerns over a number of issues which require further negotiation and clarification with the affected communities, traditional owners, Land Councils and the NT Government.

1.73 The Committee acknowledges the comments in relation to the leasing provisions that this legislation puts in place a structure or framework that may not operate immediately and will develop over ensuing years.

1.74 Had the timeframe for this inquiry been more generous, the Committee may well have had the ability to explore certain amendments to the Bill. However, the Committee considers that rather than delaying the introduction of the many provisions which have wide agreement, the Government should commit to further negotiations and dissemination of information on those provisions which have not yet been the subject of the broad processes that the other provisions have been subjected to.

### **Recommendation**

**1.75 The Committee reports to the Senate that it has considered the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 to the extent possible within the available time and recommends that the Bill proceed subject to the amendments foreshadowed by the Minister and a commitment by the Government to undertake further ongoing negotiations and dissemination of information to the NT Government, Land Councils, traditional owners and communities likely to be affected by this legislation.**

Senator Gary Humphries  
Chairman

August 2006