

NLC Submission to Inquiry into Cox Peninsula Remediation Project

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February 2015



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About the Northern Land Council

The Northern Land Council (NLC) was established in 1973. Following the enactment of the *Aboriginal Land Rights (Northern Territory) Act* (the Land Rights Act), it became an independent statutory authority responsible for assisting Aboriginal people in the northern region of the Northern Territory to acquire and manage their traditional lands and seas.

The Land Rights Act combines concepts of traditional Aboriginal law and Australian property law. It creates a three way relationship between traditional Aboriginal owners, Land Trusts and Land Councils. The Land Rights Act requires the Land Councils to consult with traditional Aboriginal owners (and other Aboriginal people affected by proposals) before giving a direction to an Aboriginal Land Trust to enter into any agreement or take any action concerning Aboriginal land. Under the Land Rights Act, traditional owners must give their informed consent, as a group, to each proposal. Some of the most important functions of Land Councils include:

- Determining and expressing the wishes of Aboriginal people about the management of, and legislation in relation to, their land; and
- Negotiating on behalf of traditional owners with parties interested in using Aboriginal land or land the subject of a land claim.

The NLC has statutory responsibility for facilitating economic activity over more than 210,000 km² of the land mass of the Northern Territory, and over 80% of the coastline.

In 1994, the NLC became a Native Title Representative Body under the *Native Title Act 1993* (the Native Title Act). In this capacity, the NLC also represents the Aboriginal people of the Tiwi Islands and Groote Eylandt. The NLC's role and functions as a Native Title Representative Body are set out under Part 11, Division 3 of the Native Title Act.

The NLC assists the Aboriginal people of its region by providing services in its key output areas of land management, land acquisition, mining, land trust administration, native title services and advocacy, information and policy advice.

The vision of the NLC is a Territory in which the land rights of every traditional owner are legally recognised and in which Aboriginal people benefit economically and culturally from the secure possession of their lands and seas.

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About this submission

The Northern Land Council (NLC) welcomes the opportunity provided by the Parliamentary Standing Committee on Public Works to provide comment on the Department of Finance Cox Peninsula Remediation Project.

The remediation of the Cox Peninsula is a critical component of the settlement of the finalisation of the Kenbi Land Claim, Australia's longest running land claim. The NLC recognises the substantial scale of the work in question and acknowledge efforts to date made by the Department of Finance.

In this submission, the NLC makes a number of general recommendations relating to the Department of Finance (DoF) proposed remediation works and associated activity. The NLC has not had the opportunity to consult with traditional owners, and accordingly, its comments are of a general nature only.

History

The Kenbi Land Claim is the longest running and most complex land claim in the history of the Land Rights Act. The claim was originally foreshadowed in correspondence to the interim Aboriginal Land Commissioner in 1975, and formally lodged on 20 March 1979 after enactment of the Land Rights Act (in 1976).

Hearings (initially of legal issues) commenced before the Land Commissioner in 1979 before Justice Toohey. In due course all previous Land Commissioners considered aspects of the claim (ie Toohey, Kearney, Maurice, Olney and Gray JJ, but not the current Commissioner Mansfield J). There were two hearings by Land Commissioners of the traditional evidence (Olney J 1989 and Gray J 2000), the first being unsuccessful, as well as three Federal Court reviews and two High Court appeals regarding legal issues. A chronology is attached.

In December 2000, the Land Commissioner (Gray J) recommended that the land claimed in the Kenbi Land Claim (with the exception of the south-eastern part of the Cox Peninsula) be granted as Aboriginal land for the benefit of all Aboriginal people who are traditionally entitled to use or occupy that land.

The Aboriginal people for whose benefit the land was recommended for grant include not only the Tommy Lyons group (who were identified by the Land Commissioner as the traditional Aboriginal owners of the Cox Peninsula), but all the other claimants, namely, the Larrakia group and the Belyuen group. The Danggalaba group were found to be part of the Larrakia group.

The Land Commissioner also made detailed recommendations regarding the interests of stakeholders in the land, including as to arrangements whereby those interests may be appropriately recognised if the land is granted as Aboriginal land (for example, by the grant of leases). Throughout the 37 year history of the Land Rights Act all successful claims have

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been finalised by implementing arrangements which recognise both traditional owner and stakeholder interests.

In 2003, discussions commenced with stakeholders as to resolving ‘detriment’ issues so as to enable the land to be granted.

Subsequently extensive consultations have been held with the traditional Aboriginal owners and other interested Aboriginals and affected groups regarding a potential settlement, including in relation to the areas for remediation. On 30 January 2009 the Northern Territory announced that it had reached an in principle settlement with the Larrakia and the NLC (with documentation executed on 28 April 2009). The Indigenous Affairs Minister welcomed the in principle settlement, and announced that the Commonwealth would move to finalise outstanding issues in relation to the claim, including the status of Commonwealth facilities.

On 29 June 2011, then Prime Minister Julia Gillard announced that the Commonwealth supported the in-principle settlement, and that outstanding issues in relation to the status of Commonwealth facilities had largely been resolved. A Heads of Agreement was executed between the Commonwealth, the Northern Territory, and the NLC.

The NLC understands that the position of traditional owners is that the Commonwealth should transfer the land to the Kenbi Land Trust established under the *Kenbi Land Trust Act 2011 (NT)*, which can then grant a lease to the Commonwealth for the purposes of remediating the land. It should be noted that the NLC has not yet undertaken consultations with traditional owners and affected groups in relation to the proposed remediation works.

Recommendation 1: That the Department of Finance work with the Northern Land Council to engage and consult all affected parties on the proposed remediation works, including traditional owners and affected groups.

In meeting its legislative obligations, the Northern Land Council is required to consult with all Larrakia about the proposed remediation works.

The NLC notes the Department of Finance wish to hold consultations in the coming months. The NLC are committed to working with the Department of Finance on developing a timely consultation schedule.

Recommendation 2: That the Commonwealth facilitate the transfer of Section 34 to the Kenbi Land Trust as part of the wider settlement of the Kenbi Land Claim, which can then grant a lease to the Commonwealth for the purposes of remediating the land.

The NLC has consulted widely with the Tommy Lyons group, the Larrakia and residents of Belyuen, including most recently in late 2013 and early 2014, in relation to the remediation of Section 34.

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It is believed that traditional owners, the Larrakia and residents of Belyuen support the remediation of the land, but have indicated that their preferred position is that the Commonwealth transfer the land immediately to the Kenbi Land Trust, which can then grant a lease to the Commonwealth for the purposes of remediating the land.

It should be noted that further positioning by traditional owners and other groups is subject to consultation.

Recommendation 3: That all remediation works are carried out to the highest possible standards of completed remediation.

Given the perceived general consensus that the Cox Peninsula represents a future residential development opportunity for traditional owners, the NLC believe that the future use of the area should be safeguarded via adherence to the strongest possible remediation standards.

The NLC acknowledge the commitment Department of Finance to ensure all remediation works meet the relevant Standards set out under the National Environmental Protection Methods (¹NEPM).

The NLC also note a requirement on the DoF to ensure that all works are approved by a site auditor, appointed in advance of the commencement of any remediation work.

While in-depth commentary on remediation processes, either generally, or in relation to specific aspects of proposed remediation work in Cox Peninsula is outside the scope of this submission, the NLC makes the following general points:

- All remediation work ought be undertaken with regard to the Aboriginal consultation heritage assessment by Environmental Resource Management Australia Pty Ltd (ERM) conducted in September 2009 (Refer attachment A).
- All remediation work be undertaken in close consultation with the Aboriginal Areas Protection Agency (AAPA) in regard to Sacred Site maintenance and monitoring.
- The NLC recommend that all remediation works be compliant with all aspects of Northern Territory specific legislation.
- All remediation, storage facilities and associated works should be designed, tested and certified to accommodate the unique natural environment of the Top End of the Northern Territory.

¹ <http://www.scew.gov.au/nepms> - accessed 29 January 2015

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Recommendation 4: That the Department of Finance work with the Northern Land Council, and Traditional Owners to establish open and inclusive management arrangements, with a focus on efficiency and accountability.

The NLC believes that the critical importance of the remediation work in question, and the substantial funds allocated by the Commonwealth to undertaking that work underline the need for a community oriented approach to efficiency and accountability. Such an approach should include (but not be limited to):

- Development of project management arrangements that clarify the role and responsibilities of a 'Cox Peninsula Remediation Steering Group' consisting of Traditional Owners, Land Council representatives and Department of Finance representatives;
- Regular meetings of the Cox Peninsula Remediation Steering Group;
- A commitment to gender balance in consultation, project planning and project management arrangements;
- Jointly agreed timeframes for structured achievement of remediation outcomes (key performance indicators KPIs);
- Provision for independent assessment of remediation outcomes by external experts; and
- Jointly agreed penalties for failure to meet KPIs

Recommendation 5: That the Department of Finance ensure that all contractors and sub-contractors involved in remediation works receive cross-cultural training from a provider nominated by traditional owners.

Cross cultural training delivered by a nominated provider is a vital risk management and community relations tool in any large project.

The NLC maintain that strong cross-cultural foundations underpin any effective governance arrangements in a project the size and complexity of the proposed remediation works.

Recommendation 6: That the Department of Finance commit every available resource to maximising the economic development and other opportunities arising from Cox Peninsula remediation and related activity.

The NLC note the good work undertaken by the Department of Finance through their support of initiatives in previous projects (principally Risk Mitigation) including:

- Utilising the Kenbi Ranger group to manage site security
- Indigenous led revegetation and native plant propagation; and
- General land management associated with risk mitigation work.

The NLC also acknowledge the target specified by the DoF of 35% in upcoming remediation works.

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The NLC urge the Department of Finance to further commit to maximising the substantial economic opportunities available to Traditional Owners arising from remediation works. Elements of such an approach should include:

- Jointly agreed and binding employment and procurement outcomes between Cox Peninsula Remediation Steering Group members across all aspects of rehabilitation and remediation and associated works;
- Jointly agreed and binding timeframes for structured achievement of employment and procurement outcomes (key performance indicators KPIs);
- Systematic engagement by the Department of Finance with Larrakia entities to promote employment and procurement opportunities;
- Large scale procurement amendment to provide preferential status to Traditional Owner controlled and other Indigenous entities; and
- Jointly agreed penalties for failure to meet employment and procurement KPIs.