



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

COMMUNITY AFFAIRS LEGISLATION COMMITTEE

**Reference: Aboriginal Land Rights (Northern Territory) Amendment Bill 2006**

FRIDAY, 21 JULY 2006

DARWIN

BY AUTHORITY OF THE SENATE



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**SENATE**  
**COMMUNITY AFFAIRS LEGISLATION COMMITTEE**  
**Friday, 21 July 2006**

**Members:** Senator Humphries (*Chair*), Senator Moore (*Deputy Chair*), Senators Adams, Barnett, Nettle and Polley

**Participating members:** Senators Abetz, Allison, Bartlett, Bernardi, Mark Bishop, Boswell, Bob Brown, Carol Brown, George Campbell, Carr, Chapman, Colebeck, Coonan, Crossin, Eggleston, Evans, Faulkner, Ferris, Fielding, Forshaw, Heffernan, Hogg, Hurley, Joyce, Lightfoot, Ludwig, Lundy, Mackay, McEwen, McGauran, McLucas, Milne, Nash, Nettle, O'Brien, Parry, Patterson, Payne, Robert Ray, Siewert, Stephens, Stott Despoja, Watson, Webber, Wong and Wortley

**Senators in attendance:** Senators Adams, Bartlett, Crossin, Evans, Humphries and Moore

**Terms of reference for the inquiry:**

Land Rights (Northern Territory) Amendment Bill 2006

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**Committee met at 9.06 am****DALY, Mr John, Chairman, Northern Land Council****FRY, Mr Norman, Chief Executive Officer, Northern Land Council****LEVY, Mr Ron, Principal Legal Officer, Northern Land Council****SHELDON, Mr John, Senior Policy Officer, Northern Land Council**

**CHAIR (Senator Humphries)**—The Senate Community Affairs Legislation Committee is commencing its inquiry into the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 today here in Darwin. May I first of all acknowledge that the committee is meeting on the lands of the Larrakia people, and the committee pays its respects to the Larrakia people's elders. I welcome all of those people who are present here today, and particularly I welcome representatives of the Northern Land Council.

Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. The committee prefers evidence to be heard in public, but it can also be taken in camera if you consider that the evidence might be of a confidential nature, so please let us know if you have any evidence that falls into that category. We have received your submission. Thank you very much for that. The committee has received a large amount of information in a fairly short time, and therefore any opening statement you can make to clarify the thrust and principles in your submission will be welcomed by the committee. I now ask you to make an opening statement if you wish, and then the committee will proceed to ask you questions.

**Mr Fry**—The Northern Land Council welcomes the opportunity to provide a submission regarding the proposed amendments to the Aboriginal Land Rights (Northern Territory) Act 1976. The act, which was enacted by the Liberal Party in 1976, is undoubtedly among the most important social justice reforms enacted in Australia's history and is internationally recognised to that effect. It was the first statute to comprehensively provide for Aboriginal land rights in Australia and remains the high watermark of legislative recognition of these rights. The act was forged from some of the great human rights struggles of the 20th century, including the bark petitions of 1963, the Gove land rights case in 1971—Australia's first native title case—and the Woodward royal commission into land rights in 1974.

The legislation has operated successfully during its first 30 years, with the primary focus being the land claim based process and the negotiation of development agreements. The land claim based process has returned approximately 44 per cent of the Northern Territory to Aboriginal ownership but has often been controversial. This is not surprising. It was always inevitable that claims such as those over Kakadu, Nitmiluk in Katherine Gorge, Uluru—Ayers Rock—or the Kenbi land claim to the Cox Peninsula, near Darwin, would be hard fought given the many stakeholders interested in the outcome.

Importantly, once the legal process was completed, controversial claims like these were settled by agreement with internationally recognised outcomes such as joint management of national parks and world heritage. Agreements of this nature have greatly promoted tourism, which has benefited both the Northern Territory and Australia as a whole. Other agreements, such as the landmark Alice Springs to Darwin railway, have likewise been welcomed as win-

win outcomes which are a credit to all Territorians. The finalisation of the land claim based process means that land councils and traditional owners can now focus exclusively on development agreements and obtain outcomes which are free of controversy and benefit all Territorians.

The amendments must be assessed in that context. Many of the amendments improve workability and are welcome, since they will remove red tape and speed up processes for mining and other developments. These were jointly recommended by the Northern Territory government and the four land councils in 2002, and have been largely adopted. These amendments derive from the 1999 report of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, as chaired by the Hon. Lou Lieberman MP, which recommended that the act should only be amended after comprehensive consultations and with the informed consent of traditional owners.

The Northern Land Council also appreciates the Commonwealth's commitment to facilitate economically healthy communities, including entrepreneurship and private ownership of subleases in towns on Aboriginal land. This commitment will, for the first time, enable traditional owners of communities on Aboriginal land to obtain full recognition of their rights, including a financial return and the opportunity to commercially participate in their communities.

However, the NLC has very serious concerns regarding other amendments which (1) appear to breach or impliedly repeal the Racial Discrimination Act 1975 (2) appear directed at effectively implementing the 1998 Reeves report model by breaking up land councils and removing financial independence, and forcing them in effect to publicly disclose confidential minutes and to 'delegate' functions to small and unrepresentative corporations and (3) terminate non-contiguous land claims to the intertidal zone and rivers, and enable termination of claims to Northern Territory Land Corporation land. Some of these amendments have only recently been raised, have not been the subject of comprehensive consultation and do not have the consent of traditional owners as recommended by the Horscatsia committee in 1999.

The apparent breaches of the Racial Discrimination Act, or RDA, appear to be unforeseen consequences. They can be readily addressed in a manner which will promote Commonwealth policy and increase the likelihood of agreed outcomes. The proposal that land councils be forced to delegate land use functions to small corporations and prioritise scarce resources to them are unworkable and inefficient and will promote dispute and jeopardise development outcomes. The proposal is inconsistent with Commonwealth policy in native title matters, where small representative bodies have proven inefficient and dysfunctional. Successful outcomes like the railway, mining, gas pipelines, the recently finalised Eni Blacktip gas processing plant near Wadeye at Port Keats and the foreshadowed Commonwealth radioactive waste facility will be seriously jeopardised if a myriad of underfunded, inefficient small corporations are responsible for performing professional functions.

The proposal also breaches basic principles of public administration, because two separate bodies will be responsible for making the same administrative decision. When negotiating a mining or development agreement, such as a town lease, a corporation will be required to resolve disputes as to the identity of the traditional owners. The land council, however, will retain responsibility under section 35 to distribute royalties or rent and will be required to



make its own fresh decision as to the identity of the traditional owners for that purpose. This outcome is obviously unsatisfactory and unworkable.

So too is the proposal that land council minutes are to be disclosed to any Aboriginal resident. One-third of the entire Northern Territory population is Aboriginal. The practical result would be that all residents of the Northern Territory, including the media and political bodies, would directly or indirectly have access to a land council's minutes. This would include sensitive matters of national interest such as the Commonwealth legislation to establish a radioactive waste facility, which was privately considered by the Northern Land Council's full council in 2005. Other Commonwealth bodies are not subject to such an unworkable requirement. The parliament should see these proposals for what they are—a hangover from the land claim phase of the land rights act, which was necessarily controversial but which now must be put behind us. The focus of all stakeholders must now be on ensuring that the institutional framework of the act is strengthened and streamlined so as to promote development outcomes. This is our joint challenge for the 21st century, since the development of regional economies in Aboriginal communities is the only means by which a serious—and I mean 'serious'—social crisis deriving from impoverishment and population growth may be avoided.

The Northern Land Council is committed to promoting this outcome by maximising agreed development on Aboriginal land. To that end, the NLC is also committed to assisting traditional owners to directly participate in commercial development as owners of businesses through development corporations incorporated under the Corporations Act. The Larrakia Development Corporation in Darwin, for example, has largely completed a \$25 million suburban development from a native title settlement at Darwin with a board comprised of traditional owners and professionals. Bunuwal Investments Pty Ltd is presently engaged in a \$10 million commercial housing development on leases of Aboriginal land in Nhulunbuy. The termination of non-contiguous land claims to the intertidal zone and to the beds and banks of rivers is unnecessary and unfair. Some claims have already been granted or heard and recommended for grant as Aboriginal land, provided that the interests of adjacent stakeholders such as pastoralists are met.

Finally, these amendments are an opportunity for this parliament to remedy one of the great scams—and we do mean scams—perpetrated by successive Northern Territory governments, including the current Northern Territory government. Vast areas of vacant crown land have been vested in the notorious Northern Territory Land Corporation for the sole purpose of thwarting Commonwealth legislation and preventing land claims. The NLC seeks a pragmatic settlement regarding this particular issue. I commend the NLC's submission to the consideration of the committee and I would like to table the document on the presentation I have just made.

**CHAIR**—There being no objection, it is so ordered. Mr Daly, do you wish to make a statement at this stage?

**Mr Daly**—I would like to say a few things. If you look at this piece of land rights legislation, you see that it is the only legislation that empowers Indigenous people in the Northern Territory to act out their functions on the land. Primarily, it is a piece of legislation that gives us power to make decisions for ourselves in the communities and things like that. I

would like this committee to look seriously at what has been happening in Australia in the last couple of months and, when making their decision in regard to the land rights act, to not focus on the attention that has been brought about by other ministers around Australia and the media. Some of the issues in the media lately have to do with serious issues such as education and things like that. Those issues need to be addressed. People are saying that this land rights legislation is too soon and too quick.

Basically there is something in the legislation called ‘informed consent’. How am I, as Chairman of the Northern Land Council, supposed to go out and, in a matter of three months, get informed consent from the traditional owners of the northern half of the Territory? It is physically impossible. We need more time to get out and explain to our people exactly what this legislation is about. There are tricky bits that have been added in that we do not like one bit. As Indigenous people, we would like to move forward. As we say, the land claim process is finished. It is well and truly over and done. There are a couple of little claims and a couple of large claims that are going through, but it is purely and simply about us getting economic independence in our own traditional lands.

We want to be part of the Territory economy. We have been sitting on the outside for long enough. Territory governments have ignored us in the past. We are a major player in the Territory here. We want to see our people move forward. We also want our kids to have a decent education and to be able to get decent jobs out on their own traditional lands. If this means better negotiations on our behalf, I think that can be achieved. But I think we seriously need to look at this legislation and say: ‘Are we rushing it through too quickly? Do we need to get it on the ground?’ This is a piece of legislation that people are going to deal with on the land. This is about people in the country, and we need to get this information deciphered out there and right across the board so they can give us an indication of where exactly they would like go with this piece of legislation. It is too fast, too rushed. What I am saying is: slow it down. The people at the back here have been saying for the last couple of months: ‘This has been rushed through. It is too fast. We need to slow it down.’ We need to put this to the traditional owners in the Northern Territory, not to politicians and not to the likes of me sitting before you here. The people on the ground need to make a decision about this. I think this legislation is catering for them. What I am saying is that, on the informed consent side, we need to slow it down a bit and get this piece of legislation out there and talk to the traditional owners.

**CHAIR**—Thank you very much. Mr Sheldon, do you or Mr Levy wish to make a statement at this stage?

**Mr Sheldon**—No.

**Mr Levy**—No.

**CHAIR**—Mr Daly, you mentioned a moment ago that, under the land rights act, the land claim phase is coming to an end and it is now necessary for us to look at how to use the land that this process to date has handed to Aboriginal people to produce real economic independence for them. You have said in your submission that there are a number of problems with the legislation that has been tabled in the federal parliament to do that, and I accept that you have got some very serious criticisms. Can you outline what you see as the kind of

framework which should be in place? What ought to be the provisions that we are looking at now to create a framework for Aboriginal people to develop their land or to use their land in a way which gives them maximum control and can produce economic independence for them?

**Mr Daly**—What we need to look at first is education, and that is outside the scope of this framework here. Education is the key part. Basically, education right across the board has been let down—the ball has been dropped. We need to look at the way we deliver services to Indigenous people in these communities. We need to make it so these communities are economically viable. By just going out there and leasing the land off, I do not think we are going to truly achieve anything. A majority of the people in those communities are on CDEP or unemployment benefits. If you look Australia wide, and look at the normal society in, say, Sydney and places like that, you see that the majority of the people on CDEP or on unemployment benefits do not own their own homes, generally speaking. If you have a look at the whole of society in Australia, I think you see there is a generation that does not necessarily own their own homes.

We are not saying that Aboriginal people do not want to own their homes on their own traditional lands; it is just that we are using mainstream society and looking through a periscope at a black society like that and saying: ‘We can use this to make better economic independence in Aboriginal communities.’ I do not think that can happen. I think we need to look at education first and foremost and then we need to look at jobs. In the Northern Land Council region here just recently we have signed agreements with the Blacktip washing plant. We see major projects in the Northern Territory, in our region specifically, as job targeted areas we would like to look at. It is about us negotiating with the big end of business, not with government, and basically deriving outcomes from that where we can achieve jobs on the ground there for our people physically. That is one way of looking at it.

The other side of it is that Aboriginal people need to own and run their own businesses themselves if they are to become independent. As I say, education is the key to this and it has been proven from day one that education has been tampered with. Basically, Territorians have gone to Canberra. The Territory has received money and it has not delivered on outcomes in the communities. With regard to education and health, if what was done to the Wadey community, say, over the last 20 years was done to Sydney, we would have the same outcomes in Sydney, except Sydney would probably look like Beirut. The key point in this is education. We need to educate our kids and we need to move them forward. You cannot have economic independence if you have kids on the ground who do not understand English. The majority of people there cannot even speak English because of the education system that has been delivered in the Territory. That is one of the key points that we need to look at. If we can educate our kids then it is up to leaders like me and the rest of us around the Territory to try to get as much economic independence for Aboriginal people and to get jobs and outcomes on the ground through major projects that we deal with.

**Mr Fry**—When the current government came to power in 2002, the Northern Territory government and the land councils entered into a very serious dialogue on what became known as the historic agreed package of amendments to the land rights act. You asked my chairman how the framework could be achieved. The focus of that historic package was largely on the ‘smoothability’ and the workability of those arrangements which are small detail in the actual

drafting of the legislation that needs to be changed—for example, allowing relevant ministers in the Northern Territory government to have a role in certain mining provisions. It allows the department of mines and energy here in the Northern Territory and the relevant minister to have a role, in conjunction with his federal counterpart, in making the process and the turnaround time somewhat shorter. We have aiming at those types of amendments in trying to get the act to work in that way.

My chairman is addressing a more serious problem which has to do with the service provision in the Northern Territory of education, health and the like. A quick snapshot of Port Keats, which we are talking about, is that it is a community of over 3,000 people. It has been in the news a lot. It has access for only six months of the year. I know of no town in Australia, with a resident population of that number, that would have access for only six months of the year. The neglect is there for all to see: not even a decent road access is afforded to these people. It just flows: education, the COAG report, the 29c in the dollar tax rate—all set the scene for what has been transpiring up here for some time.

When land councils have appeared over the years before these committees, they have consistently talked about Northern Territory Inc. Northern Territory Inc. is referred to as a self-government act. The self-government act came into play up here a year after 1976 when the Aboriginal Land Rights (Northern Territory) Act was enacted. These two acts have been at loggerheads ever since. This parliament has taken licence to thwart services for Aboriginal people. Many of us who have watched this over the years have been very disillusioned with what has been going on. We are not surprised at what is transpiring out there.

We think the Commonwealth at the moment has the wrong end of the stick by blaming blackfellas. We are sick of being the victims. Our carriage and our very existence seem to be problematic in service provision. Education in the Northern Territory has gone backwards since self-government. A whole range of other services have gone backwards. We want to talk about the fairness of this place as a legislative assembly—and that is what it is; it is not a parliament, and that has to be understood.

In my opening statement I said that we own nearly 50 per cent of the landmass. It has a hell of a lot of commodities in it, a lot of resources, and lots of other people want those things. What we want to do is to address lifestyle. The key and the carriage to lifestyle for us is to address the social framework that people are seeing as problematic—in particular, politicians. We need to be given an economic chance. We need some serious strategic financial planning with regard to services for Aboriginal people in the Territory.

When the current Northern Territory government, led by Clare Martin, entered into this process with us for amendments to the Northern Territory land rights act, we believe it was a very serious and positive step in the right direction. Her government entered into this with us. It is a historic agreement and we commend her for that. Some of these other things have fallen off the back of the truck. I have just been informed that some of them have only come to the attention of the land councils as late as in the last couple of months. Quite frankly, this type of legislative reform on the run is not something that should be afforded to this process or seriously entertained.

**Mr Daly**—I would like a message sent to Canberra that the blacks in the north will not be bullied or blackmailed. I have actually seen first-hand, and it absolutely disgusted me as an Indigenous person but as an Australian first and foremost, that politicians can have the right to blackmail us on the ground in regard to community legislation: the community leasing scheme and things like that. I have seen ministers and people who have worked for the crown go out there and say, 'If you do not sign up to this community leasing scheme you will not get the 50 houses that we promised.' I think this does not send a very good message to black Australia.

Basically since then we have been politically blackmailed. That is way off the mark. If we are talking about performing our role, I think we should look at reforming it so that Indigenous people are the ones who are saying, 'Okay, we agree with that package. Let's push it through.' They have to live out this piece of legislation—not the rest of Australia. There needs to be a message sent to Canberra that we will not be blackmailed or politically bullied up here. By starving us off from housing is not going to help the current situation in communities in the north.

**CHAIR**—Message understood. Can I ask a couple of quick questions about specific provisions of this legislation and your position on them. You have criticised the change of the test for the establishment of new land councils. You said that the change of the test from 'a substantial majority' to 55 per cent of eligible people voting in favour of a new land council means that these new, small land councils will find it difficult to avoid conflicts of interest. Can you explain what you mean by that?

**Mr Fry**—One of the things about a substantial majority, just to tackle that point, is that it is usually at 75 per cent, so there is a numerical problem with 55 per cent. In addressing the real issue here, traditional owners—all the people standing behind us here who are part of the council and, outside this forum, who are traditional owners and members of the land council—are the people who elect members of the land council. The traditional owners or private land owners elect their private representatives to their Commonwealth statute to administer their affairs. By changing that and making it a plebiscite of 55 per cent of all Aboriginal people is to assume that all Aboriginal people in that area are traditional owners, when in fact they are not. A lot of these towns are ex-government reserves and missions and are configurations or conglomerates of people who were brought together under the old Department of Native Affairs for the purposes of administration.

**Mr Daly**—Further, if the wording '55 per cent of traditional owners' was added I think the land councils might look at it and give it support. But as long as it is not traditional owners that are making decisions about land up here we are not in a position to support it. If the amendment read '55 per cent of traditional owners' we would probably look at it and say 'Okay, we can wear that'. But, as it is, it is too wide open.

**CHAIR**—You have also criticised the provision that deals with the limit on the ability to spend funds in excess of the estimates in the land council budgets. You have criticised the idea that, where a budget has been exceeded—and you can spend up to 20 per cent more than the budgeted amount on a particular item—the other parts of the budget should be reduced in turn to compensate for the overspend in that particular area. I would have thought that any other public organisation needs to confront the situation such that, when it spends too much in one

area, it has to cut back in another to keep its budget in balance, but you say that is not appropriate in your case. Can you tell me why?

**Mr Levy**—When this amendment was proposed by the OIPC, which was a few months ago, we were told that they were not changing the current scenario. The current scenario is that a land council under the statute can spend 20 per cent more than its budget without breaking the law. Obviously, there is still accountability. The minister has to know what you are doing and all those sorts of things. When we analysed this amendment, it is not the same as the current situation. The way it allocates the checks to the three areas—being operations, capital and salaries—is that you can no longer spend 20 per cent more than your total budget without breaking the law.

We are not saying that land councils should be allowed to spend more without being accountable or anything like that. The problem is that, if for whatever reason you have extra expenses which the minister knows about and so forth, you find yourself in a position where you are not only over budget but you are going to break the law. If you break the law, you then get into trouble from the minister for being in breach of a Commonwealth statute. Our complaint is that we thought the previous system worked. We think the minister watches land councils very closely on an ongoing basis, and these amendments will improve that as well. We are in favour of all of those things; we are not in favour of changing the current situation. We were told by OIPC that it was not being changed, but we think it is.

**CHAIR**—I think you are criticising the arrangements whereby, at the present time, payments without a purpose can be made to a person by royalty associations. That is going to be wound back. You say that that needs to be dealt with with care. Do you suggest that that is a matter of administration of the policy, or are you saying that there should be a change in the legislation with respect to that provision?

**Mr Levy**—The criticism is carefully put; we do not make a recommendation. When originally suggested to us by OIPC a few months ago, they said that every three years a determination would need to be made. They have now moved to five years. I think we have put in the submission that five years would be the minimum that would be acceptable. We are not saying any more than that. We can live with five years.

**CHAIR**—I understand that at the moment it is possible for a payment to be made by a royalty association for any purpose. You need not specify what the purpose is. But now it is proposed that it not be possible to make a payment unless there is a purpose associated with it. Simply giving money to a number of people who are associated with the organisation would no longer be allowed; it would have to be specified what the money is for. That is my understanding of what is proposed.

**Mr Levy**—I think we are really saying that it depends how it is done. We are in favour of transparency, accountability and recording it, which is what we think the amendment is intended to do and which the joint 2002 land council government position supported—namely, when the royalty association gives the money it is clear then what it is for, and that is recorded. The point we are trying to make is that at the end of the day it needs to be recognised by everyone that money is what makes the world go round and cash payments for all sorts of purposes are beneficial. There is nothing wrong with buying a troop carrier if you

need one, owning a motor vehicle or buying washing machines or food, and cash is what is needed to do it. It is really just a cautionary comment; it is not supposed to be any more than that.

**CHAIR**—Thank you.

**Senator CHRIS EVANS**—I would like to go back to the issue of the negotiations. The defence often used by the government for the legislation is that this is the process of a long period of negotiation. I understand that is right in terms of the mining provisions and a number of the provisions that are included in the act, but it seems to me that a whole set of other things have emerged in more recent times. What I am keen to hear about from you is: when did the other bits emerge and what was the extent of the negotiations about those bits? That is not clear to the committee. In particular, there is the suggestion at the heart of this which is about the creation of the entity and the headleases to allow for private ownership of land on Aboriginal land. When were you first aware of that particular provision? What is the extent of the negotiation agreement over that?

**Mr Fry**—With respect to the historic package, that was a process that took a year and involved the four land councils, and we commend Clare Martin's government on doing that. In the last year and a bit, successive pieces of amendments have been falling off the back of the truck or getting introduced spasmodically to the process. Some of them arrived as late as April 2006—that is, this year. There is the delegation of functions and minutes and what we call scary amendments. We say they are scary because the people who have drafted them or came up with some of the ideas for these things have not seriously thought through the practical, legal and political consequences of a whole raft of things that could flow out of these types of amendments. We are horrified that some of these things have been coming out outside an agreed process.

We really started this process 10 years ago. It started with the Reeves review and HORSCATSIA's outcome. The majority recommendation from that standing committee was that there had to be informed consent. Clare Martin's government here in the Northern Territory went down the path of informed consent. They engaged four land councils and we sat down and talked turkey with them. However, that seemed to go in abeyance for about a year and a half or two years, and the next thing we know is that the Commonwealth has embarked upon a reform process. As I said, we have been getting dribs and drabs in the last two years and the last lot of stuff came to us as late as April 2006.

**Senator CHRIS EVANS**—But, on the specific questions of the headleases, the entity—the structure which, according to the minister, is at the heart of the bill—and the prime objective, which is private home ownership, when did you become aware of those? What was your involvement in the development of those propositions?

**Mr Fry**—Some of that was discussed—and I will let my chairman talk about that in a moment—at an ABA meeting. There were reports in December 2004 by the current Chief Minister. She claimed in a press article that she had the backing of the two major land councils. I wrote to her in early 2005 on hearing about that and put the record straight to her that that is not the case. The land councils, especially the Northern Land Council, do not support—especially at that juncture in time, as it had only been mooted in the press—home

ownership. This started to run in early 2005. It was not until around October 2005 that we started to see legislation being drafted after the Northern Territory government, through its community services department, circulated a paper looking at home ownership.

**CHAIR**—Before you go on, I want to point out that we have some requests for both television footage and the taking of photographs in the room. First of all, I would like to make sure that nobody at the table objects to that occurring. I would also like to get a resolution from the committee that such recording and proceedings be approved. That is agreed. Senator Evans, please proceed.

**Senator CHRIS EVANS**—I just want to nail this down. What has the Northern Land Council's involvement been in the finalisation of what is at the core of this bill, which is the creation of the headlease system and a new entity to control land on Aboriginal land?

**Mr Daly**—We have always said this strongly: why introduce a new piece of legislation into the land rights act when you have a current piece of legislation—section 19—that can deal with this? That question was put to a few members—and I think the minister was present as well—at an ABA meeting, and the answer from the minister and his advisers was not very good. Basically, they could not tell us Aboriginals in the room, 'No, that piece of legislation is not working, for this reason, and that is why we want to introduce a new piece of legislation.' The piece of legislation has been thrown around for the last 12 months, but the first I heard of it—as the Chairman of the Northern Land Council—was when it was dropped on the ABA Advisory Committee; I think it was two meetings ago. We disagreed with it hands down, right there.

**Senator CHRIS EVANS**—No-one is opposed to people having aspirations to own their own home, so I think people are relaxed about that and supportive of that function. But one of the difficulties I have in dealing with this issue is that when you try to work through the detail in the bill it is a much more complicated issue. One of the things is this entity—how it will work, who runs it and who is on it, and all those things are not known. We have been asked to pass the bill without knowing how it operates. What is your view about those issues, and do you have any more knowledge about how all of that is going to work?

**Mr Fry**—As my chairman just indicated, the current act allows for private ownership in towns under section 19. It covers all leases anywhere, whether they are in Aboriginal towns or are parts of the Aboriginal land estate. In fact, this amendment for town leases will become section 19A; it just gives effect to what part of section 19 will deal with a specific clause for headleases. There is a notion that a statute would run this, and our initial fears about it usurping the powers of the traditional landowners of the particular town are still fears that we hold. We are very suspicious about why, legally, you would want to put in a framework that is currently in operation unless there is some other reason. We thought about it for a long time, and, when we had thought about all the negative sides, we thought about the positive side. There is a positive side if these entities are going to help in the transparency and accountability of funds and service provision to these communities—that is, the Northern Territory government will be far more accountable for the level of funds that are being spent in these towns. Some of these town leases, in the context of a statute, could very well be watchdogs that ensure that moneys actually get to these towns and that service provision



actually takes place. That is another tier in our thinking about how this piece of reform could work and address the chronic shortage of funds in the communities.

**Senator CHRIS EVANS**—But, fundamentally, this is about providing private ownership of economic businesses and home ownership on Aboriginal land. You would be aware that the minister keeps referring to communal ownership of land by Indigenous people as a communist institution. Part of his policy is to end communism, as represented by Aboriginal communal land ownership. How do those measures then fit with your thinking, given that the minister says this is what it is about? You seem to be saying it is about something completely different. Where are we at? The person sponsoring that legislation says it is about ending communism and ending communal land ownership, and you seem to be a bit more comfortable with that proposition than I thought you might be.

**Mr Fry**—No, we are not really comfortable at all. Concerning the notion of private home ownership, as we say, under section 19 you can currently do those things. Private home ownership is not high on the lists of priorities of poor people, whether they are Aboriginal or non-Aboriginal. People in Western Sydney do not have great aspirations for owning their home when they do not have a job. There are large parts of communist Australia, as you say, already in existence. Lots of people do not own their homes. If they wish to own their homes, they can. It is just not a high priority. For us, basic services such as education, health, roads and infrastructure are where we are at. Owning homes is something only for those Australians, black or white, who can afford them. It is as simple as that.

**Senator CHRIS EVANS**—Thank you.

**Senator ADAMS**—There is a comment here that I would like a little bit more explanation about. In your opening statement today you said that the Northern Land Council has very serious concerns regarding other amendments which appear to breach or impliedly repeal the Racial Discrimination Act 1975. Could you explain a little bit more about that to me please?

**Mr Levy**—The amendments currently state—and the minister is going to fix this point; he announced that in parliament—that there should be a five per cent cap on what can be negotiated. There are a lot of reasons why that was a bad idea. One of them was that it probably set false expectations as to what the land was worth, frankly. Apart from the commercial areas of townships, a lot of the land probably would not be worth that much. That is being removed because at least as a theoretical proposition the minister accepted—I assume—that it breaches the Racial Discrimination Act because it imposes a barrier that is not imposed on other people who own land.

There are some other things like that which we think are inadvertently in there, and I will mention a couple of them. One of them is that we are advised by counsel that a likely effect of introducing a specific scheme—section 19A—about leases for townships is that a court might say that therefore the broad power in section 19 is restricted such that the only way that townships can be dealt with for those township type purposes is via the government scheme. If that is the case then as a theoretical proposition the powers which all owners of land have regarding their land will have been restricted. That can easily be solved by having express wording in there saying that that is not intended. We assume that the Commonwealth does not intend that. No doubt they will talk to their lawyers. It is set out in detail in the submission. It

is really a legal point. There are a number of matters of that nature which we think can be readily fixed.

Another one—and this is an important one which we think the Commonwealth needs to think through further—is that they say that the only ‘pecuniary or other benefit’ you are allowed to receive is annual rent. On one view, annual rent is just a rental payment; on another view, it might be broader and you could calculate it by reference to a percentage of turnover of commercial operations and that kind of thing. If, however, it is the former then it would be different regarding commercial leases, which in a former life I used to negotiate. They are not always based simply on a rental payment determined by a valuer; they are often sorted out in a range of different ways, depending on the kind of commercial operation that is being undertaken.

In the larger communities, which are almost all in the NLC’s area, traditional owners are very familiar with the worth of land because there are leases for shops operating on the land and there are a significant number of people living there and so the rent is quite high. That is calculated in various ways. They have negotiated those agreements. If we suddenly find ourselves in a situation where if we negotiate a headlease we are restricted to a formula which is annual rent determined by the valuer then we say that that would have the effect of imposing an unforeseen restriction on the rights an owner ordinarily has in owning land. That is something that we think can be fixed.

We do not think fixing that will affect Commonwealth policy at all. Leases in these large communities are just going to be negotiations. That is what we do all the time. We are used to dealing with large mining companies and governments. They say, ‘These things are out and these things are in.’ We have no doubt that, if there is a deal to be done, it will be done. We do not think that legislative parameters are needed to cause people to act reasonably. We think that that is an area where things will be fine. We think that the Commonwealth lawyers should have a good look at it.

**Senator ADAMS**—So it is more an interpretation thing that you are looking at?

**Mr Levy**—It may be an interpretation thing. We are nervous about it because this is detailed legislated and we do not know what a court would do with some of those things. We think that they should be looked at. We think that the Commonwealth should endeavour to ensure that there is no doubt that there is no inadvertent implicit repeal of the Racial Discrimination Act.

We do not think that will affect Commonwealth policy at all because, as I said, in larger communities traditional owners are used to having to negotiate some quite lucrative leases. They will expect to get advice, they will be expecting to hear what a valuation says and they will distinguish between commercial land and public housing rental land which is already owned by the Northern Territory government under the statute. That is how the NT land rights act works—the NT government owns the improvements on the land if they pre-date 1976, which most of them do. There will need to be comprehensive consultations, but there is no need to have these sorts of parameters in there to achieve Commonwealth objectives or have these parameters inadvertently causing difficulty. That is our point.

**Senator ADAMS**—I have another question on education. What negotiations have you made with the Northern Territory government to improve education? You say that all the other things really do not matter, that education is the key—and I am very supportive of that—but, with it really being the state's right to improve education, how do you think you can do it practically?

**Mr Fry**—That is a good question, Senator Adams, because health and education and a myriad of other things of social service delivery are not the responsibility of the land councils. We are not funded to look into these matters. There are other bodies and other institutions set up for these tasks. However, it is becoming much more apparent that the land councils are getting drawn into this debate. The reason we are getting drawn into this debate goes back to my earlier synopsis about what has happened since 1976, with the introduction of the land rights act as a sociopolitical phenomenon up here, and the other phenomenon, which is the 1977 introduction of the self-government act.

Any audit of the Northern Territory prior to 1977 illustrates the following: we are a pretty healthy group of people and we are taking our place in society. Most of the train drivers here are Aboriginal men. The pearling trade employs Japanese and Aboriginal people. Aboriginal people maintain the railway line and work on the quads. Torres Strait Islander people live here in large numbers as well as part of that enterprise. The pastoral industry was largely predicated on the work and shoulders of Aboriginal Territorians. We are educated from South Australia with SSABSA, which is their education program, and it is administered by the Commonwealth from Canberra.

Since 1977, yes, there have been a lot of improvements in the lives of Territorians; there is no doubt about that. This is a better place to live if you are a non-Aboriginal person. Our lives since 1977 have become progressively worse. Our education attainments, our retention levels at school, our health status and our life expectancy—all of these indicators—are nosediving in this part of the world at a rate of knots. We have a serious problem here with the provision of education. I talked about serious financial planning. Why are there no proper high schools here? Why aren't there any proper bitumen roads to these large communities of over 3,000 people? Why is this the case? Why has it been allowed to occur?

The land council finds itself more and more pressured by our people to take a more political stand and to take what is going on up to politicians. My chairman and I are not in charge of the Northern Territory education department; we are not responsible for education. The Central Land Council, the Northern Land Council, the Tiwi Land Council and the Anindilyakwa Land Council have been forced more and more to step in and to do things. The Tiwi Land Council will talk to you about what they have been doing. The Central Land Council has pressure on it to step in and to speak up on these matters. We have huge pressure put on us to talk to you about what is going on, because our education is appalling.

To the credit of the present government, they are starting to turn some of the things around, but there are a lot of hang-ups, and a lot of issues are being allowed to occur. In relation to the funding regime in the Northern Territory and the distribution of the funds, the apple pie in this part of the world is not being divvied up properly or fairly. Your own Commonwealth government, or the Council of Australian Governments, COAG, gave a report just recently about 29c in the dollar. The man who wrote the report has since been hounded down and has

had a lot of pressure put on him, and universities have had a lot of pressure put on them, about that finding. Why? He is talking about something that us blackfellas know about.

Very good non-Aboriginal educators who come to the Territory have talked about a conspiracy in public administration here in the Northern Territory. This is not a new theme. Check out the *Hansard* for what I, my former chair and the Northern Land Council have been saying for years. Have a read of what responsible Aboriginal leaders in the Northern Territory have been saying for years with regard to this. That is why we find what Mal Brough has been doing and saying a little insulting with regard to some of these things. They are more problematic. It is not a matter of a denial of a basic education, which you, me and others take for granted. Us blackfellas here were educated largely before 1977 and that is why we have a decent education, but lots of people are not getting a decent education in 2006. What we are doing is creating a recipe for disaster.

We own 44 per cent of the Territory. We want to use the economics of that. We want to make sure that lifestyle is addressed. We want a life that we can manage, maintain and self-determine for ourselves, with little interference from government regulatory regimes. Some of the amendments that have been proposed to the land rights act will only stifle Aboriginal economic independence and our ability to engage with the corporate world. The Northern Land Council is a sophisticated organisation. I say that not because I work there; it simply is a critical mass of professional people who come from all parts of Australia and outside Australia. The types of employees we get are people who, quite frankly, could earn a lot of money elsewhere a lot more easily, with less humbug and a lot less stress. However, they are committed people and very professional. Above all, they want a bit of social justice to be done and served. The hard fight for the land rights cause and winning those court cases is largely over. The sunset clause provision was introduced by, I think, Senator Herron back in 1999. We have now almost exhausted that pipeline of outstanding claims.

We are now into the business of consolidating what we have legally won. Now we are in a position to start expending more of our moneys and resources on economic planning and strategic intergenerational planning. That is what we are planning with the pipelines. That is what we have done with the railway line. That is what we want to do with mining agreements. We do not just joint ventureships. We want to take an equity position in those mining operations. In the last 30 years many billions of dollars have gone off Aboriginal land in terms of mining.

Politicians and other people have turned their attention to a tiny bit of money that has been handed back to the Aboriginal Benefits Reserve from the Australian government, as royalties. It is a very meagre amount. People have focused in on that and have addressed that as the draconian aspect of land rights. The reality is that it is a very small pool of money, and a very small number of Aboriginal Territorians actually receive royalties. Royalties are like some big elephant in a shop and have been largely created by politicians for a political purpose. The amount of money that is involved in royalties, even if you aggregate it over the last 30 years, would not offset 10 per cent of all the outlays that are required for the service provision of health, education, town planning and housing.

**Senator ADAMS**—I want to know whether the land council has a solution to the education of your children. That is the key. How can it be improved?

**Mr Daly**—What we are asking for as Aboriginal people and as the Indigenous people of this country is a decent education, and that is a basic birthright. To talk in specifics: some of our kids do not even have enough desks, let alone the material they need day to day to work within the curriculum system. They have to share. In some communities, it is four kids to one book. You would not allow that to happen in Sydney, and that is the bottom line. If that happened in Sydney, there would be an outcry and some heads would have to roll. We are saying that we have a right to a decent education.

**Senator ADAMS**—Yes, we know that.

**Mr Daly**—If our kids cannot achieve a decent education out in the communities, how can we move forward as a nation? Education is a key to getting anywhere in life. We have to deal with that issue. We need to look at the curriculum system that is out there. We need to fund schools in Indigenous communities. We need to fund Indigenous high schools. We do not want a black school just for blacks. We want a school that any kid can come to. We want to strive to achieve educational standards that have not yet been achieved in the Territory. We want that as a birthright. We have never been given that and that is what Indigenous people are starting to say. Indigenous leaders are starting to stand up and say: ‘We know where the problem is. The problem is our education system has been tampered with. We do not get the same education in communities as they do in towns.’ That is the bottom line. That needs to be addressed from the government’s side, not from our side. We are not the education department. We cannot be running around chasing the education department portfolio and fixing their problems.

The bottom line is that we can negotiate outcomes on the ground—we can deal with mining companies and multinational companies that want to deal with us on our land. But we cannot achieve the outcomes that we strive to achieve—which are to get our people into full-time paid jobs, not CDEP and not Work for the Dole schemes—if our people are not educated. Our people do not have the training facilities to develop the training they need to get into these industries. We are saying that you need to change the education system first. It is not about land rights or anything else that is hurting and degrading Aboriginal constituents out there; it is the education system. The education system is what needs to be looked at first and foremost.

**Senator ADAMS**—Thanks very much.

**Senator CROSSIN**—Thanks for your work in analysing this bill. I acknowledge the short time line that we have all had in terms of trying to cover the detail of this. I want to go to the section 19 proposals. Mr Levy, you talked about the need for changes to clarify that it is not intended that the main section, section 19, would be restricted. Do you have any proposed wording for amendments that we could include in this report?

**Mr Levy**—It only needs a few words. It just needs a clause saying that nothing in section 19A affects the ambit of the power bestowed by section 19. The draftsman could probably work out the words better than me.

**Senator CROSSIN**—What I actually want to get to is this: we have heard arguments, without much reason, that new section 19A is there to develop economic benefits for

Indigenous people, but it will be optional, they tell us—in fact, communities and traditional owners will have the option of suggesting that town leases be given up for 99 years.

**Mr Daly**—I do not think they are options. If they were options, we would accept them as options and we would decide case by case in each community. But when you have ministers and people work who for them coming around saying, ‘If you don’t sign up for this community leasing scheme, you are not going to get your 50 houses’—

**Senator CROSSIN**—That is exactly what I want to ask you about. Of the two instances in the Territory where we have heard the mention of the 99-year leases, they have been specifically attached to an agreement to get essential services. One of those is actually in the jurisdiction of the Northern Land Council. Perhaps you might like to tell us what is happening at Elcho Island and about the existing leases and businesses that are currently there under section 19.

**Mr Daly**—Some section 19 agreements are currently in place at Elcho Island. They have actually been enacted and passed through the full council. They are to do with commercial aspects of the community—take-away shops and things like that, which the traditional owners would like to keep their hands on. When we were looking at the community leasing scheme, first and foremost we said, ‘This scheme is not a bad scheme; we could work on this. But there need to be some improvements from the Commonwealth.’ How open is the scheme going to be? That was the first question asked of me by a traditional owner. Does this scheme enable, for instance, the rich in Australia to come and buy land? Is this legislation just for Aboriginal people, or does it open it up to the public? That has never been put out there. The Commonwealth has never come to the land councils and said, ‘This is specifically for Indigenous people who live in the community.’ You do not want some fat cat from the outside coming in and basically buying up as much land as they can and controlling those communities, because those communities are for those people who live in those communities.

We do not have a problem with the lease scheme being specifically for those communities and geared for those communities. I don’t think any land councillor or any land council would have a problem with that. What we are saying is that you need to look at these communities and ask whether economically it is viable to have a community leasing scheme. Are people going to be involved in owning their own homes? I know there are some people within the communities who want to own their own homes. If you look at each community you could probably pull out 20 people who want to own their own homes. But is that 20 out of 200 or 20 out of 3,000? That is a big difference in numbers, and it still does not solve the problem of poverty in the community. Making people own their own houses is not well and truly going to lift their wealth.

**Senator CROSSIN**—But on Elcho Island people have not been given the choice, have they? It is unfortunate that the Tiwi Land Council are not able to appear today because there is a similar agreement on the Tiwi Islands. But essentially, from what I can see of what is currently happening, in the two examples we have it is not an option. If the people on Elcho Island decide not to enter into the 99-year lease, I take it they don’t get the 49 houses, then, that have been promised by Minister Brough?

**Mr Daly**—That is correct. The community leaders out there have been told, ‘If you do not sign up to this community leasing scheme, you will not get the 50 houses that I have promised you.’

**Senator CROSSIN**—I want to go to the Northern Territory Authority, which will be established to administer the land leasing arrangements under section 19A. I gather that the Northern Territory government will need to produce legislation in order to set up this authority. Have you seen that legislation? Have you seen a draft of it?

**Mr Fry**—No, we haven’t yet. The Northern Territory government have just written to us about this matter. Obviously, we are sensitive about the entity and how that entity would operate and whether it would be Commonwealth or whether it would be a Northern Territory government one. We will be talking and meeting with Northern Territory government representatives to flesh out some of those points that you are raising. We have only just received that invitation this week.

**Senator CROSSIN**—As you know, the Senate Legal and Constitutional Legislation Committee has been conducting an inquiry into the massive changes to the Aboriginal Councils and Associations Act. In fact, you came down to Canberra and appeared before us. That new legislation and changes to the Corporations Act require transitional legislation. The Senate Legal and Constitutional Committee have put off reporting on the changes to the Corporations Act until we see that transitional legislation. In other words, we have said, ‘We are not going to hand down a final report into the major changes until we see all the other consequential legislation.’ Why should this committee provide a report into the changes to the Northern Territory land rights act without this committee being given a chance to see the Northern Territory government’s consequential legislation? Do you have a view about that?

**Mr Fry**—To be fair to the Northern Territory government, they haven’t got their legislation yet. When we sit down with the responsible minister, Elliot McAdam, and the OIPC people, the Commonwealth people, they will want to obviously flesh this out. They want it to be more or less a bipartisan approach and to quell any fears that we have about it.

The decision about whether it goes to the Commonwealth one is pertinent to those issues that you are raising, but it is still pertinent to us too, because whatever that statute is and what act it would come under—whether it would be the Australian Corporations Act or CATSI or ORAC, the new act—is a matter that legal counsel and we are currently looking at. To be fair to the two governments, I think we should wait until we sit down and have that meeting with them. I do not know whether the other land councils are also being invited here, so I do not know.

**Senator CROSSIN**—What I am putting to you is: do you have a view that we also should hold off on this report until we have seen any consequential legislation?

**Mr Fry**—I would seriously recommend that.

**Senator CROSSIN**—I have a couple of other questions about the continual drain on the ABA in order to put this into place. I understand that the entity that is going to be set up to establish this will be established out of ABA funds. Any deal that is done on the land leasing—that is, at Elcho Island, if it goes ahead—will be a drain on the ABA.

**Mr Fry**—That is right.

**Senator CROSSIN**—It is not a bottomless pit, surely.

**Mr Fry**—Absolutely not. We are very much opposed to that suggestion that moneys be used out of the ABA for basically town planning purposes, which are really a state responsibility. There is no way that we think that we should be paying for that, any more than we think that ABA funds should have been utilised to pay John Reeves for his Reeves review. We do not think that the Aboriginals Benefit Account is there for that purpose. It is supposed to be there for the benefit of Aboriginal Territorians and to be used in a very practical way. To pay for mainstream infrastructure services that governments should be providing is an outrageous suggestion.

**Mr Daly**—I think the ABA is being called on more and more as well. I think you need to look at the ABA and at what is being asked of the ABA. I think the funding submissions that were submitted by the Territory government need to be looked at and you need to ask, ‘Why is the Territory government going to the ABA and asking it to pay for half a police station in the Territory?’ I do not think Indigenous people should be paying for police, education or things like that. They are state and territory responsibilities. It basically shows the hand of the current Territory government and says purely and simply that, if they cannot look after their own finances and they have to run to the ABA for money, then we have a serious issue. They are some of the issues that Indigenous people have had with previous governments as well as this government.

**Mr Fry**—Both governments are trying to utilise the ABA bucket to somehow supplement state and Commonwealth funds for the delivery of Aboriginal programs, and that to us is reprehensible.

**Mr Daly**—The ABA was set up for the benefit of Indigenous Territorians. If you do find a tap on it, where we can actually sign for some of these funds in the Indigenous businesses and things around the Territory, like we have always wanted to do, I think you should tell the Aboriginal constituents of the Territory where this tap is, because basically we have not been able to access funds from this for Indigenous family groups on the ground. Basically, if it is not a large corporation, we cannot access funds from there.

**Mr Fry**—When Amanda Vanstone was minister she talked about the funding of swimming pools. That was a very contentious issue in the ABA and amongst the land council. We do not really think we should be funding swimming pools, for goodness sake, to augment the settings of schools. We know that as a part of schooling it is very important to have some of these other facilities, but those are capital works programs, and the ABA should not be funding those things. In the past the ABA have supported things like applications from schools for excursions—kids going down south to visit all sorts of places and to do things. We will help out in those things. We are supposed to be helping out families in out-stations, helping with satellite equipment and helping with some school equipment in some of those remote areas. We will do these things, but we will be damned if we are going to allow this to be used as some sort of bucket for governments to put their hands in and basically take these moneys out and offset their own outlays.

**Senator MOORE**—Can you stop it?



**Mr Fry**—We have had people ask that question in the past and we find that a very cynical type of exercise, in that governments have played with us. People have even said to me: ‘You can look at it but you can’t touch it.’

**Senator MOORE**—You do not have the authority to stop it?

**Mr Fry**—Absolutely.

**Senator CROSSIN**—I have two quick questions I want to ask you. I want to further explore the situation you raise, Mr Levy, with Indigenous associations that would set themselves up as land councils, the distribution of royalties, the conflict between the administrative decision of to whom they think the royalties should be distributed and the overarching role of the land council, and the potential problems that this will create.

**Mr Levy**—The bread and butter of the work of everyone employed by a land council, from the chair right down to anyone who is working there, is knowing who the traditional Aboriginal owners are of a particular land, knowing who the senior people are so you know how decisions are made, knowing if there are any disputes, and knowing if there is an Aboriginal clan that has what is called a ‘deceased estate’. There is a process whereby one of the adjacent clans probably will become responsible for that land and become the owners.

Under the land rights act, rent from leases of Aboriginal land is paid ‘to or for the benefit of’ traditional owners. They get it. We then go and hold a meeting with them, and they usually say, ‘Put it in with this association, which is ours,’ or they might say, ‘Share it with a broader group.’ It is usually shared with senior people in the region, neighbouring groups and so on. In a sense, under the statute, they own that money. So you have to know who they are and not only do you have to know who they are but you also have to know it such that it will stand up if anyone takes you to court. It has to be well documented, you have to have proper meetings and it has to be such that it cannot be challenged successfully in a judicial review.

Like a lot of these decisions, when there is a dispute there sometimes might be differing views as to the correct answer. In some complicated matters, as in any dispute, sometimes there are a number of reasonable answers. But, ultimately, a responsible body has to make a decision. The problem with this legislation is that land councils can be directed to divest some but not all of their functions to this corporation, which will then negotiate an agreement on behalf of who it says are the traditional owners of certain land. It might be a lease of a community which would have lucrative benefits. It might be a mining agreement that would have lucrative royalties coming from it. It may well be—and I predict that this is what will happen—that from 30 years of work the land council already has a view as to who the traditional owners are and has a different view as to what that corporation is.

When it is time for rent and royalties to be paid, even though the corporation is exercising mandatory delegated powers, the power to receive the rent and royalties remains with the land council. That cannot be delegated. The land council must then make a decision about paying that money to or for the benefit of the traditional owners. If it has a different view to that of the delegated corporation, then there will be a dispute. You will have two administrative bodies vested with the same function. That is just silly. Courts are supposed to resolve disputes. Government should not set up competing bodies to do the same thing. I should add that there is an extra problem with all this. It appears to be the case that if a corporation

which, for all intents and purposes, is going to be independent of its principal and makes a decision, if someone does not like it and if litigation is commenced, it will be the land council that is the party to the litigation.

**Senator CROSSIN**—Does this legislation have the potential to undermine the rights of traditional owners?

**Mr Levy**—Yes. It has the potential to undermine good administrative practice. You have to have finality of decisions.

**Senator CROSSIN**—I have one last question. The provision to extend your community for a 99-year lease does not apply to all communities in the Northern Territory, does it? There are some communities that are actually classified under the legislation pertaining to the Northern Territory. I think it is important that you explain the community leasing arrangements to the committee.

**Mr Levy**—I think you are asking particularly about the Central Land Council region, but also in the NLC region—

**Senator CROSSIN**—Are there communities in the NLC region that this applies to?

**Mr Levy**—Yes, Yarralin.

**Senator CROSSIN**—We should be very clear about the fact that this is not going to apply to every remote Indigenous community in the Territory, because some are actually owned and controlled by the Northern Territory government. As I understand it, they have not been asked by the Commonwealth to amend, and have not shown any intention at this stage of amending, their legislation to allow Northern Territory controlled communities to be given a 99-year lease. Is that correct?

**Mr Fry**—That is an interesting point, Senator. I note, for the benefit of other members of the committee, that there is another act involved. Senator Crossin is referring to the Northern Territory community living areas act—CLAs, as we refer to them. Their status is not very clear in this process. As Senator Crossin is pointing out, a significant number of people come under that act. That act affects lands that are part of the pastoral estate. So you have these communities that are located in an area of 10 square miles or less. There is a ‘good neighbourly’ provision in that act, as part of the policy framework for the community living areas. I am not aware how this would apply to them at all, or even how you could put either a Commonwealth statute or a Northern Territory statute inside that act. The ownership of the land is still vested in the Northern Territory, as I understand it. In other words, Aboriginal people do not have it as inalienable Aboriginal freehold.

**Senator CROSSIN**—Yes, I understand that.

**Mr Fry**—It is Territory freehold.

**Mr Daly**—Then there is the issue of privately owned land on which Aboriginal communities have been built. One of those is my community, Nauiya Nambiyi community, which is actually owned by the Catholic Church, but which is listed as an Indigenous community. So there is that side of the spectrum as well, and those two sides of the spectrum have not been looked at. Clearly, the magnifying glass is applied to Aboriginal land and not to the other two.

**Senator BARTLETT**—You mentioned a number of times in your submission, and have touched on it briefly today in evidence as well, that the legislation that we are considering may breach the international convention on racial discrimination and, impliedly, may repeal parts of the Racial Discrimination Act. I have looked through your written submission a few times in order to nail down precisely how it may do that, because it is a fairly serious concern. Could you, as briefly as possible, indicate in what ways you think it may breach the Racial Discrimination Act, and also what the consequence of that is. Is that just the way it goes, if this bill is passed, or does that set in place potential court proceedings challenging such a breach?

**CHAIR**—This question was asked earlier by Senator Adams. I am not sure whether you were here, Senator.

**Senator BARTLETT**—I was. I really did not get a sense of how it—

**Mr Levy**—I will be very general, Senator. The convention says that owners of property have to be treated equally. The convention says that whether the property is communally owned or individually owned, you have to be treated equally. We are concerned that, inadvertently, various constraints put in the section 19A scheme, which really are intended to guide the parties to what the Commonwealth thinks would be a fair negotiated outcome, in fact restrict the capacity that owners would ordinarily have to negotiate about property they own. If we are right, that is a restriction that would be discriminatory—inadvertently, but nonetheless it would be discriminatory. Therefore, it would impliedly repeal the Racial Discrimination Act. We want the Commonwealth to have a good look at it for that reason, and also because we do not see why they need those constraints. We think they are far too worried about negotiations. Honestly, we know how to negotiate agreements. We do it all the time.

**Senator BARTLETT**—Does the 19A component—and this goes to the question that Senator Crossin asked—override the existing section 19 or does it sit alongside and provide a different pathway?

**Mr Levy**—We understand that the Commonwealth wants them to sit there independently and separately without interfering with each other. We are advised that the later, very detailed 19A scheme may inadvertently restrict the ambit of the general power in section 19. We assume that is not intended and a couple of words would ensure that there was no doubt. We do not want any doubt about that.

**Senator BARTLETT**—I do not have time to go to some of the other concerns, but we might pursue those with future witnesses. The core concern that has been touched on, or one of them, seems to be that there is potential there basically for communities, particularly if they have broken down into sub land councils or whatever, to be forced into undertaking some of these leases. Maybe that is a worst case scenario, but I guess that some of the history you have been outlining suggests that we should look at worst case scenarios. Are there enough protections in the legislation as it stands or do you think we could put in protections to prevent that sort of involuntary situation or blackmailing groups into having to take on 99-year leases? It seems to me that, once you have that 99-year headlease, it is really another form of dispossession. You have lost it for 100 years and the Territory government can do

what they want with it. You get no extra money from it based on what they do with it either, I do not think.

**Mr Levy**—Just from a legal point of view, we have suggested a range of things that we think would assist generally regarding the scheme—purposes of the provision and that sort of thing—which are set out in the submission. They might assist partly regarding what you are talking about. Regarding the broader issue, I am not sure if it is something that can be dealt with in this legislation, but if governments really did at the end of the day approach things in that bald manner then they would have a problem with section 9 of the Racial Discrimination Act. Whether the government is intending to do that or not is another matter. I do not say anything about that. I am looking forward to entering into negotiation.

**Senator BARTLETT**—Is it stretching it too far to say, or have you looked at, whether this sort of thing could potentially breach the just terms compensation components of the Constitution?

**Mr Levy**—Yes, we have preliminary advice on all of those things. If the suggestions we make in this submission are considered by the Commonwealth and are dealt with in some fashion then we think those matters would be resolved.

**Senator BARTLETT**—But if they are not?

**Mr Levy**—If they are not then, nonetheless, when each particular matter is dealt with, it will need to be dealt with on a case-by-case basis. The thing about negotiations is that when you get into them everyone gets mugged by reality. You then play things by what happens. You wait to get mugged by reality and see if you get an outcome which nonetheless is a fair outcome. If you do not then deal with it then.

**Senator BARTLETT**—It would be nice to have fewer muggings if possible, though, I would have thought.

**Mr Levy**—You obviously do not live up here!

**Senator BARTLETT**—No, that is true.

**Mr Levy**—It is a daily occurrence here.

**CHAIR**—I have a couple of quick questions before we finish. Are you saying with respect to the proposal to grant town leases that, if the body which holds the headlease is an Aboriginal corporation or a body like the Larrakia Development Corporation, the proposal is acceptable to you?

**Mr Fry**—It is a damned sight more commercial and it is a reality check because the CATSI Bill and all of the considerations and constraints in there would simply make it that you would not want to go to a Commonwealth stat. What would the Northern Territory entity look like? That is an unknown question. That is why my response to Senator Crossin was that when we meet with Elliot McAdam, the Chief Minister's department and the OIPC people we will talk about those matters and about the reality of how a town actually develops. As you know, Norfolk Island has a particular set of things in its headlease and arrangements. For instance, Norfolk Islanders can only sell to Norfolk Islanders. Nobody talks about that, but that is a reality.

These are some of the things that we have to worry about because, as our chairman just said, someone from Singapore, New York, Sydney or wherever could come into these places and invest. As we know, under the Native Title Act, we had people from England in those court cases investing in land in 1898 and these things being held up validly in courts a century later. That is where the chairman is coming from. You can have people investing in these headleases and tying up land, and that can thwart the government's intent, which is to get private ownership and to allow Aboriginal people to be home owners. We are not saying that is something the government should not pursue; we are saying it is not a high priority for us. With the issues about our education, health and all these other things, who gives a damn about owning houses? We are trying to live. We are trying to get some skills in order to stay alive. We are trying to address lifestyle. That is where we are coming from.

**CHAIR**—Lastly, you say the NT Land Corporation is a device to thwart the land rights act.

**Mr Fry**—We know it is.

**CHAIR**—What does the NT government say it is for? Presumably they do not say it is about thwarting the land rights act. What is their public take on why they have that corporation?

**Mr Fry**—As you know, between the 1977 and 2001 elections we had CLP, Country Liberal Party, governments in the Northern Territory. We have had a Labor government since that election in 2001. The previous governments between 1977 and 2001 set up this corporation to thwart Commonwealth legislation—namely, the Northern Territory land rights act—because under the Northern Territory land rights act you can only claim vacant crown land. The idea was to remove vast swathes of crown land and chuck them into a land corporation.

**CHAIR**—I understand what you are saying in the submission about why that happened; I am just wondering about the presentation. Why do they say that they have this corporation?

**Mr Fry**—There is absolute silence. There are no objects of these corporations either.

**Mr Levy**—You might like to ask them.

**CHAIR**—All right; we might do that. Thank you very much for your submission and your presentation today.

**Proceedings suspended from 10.37 am to 10.53 am**

**AVERY, Mr David, Manager, Legal Services, Central Land Council**

**BOOKIE, Mr Lindsay, Chairman, Central Land Council**

**McDONNELL, Ms Siobhan, Policy Officer, Central Land Council**

**NUGENT, Mr James Stanley, Senior Policy Officer, Central Land Council**

**ROSS, Mr David, Director, Central Land Council**

**CHAIR**—I welcome representatives of the Central Land Council to the hearing. Thank you very much for appearing here today and thank you for your submission, which we have received and have numbered No. 12. You have had information, I understand, on parliamentary privilege and the protection of witnesses. We will take the evidence today in public, but it is possible for us to take evidence in camera as well if you feel that anything you want to present to us needs to be confidential. Please let us know if there is any evidence of that kind. We have only just received your submission, so I do not know whether senators have had the chance to be able to read it. Perhaps the presentation you make today can cover the key points so that we are able to ask you questions on the basis of that. I now invite you to make an opening statement, after which we will fire some questions at you.

**Mr Bookie**—Thank you for letting us come up here to talk to you about the problems with the land rights bill, which we would like to sort out. We have the same problems as the people up here north of Alice. I would like to hand over to Mr Ross.

**Mr Ross**—Thank you, Chairman. I have a prepared paper here and I guess we can go on from there. I will just run through that first. The Central Land Council welcomes the opportunity to give evidence before this Senate inquiry into the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006. However, the Central Land Council is concerned that the one-day committee hearing does not do justice to the complex nature of the matters to which the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 relates.

In August 2003 the four Northern Territory land councils and the Northern Territory government made a joint submission to the Australian government of a package of amendments designed to improve the workability of the act. Whilst these jointly developed reforms were largely adopted in the amendment bill, and are supported by the Central Land Council, there are several amendments that will detrimentally impact on the rights of traditional landowners and the functions of land councils. The Central Land Council would like it noted on the public record that neither the land councils nor the traditional Aboriginal landowners have been consulted in respect of the whole-of-community leasing proposals nor the stripping of land council functions under the guise of delegation. The Central Land Council was briefed on these amendments and asked to provide comment on the workability of the package as a whole, but this is not consultation.

I would like to highlight those parts of the amendment bill which are of concern and to detail briefly the problems the Central Land Council has with each of these amendments. The Central Land Council has identified a number of issues with this new whole-of-community leasing arrangement. First, one of the reasons given by the Australian and Northern Territory governments for putting in place the new leasing arrangements is that it is difficult to own a

house or run a business on Aboriginal land. However, it is clear that these tenure arrangements can currently be negotiated using the existing provisions of the land rights act—as mentioned by Norman Fry from the Northern Land Council and as is the case with stores and other leases in communities and the Alice-to-Darwin railway development. That has all been done under the current legislation. Changing the leasing arrangements over communities, by itself, will not result in more businesses being started nor will it increase home ownership. Moreover, even if the Australian government's rationale was accepted that headlease arrangements will attract greater business interest in and development of Aboriginal land, it is neither reasonable nor acceptable that the traditional Aboriginal landowners on whose land the townships are situated be excluded from participating in the benefit.

The Australian government has also said that community leasing agreements are voluntary agreements. However, the Central Land Council remains concerned that communities will be placed in a position where in order to access essential services or funding they will be told they need to sign up to these new arrangements. You heard from the NLC some of the proposals that are taking place. Moreover, the Central Land Council is concerned that some communities may have already been given this ultimatum—'Sign up and funds will be provided. Otherwise, no money for housing and services.' A scheme such as this is not voluntary if the participants feel that they have no real alternative. Finally, all money for putting this new arrangement in place on Aboriginal land will come out of the Aboriginals Benefit Account. That is unacceptable. The Central Land Council is concerned that the cost of surveying, valuations and rentals 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 for the benefit of traditional landowners will be diverted into a leasing scheme for everyone else's benefit.

The Central Land Council is very concerned that proposed amendments 28B and 28C are a radical departure from normal administrative rules relating to the delegation of powers. The two highly objectionable features of proposed section 28B are: (a) it provides that a delegation once made by a land council cannot be varied or revoked except either at the request of the delegate or with the minister's approval; and (b) the minister may effectively grant a variation or revocation by written direction to a land council. Proposed section 28C is particularly problematic as it provides that the minister may delegate the delegable powers if a land council refuses to do so. This is clearly no longer a mere delegation power but a mechanism which allows the stripping and reallocation of core functions under the act.

Furthermore, the proposed section 28D provides that a land council may not exercise its functions regarding a subregion while a delegation is in force and a land council must, if requested, provide a corporation with facilities and assistance to perform delegated functions—section 28E. This is unworkable and has the potential to create conflict. The CLC considers that the delegation mechanism proposed in sections 28A to 28F is unsatisfactory and, in particular, the provisions of proposed sections 28C, D, E and F should be withdrawn. These latter proposed sections do not frame a proper delegation procedure but are an ill-considered process to remove core functions from land councils without providing for the informed consent of traditional landowners.

Finally, the Central Land Council position is that the restrictions on mining negotiations contained in the existing section 44A should be removed, the amendment to allow for changes to the process of the creation of new land councils should be reconsidered in line with the recommendations of the HORSCATSIA inquiry, and the proposal to remove the statutory guarantee of funding for the four land councils out of the ABA—section 64(1)—should be reconsidered as it has the potential to impact on the independence of the land councils. Thank you.

**CHAIR**—Do no other people at the table wish to make an opening statement?

**Mr Ross**—No, I think we will leave it to questions. Between us we will try to answer particular matters.

**CHAIR**—I take it that it is possible at the moment for individuals or businesses to be granted some kind of leasehold or ownership arrangement over lands that are owned by Aboriginal bodies or corporations within the area of the Central Land Council. Is that the case?

**Mr Ross**—Yes, people can do that on Aboriginal freehold land.

**CHAIR**—Are there many such leases or ownership arrangements already in place, do you know?

**Mr Ross**—There are government leases. There are private leases. I think we have had one request and one we tried to fulfil for a businessman but he departed. When there was pressure to sign up a lease for a store, he disappeared never to return. That is the extent of people wanting leases within the Central Land Council region.

**CHAIR**—If an Indigenous person living in, say, a house on Aboriginal land wanted to apply to buy the house they were living in or to obtain a lease over it, would they come to you or would they go to some other representative body?

**Mr Ross**—They would come to the Central Land Council if that is what they wanted to do and we would put that proposal in place. As we do with any other proposal, we would put it to the traditional owners for the particular place and they would make a decision as to whether they accepted the proposal or not.

**CHAIR**—You have not had any requests of that kind in the last few years?

**Mr Ross**—I have been around the Central Land Council for a few years and I have never had one, no.

**CHAIR**—Is that because there is an expectation that the land will be owned communally? Are there legal barriers or other problems that might make it difficult for a person to do that, or is it that nobody is in a position to be able to take a leasehold like that or to purchase a house?

**Mr Ross**—No-one has come forward to say, ‘This is what I actually want to do.’ That has not been the case.

**CHAIR**—Do you want to comment, Mr Avery?

**Mr Avery**—There are some cultural issues as well. People will periodically vacate their houses for sorry business reasons in some more traditional communities, so ownership of the



house would be a matter of some difficulty in those circumstances—they may never move back into that house. There are houses on Aboriginal land that are leased, but they are leased by government entities. We have had a number of leases of houses on Aboriginal land, and so the examples have been provided of being able to lease houses.

**CHAIR**—Okay.

**Mr Ross**—I think that the Central Land Council has actually got a number of leases in place as well. Where we have an office and a member of staff residing in a community, we have a couple of leases in place. But that is not the individual; it is the organisation.

**CHAIR**—Yes, that is a different sort of lease.

**Mr Ross**—You asked about individuals.

**CHAIR**—Yes, indeed.

**Ms McDonnell**—I would like to add that there is a second document that we included with our submission. It is the land council response to the original Territory government proposal for the whole-of-community leasing arrangement. I am happy to table that again with the committee today. It is the ‘Communal title and economic development’ paper. In that paper we talk about restrictions on individual home ownership on Aboriginal land. We point out in the paper—there is a whole section on it—that the major impediment is the average income of our constituency. In that paper we detail that the average income of Aboriginal people living in the Central Remote Region of Alice Springs is \$9,133 per year. The land council also sought advice from financial institutions about home ownership on Aboriginal land. We were informed that one of the major impediments is the fact that there is no meaningful market in remote communities to facilitate home ownership.

**CHAIR**—Thank you for that. We do have that document. It has not been circulated but members of the committee can access it through the secretariat. I want to touch on the question of the establishment of new land councils. I take it that you do not support that provision. Do you support the recommendation of HORSCATSIA that the majority should be 60 per cent of Aboriginal people living in the area? Is that your position?

**Mr Ross**—Our view has always been that it has to be traditional land owners who make a decision about what happens on their country and not the Aboriginal people living in the area.

**CHAIR**—Right.

**Mr Ross**—As pointed out by the representatives from the Northern Land Council, our view has always been that it has to be the traditional land owners who make that decision, because otherwise it could be people from anywhere else living in someone else’s country making a decision about their country, and that is just going to open up all sorts of conflicts.

**CHAIR**—If the proposal were restricted just to people who were the traditional owners of that area and if, say, 55 per cent of those traditional owners voted for the establishment of a new land council, would that be acceptable to establish a new land council?

**Mr Ross**—I do not think 55 per cent is acceptable. We have always stuck with 75 per cent, and we would prefer a higher number of people. The land rights act is quite clear about having informed consent. I think it is very important that people understand what is being

proposed and that they have time to think about it, consider it and weigh up the upsides and the downsides before making a decision. All of the traditional owners need to be involved in that process. If they are not, you are just opening that up to conflict. There was a show on SBS last night called *The Making of Ten Canoes*. It is a documentary that points out some of these very important issues. I recommend that all the committee members have a look at it.

**Senator CROSSIN**—I want to get your opinion about some of the issues I raised with the Northern Land Council. I particularly want to pick up on the fact that the Commonwealth government says to us that the land leasing will be entirely optional, and that traditional owners and communities will not have to enter into it if they do not want to. Has that been your experience?

**Mr Ross**—That is the issue. I do not know how far it has gone, but we were informed by our staff at the Tennant Creek office only a week ago that there are some discussions about an SRA taking place with a township community within the Tennant Creek region—

**CHAIR**—What is an SRA?

**Mr Ross**—A shared responsibility agreement that the Commonwealth has been dealing with. Senior people asked whether the issue of leasing had been discussed. The answer came back that ‘No, it has not’, they do not know anything about it, and ‘the legislation has not been passed yet, so why should we be talking about it?’ This is not from my staff; this was reported back to us from our staff. It was part of the discussion that has taken place. But senior people from OIPC have asked the question: has this issue been raised?

**Senator CROSSIN**—So it would seem that there is slowly, in the minds of the Commonwealth and its officials, a connection being made between shared responsibility agreements and basic infrastructure in the same discussion as land leasing. Is there a view that, given the two examples that are happening in the Top End, more and more of this will not become an optional arrangement that people can enter into?

**Mr Ross**—I think it is pretty clear about where it is going. Pressure, coercion or whatever you want to call it will be put on people.

**Senator CROSSIN**—As I understand it, this is not just about the townships of a community but a broader parcel of land that might even surround the township. As a traditional owner, I am going to be voluntarily—the Commonwealth would say—giving up that land for 99 years to an unknown entity controlled by either the Northern Territory or the Commonwealth government. What is your understanding about the powers that entity will have as to who can then lease aspects of the land? Why would I, as a traditional owner, want to give away that right for 99 years?

**Mr Ross**—I personally have not seen anything from the Commonwealth or the Northern Territory as yet about what the detail would be of their proposals. I heard that Normie Fry has had an invite to attend a meeting. I have not received one as yet. The chairman and I have been away, so I have not seen anything, if anything has come through. As I said, no-one has raised any issues about what detail there is. As we know, the devil is always in the detail and we would really like to see what these proposals are. I understand the Northern Territory government does have something in place. What that is, and the extent of it, I am not sure, but

I know people have been working on a proposal. We have not seen it and no-one has raised the issues with us as yet.

**Senator CROSSIN**—As I said earlier, it is not unusual for a Senate committee to withhold a report or to put down an interim report and then, in the final report, report on any consequential pieces of legislation that go with any piece of documentation we might be looking at. So you are suggesting to us that you think it will be a Northern Territory entity rather than a Commonwealth entity. Why should this committee not take a view—or should we take a view—that we should seek to delay reporting until we have seen any other consequential legislation that impacts on these changes?

**Mr Ross**—If I could be so bold, might I suggest that you recommend to the Senate that the parliament passes the legislation, based on the proposed amendments that we all agreed to previously, and to withhold the other amendments that have been raised outside of that agreement until we all understand what the consequences of those bits and pieces are going to be long term and what the proposed entities may be—whether it is just the Northern Territory or whether it is the Northern Territory and the Commonwealth or just the Commonwealth. We do now know any of these things, and we really do need to understand what the consequences of these proposals are.

**Senator CROSSIN**—So your suggestion is that we, in the first instance, could split the bill and suggest that the Senate look at those sections that have been agreed to by all three parties—the Commonwealth, the land councils and the Northern Territory government?

**Mr Ross**—Yes.

**Senator CROSSIN**—Certainly, as I have gone around to communities, I have found that Indigenous people have not seen anything under Minister Brough's name. There is still only the 16-page booklet or a DVD that Senator Vanstone put out. What sort of feedback are you getting from people about the lack of information coming from the Commonwealth government about these proposed changes?

**Mr Ross**—Most people are scratching their heads, wondering what is going on, because there seems to be a hell of a lot of talk in the media about housing—people buying their houses and all the rest of it. That has been taking place over the last couple of months, and there has been very little about what is beneficial to Aboriginal people living on Aboriginal land. People are not getting the information.

**Senator CROSSIN**—I will ask a question that I also asked of the Northern Land Council. If traditional owners are put in a position where they give up their land for 99 years—and let's face it: that is almost four generations of this particular race in our country—does that not undermine the rights of traditional owners to say who will then eventually settle, come to, buy, lease or develop their land? My understanding is that that decision will be taken right out of their hands and given to this Northern Territory entity. What is that future status of traditional owners if that is that case?

**Mr Ross**—That is a great question. It is a matter of: where do these people go? What do they do? They have leased their property. These are the sorts of things people need to consider. On top of that, as I pointed out in my opening statement, we have difficulties with the whole of community leasing. We have put forward to the Northern Territory government,

as outlined by Siobhan, the submission. To deal with housing, the Northern Territory came to us alone on housing, and asked: ‘How do we fix housing? How do we deal with this issue?’ We talked about leasing of housing and housing separately, with the business and the rest of the community not to be touched.

You then go back and start talking about how people enter into business when you have taken their land from them and given them a few measly dollars in return for that land. Any business person in this country and around the world knows that one of your greatest assets is always your land. What do you start with when you have given that away? Let’s be sensible about what is being proposed. You are going to take that land off them. It is the best asset that they could ever have in being able to negotiate any business opportunities; employment et cetera into the future, and you will remove their capacity to deal with them, all for a few measly dollars that they then have to go and borrow probably 10 times as much as to get started again. It is absolute craziness.

**Senator CROSSIN**—What will be the impact on the land councils of the changed funding arrangement? My understanding is that it will not be the 40 per cent of the ABA that is given to the land councils for your annual funding; it will be a discretionary amount from the minister. If you combine that with the ability of associations to establish a land council that you will then be required to delegate some of the powers to, what impact does that have on the operation or the viability of your land council and, say, employment prospects for staff? Is there any suggestion that future funding of land councils would be tied to, say, you offering your staff AWAs?

**Mr Ross**—Who knows whether that would be one of the conditions in the future. At the moment, that has not been put on us. We have just had to agree this year that we will now report quarterly on our funding. We have never had to report quarterly on our funding in the last 30 years. We have had to report, yes, and we do. We have had to provide annual reports as tabled in the parliament every year. We go through a process. We put forward a budget—the whole thing. We are now being drawn back into this process of having to report quarterly against outcomes based budgeting processes. That is fine. We can deal with that. It just costs more money to go through this process, so that is an issue. We cannot have any more money to help provide that accounting process; we have to live within that.

**Senator CROSSIN**—So existing staff are having to comply with that without you being given additional funds to assist with that?

**Mr Ross**—That is correct.

**Senator CROSSIN**—So pressure is starting on the staff already?

**Mr Ross**—There is pressure there, and that will be brought to bear right up front. There is that, and there are other things that we just have to live within, on that basis. But, as for the 40 per cent, I think the land councils have required more than the 40 per cent in past years, but it is the issue of the 40 per cent rather than how much the overall amount is. They are the sorts of things that people need to understand.

**Senator ADAMS**—I would just like to try and explore whether or not there is actual, documented evidence of ‘signing up or no houses’. The Northern Land Council mentioned

this, as you did. Do you have anything in a document stating that, if you do not go along with the lease—

**Senator CROSSIN**—The minister's press releases.

**Mr Ross**—That has not happened within the Central Land Council's region to this point. What has been raised here and what the Northern Land Council were talking about was the \$10 million for Galiwinku. That is \$10 million that was to come out of the Aboriginal benefit account. There was another \$10 million to go into Central Australia. The ABA members from Central Australia, from the Central Land Council, agreed that, yes, there should be \$10 million in the north and \$10 million in the south. On the basis of that, the \$10 million that went into Central Australia had to go into outlying communities, not into Alice Springs. That was the agreement around the table of the ABA committee. I attend ABA committee meetings. I do not vote, as a member of staff, but I attend with the members from the land council. The agreement was that that money was to go outside.

Now, that is not the case. The minister in conjunction with the Chief Minister has made an announcement that they want to put the money into town camps in Alice Springs and so on and so forth. There was no discussion with the ABA members of the Central Land Council and no follow-up with anyone from our side of the discussion at all. So, in terms of what is going to be done, we do not know because we have not been at the table. We have not been invited.

**Ms McDonnell**—Just to follow up on that: in terms of the town camp agreements, the minister has made a range of public statements saying that that housing allocation will be linked to changed tenure arrangements on the town camps.

**Senator CHRIS EVANS**—He actually gave them two months notice to make up their minds whether they are going to sign—he would come back in two months. They only get the housing if they sign. That is his press release.

**Mr Ross**—There are many public discussions in the media about changing the Alice Springs town camps into suburbs. So that is a part of the public discussion but, as I say, nothing has come back to us for any detailed discussions, and we have not been invited to any of those discussions.

**Senator CHRIS EVANS**—I just want to get to what seems to be the nub of a couple of these issues. You are in favour of economic development on your CLC controlled land. You say that section 19 already allows many of the things that the minister says he wants to do via the amendments. You say that his ambitions for home ownership are pretty foolish—they are not going to happen. Given all those things, why then would you care if another southern politician has a grand idea that is not going to work? You have been there before. What is the damage done by the change? Say it fails—so what? What is the damage done by the change?

**Mr Ross**—I guess the damage in the long term is that if, for instance, there was to be some leasing or whatnot taking place, then we do not know—as I say, we have not seen any detail of what these proposals are. So, if this went through, regardless of whether it was the Northern Territory government or the Commonwealth, with their proposals on how they would run these townships to that extent, we do not know what the detail is. What is the long-term effect of that? What is the long-term effect of a few non-Aboriginal people, corporations,

miners or someone taking up some interests within a community? What is the long-term effect of that? We have no idea. We have not looked at it. There has been no discussion.

**Mr Nugent**—I think it is fair to say that, under the existing section 19, the traditional owners have already entered into long-term leases. The Alice Springs to Darwin railway, for instance, has 99-year leases. There are horticultural projects in the Central Land Council region that traditional owners have considered, and they provide for long-term leases negotiated under section 19 under commercial terms. What the section 19A provisions effectively do is constrain the negotiating ability of traditional owners. Once those leases have gone through, if it is a bad idea, they have effectively lost control over their land for the period of those leases and any renewals.

**Senator CHRIS EVANS**—Being devil's advocate, what the government would say is that in 30 years of land rights a lot of these townships have not seen any economic development, that the sorts of things you aspire to are not happening. You say they have had very few applications for leases in the townships, and there might be some advantage in providing the certainty of a 99-year lease for people to establish businesses or invest in housing. Do you have a problem with that?

**Mr Nugent**—I think if you take a look at the Central Land Council's proposition on housing leases you will see that the land council has no difficulty with the proposition per se. If it improves the lot of Aboriginal people, of the traditional owners, if it is genuinely a good idea, then more power to it. The land councils would work with that. The difficulty is in constraining the process and in providing some sort of coercion to force traditional owners into a position where they do not have full negotiating rights. If the idea and the philosophy that underpins the government proposal is a good one, then it could certainly have been rolled out by putting a proposition to the land councils which could have been taken to traditional owners under the existing provisions of the land rights act. There is therefore no need to change the land rights act, if indeed this is a good idea. It has just never been put.

**Senator CHRIS EVANS**—Even if you accept that, though, you do not have an argument, in a sense. Do you know what I mean? If you say they can do it anyway, that is fine, and it may be true. It may not be. There might be a difference of opinion about that, but that does not go to the nub of the issue, which is: is it a good or a bad thing? It seems to me you are saying you do not have any problem with economic development or with the lease arrangements, and the coercion issue is a separate one. We talked about people having to negotiate for basic services. I think that would be of concern to the committee and that is a big issue we have got to have a look at. But isn't the core issue one of what happens to traditional owners' control and influence during that 99-year period? Isn't that the nub of it?

**Ms McDonnell**—They would lose control over those townships. I want to address this question of limited economic development opportunities. The reality is that the economic development opportunities in desert Australia, in remote Aboriginal communities, are extremely constrained. That is not at all related to tenure. You can look at our communities on Aboriginal land; you can look at our communities off Aboriginal land, on CLAs. Both of them have extremely limited economic development opportunities because they are incredibly remote. Because they have very small population sizes, there is no economy of scale. We are literally talking about 'a community store' in most of those communities. The CLC has 30

years worth of experience of trying to promote economic development on Aboriginal land, and the major equity that we use as the basis for investment opportunities is the land.

I really want to highlight again this issue of NT tenure. The Northern Territory has very restrictive tenure arrangements over community living areas that basically mean that you cannot have Aboriginal people being involved in economic development opportunities on community living areas. If the Commonwealth and the Territory really thought that tenure was the major impediment to economic development, why have they not moved to adjust their own tenure arrangements? Why are they looking only at Aboriginal land?

**Senator CHRIS EVANS**—I accept these are all debating points, but as parliamentarians we are dealing with an iconic piece of legislation, a very important piece of legislation for the development of Indigenous rights in this country—one initiated by a conservative government which, I would have thought, had some ownership of the Northern Territory land rights act. It seems to me that my job, as a parliamentarian, is to ask, ‘Is the integrity of the act being protected if these changes go through?’ It seems to me that that is fundamental. We have all these arguments at the side about whether they can do it elsewhere, whether they have to use this method and whether the Northern Territory government could do it under some other act, but essentially our challenge is to look at what is left of the Northern Territory land rights legislation after these amendments are passed and what that says about traditional owners’ control and the essential fundamental principles that the act envisaged. That is where I want to focus. Where do you think it leaves traditional owners if the legislation goes through in its current form?

**Mr Ross**—If it went through in its current form, it would be one hell of a bloody mess. You would have the ability of the minister—not crucial owners—to delegate to whomever. Part of our discussions with the officers about these amendments was that the particular land council would be expected to provide the funds, the staff and the support resources for whoever it is that has been delegated to take on this role and the functions it is supposed to be undertaking. The particular land council would have to carry out all of those functions for that group of people. That would be an absolute nightmare to start with, not to mention the issues there would be with respect to the ability of these people to go and carry out the role. As I say, they do not necessarily need to be traditional landowners, so there are going to be huge conflicts there. That is just the delegation side.

On the side of the community leasing, as a whole: as I have pointed out earlier, if you take away people’s ability of land ownership, what is their ability to become involved in business? That is regardless of who might want to come into a community and put in place some particular business within that community. You have removed their ability to participate. At the present time, the land council has been, as James pointed out, working on the ability to put together some areas for leasing horticultural blocks. We will have three of these blocks for our council meeting in a few weeks, which will then enable Centrefarm and traditional owners to lease out those blocks to non-Aboriginal or Aboriginal growers, who could come in and start utilising those serviced blocks. We tried a number of years ago to set up joint ventures for traditional owners, but it was too costly. Trying to bring money to the table is an absolute nightmare. We have had to revamp our thinking on how we do business, how to bring business in, how to get people employed and how to give people those opportunities. We have

had to redo the whole thing and our thinking. It has taken us a number of years to get that process up to a level where we are about ready to go with it. We still need support.

**Senator CHRIS EVANS**—I have concerns when the minister is running around the country saying that Aboriginal land rights equals communism and communal land rights equals communism.

**Mr Ross**—So do we.

**Senator CHRIS EVANS**—You also have a major amendment to the land rights act at the same time. It seems to me that the conjunction of events is of some concern in terms of the original intentions of the act. I am really trying to get to the heart of what you think is an acceptable way forward. You do not oppose leasing per se and you do not oppose economic development per se. What are we arguing about? Is it the nature and length of the lease? What is at the crux of the argument? You are prepared to lease land to other people under the current arrangements. You want economic development and are striving to get it. I accept all the arguments about it being very hard in remote communities et cetera. But what is the principal objection? Are we just having an argument about the length of the lease? Are we having an argument about the terms of the lease? What are we actually having an argument about, at the crux?

**Mr Nugent**—You are having an argument about the constraints on the landowners and their ability to deal with their own land. The land rights act currently provides for traditional owners to undertake negotiations and to lease their land for whatever period they see fit, with the consent of the minister. But nonetheless traditional owners, with the assistance of land councils, are perfectly able to lease their land and to undertake these things already.

What we are arguing about is an amendment to the iconic act that actually constrains their ability and forces them into a position where they must give over control of their land, and that is an unwarranted restraint on landowners. The other offensive part of that provision is the fact that the funds for it and the funds for surveying and administration come not from the government that is proposing these changes but from the Aboriginal benefit account and those funds are for the benefit of Aboriginal people and traditional owners in the Territory.

**Ms MsDonnell**—If you want to engage Aboriginal people in economic development opportunities, and traditional owners specifically, why would you remove their rights over townships, which could help facilitate that? Outside the context of mineral exploration, the major commercial development opportunities are going to be situated in townships. That is why in the model that we put back to the Territory government we said that we were not prepared for traditional owners to forgo those rights over townships. That is essentially what we are talking about. We are talking about a 99-year period—four generations—during which people would forgo their rights to do any negotiations under the sublease arrangement over any economic development opportunities into the future.

**Senator CHRIS EVANS**—What about the argument that without a 99-year lease you are not going to get investment, that people will not take the risk without that sort of length of lease?



**Ms MsDonnell**—There is no evidence for that. You can now do long-term leases under section 19 as it already exists. The Alice Springs-Darwin railway is one such lease. We are saying that there is no basis for the 19A amendment package.

**Mr Avery**—Under the present situation traditional landowners have a right of residence—and section 71 protects their rights. Those rights would get stripped out under this proposal. They also have a right to obtain a lease for a business for up to 21 years on Aboriginal land without ministerial consent. That right exists and it is specified in the land rights act, section 19. That gets stripped out. So there are some specific things that will be stripped away. If you start to look at the existing act you can see what is going to happen with community leasing with the stripping away of rights from the traditional landowners. These rights were envisaged in the original legislation. If you think that 21 years is not long enough, it is very simple: make it 42 years or something like that for the traditional owners and they can then use that as their equity in a business. But it is there already and it does not even need ministerial consent for up to 21 years.

**Senator BARTLETT**—There is one part of your submission that I want to go to which has not had much attention to date, which is the part to do with exploration and mining—section 3—where you are actually wanting an amendment that has not been put in, as I understand it. My understanding of your concern is that currently under section 44A there is in effect a disincentive to give consent for exploration because once you give it you lose all future control. My understanding from your submission is that in conjunction with the NT government in some of the previous processes leading up to where we are now there was a proposal to amend that to give more freedom in the negotiating process all the way through. Firstly, to clarify whether I have my understanding of it correct, have you got any idea why that amendment has been made? It would seem to me, taking on board all the rationale that is being put forward here, that we need to open things up, to get rid of the red tape and provide more opportunities for exploration, whether it is mining or leasing or whatever, so why wouldn't the federal government remove something that is a disincentive to do those things?

**Mr Nugent**—That is an interesting question and perhaps one that might be more properly asked of the OIPC representatives this afternoon. From the land councils' position, the restraints on the negotiations are unnecessary and, in fact, most of the agreements that I am aware of that traditional owners currently negotiate under the land rights act—in defiance perhaps of this current provision, 44A—do include terms for compensation, a framework at the mining stage, so that the framework of the act provides for a one-off consent for traditional owners when an explorer comes and puts an application on their land. At that stage they are able to decide whether or not they want exploration, but because there is only a one-off consent in the current act it was changed earlier in the piece.

They must also consider what is going to happen if there is a viable mine. So in effect their consent for exploration is a consent for mining at that stage, and therefore, not unreasonably, traditional owners want to have a framework for mining provisions in the exploration agreements. The current section 44A restricts their ability to do that and therefore provides, if you like, a disincentive for their consent as well as an unwarranted constraint on their ability to decide what goes on in their country.

The land councils agreed a package with the Northern Territory and, as we have said, most of the amendments to part IV that were part of that package have gone into these amendments, and we are very happy with that. It is difficult to understand why the government would want to constrain traditional owners' rights this way. In the early years of the land rights act, there was quite a campaign by the minerals industry to make sure that what has been called a *de facto* property right—the ability to give consent and put traditional owners into a strong position—should be removed. I am not entirely sure that the minerals industry in this era would necessarily stand by that. Nonetheless, the government has seen fit not to take on board the joint position of the land councils and the Territory.

**Senator BARTLETT**—I would like to ask about the accountability aspects. This is not so much in your written submission, although I think Mr Ross might have mentioned that you are now required to give quarterly reports. There was also something in the Northern Land Council's submission about a requirement for annual reports to include fees received for services provided, disclosure of minutes et cetera. If you are aware of what I am referring to, do you share the concerns that they have expressed? The other part—and this seems to me to be going in the opposite direction to what the rationale is—is putting more red tape on your operations, when you are trying to remove those sorts of impediments to how you operate. I do not know if that question is clear enough, but are you concerned that components of this legislation will just create unnecessary extra red tape under the guise of accountability? There are allegations from time to time—perhaps 'inferences' might be a better word—that come through in some parts of the country about the potential risk of featherbedding: people awarding contracts to mates and that sort of stuff. All of your accounts and your annual reports are audited. My understanding was that, whatever other complaints people may have about land councils, there have never been any serious problems with misuse of funds disclosed in audits.

**Mr Ross**—Probably one of the sore points in my life is that people around the country consider land councils across the board and think that they are all the same. People have this mental block and think that the land councils in the Northern Territory are like all these other land councils. We are not. We are Commonwealth statutory bodies and we are accountable for what we do. When we put together our budget at the start of the year, the local officer from the ABA employs an outside consultant who comes to each of the land councils and goes through our budgets. It can take up to a week. That then goes off, with his recommendations, to the minister. That happens to no-one else in the country except the four land councils in the Northern Territory. He does not go through our side of the native title budget. We are a native title rep body as well. This man does not touch our native title budget. Our native title budget is dealt with by the OIPC in Canberra directly. On the ABA side we have this extra line.

Our books are audited by the Australian National Audit Office and we have to report through the parliament. All the accountability procedures are there. We have an audit committee, which has to meet and make recommendations and has an outside chairman. All of the accounting measures that need to be there are there. On the other hand, we have been brought back because OIPC has now moved pretty much all of the budgetary processes from the Northern Territory to Canberra. We deal with people from Canberra, no longer with

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people from Darwin to that extent with our budgets and they happen to be the same people who deal with the native title budgets. That is fine: that is what we are dealing with.

We are expected to account in the same way that native title representative bodies have to account for ABA funds. Native title rep bodies have been cut back all around the country. There used to be 17, 18—God knows how many—and there are fewer and fewer. Every year they have been cut back. Two or three have been joined to form one. Yet on the other side in the Northern Territory we now have proposed delegations that can set up other bodies that can carry out functions of the land council. There is nothing to say what their accountability measures will be—how they will account for their decision making, how they will account for expenditure, et cetera. I put the question back to you about our accountability—I have outlined that—and concerning the delegation procedures, there is just nothing there.

**CHAIR**—Thank you very much for the evidence you have put to the committee today and thank you for the submission you provided. It has been very useful.

[11.48 am]

**OLNEY, The Hon. Howard William, Aboriginal Land Commissioner**

**CHAIR**—Welcome, Mr Olney.

**Mr Olney**—I appear as the acting Aboriginal Land Commissioner, under the Aboriginal Land Rights Act.

**CHAIR**—I think you have had information on parliamentary privilege.

**Mr Olney**—I have.

**CHAIR**—You are also aware that you have the capacity to give evidence in camera, should you believe that is necessary. We do not have a submission from you but we are very happy to take a presentation from you on the issues as you understand them to be relevant to this committee's inquiry. I apologise at the outset for the short period we have to spend with you this morning—only 30 minutes. I invite you to make a presentation and if we have time we will ask you some questions.

**Commissioner Olney**—Thank you, Chair. I have actually made available to the secretary of the committee this morning a document entitled 'Traditional land claims under the Aboriginal land rights act involving land comprising the intertidal zone and beds and banks of rivers'.

**CHAIR**—We now have that.

**Commissioner Olney**—I felt it might be desirable to place some information before the committee as a number of the amendments to the act—particularly clause 192, which deals with amendments to section 67A—deal with circumstances in which this type of claim is to be regarded as finally disposed of. The map on the pin-up board, which you can see, depicts effectively what is in the written particulars. I have the advantage of being able to make available to committee members a smaller copy of that map. Perhaps it could be put before the senators.

**CHAIR**—Thank you.

**Commissioner Olney**—The comments I wish to make are certainly tied up with what has been said this morning about the land claim phase coming to an end. The committee will be aware that the sunset clause came into force in 1997. It was not introduced by Senator Herron, as has been said. It was actually introduced by the Hawke government, 10 years earlier. The sun took 10 years to set before it became effective. There have no new claims since 1997. However, there are many outstanding claims still to be dealt with. Effectively, according to my calculations, there are 39 claims to be dealt with. But, in practice, probably only about half a dozen of those are ever likely to come to fruition.

In the first paragraph of the typed particulars that I supplied, I made a mistake. I said that all Aboriginal land having coastal frontage extends to the low-water mark. That is correct. I also said that this land has been granted by reason of being included in schedule 1 to the act. That is not quite correct. In fact, title in the Sir Edward Pellew group of islands goes to the low-water mark and was granted pursuant to two separate land claims that were heard by

commissioners. You will see on the map that the Sir Edward Pellew group of islands is the small group in the Gulf of Carpentaria, down in the lower right-hand corner.

It has always been the case that rivers flowing through Aboriginal land, whether granted pursuant to the schedule or after inquiry, have always been included in the grant of title. Paragraph 3 deals with three separate minor issues, which perhaps we do not need to dwell upon. In paragraph 4, I refer to the Kenbi Cox Peninsula land claim—that is, the claim to land just across the harbour from Darwin. You will see that on the map on the left-hand side. In that case, a commissioner recommended grant of the land going down to the low-water mark. There are other claims to islands and to some coastline which fit the description of the intertidal zone, which is contiguous with Aboriginal land or land claimed under the land rights act. The islands referred to are the Vernon islands, which you will see just below Melville Island, and Port Patterson islands, which are that little red dot below the Kenbi land claim. The bit in the Kakadu region is a small part right in the corner, in the most westerly part of the Kakadu, which is the Arnhem Aboriginal Land Trust.

The matters that have concerned me as commissioner and that have provoked debate between the land councils on the one hand and the Northern Territory government on the other hand are claims to the intertidal zone and to the beds and banks of rivers which are not immediately adjacent to Aboriginal land or land claimed as such. In a number of cases—and these are all ones which I have heard and which have resulted in recommendations to the minister for the granting of title—the Northern Territory government has opposed the recommendation. Whether the commissioner was entitled to make the recommendation has been litigated, and the finding that it was a matter appropriate to be the subject of recommendation was upheld in the Federal Court.

The matters in particular are the ones coloured in light blue on the map, which you will see cover the coast of the Gulf of Carpentaria. I think earlier I might have said the Great Australian Bight to somebody, but I meant the Gulf of Carpentaria. That light blue line indicates land which has been the subject of recommendation for grant, the intertidal zone that is between the high and low water marks, and rivers, you will see, that are not adjacent to any other Aboriginal land—that is, the beds and banks of rivers. There is also a light blue line running across. This is the Roper River, south of the Arnhem Land Aboriginal Land Trust area. On the north side you have mostly Aboriginal land and on the south side some but not much. There has been concern about what should happen to that land. The Territory government has taken the view that land should be granted only if it is land on which people can live and work et cetera. The claimants take a different view. They take the view that if it is traditional land and so found then it ought to be the subject of a claim. I note that in the NLC submission that is referred to.

There are a number of outstanding applications dealing with claims to the intertidal zone and to the beds and banks of rivers which fall into the same category as most of that light blue area. They are the red or pinky colour rivers and the intertidal zone that is mainly in the western part of the Territory. Those matters have not been heard but, in the event that the amendments are passed in the form that they are in the bill, all those applications will be deemed to be finally disposed of, except to the extent that the rivers are contiguous with Aboriginal land. You will see some there along the south. There is a claim to the Fitzmaurice

River, which is to the south of the Daly River Aboriginal Land Trust, and there is a little bit of river abutting other Aboriginal land a bit further east of there.

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.

With respect to the areas that have been recommended for grant, the situation is that the minister has the discretion either to recommend or not recommend. Although the original recommendations were made in respect of the McArthur River area about five or six years ago, there has never been any action taken to facilitate a grant of title by recommending to the Governor-General that a deed of grant be executed; nor has there been any statement indicating any decision made to simply not recommend. As commissioner, the position is that there is somewhat of a hiatus—one does not know whether one should press ahead with the outstanding claims or not. In the event that this bill is passed in its present form those claims, together with those that have been heard, will no longer be of any significance. I hope that that information will be of some assistance to the committee in considering the issues before it.

I could perhaps be of some assistance in pointing out something that has arisen out of what has been said this morning. You will see the dark brown colour on this map. There is a large area right in the centre, a smaller one and then another one down at the bottom. That colour represents Aboriginal freehold granted under Northern Territory legislation. They are granted to Aboriginal associations. There are other quite large areas that have that same type of title in the Central Land Council area. I only raise that because I heard the discussion this morning in which differentiation was made between Aboriginal land—that is, land granted under the Land Rights Act—and other land which is owned by Aboriginal people. There is indeed a map over on the shelf there, which I will leave behind, that through colour coding shows all the various types of land that has been claimed and granted and the basis of the grants. That may be of some assistance to the committee.

The other matter that might be of interest to the committee is that an ongoing issue with the Northern Territory Land Corporation has been raised. The situation is that quite some years before I was commissioner—and I might say that I was first commissioner in 1988, so it goes back a long time—the High Court determined that land held then by the Conservation Land Corporation was not crown land or land that could be claimed under the act. It came to this conclusion on the basis of the construction of the act, which in effect said that it was not crown land.

The Northern Territory Land Corporation statute, which has varied from time to time, adopts the same formula of words. Over the years, there have been a number of cases that have gone to the Federal Court. That court has upheld rulings that I have made that the Northern Territory Land Corporation land is not crown land. In the most recent decision, the High Court refused special leave, so one assumes that that situation has been maintained. Without trying to confuse the issue, there have been suggestions from time to time that the

Northern Territory Land Corporation was set up simply to circumvent the provisions of the land rights act. I am not in a position to make a comment on that at all.

Committee members may be aware of the long-running battle over the Kenbi land claim, where a device was used, and later found to be improperly used, to declare a huge area of the Northern Territory around Darwin and other major towns to be parts of towns in order to prevent the land from being claimed under the land rights act, under which land in a town is excluded from the definition of available land. An issue raised on one occasion was that a particular grant of Northern Territory Land Corporation land was simply a device to prevent a land claim from proceeding. On the facts of the case, it was held by me as commissioner, and later upheld on appeal, that this was not the case.

However, the issue still remains that there is a substantial amount of land in the Northern Territory held in the name of the Northern Territory Land Corporation which is subject to claim under the act, but in respect of which there is somewhat of a hiatus. It may well be that in some cases a case could be made based on the Kenbi decision of the High Court—the *Queen v Toohey*, going back to about 1978—which held that there was an improper purpose. It has been suggested from time to time that these land corporation claims were made for an improper purpose. Again, there has been no evidence put to the commissioner. But there is a problem in the act in that section 67A provides that estates or interests may not be granted in land whilst it is subject to a traditional land claim. The question is whether that section applies in respect of claims made to Northern Territory Land Corporation land. That is something that the amendments have not addressed—I think probably deliberately. Nevertheless, it is an issue which impinges upon the suggestion made by Mr Fry this morning that the land claim process is coming to an end. Until that issue is resolved one way or the other, the land claim process may well drag on for many years to come. That is all that I wish to put before the committee.

**CHAIR**—Thank you, Mr Olney, very much for that. The minister’s media release in May announcing the tabling of this legislation talked about provisions that disposed of claims to the intertidal zone and the beds and banks of rivers not contiguous with Aboriginal land. He said:

It is not appropriate to grant these narrow strips of land.

I take it that the argument there is that, because they are quite thin and disassociated with any existing claim, they would be difficult to administer as Aboriginal land or difficult to properly exploit in an economic sense. Can you comment on that particular argument?

**Mr Olney**—The view of the Aboriginal claimants who seek to establish traditional Aboriginal ownership is that this land—we are talking mainly about the intertidal zone, which is particularly important to them—is adjacent to land about which, if it had not been granted as a pastoral lease to someone else, we probably could have established traditional ownership. Indeed, in all the cases that I have heard, it is obvious that traditional ownership would have been established if the land had been available to claim. The problem is that you have a strip of land which runs along the sea coast. If it were Aboriginal land, one would need a permit from the Northern Land Council to enter upon it. There are those sorts of constraints that have been raised by the Northern Territory government in their arguments contra to recommending the granting of that land.

What the minister was probably saying was that it is not appropriate to grant these narrow strips of land. It is not so much the narrowness of them but the location and the effect it would possibly have on the conduct of fishing and other industries and on the access to rivers and the like, which would cause, on that argument, impediments. The contrary argument is of course what the land councils have always said: 'We acknowledge these problems, and we would under the Northern Territory Aboriginal land act declare them open areas so that access could be granted.' Their argument has always been that they seek recognition of traditional ownership. That is the real issue that they argue. They also feel that in some cases, particularly around the Gulf of Carpentaria, there have been occasions where some of the fishing people—not necessarily all commercial but some amateurs—have unduly exploited the fish stocks, and of course there are some sea creatures, such as the dugong, which are of particular importance to Aboriginal people and which they would like to be able to protect. They feel they could do that better if they had some title to that area of land.

**Senator CHRIS EVANS**—Forgive me—I do not have a great deal of understanding of your role, but as I understood your evidence you have recommended a number of these intertidal zones and beds and banks of rivers for grant. They are recommendations to the federal minister, and they have not been acted on in either a positive or negative way.

**Mr Olney**—That is right.

**Senator CHRIS EVANS**—How many such recommendations are we talking about?

**Mr Olney**—I think there are eight all together.

**Senator CHRIS EVANS**—When do they date back to?

**Mr Olney**—They date back to the McArthur River land claim.

**Senator CHRIS EVANS**—There are seven listed at No. 6. Is that them?

**Mr Olney**—Yes, there are seven.

**Senator CHRIS EVANS**—Do you think McArthur River is the oldest of them?

**Mr Olney**—Yes. I think it was in 2000 that the first recommendation was made regarding bed and banks and the intertidal zone.

**Senator CHRIS EVANS**—And none of those have been approved by the minister?

**Mr Olney**—None of those have been recommended by the minister to the Governor-General for grant.

**Senator CHRIS EVANS**—But they also have not made a declaration that they are not going to grant them?

**Mr Olney**—There has been no determination not to grant them.

**Senator CHRIS EVANS**—Forgive me if I am getting confused. What has actually been approved under that process?

**Mr Olney**—So far as the intertidal zone is concerned, the only actual approval has been the matter that I mentioned by way of error at the beginning. Mr Brough recently handed over title to Centre Island in the Sir Edward Pellew group. The grant was of the island itself down to the low-water mark. The other islands in the Sir Edward Pellew group were granted as a



result of recommendations made by Justice Toohey, who is the original land commissioner, and again that title goes down to the low-water mark. There have been no other circumstances where a grant of title has been made to the low-water mark as a result of a commissioner's recommendation.

**Senator CHRIS EVANS**—Did you make the recommendation regarding the Sir Edward Pellew group?

**Mr Olney**—No. It was Justice Gray who heard the Centre Island case. Justice Toohey heard the case of other islands.

**Senator CHRIS EVANS**—Operating as—

**Mr Olney**—Aboriginal Land Commissioner.

**Senator CHRIS EVANS**—So both those were done in your current capacity?

**Mr Olney**—That is right.

**Senator CHRIS EVANS**—For how long had the Sir Edward Pellew group recommendation been made but not acted upon?

**Mr Olney**—Justice Toohey's recommendation was with respect to the very first land rights case that was ever heard. It was heard in, I think, 1978 and granted shortly after his report went to the minister.

**Senator CHRIS EVANS**—That has been sitting on the books since 1978—that is, waiting for the grant to be approved?

**Mr Olney**—No, it has been approved.

**Senator CHRIS EVANS**—When was it approved?

**Mr Olney**—Shortly after the grant. There was no delay. Centre Island was an island in that group where Justice Toohey was unable to find any traditional owners, but many years later Justice Gray found there were traditional owners and his recommendation was made, I think, in 1996. The grant of title was made in 2006. But there were very special circumstances there which involved a very complex question of negotiation between people who had actually been granted title, probably illegally, by the Northern Territory government. There were many complications there.

**Senator CHRIS EVANS**—I do not intend us to get into that. I am confused enough as it is. The minister recently approved that grant, but that had the effect of also including title down to the low water mark?

**Mr Olney**—Yes. It was a case of granting an island title and the island goes to the low water mark.

**Senator CHRIS EVANS**—But all the other outstanding recommendations you have made have not been acted upon and they go as far back as 2000?

**Mr Olney**—I think 2000.

**Senator CHRIS EVANS**—The legislation, as proposed, would effectively wipe out those recommendations, deny the grants you have recommended and also rule out any further grants?

**Mr Olney**—That is right.

**Senator CHRIS EVANS**—So your role in this regard will be made redundant?

**Mr Olney**—Indeed. I am not complaining about that aspect of it.

**Senator CROSSIN**—I think that is really the crux of the matter, isn't it? If this legislation goes through, everything on this map, except the black line, will disappear. Is that correct?

**Mr Olney**—Where you have a blue or red line adjacent to existing Aboriginal land, that would be available to be recommended for grant.

**Senator CROSSIN**—Would that include the Kenbi—Cox Peninsula—land claim?

**Mr Olney**—Yes. That has actually been recommended for grant in that the land itself on the Cox Peninsula goes down to the low water mark, so that would not be affected.

**Senator CROSSIN**—It includes the McArthur River region, doesn't it?

**Mr Olney**—Indeed.

**Senator CROSSIN**—So if this legislation goes through then the land claim for the McArthur River region is off the books? The claim can no longer be heard or recommended?

**Mr Olney**—The McArthur River claim has been heard. It was a claim to the intertidal zone adjacent to land, some of which is Northern Territory Land Corporation land and some of which is pastoral lease. It was the intertidal zone going from the Limmen Bight River down to the McArthur River and from the McArthur River right up to what is called the Borroloola land. That case was heard and recommended for grant.

**Senator CROSSIN**—But it has not been granted; therefore, if this legislation goes through—

**Mr Olney**—It will not be granted.

**Senator CROSSIN**—that leaves the McArthur River claim off the books—in other words, dead?

**Mr Olney**—Indeed.

**Senator CROSSIN**—Can I also ask you about the impact this will have on commercial fishing around these areas. Let me read some of the Northern Land Council's submission to you to put it into context. They are talking about the Blue Mud Bay litigation. They state:

... 80% of the Territory's coastline is Aboriginal land to [the] low water mark ... If the litigation is successful commercial fishing in the intertidal zone or in tidal rivers above Aboriginal land will be unlawful unless with the permission of traditional owners under the Land Rights Act.

What impact does this aspect of this legislation then have on traditional owners to have any right of veto over commercial fishing? Or does it in fact give commercial fishermen open access? I assume that if the McArthur River claim is off the table, that gives commercial fishing people open access to the McArthur River region, does it?

**Mr Olney**—There would be no change to the present situation. Perhaps I need to go back to the report I wrote some years ago, because these aspects are dealt with in each report. The commissioner is obliged to comment on what are called detriment issues. And, of course, with

river claims and these sea claims, the fishing industry is a big issue. I think the McArthur River has been closed to commercial fishing under Northern Territory law.

**Senator CROSSIN**—But not, perhaps, the coastline?

**Mr Olney**—I do not think there is any question of the coastline being closed. So the effect of this legislation would simply be business as usual, as it is at the moment—

**Senator CROSSIN**—That would mean that commercial fishermen can still greatly benefit because there would be no change, whereas the rights of traditional owners would be further diminished?

**Mr Olney**—Yes. Could I just say that these issues are complex in that the Blue Mud Bay case has been brought under the native title regime. But the argument which seems to be accepted is that, under the Aboriginal land rights act, ownership of the riverbed does not give ownership of the water. So the arguments that were put before me were simply that people could sail their boats but they would not be able to put an anchor on the ground, because that would be using Aboriginal land and they would need a permit from the land council. They would not be able to anchor below the top of the bank, but they could anchor above the top of the bank. So all sorts of very minor complications would be involved in the granting of title.

**Senator CROSSIN**—So, Mr Olney, why then do you believe that such restrictions have been placed in the amendments currently before us? You can have the expiration provisions that were agreed to between the land council and the Territory government—give them a tick. You have provisions for the land leasing and for changes to the structure of the land council and to funding. You could make those changes to the Northern Territory land rights act without having any amendments to do with existing claims or recommendations.

**Mr Olney**—I, of course, am not involved in policy making. But I think it would be fair to say that the act, as it is structured at present, together with the Northern Territory legislation—the Aboriginal Land Rights (Northern Territory) Act—could be used in such a way as to provide for the granting of title subject to appropriate safeguards in relation to the continued use of the land both for recreational and commercial fishing and for other purposes.

The Northern Territory legislation, which of course is made pursuant to the provision of the land rights act, provides that the administrator declares on the recommendation of the land council that the land be declared open, and so there is no need for obtaining permits to enter upon that land. It would be feasible I suppose, because the minister can recommend to the Governor-General that a grant be made subject to conditions. Theoretically, a condition could be imposed on the recommendations of the granting of a river that this grant be subject to the administrator declaring that area open.

**Senator CROSSIN**—It is not likely to happen though, is it?

**Mr Olney**—It is not likely to happen, no. Although it has happened in one case in respect of the Upper Daly river. That was done by a settlement between the land council and the government.

**Senator CROSSIN**—Thank you.

**Senator BARTLETT**—Perhaps you could take this question on notice to save us time. To clarify your presentation and that document you gave us, the ones that will be wiped out by

virtue of this bill passing I understand are the ones listed in items 6, 7 and 9 that are not contiguous. Could you just confirm that or not. The question I have is that those blue lines that are not contiguous have been recommended for grant. In effect, the commissioner has made a determination that this is Aboriginal land. Why is there not some compensation provision required if this Aboriginal land is being wiped out and taken away by virtue of this legislation? It is not legally determined finally yet so it is not—

**Mr Olney**—It is not Aboriginal land. This is a question which lawyers rather than retired judges may have to address.

**Senator BARTLETT**—Sorry. Maybe I should say: does it open up that question?

**Mr Olney**—It has been put to me in discussion that, since these claims were made and particularly since the first recommendation for a grant was made for intertidal sand and beds and banks of rivers that were not contiguous with Aboriginal land, there was a reasonable expectation that a grant would be made—particularly after the court upheld the recommendation that the commissioner had made. Whether taking away that reasonable expectation amounts to an acquisition of property on unjust terms is another question which I am not in a position to delve into.

I know that some concern has been expressed on the claimant's side about that, whereas the Territory government have always pointed to a provision—I have just mentioned it and senators can have a look at it—in subsection (4) of section 50 which says that in carrying out his functions a commissioner shall have regard to certain principles. This deals with Aboriginals being able to live on their own traditional land. The point that the Northern Territory has always taken is that they do not want to and they cannot live in the intertidal zone and in a river. Therefore, it is not land which the commissioner should recommend for a grant.

The construction that I followed on the act, which has been upheld, is that one has regard for those factors but that does not inhibit the commissioner's power to recommend. In fact, going back to Chief Justice Brennan—or Justice Brennan as he then was in the High Court—in an early case he said: 'If traditional ownership is proved, it is the commissioner's job to recommend. It is then an executive decision as to whether to grant.' That is how the act has always operated—so that the minister is of course confined to an area that is recommended by the commissioner, but the minister has the executive decision as to whether or not to grant any land that has been recommended.

**CHAIR**—Thank you very much, Mr Olney, for your evidence today and for the information you provided to us. I take it that we can keep that map?

**Mr Olney**—You can keep that map. You might find the other maps that are rolled up of some interest. They are explanatory for particular land claims which are referred to.

**CHAIR**—Excellent. Thank you very much indeed. There may be other questions put on notice to you, in which case I take it you would be able to give us an answer on notice.

**Mr Olney**—Indeed.

**CHAIR**—Thank you very much. We appreciate that.

[12.33 pm]

**MARIKA, Ms Raymattja, Spokesperson, Yolngu people**

*Evidence was taken via teleconference—*

**CHAIR**—Welcome. Thank you for your time today. Do you have anything to add to the capacity in which you appear?

**Ms Marika**—I am a Yolngu traditional owner from north-east Arnhem Land.

**CHAIR**—Do you also speak on behalf of the Aboriginal and Torres Strait Islander Social Justice Commissioner today?

**Ms Marika**—Yes, I believe that he nominated me to speak on his behalf.

**CHAIR**—I understand that you have been provided with information on parliamentary privilege and the protection of witnesses and evidence. I think you also understand that, if you have any evidence which you wish to give confidentially to the committee, it is possible for the committee to take that evidence in camera. We have the submission which you provided to us. We thank you for that. We also are led to understand that you have recently been awarded the title of Territorian of the Year. May we say congratulations to you for that honour. We regret that there is not the time to be able to explore the reasons for your award in more detail, but please accept our congratulations on that nomination.

**Ms Marika**—Thank you.

**CHAIR**—I invite you to make a short opening statement and then the committee will proceed to ask you some questions.

**Ms Marika**—Thank you. It is an honour for me to be here to comment on the proposed Aboriginal Land Rights (Northern Territory) Amendment Bill 2006. I speak here today because it is an important matter for me and my people. I am a Yolngu traditional owner from Yirrkala in north-east Arnhem Land. My ancestors are from that land. I was born on that land, I live on that land and I hope all future generations of my people will be able to live freely on that land.

My father was part of the struggle for land rights back in the 1960s and part of the Bark Petition to Canberra in 1963, 1966 and 1967. My father was protesting against the first leases that the federal government took over my people's land. In Nancy Williams's book *The Yolngu and Their Land*, you can see photographs of the Yolngu, including my father, in front of the Supreme Court in the ACT in 1970 during their struggle for their land rights. For those of you who do not know, my father was Dadaynga 'Roy' Marika, one of the instigators of the land rights movement in the Northern Territory. In 1971, my father took a sacred object to Canberra. That object speaks of my fundamental spiritual relationship to my land and my cultural rights and obligations to my land and sea country. That object signifies the sovereignty of Yolngungbra and her people. Translated that means the sovereign rights of the Yolngu.

Our old people lost that land rights case in 1971 in *Milirrpum v Nabalco* and the Commonwealth because of the doctrine of terra nullius and because there was no way to

recognise our system of law and knowledge and sovereign rights in Australian law. Blackburn handed down that ruling in 1971 and the Yolngu felt this as a slap in their face. He denied the reality of my people's natural rights to the land and its resources. The doctrine of terra nullius, which brought so much shame to the beginnings of Australia, denied that we Yolngu existed as a people. It forced Blackburn to deny us our land. But Blackburn did not deny the true nature of the link between Yolngu people and their land. He said:

On the basis of the evidence presented to me I judge that it is more correct to say that the Yolngu people belong to the land than that the land belongs to the people. If ever there was a system of law that is not merely the product of human hands but comes from a higher order, it is the one that has been presented to me in this case.

While we Yolngu have always known our connection to land and the laws that govern our connection and our rights, my father and the other petitioners were the first to try to inform the government and to assert our rights to land and to protest against the mining operations and leases that were given out. Our struggle was against the mining companies and the federal government that issued the first leases in 1966. Now we are in the same position today—we are still fighting the Commonwealth government.

My people did not get the land rights legislation in 1976 after our struggle for recognition of our land. We started the homelands movement, further demonstrating the deep connection of my people to their land. I want the committee to understand that we see the current dangers to land rights in the Northern Territory as part of the same struggle. As traditional owners, we are very worried about what is going to happen to our land and our people. I know that this committee wants to know what the impact of these amendments will be on traditional owners and what the consequences will be. In order for you to appreciate the impact, it is important for me to try to explain the complex relationship that we Yolngu have to land.

What is our connection to land? To the Yolngu land is identity. It is connected to our wellbeing, our language, our culture and our law. It is the foundation of our very being. The land defines us. Our relationship to land is very different from yours. Through the Torrens system of land law you use a pen in your Westminster system to determine land tenures and land allotments. We Yolngu have songs, stories and sacred objects that tell the law and provide the abstract knowledge of land. Without the land we are nothing. If you cut us off from our land, you cut us off from our culture. Our stories, our songs and our spiritual and social world come from the land. All Indigenous people around the world understand this.

My mother comes from the fire dreaming. She passes that voice on to me. It is powerful. I speak with that authority and that knowledge of the fire dreaming that burns and sparks and blazes. The fire dreaming is about honesty and integrity. It burns away lies. It empowers me and gives me the knowledge to speak for my land. All 13 Yolngu tribes are connected through yothu-yindi, mother-child relationships, and through maternal grandmother and grandfather relationships. These relationships with these people and this land are the external structure of our culture in north-east Arnhem Land. We are all interrelated, integrated and interconnected in a holistic way to our world. Our kinship structures define the ownership of our land and sea and space. This is why you cannot take away our communal relationships with land. These are our epistemology and anthology, our ways of being, ways of knowing, ways of doing and ways of living. From those come our maps of land and sea. It is our history. Land is our

narrative; it upholds our human rights, our sense of respect and our values. Land is the law and the foundation of law.

Everything is integrated in the Yolngu way. The land is integrated with kinship, with ceremony, with the whole identity of the Yolngu people. You cannot separate our land from our whole being. When you put a lease over it, when you put bonds on us, you take us away from ourselves and our law. But you will not break us. Our spirits will stay strong. That is why I am here today, to protest against these changes to our land rights. I stand here today to continue the work of my father and to advocate for the Napaki people. The ebb and flow of the tide is like the Yolngu and the Napaki coming together. Both sides should be committed to an ongoing balance. Only then can there be justice. There should be balance between our views and our worlds. We want Yolngu and Napaki to come together for understanding. We Yolngu want you to know that it is sacrilege for Napaki to deny us our right to our land.

Land ownership is not something you can play with. You dig our land and you take our land, but that land is our backbone. It is our life source. We invite you to respect that and to understand the value we have on our land and to help us achieve our goals. We need a cultural association to land to sustain us. We want control of our most important asset so that our children and their children can enjoy the social, cultural and economic benefits that land can bring. We do not want 99-year leases. Land ownership has never involved time. This is true in the Western traditional of law. It is even more true for Aboriginal law. It is in the interests of all Australians that we not be denied ownership of our land in perpetuity.

I have just been to a conference in Sydney, the inaugural First Nations conference. At that conference I heard how Maori people are able to use their communal land to create world-class enterprises without giving up their communal rights. If these amendments are designed to improve living standards and create amenities for our people then why aren't we looking at the examples of New Zealand and Canada, where communal land rights are preserved and enterprise is encouraged in different ways? Enterprise and opportunity that exist within communal rights will ensure the continuation of our cultural and kinship connection to the land and allow us to develop in a way which meets our needs.

What are our concerns about changes to the land rights act? There has been no consultation. The main problem I have with the amendments is that there has been no consultation with traditional owners. The government may have negotiated with the Northern Land Council, but they have not consulted with us properly. We have not heard from the government nor the NLC. Really, how can the NLC consult with all traditional owners across the Territory when the size of the Aboriginal land mass under the jurisdiction of NLC is 280,730 square kilometres? The east Arnhem region alone is 26,940 square kilometres. This is too big an area for the NLC to cover to properly inform traditional people in remote Northern Territory. Gone is the time for talking to the NLC about our land. It is time to come to Yolngu to talk to us directly. The same should be done right across the Northern Territory. Nothing should be done secretly.

I say to the committee that, before any amendments are made to our land rights, the federal government must provide information that gives traditional owners a process for 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. Government action like this one makes me think that the federal government thinks the rights of Aboriginal people are lesser than those of other Australians. Imagine the government saying to white people: 'We spoke to your regional council and they thought it was a good idea that we take out a 99-year lease over your land. As it was your local council, that means that you give your consent to lease your land and your home.' We assume all of you would think the same way: that you are changing the legislation to make it possible.

I ask the committee to take to the parliament the message that we, the traditional owners, need to know the details of these changes. We need time to discuss the amendments. We need to think about what they will mean to us culturally. We need to think about and discuss these changes together, and this is very important. We would like to have a say in any changes to our legislation, because they will have such a big impact on our people. Do not change this legislation without including our views. I would like the committee to take to the parliament the message that we want a process so that we can respond to these amendments. Draw up a process now and let us be part of the process for any changes to the Northern Territory land rights act.

**CHAIR**—Thank you very much, Ms Marika, for those comments by way of an opening statement. Do you have something more to add?

**Ms Marika**—Yes, I still have more.

**CHAIR**—May I indicate to you that we are running very short of time today. If you have other comments to add, we would be very pleased to receive those by way of a written addition to your submission. Because we have very little time left, might I now turn to some of my colleagues on the committee and invite them to ask you some questions? I will turn to Senator Crossin first of all.

**Senator CROSSIN**—Nha mirri? Trish Crossin here.

**Ms Marika**—Hello, Trish. Nha mirri?

**Senator CROSSIN**—I want to talk to you about Nhulunbuy and Yirrkala. One of the most significant developments in the Northern Territory has been the Alcan mine and the establishment of the Nhulunbuy township. That has existed under the current land rights provisions.

**Ms Marika**—Yes.

**Senator CROSSIN**—We have heard a lot of arguments put to us this morning by the land councils that economic development does and can occur very successfully here in the Territory under the existing section 19 and there is no reason to make a significant change. Is that your experience living out in north-east Arnhem?

**Ms Marika**—'There is no' what?

**Senator CROSSIN**—There is no reason to change the land rights act to allow for the 99-year lease provision; it is already occurring.

**Ms Marika**—Yes, economic development can occur under section 19 as it stands and we can make the decisions ourselves.



**Senator CROSSIN**—And your people have done that.

**Ms Marika**—My people have done that, yes.

**Senator CROSSIN**—And very successfully. Do you want to provide some comments about that to us?

**Ms Marika**—My family has the Bunuwal Investments in this place. We have had negotiations with Alcan on the areas that they have given us—just as a small part of the lease. We have the housing project on that land in Nhulunbuy. It is going to be a very successful investment for my family and for future generations. That has come about with the expansion. We have grabbed that opportunity. That is an opportunity that we had.

**Senator CROSSIN**—So, Raymattja, you would be putting it to us today that this emphasis on giving up your land for 99 years is a very balanda way of looking at improving economic development for Indigenous people. If I have got it right, you are actually saying to us that one of the key issues that Indigenous people hold on to—and in fact it is probably the last thing they would ever want to give up or trade away—is their land.

**Ms Marika**—Yes. I am very concerned about the 99-year leases. I am concerned because we, the Yolngu, will lose control over that land again. We do not want other people making decisions about who can come onto our land and start a business. We have had enough of the mercenaries. We do not want McDonald's, Irish clubs or anything else that Minister Tolner has suggested. The governance of a community needs to be in the hands of the traditional owners. They are the right decision makers over the land.

The 99-year leases will be abhorrent to us. We do not want them. I think it is wrong to offer my people money in exchange for agreements over land, as the government is doing in Galiwinku and elsewhere. Many of my people are poor, they are still living in poverty, and so money is attractive to them and you know it. But are they really agreeing to the leases or are they agreeing because they are poor and they need the money? When you offer them money and speak to them in your white legal language, many will not understand what they are signing. They will only see rupiah—money—in it. This is not a good agreement-making thing. It is not good for my people and it is not good government business either—it is like being back in the days of giving natives glass beads and trinkets for their land.

If these leases are going to be good for my people, why isn't the government asking for leases without bribes, without money? Do you see? How far will the government go? Worst of all, under the amendments the government plans to pay us for our land with our own money—with money from our Aboriginal benefits and our mining royalties. Has the government told the Yolngu about that? The Yolngu people want to have direct access to mining royalties. At the moment the mining money goes to the land councils, and the people affected by the mining, like the Yolngu at Yirrkala, only see a small portion of the rupiah. That is wrong. I think we should have better access to our money, with a better system to set up our enterprises on our land.

**Senator CROSSIN**—Thank you.

**CHAIR**—Regrettably, we really do not have time to proceed any further at this stage, but I thank you very much for the evidence you have presented to us today and for the powerful

presentation which you have made to the committee. Thank you very much for providing that information to us over the telephone. I know it is not a very easy medium to use, but we appreciate your time and effort today.

**Ms Marika**—Thank you.

[1.00 pm]

**WUNUNGMURRA, Mr Wali Wulanybuma, Spokesperson, Laynhapuy Association**

**CHAIR**—Welcome. I understand that you represent the traditional owners of the Miyarrkapuy, Laynhapuy and Djalkiripuy regions of north-east Arnhem Land.

**Mr Wunungmurra**—I have been picked as the spokesman from Laynhapuy Association on behalf of the Laynhapuy people.

**CHAIR**—I think you have been given some information about parliamentary privilege and about the protection of your evidence to the committee today. It is also possible to have evidence taken confidentially, if you wish to do that. If you have any evidence that you think should be given privately to the committee, please let us know and we can take that evidence in camera. We do have a submission from you, as the representative of those three areas of north-east Arnhem Land, and we have numbered it submission No. 6. Would you like to make a statement to the committee, and we can then proceed to ask you some questions.

**Mr Wunungmurra**—I have worked with the Aboriginal people for a long time. I was one of the signatories of the bark petition that hangs at Parliament House and I was the interpreter in the Northern Territory land rights case. So my association in this area has been over a long period of time, and I have kept in very close contact with the land rights movement that has been going on for so long. I am now trying to go through the same system that we went through before. It is hard going, but we will eventually get there.

I would like to briefly say a little bit more about some of the areas that are covered in our submission. I have jotted down some dot points that I would like to go through, because of the time that we have got today. The only way I can move a little bit faster is to be able to point out some of the areas that I would like to speak on, without going into depth.

I would also like to remind you that I am speaking on behalf of the Aboriginal people at a grassroots level. I am representing them. We are very pleased with the land rights act that we have at present. It is a workable act and we are working very closely in connection with that act. We have so many people working around the clock, like land councillors and a few other people on the ground, to help Aboriginal people to understand the land rights act.

It would be difficult to see something better than the act we have now, and perhaps it would go down the drain if the changes take place. What I say and what the people who asked me to present the case here to the committee say strongly is that if there are going to be changes made to the act, Aboriginal people would like to be a part of those changes. They are saying that they would like to be making decisions and saying where we should go and how fast we should go. We want to make decisions about the pace and the timing. In the past, we were fully consulted. A lot of the people who heard about this Senate inquiry back at home knew nothing about it. The story and the changes did not get out to the people.

We have been through a shock like this before when we went through the land rights case. This is the second time around. For Aboriginal people in general, it is a big shock and it is now time for us to determine how long that shock is going to last. Will it last a short while? I think it will probably last some time. Aboriginal people feel very strongly that these sorts of

things should not happen so quickly. We urge strongly against that happening. When the Reeves report came out we did not like it. But I think at that point in time we were consulted and we had plenty of time to work around the Reeves report, and we became a part of that decision-making process.

We have not actually been told about what is going to be changed within the act and the proposed changes that are on the table at the moment. We believe that problems can be worked out in consultation with traditional owners under the existing legislation. I think there are plenty of areas that we need to look into and tap into. Rather than making a whole lot of changes, we can work within the existing land rights act. We can work around it rather than wiping it out and bringing in new legislation.

At the moment, the Aboriginal people are very satisfied with the existing legislation that we have been working with. With any new changes that might take place, it is going to take time for Aboriginal people to absorb everything and to be able to satisfy the changes. I do not know how long it will take us to do that. This is where I think the Australian government and the Northern Territory government, including NLC, have to work very closely with us to make those changes possible. Aboriginal people on the ground are very much aware of what is happening. We have been haunted by and bombarded with so much pressure from within and from outside our communities. The changes that we are expected to make are a big ask for Aboriginal communities.

We are concerned about the proposed changes to the land councils. I think we should maintain the current priority given to the rights of traditional landowners, and it should be in place at all times if any negotiations are going to be made. We believe that small land councils will have less power and fewer resources to fight for the interests of traditional owners. Setting up many land councils would cause much conflict and division. We are very concerned that the proposed changes will make our land councils weaker and the minister—whoever that might be—stronger, so the power will change. At the same time, if that is going to be the case, then the power of the traditional people will gradually weaken. We want our land council which operates from day to day here in the Northern Territory to be more accountable and more responsive to land-holders. We want to lead these changes and make sure that they know that we want to be a part of the changes, if there is any need for changes to the act.

We are very worried about the town lease agreements proposal, as it would mean giving up control of what happens on our land and who lives on it—those sorts of powers. That is going to be a problem for Aboriginal people. We are concerned that these arrangements may be a threat to our current system of local representation and governance. Our present community councils and associations would be under threat because of that. We are afraid that we may become a minority in our own communities, with development being taken over by outside people, and we are seeing those sorts of things happening day after day. This is where a lot of our criticism and complaints come from; there are so many people hanging around doing nothing while other people do the business in our towns. That is a problem in itself. We believe home ownership and businesses can be developed under the existing legislation—it should happen with a proper close network and be properly maintained and ordered—if land

councils, government and business make a commitment to work together. We would welcome such partnerships.

Regarding the proposed changes to the mining provisions, we are concerned that traditional owners must receive the earliest possible notice of applications for exploration. I think traditional owners should be informed right from the start that something is about to happen. We are afraid that changes to the moratorium provisions may result in traditional owners being placed under constant pressure to recommence negotiations.

This five-year moratorium is in place now, and these amendments will mean that anybody can make changes in those five years. We are afraid of manipulation. There are other people out there just waiting for the time that they can sweet-talk Aboriginal people and tell them all sorts of lies to get them to agree—‘Can we shorten the time?’ ‘Can we negotiate?’ Those sorts of things can develop or become habit.

All in all, this goes back to my submission, which is all I have done because of the time limit, as I have already pointed out. We believe the changes are happening too fast and without our people understanding the consequences. Many people have said that there are strong cultural ties there. A lot of Aboriginal people in our community do not even speak English well enough to explain their views to white people. A language barrier is there all the time. Whatever negotiations we come to, there is always going to be a language barrier. With this language barrier between us, this agreement is going to develop further and further away from us, because it is only through language that you can come to talk business and make deals with other people. If you do not understand each other because you speak different languages altogether, there is nothing that one can do.

That division will be there all the time with us, because we do not see that one day we are going to be like you. We do not see ourselves like that. We will be like an Aboriginal person, die like an Aboriginal person and be buried like an Aboriginal person. We will not change. You will be there as white people, with your own culture and your own rituals, and you are going to go down to the ground like your parents and relatives before you. There is a big difference. This time and space that we have in front of us now is the area we have to work in—how we can get closer to each other without somebody putting pressure on us and saying, ‘Look, this is the best way.’ There is no best way that you can come to an agreement that accepts both of your points of view.

**CHAIR**—We might proceed to questions. If you wish you can give us your written statement and we will attach it to your submission. You have commented on the changes that affect land councils. You see that the proposals in the legislation are to give the minister more power over the land councils and, in some cases, to override the land councils with respect to things like delegations and creating new councils and so on. How do you think that traditional owners and Indigenous people generally in the Northern Territory feel about the land councils? If you asked the average person in a community around the NT what they thought of their own land council, what do you think they would say?

**Mr Wunungmurra**—Which land councils are you referring to?

**CHAIR**—I was really talking generally about them, but for argument sake let's talk about the Northern Land Council. What would people say about that if they were asked? Would they say, 'Doing a great job; we're very happy with it,' or, 'I don't like what they're doing here'?

**Mr Wunungmurra**—I think most of them would be saying, 'I don't know' and those sorts of answers. That is probably what the general population would be saying. There has been a little bit of a misunderstanding right from the beginning until now. We are getting more and more people not happy with the land councils and I would not really like to put my finger on where they are coming from or what reasons they have. One can only guess, and they have their own reasons as to why, but I am hearing those sorts of stories coming in.

**CHAIR**—I wonder whether the minister is looking for more capacity to intervene in what the land councils do, because perhaps he senses that many Aboriginal people have reservations about the way that they work. I am just speculating—I do not really know—but is that possible, do you think?

**Mr Wunungmurra**—Did you say the minister would be intervening?

**CHAIR**—Yes. The minister under this legislation would have more power to step in and override the decisions that the land councils might make. For example, he can require them to make a delegation of some of their powers to negotiate leases and things like that. He can actually make them do those things. He does not have that power at the moment, as I understand it.

**Mr Wunungmurra**—I personally would suggest that, if the minister did have that sort of power, I think the way the NLC works you would need some sort of internal structure within the organisation before the power is delegated to the minister by the organisation like the Northern Land Council. First I would suggest that there needs to be restructuring done within the organisation itself.

**CHAIR**—Within the NLC?

**Mr Wunungmurra**—Yes.

**CHAIR**—And who should do that? Should that be done by this legislation or should it be done by the NLC itself?

**Mr Wunungmurra**—I think the NLC can do that one in line with the minister for Aboriginal affairs.

**Senator CHRIS EVANS**—One of the key issues here is this question of 99-year leases and handing over your rights to control what happens in the township or the community for 99 years. What sorts of things do you think you would want to control if those leases came into being? Currently under the proposal, for 99 years you say that the area of the community is run by this new entity controlled by, say, the Northern Territory government. What sorts of problems do you see with that sort of arrangement? What is your objection to that? Why would the traditional owners want to have a say over what shop opened or who bought a house? What problem would it cause you if Coles came to town and provided cheaper or better service than the community store did? What is at the heart of your objection there?

**Mr Wunungmurra**—I will go back to the experience that we had negotiating the Wadey issue that we had about this gas coming into the Northern Territory. All the time there were

talks about gas coming in and why it was important to have gas in the Northern Territory, nearly everybody said yes. Nearly all of the Aboriginal people in the Northern Territory said: 'Yes, it would be good. It would be cheaper, so everybody would benefit from it.' Also, we knew then that it was providing job opportunities for Aboriginal people. In general, I think Aboriginal people would go along with those sorts of arrangements. Your question is in relation to a 99-year lease—am I right?

**Senator CHRIS EVANS**—Yes. The argument has been that, in agreeing to a 99-year lease, the traditional owners lose control about what happens in the township. I am just trying to understand what sort of thing you would object to that might happen.

**Mr Wunungmurra**—I personally would think twice about that before I would say yes straightaway, just like that, because that 99-year lease, as somebody was saying earlier on, would take three to four generations. By then we will not have powers over it to be able to say what goes on, who comes in and so forth. It is going to be somebody living on that piece of land that is going to do most of the thinking and talking. The Aboriginal people who have leased the land to those people will not have a say at all except maybe to negotiate if there are going to be any businesses built or done within the lease area. As far as a 99-year lease is concerned, it is a big thing for me to say yes or no. There are a lot of question marks in my mind about whether Aboriginal people in general would go along with that idea or be opposed to it.

**Senator BARTLETT**—I have just one question, given the time. The simple summary given in public debate about why some of these changes are necessary is that it will help Aboriginal people become more prosperous if they can own their own homes. There is a lot more to it than that, but that is one of the key debating points that have been used down in Canberra. Is there a desire amongst people in your communities to own their homes? Does the existing law get in the way of that in some way?

**Mr Wunungmurra**—It would be good to be able to have houses for Aboriginal people to live in. I think many Aboriginal people at this point in time are finding it very hard as to how this would come about, because of the changes that are taking place and because of the requirement that is going to be put in place. It is going to be very hard for any Aboriginal people in the Northern Territory to be able to say yes or no to you straightaway. As I pointed out to you earlier on, we have got a lot of differences in how we communicate to each other, and we have got to make up our minds about whether we have been saying the same thing on the same level or whether we have misunderstood each other or lost track of each other. That is another area that needs understanding, needs to be followed up. As far as your question goes, I think it would be hard, because if we are talking about house accommodation it is going to take time for Aboriginal people and it is going to cost money—it can cost so many things—and people are not used to, not capable of, or cannot even cope with it.

**Senator CROSSIN**—Can I ask you about the logistics. How much does it cost to build a house out in north-east Arnhem? Would you have an idea of that?

**Mr Wunungmurra**—A Yolngu house or—

**Senator CROSSIN**—A house that you might want to buy.

**Mr Wunungmurra**—I would probably not think of buying a house, but it would cost around \$400,000 to \$500,000.

**Senator CROSSIN**—Most people of course out in Aboriginal communities would be on CDEP or, at best, at places like Yirrkala they would perhaps be employed by YBE.

**Mr Wunungmurra**—No. Money that is coming for building Aboriginal houses at Yirrkala is coming from government funding.

**Senator CROSSIN**—How much money would people earn? What is their income each fortnight?

**Mr Wunungmurra**—As far as CDEP goes, it is about \$300 to \$400 a fortnight.

**Senator CROSSIN**—Because of the lack of housing, what would be the average number of people living in a house out there?

**Mr Wunungmurra**—We would be looking at around 10 or 12 people living in a three- or four-bedroom house.

**Senator CROSSIN**—I suppose I am trying to build up a picture here. It is going to cost \$400,000 to build a house. There is currently such a lack of housing that you really do not have one family per house. People are only earning \$400 a fortnight. What is the real likelihood of Indigenous people actually buying a house in this situation? I noticed in your submission that you are suggesting that it be trialled in some communities. Is it for those sorts of reasons that you think there should be a trial of this before the legislation massively changes what could happen in the Northern Territory right across the board? Should we suggest that it be trialled rather than be available to all communities that would want it?

**Mr Wunungmurra**—That building houses be trialled?

**Senator CROSSIN**—No—that the 99-year leases be trialled, given that both the Northern Territory and the federal governments tell us that 99-year leases are so people can buy their own homes. But, if a home is going to cost \$400,000, 12 people live in each house and people are only earning an average of \$400 a fortnight, there are major problems to get over before this scheme becomes successful or even gets off the ground. You have suggested that there should be a trial. Are they some of the reasons why you think it should be trialled rather than just allowed to happen right across the board?

**Mr Wunungmurra**—I think that would be one option—to give it a trial and see what happens.

**Senator CROSSIN**—But we are not hearing any evidence today from any Indigenous person or any land council that is suggesting that this committee should put in its report that the 99-year lease proposal should go ahead.

**Mr Wunungmurra**—I personally would not, as a Laynhapuy person, suggest that you go ahead.

**Senator CROSSIN**—Okay.



**CHAIR**—Thank you very much for your evidence today and for the submission which you have given to us. It has been very useful.

**Proceedings suspended from 1.34 pm to 2.08 pm**

**PARMETER, Mr Nick, Policy Lawyer, Law Council Secretariat, Law Council of Australia**

**WEBB, Ms Raelene, QC, Member, Advisory Committee on Indigenous Legal Issues, Law Council of Australia**

*Evidence from Mr Parmeter was taken via teleconference—*

**CHAIR**—Welcome. I understand that you have been provided with information on parliamentary privilege and the protection of witnesses and evidence. Although we generally hear evidence in public, if you wish to give evidence in camera, please indicate your desire to do so to the committee. We have a submission from the Law Council of Australia. We thank you for that. I apologise for the limited time we have today, but we have a constraint regarding the amount of time available for this hearing. I now invite you to make an opening statement.

**Ms Webb**—I will summarise the Law Council of Australia's position. As is made plain by the second reading speech, the proposed amendments to the Aboriginal Land Rights (Northern Territory) Act are intended to deliver better economic outcomes and to facilitate the productive use of traditional Aboriginal land. That is land which has been granted in freehold title under the land rights act to be held by Aboriginal land trusts for the benefit of Aboriginals who are entitled by Aboriginal tradition to the use or occupation of the land. Suffice to say that the underlying premise of the tenure provisions in the land rights act at present is a recognition of the communal nature of the traditional relationship that Aboriginal people have with the land. An important part of the recognition of this communal aspect of ownership is the requirement under the act that the land trust consults with and obtains the informed consent of traditional Aboriginal owners and other Aboriginals interested in the land in relation to any matter in connection with the land. Thus, the control over what happens on Aboriginal land remains a community affair under the present act.

One of the reforms to the land rights act is to provide for a new tenure system for townships on Aboriginal lands that will allow for individuals to have property rights, because, to quote the minister in his second reading speech:

It is individual property rights that drive economic development.

But concomitant with a changed tenure system which contemplates individual ownership of land is a breakdown of community based decision-making processes and a significant reduction in the control that Aboriginal people will have in respect of their land. A simple example of this in the proposed amendments is the qualification on the requirement for consultation and consent, so that a failure to consult and obtain consent from traditional Aboriginal owners will not invalidate a grant, absent of fraud on behalf of the grantee. That is in proposed section 19A(3).

Once a 99-year headlease is granted, future development of areas subject to the headlease will be under the control of the statutory entity and not the members of the community. Whilst it may be argued by proponents for this aspect of the bill that entering into a headlease agreement is voluntary, the Law Council shares the concerns of the Central Land Council and others that unacceptable pressure to enter into agreements for headleases may arise—for

example, by making provision of government services contingent upon such agreements. A specific example of this type of linking relating to Galiwinku is referred to in the submissions from the traditional owners of the homelands in north-east Arnhem Land. The submission of the traditional owners also highlights a primary concern of the Law Council as to the lack of a proper process of consultation with Indigenous communities in respect of the amendments. As the traditional owners point out, it is not for governments and others to make assumptions about the economic, material and lifestyle aspirations of Aboriginal people.

In a 1972 essay, 'Fictions, Nettles and Freedoms' published in *White man got no dreaming*, Professor Stanner considered that a statement of Commonwealth policy made on 26 January 1972 by then Prime Minister Billy McMahon was 'wise and far-seeing and in many ways courageous'. Professor Stanner referred to the statement as the doctrine of four Aboriginal freedoms. By this doctrine, Aboriginal people are entitled to decide for themselves, or at least try to decide, four things which were not as open to them in the past. First, they may decide for themselves to what degree they will identify with one Australian society. Second, they may decide for themselves at what rate they will so identify. Third, they have the right to preserve their own culture. And, fourth, they have the right to develop their own culture.

Where proposed amendments such as those we are here concerned with have the potential to profoundly impact on traditional social organisation and activities and indeed on fundamental aspects of Indigenous culture, the Law Council considers that it is essential that such changes must be positively sought by Aboriginal people, that Aboriginal people make the decisions about if, when and how economic development can be best achieved on Aboriginal land and that Aboriginal people decide for themselves whether the days of the collective or communal relationships with land are over, as reported in the second reading speech. That is a matter for Aboriginal people, not the minister, to assess. Cultures may adapt to accommodate change. That is undeniable. But a change in fundamental aspects of traditional culture—that is, from communal relationships with land to a tenure system of individual ownership—should be driven by Indigenous communities themselves and derive from their aspirations for economic and other development, not the aspirations of others.

The doctrine of the four Aboriginal freedoms is as relevant now as it was in 1972, so the Law Council urges the Commonwealth government through this committee to allow Indigenous communities to decide for themselves whether they aspire to the reforms now proposed and, if they do, to have input into the way such reforms may be achieved without having the potential negative effects on the culture of the Indigenous communities which have already been identified for this committee in some of the written submissions that are before it.

**CHAIR**—Mr Parmeter, do you wish to make a statement as well at this point?

**Mr Parmeter**—No, I will not make any further statements.

**CHAIR**—The submission that the council has made to the committee is fairly comprehensive. There is not a lot that I personally want to ask about it, but can I come back to this question about the leasing arrangements for town land. As I understand what has been proposed by the Commonwealth, it is putting forward an arrangement which, as it points out, is a voluntary arrangement. It is not compulsory for individuals to enter into it. We will come

back to the question of what other coercion might be employed, but let us assume for the moment that it is a voluntary arrangement. It is an arrangement which relies on the traditional owners being able to influence the nature of the arrangements. They do not hold the headlease under these arrangements, but they have an opportunity to contribute to the process whereby these arrangements are entered into for individual communities. Funding is provided through the ABA, and it is argued that that is an appropriate kind of funding arrangement, given that that body is set up, among other things, to fund the development of Aboriginal communities.

Although there are a lot of Aboriginal people who, for reasons we have heard today, would not be in a position to take advantage of these arrangements if they were on offer, the argument goes that some Aboriginal people would be in that position, that this is an opportunity to allow Aboriginal people to aspire to a goal of home ownership—which would break a cycle that people would point to in Aboriginal communities for homes to not last very long, to be subject to a lot of vandalism and deterioration very quickly—and that introducing the concept of home ownership or ownership of businesses in that context under this framework would provide a new paradigm that is not presently there in those communities. Can I have your reaction to the argument for that model?

**Ms Webb**—Yes. Firstly, I will deal with the choice aspect of it. It is one thing to say that there is an option to enter into a 99-year headlease, but the kinds of pressures that might be placed on traditional Aboriginal owners may not just be from governments or from those providing services or even from developers. There may indeed, in some of the communities in the Northern Territory at least, be pressure placed on traditional owners of areas from Aboriginal people who are not themselves traditional owners of that land. From my understanding, that has the potential to ignite some very difficult problems. You may end up with the traditional owners losing that decision-making process. They may be consulted, but the other people who are interested may have more say. So the option to enter into a headlease may be exercised not because of the desire of the traditional Aboriginal owners who have held that land under communal title for many years but because of other forces. While one might say it is an option, once the option is there I think the potential for the traditional owners to lose that control is certainly present.

To go back to the fundamental point, this is why we say that it is for the traditional Aboriginal owners, the communities themselves, to tell the government if that is what they want so that they can say: ‘Yes, we are now at a point where we do aspire to these things. We do accept that a change could be accommodated in our culture. This is what we want, but this is how we want it to be done,’ and have some say in the processes of how it would occur.

**CHAIR**—It is my impression—and I could be wrong about this—that there may be some communities in the Northern Territory that have sent the signal that they want to entertain this model and it is for their benefit that such arrangements are being put in place. I do not know whether you know of such communities or whether that is a matter that we may not be able to know about, given our limited state of knowledge.

**Ms Webb**—I am not aware of such communities, except from what I have read and heard about communities that have indicated that they would enter into these leasing agreements. But, from what I have heard and read, most of those agreements would be entered into in return for the provision of some services or funding. One of our concerns is that people are

not simply saying, 'We're going to enter into a headlease agreement and then we will see what happens with that.' But, from my own experience, I do not know of any communities out there that are ready to go into it. It could well be the case that some communities will be ready and others will not, but I would see it being assessed on a case by case basis.

**CHAIR**—Does the Law Council have a position on what positive direction legislation of this kind should take? I appreciate that, as has been put earlier today, we are coming to the end of the period under which the land rights act provided for the means for Aboriginal people to acquire title over the land that they occupy. It is now necessary to convert that potential into the reality of economic development for Aboriginal people. What positive steps do we need to take to make that happen? What steps are missing from this legislation to make that occur?

**Ms Webb**—I am not convinced—and I do not think the Law Council is convinced either—that there is anything necessarily missing from the legislation as it presently stands. It is apparent that commercial agreements can be entered into and that there are other ways of promoting economic development on Aboriginal land. Joint ventures are one way. We have had the example of the railway. Of course the difficulty is the availability of funding to do this. Maybe that is something that could be better addressed by other provisions, not necessarily by amending the land rights act to provide for what is already able to be done under section 19 but perhaps by the provision of other financial imperatives. Perhaps the person who could best talk to that would be Professor Jon Altman, who is an economist; I am not.

**CHAIR**—We will hear from him next. Critics would say, 'If those provisions already exist, if there is already the capacity for economic development under the present framework of the land rights act, why hasn't it happened already?' There clearly is not in many places.

**Ms Webb**—There could be a number of reasons for that. It might be that the Aboriginal people in particular communities are not ready for it yet and are not looking for it. It could be that there is no demand for that kind of development—that in fact the remoteness and other respects of it make it difficult to obtain the kinds of resources that are needed for it. We simply do not know, but it may be the case that the amendments will not necessarily change that to a large degree.

**Senator MOORE**—Ms Webb, your submission states your arguments very clearly in terms of the view from the council. You spend considerable time on the issue of proper consultation.

**Ms Webb**—Yes.

**Senator MOORE**—That seems to be of major concern to the council.

**Ms Webb**—Yes.

**Senator MOORE**—Have you given any thought to what would be an appropriate consultative model because of the difficulties of the particular client group, given how far-flung the communities are? We have heard considerable evidence about language issues and also genuine understanding. It is about the balance between paternalism—telling people what is good for them—and giving people respect and acknowledging that they do understand what

is going on. Have you given any consideration to what would be an appropriate consultation model?

**Ms Webb**—It would be better to ask the communities themselves how they would want to be consulted. But I suggest that at the very least it would require visits to communities themselves, with explanation being given—and interpreters being available, if necessary—as to what is being proposed, what the impacts of that might be and what the terminology is. There are different meanings when you ask: ‘Do you want to own a house?’ This may mean that you can put your name on a list and a house will become available or that you have a financial commitment and you will be paying money and borrowing money. These kinds of differences would need to be explained. At the very least, I believe it would involve quite rigorous consultation with the communities themselves and it would not be a quick process.

**Senator MOORE**—There is also the issue of the difference between consultation and marketing.

**Ms Webb**—Indeed.

**Senator MOORE**—That is quite a different exercise.

**Ms Webb**—Yes.

**Senator MOORE**—I am going to be very rude and ask one more question. It has been suggested by some people that it would be useful to have a trial—that, if this is going to be a major roll-out of significant change, perhaps one mechanism to see how it goes would be to have a trial. There is a limit on how you can effectively assess a 99-year lease on a trial basis, but, nonetheless, has the council given any consideration to whether there would be value in having that kind of clear understanding, as opposed to the monumental change of legislation in one go?

**Ms Webb**—I think the difficulty in answering that is that each community may well be at a different stage of development. So you may have a trial with one community or one community may indicate that they are prepared to give this a go, but you may not be able to apply the results there directly to another community. They all vary in their composition; they all vary in where they are at in their aspirations.

**Senator MOORE**—Thank you.

**Senator CROSSIN**—Ms Webb, you make a comment in your submission that no-one has raised with us, and that is the conflict with commercial investors in a township with native title rights. Could you explain where you believe that might occur?

**Ms Webb**—Yes. It is the case that native title can exist and has been found to exist on Aboriginal land. An example is in Arnhem Land, at Blue Mud Bay, where there was a recent hearing. Whilst there might be in the Native Title Act provisions which would allow for what we call a future act to occur where native title exists and there are set out in the Native Title Act relationships between them, there is no doubt that if you are going to obtain a lease over native title land—at least this is my interpretation of the Native Title Act, having worked with it for some time—you will also have to deal with the consultation and negotiation processes of the Native Title Act, which are quite rigorous. So that in itself could well be a drawback for development or at least something that people may be considering. It would be a given, I

would have thought, that if you are trying to deal with Aboriginal land you are also dealing with native title. You would at least have to assume that you were.

**Senator CROSSIN**—But people would not see that as an impediment, would they? If I asked that question of the Northern Territory government this afternoon, they are bound to say to me, ‘We will find a way around that,’ or ‘We will work through that.’

**Ms Webb**—They may well say that. The difficulty for some people who are looking at development is that they do not have the time or the resources to put into that and they may look to put their money and resources where they can obtain a return without the native title aspect. The other thing, of course, is that, because it is Aboriginal land under the Native Title Act, native title rights and interests will not be extinguished but will remain. So, at the end of the lease or sublease, they still remain to be dealt with. There are implications there as well for people who are wanting to develop. So it is very much the case that development can occur on native title land—there is no doubt—but it is a longer process and for some developers, given the difficulties there are already with the remoteness of the communities and given I think what some of the other submissions have said about difficulties with finance, that may in itself be another disincentive.

**Senator CROSSIN**—What do you see as some of the major legal rights that traditional owners would need to have if they were going to offer up their land for a 99-year lease?

**Ms Webb**—In essence what is presently in the land rights act is the inalienability of title. Of course, it cannot be compulsorily acquired, at least by the Northern Territory government. So that land is protected for time immemorial. I think this is the underlying concern with the provisions. There does seem to be the potential that, at least for generations, control of that land might well be lost. A 99-year lease could see two or three generations not being able to control the land. Once you have lost that element of control of your land, will you ever get it back, even at the end of the 99-year lease? It is that which causes concern. We say that Aboriginal people in the communities may come to that themselves, but let them come to that when they are ready for it.

**Senator CROSSIN**—Yes. That was the position I put this morning to the land council. If in fact you are a traditional owner and you are going to give your land over to this Northern Territory entity who will make decisions, I assume, in your best interest about who will and will not develop your land, I assume that traditional owners give up any rights for that 99-year period. In fact, it would undermine the status of traditional owners. Is that right?

**Ms Webb**—That is very much the way we see it. It is that giving up of that right. That appears to be the way the act is now contemplated. With the 99-year headlease you may have some consultation and consent, although if you do not it does not matter—the lease will still be valid. But with the sublease there is no requirement for consent. Subleases can be granted to whoever the entity decides that they should be granted to. As I was saying previously, while there might be an intention not to act contrary to the best interests of Aboriginal people, it is a presumption to know what is in their best interests. Those are decisions that are really better left to them in relation to their own land. So there is this potential to give up that control for 99 years. Two or three generations down the track, how is that new generation going to take

that control back when they, their fathers and their grandfathers have not have it? That is a difficulty.

**Senator CROSSIN**—Thank you.

**CHAIR**—Thank you for being here today, physically or remotely, to contribute to our inquiry.



[2.37 pm]

**ALTMAN, Professor Jon Charles, Private capacity**

*Evidence was taken via teleconference—*

**CHAIR**—Welcome, Professor Altman, and thank you for your patience today. Do you have any comments to make on the capacity in which you appear?

**Prof. Altman**—I am the Director of the Centre for Aboriginal Economic Policy Research, but the views I am expressing are my own, as an independent academic.

**CHAIR**—So you are not speaking in this respect for CAEPR?

**Prof. Altman**—I am not.

**CHAIR**—We have your submission, which is No. 3, and we thank you for that. Information has been provided to you on parliamentary privilege and the protection of witnesses and evidence. I think you would also be aware that, if you wish to give evidence in camera, you have that opportunity. If you let us know whether you have any such evidence, we would be happy to consider taking it in camera. Before we ask you questions about your submission, would you like to make an opening statement or presentation to the committee?

**Prof. Altman**—I would like to make a very brief opening statement. I realise that my submission was fairly brief, so I thought I might amplify a few points. The first thing I would like to say is that I have read the 13 submissions that you have received to date, which are on the public record. It seems to me that, of those, 12 seem to have concerns about the proposed amendments to the Aboriginal Land Rights (Northern Territory) Act and one—the submission from the Office of Indigenous Policy Coordination—seems to be in favour of the amendments.

I would like to emphasise that amongst those who are against the proposed amendments are the Northern Territory land councils and the Minerals Council of Australia, who are identified by OIPC as being among the interest groups who should be benefiting from the amendments. I notice that the Northern Territory government—another potential beneficiary from the amendments—have not made a submission as yet, although they are going to give evidence later on this afternoon. The opening question I will ask just hypothetically is: whose interests are being served by these amendments, if a number of the proposed beneficiaries are now in fact providing submissions that there are problems with them?

To follow on, looking very specifically at some of the proposed amendments, a number of the submissions including my own articulate a concern with the proposed changes to the role of the Aboriginals Benefit Account, the ABA. There is concern that the ABA's funds should not be used to substitute for the expenditure of—what I think is undeniable—a rich central government in Australia. One of the planks of current policy is shared responsibility. It seems the tenor of a number of the submissions is in fact that we are not seeing shared responsibility but that we might be seeing a danger of abrogation of responsibility by Australia's federal or central government.

Another point I would like to emphasise is in relation to land councils. There is an enormous quantity of international literature which suggests that best practice for indigenous peoples in representing their interests requires them to have a degree of independence from the state. It seems to me that some of the amendments that are being proposed will actually bring Indigenous organisations intended to represent the interests of traditional owners far more under the umbrella and control of the state than international best practice might suggest is sensible.

In the proposed amendments, and I guess what is at the core of my submission, is a degree of confusion about the nature of the property rights that the Aboriginal land rights act provides to Indigenous interests. I think that confusion is seen in a couple of instances and I must say that many of these issues in relation to property rights and land rights are quite complex. I do not think they are particularly straightforward or simple issues. Nevertheless, in the original statute there has been some confusion about whether payment of moneys in relation to mining or other commercial development on Aboriginal land is in fact intended as compensation, as rent or as a share of profits. Increasingly in these proposed amendments we are seeing a desire to interpret these payments as some form of compensation to people affected by mining. If that is the case, then one can ask why it is that one needs the approval of traditional owners to have a commercial development on Aboriginal land. Part of the answer to that is that these are not just straight compensation payments; they are also rents.

The land rights act has been structured to give traditional owners incentives to participate in mineral development and major resource development projects on their lands. I think there is a real danger that the proposed amendments will dilute that incentive. We also see a fair bit of confusion in the amendments between the aim of encouraging big business in the form of resource development on Aboriginal land. One can debate whether that is desirable or not. There is confusion between that, the big business end of town, which is discussed to some extent by the Minerals Council of Australia, and the smaller business issue of whether these amendments will encourage private housing and private businesses on Aboriginal land, particularly in townships. The latter set of issues, which really seem to me to be most heavily criticised, are to do with the nature of establishing an NT or Commonwealth entity that will hold headleases to townships. There is a view that somehow this subleasing arrangement will encourage individual home ownership and the establishment of independent small businesses on Aboriginal land. I think there are some really important issues there.

I want to emphasise that the Aboriginal Land Rights (Northern Territory) Act is complex legislation and there are some very complex issues that need to be debated. It is a pity that in these proposed amendments we have only seen a selective engagement with previous research and evidence. I drew attention in my submission to a monograph, 'Land Rights at Risk? Evaluations of the Reeves Report'. That has not been mentioned at all by government as it is looking to amend this law. I would like to submit copies of that monograph to the Senate community affairs committee as an exhibit. I will make those available as soon as possible to all members of the committee. The monograph and the House of Representatives Standing Committee on Aboriginal Affairs report *Unlocking the Future* provide critical engagement with some of the issues being debated at the moment, but they have not been given a fair coverage in the public debate.

My final point is that there is clearly a need to slow down, to have some considered debate about these proposed amendments, especially in the Northern Territory. Many of the 13 submissions you have received—that is not very many submissions, but the time frame has been quite tight—come from outside the Northern Territory. We are not really hearing much from the Northern Territory interests. It concerns me that this represents almost a form of neo-colonialism, and not just in relation to Indigenous people of the Northern Territory, but also in relation to the Northern Territory itself and federal-state financial and other relations. I make those few points to supplement my written submission to your committee.

**CHAIR**—Thank you for those comments and for the submission. I will now invite senators to ask you some questions. I will start with a couple of questions as chair. I note your comment at the end about neo-colonialism. It is certainly a very strong comment. We have just now received a copy of a submission from the Northern Territory government. It is only a brief one so it has not been hard to flick through. Broadly speaking, they seem to endorse the directions which the legislation takes. There are some areas in which they don't agree, but they seem broadly, on my brief reading, to endorse the direction of the Commonwealth legislation. What is your understanding of the incentive available to the Northern Territory government in these circumstances to support what you would call an act of neo-colonialism?

**Prof. Altman**—It surprises me that the Northern Territory government would support the amendments, except insofar as there are clearly some benefits in the packaging to the Northern Territory government in terms of meeting its liabilities, its appropriate expenditure, on Northern Territory citizens residing in Aboriginal townships. Clearly there is some incentive for the Northern Territory government to concur with the package because there are proposals there for the formation of a Northern Territory entity and for the ABA to pay traditional owners for headleases out of money—that is ultimately Commonwealth money—that is generated on Aboriginal land. So there is a financial incentive there for the Northern Territory government. But in terms of other issues in the package—for instance, whether you will see more exploration and mining on Aboriginal land following these amendments—it is not in the interests of the Northern Territory government.

I am not referring so much to the amendments at part IV; I am referring to the diluted incentives for traditional owners to consent to exploration and mining on Aboriginal land, because many of the new institutional arrangements will in fact mean fewer discretionary resources going to the traditional owners and, like other landowners in Australia, if they get less payment for mining on their land, they face less incentive to consent to that activity.

**CHAIR**—You obviously have an expertise in issues of Aboriginal economic policy, so I think it is fair to direct a question to you about why it would be that we could not translate into Aboriginal Australia the incentive to invest in housing which we see very much at work for other Australians. That impulse to own and invest in a house is a very powerful impulse for Australians generally, and they spend huge amounts of money each year satisfying that impulse. Accepting, of course, that average disposable incomes amongst Indigenous Australians are much lower than in other communities in Australia, particularly in traditional communities, there are nonetheless some people who would be in a position to take advantage of arrangements for individual ownership or ownership of the lease of their property. Why

would that incentive not work in a positive way in Indigenous communities, were it to be facilitated?

**Prof. Altman**—I think that you, in part, own answer your question. In some research that the Centre for Aboriginal Economic Policy Research did last year for Oxfam highlighted that a big part of the answer is to do with poverty and the sorts of repayments that one would need to make to meet the high cost of constructing houses in remote Aboriginal communities, which is beyond the income level of the vast majority of indigenous people who live in remote townships. There are obviously other issues here. One of the issues is also to do with the nature of social relations in Indigenous communities. We do have group ownership of land; sometimes it is referred to as communal ownership of land, but I think that ‘group ownership’ is a better term because the land is owned by corporate groups. Therefore you do have some contestability of who in fact has the right to occupy, own or inherit houses.

I also think that, for those individuals who can afford to buy a house, there is nothing in the current statute that precludes them getting a sublease under section 19 which can be for 99 years. It allows them to pay for their own house on their own leased block, very much as occurs in Canberra, where you and I live. I think the issue then is whether there is in fact a robust real estate market in Indigenous communities. The reality is that there is not. One may get a lease, put a house on that lease and pay for it. If you had a significant win at the casino or you had a particularly well-paid job, there would be nothing to stop you paying for a house without having a mortgage. Then you would own that house outright. You do have examples of that form of land ownership on Aboriginal land in places like Kakadu National Park.

**CHAIR**—On that last point: it has been put to us in the government submission that, although the provisions do exist for people to own individual leases, the provisions are extraordinarily complicated and are akin to a developer seeking a right to develop a piece of land in those circumstances for something more elaborate than a house. Is that not the way you see it? Do you not think that the provisions are in fact an impediment to individual ownership at present?

**Prof. Altman**—There is clearly an acute shortage of community housing in Aboriginal townships and there is an almost total absence of public housing, and I think that traditional owners of townships sites are well aware of the problem. If they had approaches from individual Aboriginal people, whether they were residents of townships or other traditional owners who sought a lease and said, ‘The reason we want a lease is to privately pay to construct a house on that lease,’ I think they would get approval from traditional owners quite quickly. Ultimately, in most townships traditional owners do not actually have a huge amount of authority in relation to what happens to houses—or, for that matter, to other forms of infrastructure. These are generally run by the local councils, so I think that you would find that, just as permission is given for local councils or other Aboriginal organisations to construct what ends up being community housing on the land of traditional owners, they would be willing to provide opportunities for other Aboriginal people to privately pay to construct housing on township sites. I do not see any impediment under the current land rights legislation.

**Senator CROSSIN**—I am wondering if you could tell us a little bit more about the Oxfam report. Oxfam are not putting in a submission to this inquiry and, given the constraints of our

time frame, we have been unable to meet as a committee to look at a proposal that I was going to put forward about getting Access Economics to do some economic modelling on the 99-year leases, so the Oxfam study is about all we have. Can you perhaps give us a bit of a snapshot of the conclusions that that study came to?

**Prof. Altman**—It goes back to the chair's opening question. The Oxfam report did a number of things, and I have to say that some of the recommendations that we made in that report about reducing ministerial powers over commercial activity on the Aboriginal land have in fact been included in amendments. So at least two of the recommendations there are reflected in amendments. One of the key issues that we really want to look at is the one we have just discussed, which is: is individuation of title in townships going to be the major creator of a real estate market in remote Aboriginal townships? Very briefly, the conclusion that we came to was that there are far more important higher level structural issues that need to be addressed before we can worry about individuation of title.

After going to banks and looking at some of the rates of mortgage repayments that people would have to make under current conditions, with historically low home loan interest rates, the main finding we reached was that, looking at the incomes of Aboriginal people in remote Australia, bearing in mind the limited potential for engagement with the market economy in many of these places, the lack of commercial opportunity and the lack of full-time employment, there are going to be very few people in these communities for whom private housing—individual ownership of housing—was going to be a realistic aspiration. It is not saying that people do not articulate an aspiration for individual housing, but a lot of other poor Australians also want to own their own house and many other poor Australians live in public housing with rents that are capped in relation to their income.

So what we did in relation to the housing issue in the Oxfam report was try to highlight that in fact the need was far greater for a more realistic provision of community housing, which is provided on a grants basis by government. We also saw the potential for the provision of more public housing by governments and we realised that to deliver public housing in Aboriginal communities might in fact require forms of leasing arrangements that would allow the Northern Territory government, or indeed the Commonwealth government, to be the holder on a long-term lease of part of a township. That does not necessarily mean that the whole township needs to come under the authority that provides the public housing. In fact, we were concerned—again looking at international precedent—that many of the public utilities, schools, police stations and so on were on Aboriginal land and did not result in payments to the landowners, which is markedly different from what one sees in other settler majority societies like New Zealand, Canada or the United States.

**Senator CROSSIN**—I also want to ask you about the 99-year lease. Time and time again the federal government purports that it will be purely voluntary but in the two public situations or examples we have currently seen in the Territory at Tiwi islands and Elcho Island—and this morning we hear of a possible situation in Tennant Creek—it is anything but voluntary. In fact, Indigenous people are being told that, in order to get basic infrastructure and services such as a school on the Tiwi islands or houses at Elcho Island, they must agree to this. It has been put to us this morning that people think that it will become the norm that infrastructure funding will be critically linked to agreeing to the 99-year leases by the federal

government. Have you or CAEPR looked at any research about the impact that this has on Indigenous people or the coercive nature of the federal government to get Indigenous people to agree to this?

**Prof. Altman**—Not really. All I am aware of—probably like you—is what I read in the media. My response is that, on the one hand, the government is emphasising that the headlease for townships will only be signed on a voluntary basis but, as you say, concern is now being expressed publicly, particularly in relation to Elcho Island or Galiwinku, that people there have been told that a headlease will be required if they are to receive the level of needs based servicing that they should be receiving from the state. It seems to me that, at the very least, if this amendment goes through and the voluntary nature of the relationship ends, certainly there should be a requirement that this is not used to blackmail communities or to present them with a Hobson's choice.

Secondly, I think it is imperative that traditional owners of townships, through land councils or independently, are resourced to seek independent legal advice about whether they should be entering into 99-year leases in relation to a headlease to receive the housing and infrastructure that they need, because the implications of the headlease is that the NT or Commonwealth entity will have control over a wide range of potential developments in townships, not just housing and infrastructure. So I think that those communities would be well served by getting rigorous independent legal advice about what the entailments of these sorts of arrangements might be, not just for the current generation but also for the next four or five generations.

**Senator CROSSIN**—I will just ask you one last question. It has also been very cleverly and clearly pointed out to us this morning by the land councils that the establishment of smaller land councils by way of an Aboriginal association seeking to become a land council and the minister then directing land councils to divest some of their functions to that land council might lead to a situation where they would act in the interests of some Indigenous people who might not necessarily be the traditional owners, and this could potentially lead to a conflict about who is entitled to benefit from royalty payments—leading, of course, to perhaps a lot of litigation or to even less economic benefit for Indigenous people. Have you had a look at that aspect of the proposals, and do you want to make any comment about it?

**Prof. Altman**—The comment I would make is that the two smaller land councils in the Northern Territory, those of the Tiwi islands and Groote Eylandt, are both on islands. I think there is a reason for that, which is that drawing boundaries for smaller regional land councils is extraordinarily difficult given the nature and the intersections, if you like, of Indigenous land interests. So I think it is no accident that the two existing smaller land councils are both on islands. With pressures from regional groups for greater autonomy and smaller land councils, I think we may find not only that we will have organisations with less capacity and hence less expertise in dealing with any disputes over land issues but that we will also have a lot more contestation, particularly along the redrawn boundaries of these land councils, about who is in and who is out in relation to land interests. I would be very concerned about that.

Again, there is plenty in the literature and much discussion in the monograph *Land Rights at Risk?* about what the benefits of larger land councils are. I must say that I was interested to see that the Minerals Council of Australia not only emphasised that it would be useful to have

land councils with both financial and human capacity and land councils that maintained their independence but was basically saying that, if you were going to form smaller land councils, the majority that would be required to form those land councils should not be 55 per cent, as currently proposed, but 67 per cent. I think that, again, in relation to just forming smaller land councils, if you only need a majority of 55 per cent, you run a big risk of conflict within that new jurisdiction because you are going to have up to 45 per cent of the people in that new, smaller land council jurisdiction who did not want that jurisdiction and hence are likely to be disaffected.

**Senator CROSSIN**—That was also a view put to us this morning by the land councils—that the 55 per cent should be increased. I will just finish with the comment that it is an unholy alliance, isn't it, when the land councils have the Minerals Council of Australia supporting their position! Stranger things have happened, I suppose.

**Prof. Altman**—I think what it reflects is that, despite some of the public discourse in this area, the relationships between land councils and major resource development companies, including multinational corporations like Rio Tinto, have actually become increasingly streamlined. Individual mining companies see the benefit of working with large, independent, well-resourced land councils, and the Minerals Council is starting to reflect the views of those individual mining companies.

**Senator BARTLETT**—I will restrict my questions to one area because of the time constraint. I noted that on page 4 of your submission you spoke about what you saw as a potential, and I presume unintended, consequence. You raised a concern that we might see these changes leading to a reduction in mining related activity because of a lost reduction in incentives, basically. I note that the Central Land Council—although I am not sure if they were addressing the same point that you were—also raised a concern that these amendments did not include one that had been recommended by the land councils and the Northern Territory government to remove what is seen as an impediment to more free ranging negotiations between traditional owners and mining companies.

Firstly, given you have read the Central Land Council's submission, can you recall if your concern is related to the same one they have raised in terms of the specific non-inclusion of an amendment to open up that procedure? Secondly, what might need to be done to remove those disincentives to mining or other economic development? It seems that the rhetorical reason for these changes was to remove impediments to economic opportunity on Aboriginal land, yet your submission suggests they may actually be making it harder.

**Prof. Altman**—I am not sure about the correlation between the point I am making and the Central Land Council's point. But I would make the point that previous inquiries, including one by the Industry Commission in 1991, have suggested that the best way to enhance economic development in the form of resource development on Aboriginal land was not to grant Indigenous people de facto property rights reflected by the right of consent provisions in the Aboriginal land rights act but to give them full de jure property rights—in other words, to give them full ownership of the minerals. That would give them the strongest incentive.

As a second best, what the Industry Commission recommended—and I think what the House of Representatives report in 1999 picked up—was that the 30 per cent of statutory

payments that are made to areas affected should be increased to 40 per cent to enhance the incentive for traditional owners to consent to exploration activities. It is also important to note that those percentages only relate to the share of the statutory royalty that is raised on Aboriginal land. Land councils are also empowered in negotiations on behalf of traditional owners to negotiate royalties or other agreement payments. Those do not have to be in cash. For instance, agreement benefits can be in terms of employment or enterprise opportunities. But the key point is that we need to be aware of who those benefits are targeted at.

My main concern with the proposed amendments to the act is that they make the definition of the beneficiaries all that much more fuzzy. In other words, it is not stipulated that those benefits have to flow to traditional owners. It is not even stipulated that those benefits have to flow to long-term residents of areas affected. All it says is that those benefits need to be applied to community benefit, which could include, for instance, Indigenous people who have recently moved into an area, possibly to work at a mine. There is a possibility that the benefits could also need to extend to non-Indigenous people who live in areas affected.

I think the incentives—and in some ways this is where I think the proposed amendments represent a very weak understanding of economics—are just being diluted. So, as you said, Senator Bartlett, instead of potentially seeing more consent to exploration, bearing in mind that not all exploration ends up in a major strike and in a mine, what you may see is fewer exploration approvals because the incentives for traditional owners are being increasingly diluted by these proposals.

**Senator BARTLETT**—If I could perhaps put it in non-economic terms, you are saying that because the changes to the ABA make it less clear where the money will go, there is perhaps more of a likelihood of a feeling amongst the traditional owners of, ‘Why should we bother because it is less clear what’s in it for us?’

**Prof. Altman**—I think it is not so much at the level of the ABA; in this particular case it is at the level of what are often called royalty associations, which are the incorporated bodies in the affected areas that receive these mining moneys—currently, 30 per cent, plus negotiated payments. In fact, what is being proposed in relation to royalty associations is that they are held more accountable to the Registrar of Aboriginal Corporations in Canberra in that the purposes to which they might apply the moneys that they receive from mining on the land that they own will be directed more towards community benefit than private benefit. In other words, what we are saying to Aboriginal people is: ‘If you get a share of mineral or rental compensation on your land, government will tell you how to spend it.’ But if you are a non-Indigenous land-holder—for instance, a pastoralist who has exploration or mining on their pastoral property and gets compensated for surface disturbance—government has no role in directing how those moneys are paid or how they are expended.

**CHAIR**—Professor Altman, I thank you for your evidence here this afternoon and for the submission which you have lodged. Those matters were comprehensively covered and we are grateful for your time and your contribution.

**Prof. Altman**—Thank you for the opportunity, Senator Humphries.



**CHAIR**—You said that you would make the monograph for Oxfam available to the committee. If you can send that to the committee secretariat at the Senate, that would be very useful.

**Prof. Altman**—How many copies would you like?

**CHAIR**—Six copies would be plenty. Thank you.

**Prof. Altman**—I will make sure they are there by the time you are back in Canberra.

**Proceedings suspended from 3.18 am to 3.32 pm**

**ADAMS, Mr Robert (Bob), Principal Adviser, Minerals and Energy, Department of Primary Industries, Fisheries and Mining, Northern Territory**

**BREE, Mr Dennis Patrick, Deputy Chief Executive, Department of Business, Economic and Regional Development, Northern Territory**

**RILEY, Mr Guy Andrew, Policy Officer, Department of Justice, Northern Territory**

**STOREY, Mr Matthew, Senior Solicitor, Aboriginal Land Division, Department of Justice, Northern Territory**

**CHAIR**—Welcome. Do you have any comments to make on the capacity in which you appear?

**Mr Riley**—I am the Department of Justice's representative on the task force that has been set up to consider the amendments.

**CHAIR**—Thank you. I understand you have received information about parliamentary privilege and the protection of witnesses and evidence. We can take evidence in camera if that is considered necessary. If you have a desire to provide information of a confidential nature, please let us know and we can consider that request. The Senate has resolved that, as public servants, you shall not be asked to give opinions on matters of policy. However, this resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about how and when policies were adopted. The committee does have a submission from the Northern Territory government, which it received in the last hour or so. I think we have had a chance to read it or glance through it, at least. Before we ask you questions about your submission and generally about issues that have been raised today which touch on the position of the Northern Territory government, do you wish to make an opening presentation?

**Mr Bree**—Yes, I would. Thanks for the opportunity to appear. What I will say in the opening statement is reflected in the submission largely. The Northern Territory supports all elements of the bill which were recommended in the detailed joint submission to the Commonwealth workability reforms of the Aboriginal Land Rights (Northern Territory) Act 1976, developed and agreed by the Northern Territory government and the Northern, Central, Tiwi and Anindilyakawa Aboriginal land councils and forwarded to the Australian government in July 2003.

The proposals in the joint submission were primarily aimed at improving workability and maintain existing balance of interests under the act. 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 which were submitted to Senator Brough on 5 June 2006.

Australian government changes to the proposed amendments were put to the House of Representatives at the third reading on 19 June 2006 and it appears that a number of our

comments have been adopted. In particular changes made at the third reading may also significantly alleviate the Northern Territory concerns about proposed amendments to part IV mining provisions and related definitions. It would seem that every effort is being made to accommodate the Northern Territory's views in relation to these proposed amendments and in particular amendment to section 45 to ensure that existing granted tenements on Aboriginal freehold land can be renewed without the requirement to further negotiate agreement that is already in place.

I would now like to comment on aspects of the bill that go beyond the joint submission. The amendments to section 67A concerning resolution of outstanding land claims are broadly supported. However we are concerned that in the event that these proposed amendments proceed, they are workable and/or do not result in any unnecessary continued uncertainty or protracted litigation. The proposed section 67A(7) deals with claims which are not assessed. These essentially would be those claims that have been lodged with the commissioner but no further action has been taken by the land councils to progress the claims. It should be made clear that these include claims to land held by the two land corporations, the Conservation Land Corporation and the NT Land Corporation. These latter claims—about 39 in all—although identified in the Aboriginal Land Commissioner's report as incompetent due to a valid title existing, can, however, currently be brought on by the land councils if they show that, for example, the land is unalienated crown land—that is, what the NLC sought to establish in relation to Billengarah.

Still with regard to outstanding land claims and section 67A, we also query the proposed time frame of six months, which may delay matters so that they will take at least 12 months to dispose of. The proposed section 67A(12) to (16) deals with claims to the intertidal zone, to beds and banks of rivers and creeks, and to islands and rivers and creeks. The intention is that claims not contiguous to other claimed land or to existing ALRA land are to be taken to be finally disposed of. Our legal advice is that the term 'contiguous' requires clearer legal definition—that is, to what extent does the land need to be 'touching', 'in contact' or 'adjoining'? For example, 50(2E) in relation to the stock routes requires the stock routes to be contiguous to land to which the application relates along each of its two longer boundaries. We are concerned that, if there is any ambiguity, the proposed amendment will not achieve the desired effect in a timely and workable manner. We therefore query why the claims to be struck out are not simply listed.

Broadly speaking, the Northern Territory also supports the proposal for leasing on Aboriginal land. In this respect it is worth noting that the Tiwi have already agreed to a headlease over Nguuu, and a number of other communities are considering the scheme. It might be useful to outline the NT government's involvement in the development of these proposals and what they mean for the Territory. As you would be aware, nearly 50 per cent of the Territory is Aboriginal freehold managed under Commonwealth legislation—the Aboriginal Land Rights (Northern Territory) Act 1976. It is the Australian government minister who administers this legislation. Nonetheless, the Northern Territory has a vital interest in ensuring the act is workable and facilitates much-needed social and economic development for the people living in those areas.

The land councils also have a vital interest. At the November 2003 governance conference at Jabiru, the two major land council directors gave papers talking about the importance of improving governance arrangements on remote communities. In particular, David Ross's paper called for the development of leases on communities to assist in the resolution of conflict between residents and traditional owners.

The fact is that there is a legacy of very limited leasing of land within Aboriginal townships. Developments within townships have been delayed as a consequence of the cumbersome nature of the current process, which requires each individual lease to be separately negotiated, with the resultant transaction costs and delays. As a result, in many cases the current provisions for leasing under the act have been effectively ignored in favour of essential small-scale developments on communities proceeding expeditiously.

The result is that investors are reluctant to invest in infrastructure and communities. The Australian government is hesitant to invest in vital infrastructure for services such as Centrelink. The remote Indigenous housing sector is the only element of the national housing system which fails to draw on private sector borrowings and relies entirely on government investment. Importantly, traditional owners are missing out on the income they are entitled to from people using their land. This stagnated development is unacceptable in a situation where many Aboriginal communities are becoming towns and with our Aboriginal population set to double over the next 20 years.

In July 2004 the government developed a discussion paper that identified some options for addressing these issues. This paper was sent to all four land councils and proposed a model of voluntary whole-of-township headleases with arrangements for subleases. This was followed up with meetings with all four land councils, where they indicated that they would consider the ideas proposed and respond.

In early 2005 it became obvious that the Australian government was determined to make changes to streamline existing arrangements. The Northern Territory government wrote to the Australian government and the land councils suggesting a scheme that would be voluntary and recognise the right of traditional owners to make decisions over their land. Up to that point the only response we had received was a positive reaction from the Anindilyakwa Land Council.

A key element of the government's proposal was that any new arrangements must be voluntary and made with the informed consent of the traditional owners. We are pleased that the Australian government has accepted this in the amendments. The Northern Territory government has agreed to play a role by establishing an entity to hold headleases and issue subleases provided the Australian government covers all costs involved. Northern Territory government involvement through the NT entity will ensure that the scheme allows for streamlined development of Aboriginal townships consistent with NT laws.

We are therefore somewhat concerned about the proposed amendments which provide for exceptions to the application of the NT planning and building laws and the additional exceptions foreshadowed in the event that the body administering subleases is a Commonwealth entity. For the removal of doubt, it is our view that a provision should be made to make it clear that Northern Territory planning and building laws apply on township

leases. We are concerned further over the potential impact of the proposed amendment which appears to effectively remove the permit system from Aboriginal townships where headleases are negotiated. This may well bog down negotiations with traditional owners as they will seek to incorporate related protections into subsequent subleases.

In conclusion, I would like to highlight the critical interest of the Northern Territory in ensuring that the Aboriginal land rights act is workable and that the land councils are appropriately resourced to carry out the required functions under the act. The submission negotiated over three years ago now was fundamentally concerned with improving the workability of the act and had the support of key stakeholders. Obtaining this support was not always an easy task. However, it was deemed critical if the proposals were to achieve the stated aim of ensuring more effective application of the legislation. We would like to see those aspects of the bill relating to the joint submission passed without further delay and we urge a more considered progression of the additional elements of the bill.

**CHAIR**—I have a question about the structure for dealing with Indigenous issues in the Northern Territory government. The Chief Minister signed the submission to us as Minister for Indigenous Affairs. Is there a department of Indigenous affairs?

**Mr Bree**—No; there is an Office of Indigenous Policy.

**CHAIR**—Is that part of the Chief Minister's department?

**Mr Bree**—Correct.

**CHAIR**—That is not represented here today. Is there any reason for that?

**Mr Bree**—Yes. The reason for that is that the head of that area has retired very recently. I will explain my position. I am about to be transferred from my existing department to be Deputy Secretary of Department of the Chief Minister. Responsibility for this area will come under me.

**CHAIR**—That is fine. Just to summarise what you have said to us today and what is in the submission: I take it that, subject to what seemed to be reasonably marginal concerns about aspects of the legislation, the NT government is supportive of the legislation that has been tabled with the amendments that Minister Brough has foreshadowed to such things, for example, as removing the five per cent cap and so forth.

**Mr Bree**—I think there is a large degree of support for it. The principles are largely supported but we have outlined a number of areas where we have some issues. We have issues with timing.

**CHAIR**—Yes, and I will come to deal with some of those suggestions in a moment. You are not responsible for the consultation process on the legislation and I do not propose to ask you about that, but certainly what has come out to us today from other submissions and witnesses is that there is apparently a fairly low degree of stakeholder satisfaction with the new regime that is proposed. Would that be your assessment, or do you feel that perhaps there are members of Indigenous communities who stand ready to take advantage of some of these changes—for example, the ones affecting leasehold in townships—who have not been heard by the committee or who have not come to the committee's attention?

**Mr Bree**—I am not sure who you have heard, but I can only give you my personal experience in this matter. My understanding is that the Anindilyakwa Land Council is very keen to go ahead with it. In fact they have spoken to me in the last few days on this matter. I understand from public statements and some private discussions that the Tiwi Land Council is pretty keen to try it out, although with quite a number of caveats, as I understand it.

**Senator CROSSIN**—It is a pity neither of those land councils could find the time to appear before us today.

**Mr Bree**—I cannot comment on that. But my understanding about other communities is that they are at a starting point; they have heard about this but, quite rightly, they are taking a fairly cautious and conservative view, and that is: if they do not understand it, the answer is almost certainly going to be no. I think our government's view is that, while we support this in principle, we would prefer to see a positive outcome, and that is why we are recommending a more cautious and measured approach to it—that is, to have discussions that take as long as they take.

**CHAIR**—I will run through some of those issues around proposed section 67A that you raise in your submission. You are saying that you support the process whereby the outstanding claims can be brought to the stage where they are considered to be disposed of, subject to the caveats that you place here. Does the Northern Territory government get involved in any of those claims? And what role does it have, if any, in the advancing and disposal of those claims?

**Mr Bree**—Can I take some advice on this? It is not an area in which I have expertise, Senator.

**CHAIR**—Sure.

**Mr Bree**—Would I be able to ask Matthew Storey to come to the table? If you are going to pursue this line it might help.

**CHAIR**—Certainly. Welcome, Mr Storey.

**Mr Storey**—It has been many years since we last met.

**CHAIR**—It has indeed. You had a lot more hair in those days, might I say.

**Mr Storey**—So did you, Senator.

**Senator CROSSIN**—His is a better colour than yours, Chair!

**CHAIR**—That is true, yes. Obviously the years have treated you better than me.

**Mr Storey**—Life is a lot less stressful in the Northern Territory.

**CHAIR**—That is probably true. I will direct the question to you that I directed to Mr Bree. I am trying to work out what role, if any, the Northern Territory government might play in the bringing or disposal of claims under the land rights act. Does it have a role in terms of dealing with the claimants or is it entirely a hands-off approach?

**Mr Storey**—It is a very significant role. The structure of the act is such that an inquiry under section 50 of the Aboriginal land rights act is an administrative inquiry, not a judicial proceeding. While it might be being slightly loose with the terminology, the Territory is in

essence the first respondent—that is, it is the party that presents material to the commissioner in response to the claim. A commissioner will give notice of his intention to commence an inquiry, and any party who believes they have an interest can present material. But the Territory is always at that and always presenting the material in response to the claim. It would be fair to say that the Territory represents the public interest in a claim.

**CHAIR**—You do not necessarily take a position for or against any particular claim, but you put that public interest perspective in respect of the prosecution of the claim?

**Mr Storey**—It would depend on the specifics of a claim. If, in the Territory's assessment, the claim did not justify a recommendation from the Aboriginal land commissioner, that would be the Territory's submission. However, there have been other instances where the Territory has, for instance, accepted that the finding of traditional ownership is justified but made submissions in relation to detriment.

**CHAIR**—There is a comment in the submission about the time frame. It says:

We also query the proposed time frame of 6 months which may delay matters so that they will take at least 12 months to dispose of.

I am not quite sure what that means. Can one of you explain what that means?

**Mr Storey**—As I understand it, the comment goes to the time that will be required for an Aboriginal land commissioner to determine to dispose of a claim. It is our view that these claims have been waiting for many years now and can be dealt with more expeditiously than currently contemplated under the proposed amendments.

**CHAIR**—It says:

We also query the proposed time frame of 6 months which may delay matters so that they will take at least 12 months to dispose of.

Do you mean that they could be disposed of within six months but that this is going to stretch them out to 12 months?

**Mr Storey**—And there could be a series of interminable adjournments.

**CHAIR**—You mention in that same section of the submission land held by the two land corporations, the Conservation Land Corporation and the NT Land Corporation. If you were not here earlier, you probably would not have heard the comments made by the Northern Land Council about those two corporations. They said quite baldly that they considered them to be devices to defeat the operation of the land rights act. I asked them what the NT government's public position on those corporations was and they said they did not know. Can you tell me? Do you see those corporations as being basically devices to remove land from the ambit of being inalienable crown land and therefore land to which land rights claims cannot be subject?

**Mr Bree**—The simple answer is no.

**Mr Storey**—I might need to refer to Mr Bree for a policy perspective, but the view of the land council has been long put. It has been agitated before many a court and that view has been rejected by the courts. My understanding is that the Northern Territory government considers the land corporations to be a legitimate vehicle for the management of lands.

**CHAIR**—I note that. I also understand you to be saying this. You comment on some of the provisions regarding the way in which the bill would terminate the claims to intertidal zone areas of land and to beds and banks of creeks and rivers. You say you would need to define better what ‘contiguous’ means. Beyond that question, I take it you support what the legislation does with respect to those claims?

**Mr Bree**—We did not think the original legislation envisaged areas that were not effectively liveable land. I think that summarises it.

**Mr Storey**—This is a matter we have long agitated on. Our understanding is that the matters considered within section 50 essentially suggest that the purpose of the legislation is to create land capable of living. 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.

**CHAIR**—That is interesting. Are you saying that the effect of the land rights legislation, as you see it, was basically to provide access to land for people to live on and not so much for people to gain an economic advantage from?

**Mr Storey**—In a broader sense, we certainly did not see the purpose of the legislation to be granting inalienable freehold title to an area of intertidal land that is not contiguous with any other land.

**Senator CROSSIN**—Is that the reason why you accepted the proposition in the land rights act that all of the land recommended for grant or the land claims not yet heard can be wiped out?

**Mr Storey**—In relation to the beds and banks of rivers and intertidal zones, yes. I do not understand it to be the Territory’s position that all claims not yet heard are to be wiped out.

**Senator CROSSIN**—Can I just follow up on that. That is what Commissioner Olney was saying this morning. He has land that has been recommended for grant—so, in other words, he is suggesting it should be granted—and that is waiting with the minister for his signature and presentation to the federal parliament. That land is indicated by the blue lines on the map.

**Mr Storey**—We are talking about the intertidal zone land.

**Senator CROSSIN**—Yes, we are.

**Mr Storey**—Not all land, which was the point I was making.

**Senator CROSSIN**—When I say ‘all land’ I am just talking about the area of land he has identified on the maps he provided to us this morning. Then there are the land claims that have been claimed but not yet heard by Commissioner Olney.

**Mr Storey**—Yes.

**Senator CROSSIN**—Both of those two categories will be wiped out. They will not be able to be recommended and they will not be able to be heard with the passage of this legislation. Can you explain to this committee why the Northern Territory government would take the view that even land that is recommended by Commissioner Olney for grant should not be given the opportunity to be granted?

**Mr Storey**—The Northern Territory had a position that matters such as the fact that intertidal zone land and beds and banks of rivers are obviously not capable of being resided



upon should be included in the comment of the commissioner in making a recommendation to grant land under the Aboriginal land rights act. That proposition was rejected by the High Court in the special leave application, and it indicated that it should in fact be the minister who took that into account. My understanding is that the Australian government has taken up that proposition by dealing with the matter in the legislation. Whether the matter is dealt with in the legislation or by the minister in considering whether or not to make a recommendation to the Governor-General is, I would suggest, a matter for the Australian government. But the general proposition is one that the Territory has supported, yes.

**Senator CROSSIN**—As opposed to land that can be developed economically?

**Mr Storey**—That is not a term used in the act.

**Senator CROSSIN**—No, I know it is not, but you are saying that the Territory government have taken the view that this is not land that can be lived upon, as opposed to land that can be developed economically.

**Mr Storey**—And, for that purpose, our view is that this is not land that was within contemplation of the legislature when the act was first passed. I should add that a significant basis of all the submissions that the Territory has made—which I note was picked up in the NLC submission, so I do not think there is any disagreement about this—is the matter of detriment to the Northern Territory fishing industry. If one looks at the map the land commissioner has provided, the combination of the black, which is the land already granted to low-water mark, and the blue and the red, which is the land claimed or already recommended—and, as I recall, the figure was somewhat over 90 per cent of the Territory coastline—would be held under the Aboriginal land rights act. In the Territory government's view, that would pose a significant detriment to the commercial operations of the Northern Territory fishing industry. I notice this was picked up by the NLC, who frankly confess—and I do not mean anything pejorative by that—that the intent is to use this position to expect a greater return from the Northern Territory fishing industry. This has been a factor in the consideration of the Northern Territory government, as has access for recreational fishers to this land. I understand that the Territory has been quite up front in that view.

**Senator MOORE**—But that form of economic advantage is not favoured by the Northern Territory government. My reading of the Northern Land Council's submission was that they were very clear about their position, that that was what they were hoping to achieve by that claim. That did not actually clarify what the Northern Territory government's position is, but it is clear what it is. It is an interesting discussion that that is a form of economic development but, under this particular heading and with all the other provisos, it is not one that is favoured.

**Mr Storey**—It is probably a question for Mr Bree, but I understand the Territory government's view is not via means of the Aboriginal land rights act. That is not to suggest at all, of course, that the Territory government does not support economic development in Aboriginal communities.

**Mr Bree**—I think the difference in interpretation might be that what would be seen from that is not so much economic development as rent seeking.

**Senator CROSSIN**—Mr Bree, I want to go to something that you said in your opening statement. You talked about the Commonwealth having a reluctance to invest in communities

and you mentioned for example Centrelink offices. My understanding is that Centrelink offices are being constructed in remote communities at a rate of knots—at Maningrida, on Bathurst Island and at Port Keats, and I was out at Harts Range last week and there is one out there—through rural transaction centres. It is not my experience on the ground that the Commonwealth is reluctant to invest in Centrelink offices out there. In fact, there are more Centrelink offices out there than I have seen in my last eight years. I am not sure if you want to use another example of Commonwealth investment, but—

**Mr Bree**—I have some personal experience with the proposed transaction centre at Port Keats, at Wadeye. Although the person I am working with in the Northern Land Council involved in economic development is very keen to get it going, the traditional owners are keen to get it going and we have now been talking about it for a little over 12 months, there has been no real movement. I think it is a good example of what happens even when everybody agrees. The process and transaction costs of getting a section 19 lease are difficult, and that goes to the resources of the land councils. It is not that anybody is trying to stop it.

**Senator CROSSIN**—But there is a rural transaction centre at Port Keats. It does have a Centrelink office in it.

**Mr Bree**—I will not argue that point with you. We are specifically looking at the situation where the Diminin want to build a transaction centre. Centrelink was going to be their base client, as they advised me. We have tried to work through it with them.

**Senator CROSSIN**—Is this in an out-station of Port Keats? I went to the opening of the rural transaction centre at Port Keats only two years ago.

**Mr Bree**—That is in the area with the—

**Senator CROSSIN**—In the main town.

**Mr Bree**—takeaway shop.

**Senator CROSSIN**—Yes, and the butcher shop.

**Mr Bree**—This is another development.

**Senator CROSSIN**—I see. But there is currently one there. The point I am making is that Centrelink offices are out in remote communities now. I do not see a reluctance on the part of the Commonwealth to invest in putting Centrelink offices there.

**Mr Bree**—Sorry; I am talking about Centrelink being the base client for an office block. That is the case in Port Keats that we are trying to work through at the present moment. I am not suggesting they are not providing their services.

**Senator CROSSIN**—I see what you mean. How different is the current proposal in this legislation to what was proposed in the discussion paper that you sent to the land councils in July 2004?

**Mr Bree**—It is a little outside my area of expertise, but, if I can talk in principles, I think we are kind of at the same point—that is, that there be a headlease over a town; that it be managed by an administrative body, which I think is pretty well where this has ended up; and that they be very long-term leases.

**Senator CROSSIN**—You said you only heard back from one of the land councils. Did the Northern Territory government undertake any consultation strategy with traditional owners or communities around the Territory to inform them about this discussion paper or what was in it?

**Mr Bree**—No, we did not. We were working with the land councils at the time and, as we have said here, we had not got past that point.

**Senator CROSSIN**—Can you clearly articulate for me why you believe the current section 19 is inadequate to deal with what you are proposing in terms of supporting the Commonwealth government's land leasing proposal?

**Mr Bree**—Sure. I think it really comes down to transaction costs. To get a lease, legal action and things like surveys, which are expensive, are involved. There is no doubt that, particularly in regard to surveys, for instance, there are great economies of scale if you do a whole town rather than do them block by block. But my experience suggests that it is largely about the time involved. In terms of encouraging business, there is no doubt that, if you say there will be a two-year delay while you get your lease, a lot of people just wander off. It is not conducive to and supportive of economic development. In the end, when you actually get a lease, is there any difference? Not really. I do not think there is any significant difference between a 99-year lease under the current section 19 and a lease under this proposal, but the process itself is significantly different.

**CHAIR**—Are you saying that a two-year delay would be typical?

**Mr Bree**—I have not actually worked with one that has got through to fruition. But a lot of that is because my experience has been in the provision of essential services. Many years ago people took the view that we could do it without any leases, because they were not an asset that one wanted to deal in. It was providing a service and we simply wrote them off as soon as we built them.

**Senator CROSSIN**—Isn't the negotiation of the railway line one that has actually got through?

**Mr Bree**—Yes, that has been a successful one.

**Senator CROSSIN**—And aren't there at least three businesses on Elcho Island that have actually got through?

**Mr Bree**—I am aware of at least one, yes.

**Senator CROSSIN**—So it is possible under the current arrangements to do that?

**Mr Bree**—It is certainly possible. But I would think that—and I am looking at it from the perspective of time—if there were a significant demand for section 19 leases then we would have to put a lot more resources into the land councils.

**Senator CROSSIN**—Let me just go to the nature of the leases. You made a comment that you are satisfied now that the 99-year leases will be voluntary. In fact, the two instances that have been publicly highlighted in recent weeks show quite the contrary. The Tiwi Land Council people in fact will have only been offered \$10 million for their boarding school in return for the 99-year lease. I specifically asked DEST officers in estimates whether the Tiwi

people not agreeing to the 99-year lease meant they would not get the money for the school. The answer to that was yes. We know that Minister Brough has gone to Elcho Island and promised 49 or 50 houses only in return for the 99-year leases.

There was some great nervousness exhibited today among the more than 50 Indigenous people the land councils brought in that in fact this will be anything but voluntary—that Indigenous people will only get access to basic infrastructure and services if they agree to a 99-year lease. So far the evidence shows us that that is going to be the case. What safeguards would you suggest ought to be in the legislation to ensure that that is not the case?

**Mr Bree**—I cannot make a comment on what should be in the legislation except that it should be voluntary. I, as you, have heard exactly the same stories about those two instances. In my and I think the Territory's view this is why more time is required to sell the benefits of the legislation itself rather than to seek to induce people to move into it before they would otherwise be ready to accept the benefits of it.

**Senator CROSSIN**—So you do not agree with the Commonwealth's approach that you must agree to this in order to get that?

**Mr Bree**—We do not. We do not think it is necessary. We think that, given time and discussion, many communities and traditional owners will see the benefits of the lease-sale proposal.

**Senator CROSSIN**—Concerns have been raised with me that traditional owners who decide to give up their townships on the 99-year leases to what will be a Northern Territory entity I suppose—a statutory authority perhaps—

**Mr Bree**—Yes, of some kind.

**Senator CROSSIN**—will then not have any say in who would then be on their land leasing any aspects of the town. Is that correct? Is it correct that once they give it up for 99 years, there will be no inbuilt consultation, no guarantee of the right of traditional owners to say who comes onto their land once they give it up for 99 years?

**Mr Bree**—I have a couple of points. Firstly, it depends on what conditions are written into the headlease.

**Senator CROSSIN**—And that may vary from place to place?

**Mr Bree**—As I understand it, that is the case. One of the issues that I think needs to be discussed with traditional owners is that putting conditions on leases changes their value, but that does not mean you cannot put conditions on leases. I would assume that access by the owner of the lease would be guaranteed in some way. I am assuming that very few people would actually take up or buy a lease if they did not have guaranteed access, but that is a buyer and seller deal.

**Senator CROSSIN**—We are in the situation here where the Senate Legal and Constitutional Committee that I sit on are looking at changes to the Aboriginal Councils and Associations Act. We have handed down an interim report but not a final report, because we are waiting for consequential legislation—the transitional legislation. As I understand it, this legislation also requires the Northern Territory government to produce legislation to set up an entity.

**Mr Bree**—That is correct.

**Senator CROSSIN**—I am assuming that that legislation is in the process of being drafted.

**Mr Bree**—That is correct.

**Senator CROSSIN**—I think it would be unusual for a Senate committee to report and be satisfied about its report without looking at any consequential legislation. Is the Territory government in any position to provide us with how this entity will be established and what will be in the legislation, to show us the draft legislation and to brief this committee on that entity?

**Mr Bree**—We are in the process of developing it, but it is going through the normal government processes at the present moment and it has not reached the stage at which it can be approved by cabinet.

**Senator CROSSIN**—We are in a situation where we have to report by 1 August. We will probably be debating this in the Senate on 8 August and be expected to put through legislation federally that requires consequential legislation that the Senate will not have even seen, so it does cause some problems for us.

**Mr Bree**—I can understand your position.

**Senator CROSSIN**—I will go to two other matters. Oxfam have done some economic analysis of the proposal. The Social Justice Commissioner's submission talks about the World Bank research report that suggests that the World Bank is engaged in projects involving individualising title, and it found that the strategy was not effective. Has the Northern Territory government done any economic assessment—say, through Access Economics—as to what the long-term economic benefits of this would be, when the only two pieces of research I have seen so far, where communal land is broken up into individual leases, shows quite the contrary—that the strategies are not effective where that happens?

**Mr Bree**—No, we have not. I would be interested in that research, of course.

**Senator CROSSIN**—You have not seen the Oxfam report or the CAEPR submission?

**Mr Bree**—No, I have not.

**Senator CROSSIN**—The reference to the World Bank research is in the Social Justice Commissioner's submission. So you have done no economic analysis of the benefits of these 99-year leases for Indigenous communities?

**Mr Bree**—The principle behind this is to give people in communities the option to have private ownership if they wish. It is to provide the same level of access to economic activity that all other Australians have. That is the principle behind it.

**Senator CROSSIN**—But it is not backed up by any economic assessment.

**Mr Bree**—No, but I think one could do a bit of a check and say that communities under communal ownership do not seem to have the same level of wealth that the rest of Australia has, and one of the differences is this.

**Senator CROSSIN**—It was put to us this morning by Mr Wunungmurra from north-east Arnhem Land that in fact Indigenous people do not want that—certainly people in his area do

not want it. In fact, they are always being told, 'You've got to have your 99-year lease because, just like a balanda, you'll be able to own your own house.' He suggested to us this morning that that is the last thing that he actually wants.

**Mr Bree**—And I think we should respect that view. That is why we have insisted on it being voluntary.

**Senator CROSSIN**—I want to raise one other matter that goes to the mining section. We had a submission, I think this morning from Laynhapuy Homelands, that I think goes to a mining provision. I think there was a mining provision that you originally wanted in your joint submission that the Commonwealth has not acceded to—section 44. I just wondered if you wanted to give us a comment about that and about whether or not this committee should recommend that the Commonwealth go back and revisit that. It is on page 4 of the NLC submission, which says:

One amendment not included in the Commonwealth position paper is the removal of restrictions regarding the negotiation of mining agreements. These restrictions are contained in s 44A ...

Is it still your view that you would want section 44A amended?

**Mr Adams**—Let me check section 44A.

**Senator CROSSIN**—If you want to have a look at that—I think Senator Moore has some questions—you can come back to us, if you like.

**Mr Adams**—Yes, it is a technical question that I would have to do some research on.

**Mr Bree**—Can we come back to you on that?

**Senator CROSSIN**—Sure.

**Senator MOORE**—Mr Bree, this is very different legislation for me. It is unlike anything we have in Queensland. I have three core issues that I want to follow up. One was the consultation process, and we may get around to that, because I think it colours everything. One is on the use of ABA moneys, which I know is not the Northern Territory government's decision. In the evidence you gave earlier, I remember you were talking about the expenses. You were talking about the costs involved in the process, and you said that the Northern Territory's response was that you accepted it as long as it was not at the Northern Territory's expense. Is that accurate?

**Mr Bree**—Correct. Yes, our view is that this is the Commonwealth's idea and that, while we agree with it, we would expect them to pay for the costs of the entity plus the surveys.

**Senator MOORE**—So in terms of the consultation between governments—because certainly I know that the Northern Territory has ownership to a certain level but the overall program is a federal government one, but it seems very much, from the perspective of the community, to be a partnership—this is a federal-Territory government partnership approach to the process.

**Mr Bree**—With the caveats that we put on it today, yes, I think you could say that.

**Senator MOORE**—So, within that, the proviso from the Northern Territory government's perspective was that you did not want to have Northern Territory expense but, beyond that, you did not have any involvement or opinion about what form of federal government money

should be used? So the fact that the federal government has determined, from what I can read, that all the expense is going to be ABA money is not something that you were consulted about, had an opinion on or felt that you needed to put some opinion on to the federal government?

**Mr Bree**—No, I think that would be our position. We want it paid for by the federal government. Do we have a view on it coming out of ABA? I am not aware of a view of the government on that particular issue.

**Senator MOORE**—That was my point. So, as long as it is not paid for by the Northern Territory, that is the beginning and the end of your position on that?

**Mr Bree**—Yes, generally.

**Senator MOORE**—I was very interested in your evidence about the terms and the format of the leases being variable, because that has not come up in any of the written submissions that we have had. We have got the bare-bones approach to the process, which is that, should a community decide to take up the 99-year lease option, from that point on their role would cease. The understanding of the witnesses who appeared this morning, plus some of the legal opinion we have had by submission and in evidence, of the way it will work—and we do not know exactly how it is going to work; it is at the proposal stage; but certainly there is a fear among many people who have chosen to give evidence to this inquiry—is that once a community decides to accept a 99-year lease, usually on the basis that they will get something back for that, the length of the lease is so great that it is going to be generations before that relationship is returned to normal.

There is real concern about what will happen from that point. Once the entity, which is a term I am very interested in, takes over the role, the expectation is that from that point the traditional owners will have no role in relation to subleasing and any future activity. That perception has come out consistently in evidence. People are concerned about what could happen. Particularly when you hear various media comments about people having the right to have McDonald's or various forms of entertainment in their area, that is a genuine concern for communities. Is that something you have acknowledged? Have you thought about a process of engaging the community so that that genuine fear is somehow allayed?

**Mr Bree**—In my view, there are two things that will impact on this, as they do in the broader community. The first is the conditions of the lease itself. I am wandering a little outside my area, but I will give you an opinion. Part of the conditions of any headlease will incorporate some basic things—for instance, sacred sites clearly could be protected. Another is use of land. For instance, can it be industrial or is it just residential. Those things can be defined. There are things that one could put in the lease itself, as one can in any normal lease. Secondly—and this goes somewhat to some of the issues we have heard here—there is ongoing involvement in planning issues. I would have thought there should be a mechanism for community aspirations to be reflected—

**Senator MOORE**—And sensitivities.

**Mr Bree**—in the broad use of the land over a period of time, as it is in the broader community. We do that generally through our planning processes.

**Senator MOORE**—Do you accept that that is the key responsibility of the Northern Territory government in this process?

**Mr Bree**—Absolutely.

**Senator MOORE**—Has that been spelt out to the community?

**Mr Bree**—The discussions with the community have hardly started.

**Senator MOORE**—The legislation is going to be debated in early August.

**Mr Bree**—This is the point that we have made in our submission—that we think there needs to be quite a deal of discussion on those issues other than those agreed to jointly three years ago.

**Senator MOORE**—It just seems to me that the Northern Territory government's role as the key partner in implementing this policy is so important in whether it is going to be effective or not that, when a vote on the legislation to impose this on the Northern Territory as law is imminent, there needs to be much more overt concern.

**Mr Bree**—The perspective that we have is that what you are doing with this legislation is putting in place a framework. None of this needs to be taken up by any community. That is one of the principles that we have put down and that, as I understand it, has been accepted. With that in mind, the decision-making process by communities should be able to take as long as it takes.

**Senator CROSSIN**—Unless you want a school or a boarding school—

**Mr Bree**—I have put our government's position on that. Normal services have to be provided, and certainly NT government services will be.

**Senator MOORE**—I really hope that the Northern Territory government has a chance to review the *Hansard* so they can see what people said to us this morning in terms of the identification of significant social disadvantage and alternative service delivery to the community. There is nothing new, and that has come out as well. From the two examples that Senator Crossin told us about, the kinds of services which are being offered are basic services of housing and education. Those are the kinds of things that were being offered to the two communities which seemingly have voluntarily accepted that this was a step forward that they would take.

If, for whatever reason, communities do not feel that the kind of headlease arrangement—the details of which we will find out about down the track—will suit them, what alternative provisions of services will be available for them? For a community which is seeking housing—and that has come out a lot in the last 20 years or more of debate—if the only way of getting effective housing structures in a community is linked to a lease, and if it is voluntary to go that way, does the Territory government have any alternative options for the provision of housing for Northern Territory citizens? Are there going to be any options available? If there is no leasing, are they going to be able to access housing by another method?

**Mr Bree**—I will come to housing, but in terms of education, which is a responsibility of the Northern Territory government, we will continue to provide education within the



constraints of our resources—not based on whether a lease is in place or not. I think that is quite clear. It is not a condition that the Northern Territory government is putting on its provision of services.

**Senator MOORE**—So the community can have the confidence that, in seeking education options, the only way of getting that improved in their community is not going to be going down a lease arrangement.

**Mr Bree**—Not from the Northern Territory government's perspective. We cannot speak for what an Australian government may or may not offer, but the resources of the Northern Territory government will not be allocated on the basis of whether or not there is a lease in place. I will make one exception to that, and that is housing; but it is housing over and above the programs that are provided now. Cabinet has recently made a decision that, in light of leasing being available in communities, Territory Housing—which is a government business division and works on a commercial basis, if you like—will be authorised to go into those areas where there are leases, which it has not before.

All housing funds for Indigenous housing in the Northern Territory go through a body which was previously known as IHANT and is now the Indigenous Housing Advisory Board. So all the programs have been allocated through that board, quite separately from our public housing. Our public housing was only in areas where tenure to land was available, and that has been the case forever. Cabinet has now said that with leases being available, Territory Housing will be authorised to move into those areas. That will not impact on current levels of funding; it will only increase it. Government is looking at rebalancing its efforts between urban and community areas.

**Senator MOORE**—One of the things that we heard today—and I know you are aware of all this stuff—was about how much housing costs in the Northern Territory and in remote areas of Western Australia. A very basic house is \$500,000. There are a whole range of reasons for that. In terms of the process, will this involve going into market rate arrangements, such as determining what a market rate is for a house, determining what a market rate is for rent, determining what a market rate is for resale—all those nitty-gritty economic things?

**Mr Bree**—It will, but it will not have an impact on the tenant. It will to the extent of internal transfers between Treasury and Territory Housing

**Senator MOORE**—The paper transaction—

**Mr Bree**—Yes. But the rent charged will be as per our universal approach.

**Senator CROSSIN**—Universal rates in Darwin?

**Mr Bree**—In the Territory. The same set of rules will apply.

**Senator CROSSIN**—In other words, under this leasing arrangement Indigenous people currently living in a remote community would pay at least the same rent for their house in a remote community as for one in Darwin where currently they would pay a percentage of their Centrelink money—\$20 or \$30. Is that correct?

**Mr Bree**—That is correct.

**Senator CROSSIN**—Nothing less?

**Mr Bree**—I have not seen a proposal for it to be less. Currently, my understanding is that in most communities the community housing organisations tend to charge using a poll tax approach—that is, per capita.

**Senator CROSSIN**—Why would an Indigenous person want to do that in a remote community? If they step out their front door, they are not even going to step onto a sealed bitumen road. Why would they want to pay the same rent to the housing commission for a house in Ramangining as they would pay for a house in Darwin when clearly the level of services around their house is not the same?

**Mr Bree**—The level of service for the house will be the same.

**Senator CROSSIN**—But not the environment in which that house is placed.

**Mr Bree**—How does that reflect on Territory Housing?

**Senator CROSSIN**—That is what I am saying to you. Why would somebody in a remote community want to do that? Why wouldn't they move into Darwin to pay that rent?

**Mr Bree**—They are quite at liberty to do so. In fact, that is occurring. Our Territory Housing lists are growing in Indigenous participation.

**Senator CROSSIN**—I would assume that when you seek to strike a rent that people will pay for a housing commission house you also look at the public services that surround that house, like the footpaths, guttering, sealed roads and street lighting. Surely someone at Ramangining would not be expected to pay the same amount to rent their house as a person in Darwin.

**Mr Bree**—I can only speak as someone on the Territory Housing board. It is my view that they should, because they are renting the asset, not the road or the footpath or the lights. That is another issue.

**Senator CROSSIN**—Public servants in those communities do not currently pay the same rent. Public servants and teachers actually pay—

**Mr Bree**—That is part of an employment contract.

**Senator CROSSIN**—a much reduced rent.

**Mr Bree**—That is part of an employment contract, not a public-housing model.

**Senator CROSSIN**—That is true, but it is not subsidised in any way. It is not as if at Ramangining your housing commission rent would be \$200 a week, which as a teacher you would pay \$75 of, with someone in the government paying the housing commission the difference; rather, it is recognised that it is remote and it is not the same and there is a reduction in the rent because of that remoteness and the lack of infrastructure.

**Mr Bree**—The reason that government employees pay different rents is simply because of their employment contract.

**CHAIR**—We are wandering a little way from the bill at this point.

**Senator CROSSIN**—I am not sure about that. What this goes to is the capacity of Indigenous people in a remote community under a land-leasing arrangement to pay the same

rent for a housing commission house that you would be expected to pay in Darwin or in Alice Springs.

**CHAIR**—There is nothing in the bill about that, though.

**Senator CROSSIN**—No, but that is the consequence of this leasing arrangement if Indigenous communities agree to that. We need to look at the flow-on consequences of this. It relates to this catch phrase that we have heard: ‘We’re doing this because it will drive economic development for communities.’ But you will be asking Indigenous people who currently probably pay only around \$20 a week rent for the houses out there to pay more. And let us be frank about this: the houses are substandard compared to the housing commission houses that they can get here at Nightcliff, and they will be paying a similar rent under this proposal.

**Mr Bree**—These will not be substandard houses.

**Senator CROSSIN**—So existing houses will be exempt from all of this? So if Ramangining says tomorrow, ‘We’ll do the 99-year lease,’ then existing houses will be exempt and only houses that are built from here on in will be affected?

**Mr Bree**—That is my understanding.

**Senator CROSSIN**—So it will only apply to houses that get built from here on in?

**Mr Bree**—That is my understanding. There is no way that substandard houses would be rented out at full rent.

**Senator CROSSIN**—Will that also include the prefabricated dongas that Minister Brough keeps talking about that can be shipped into communities? They will be new houses in the community. Does it include those?

**Mr Bree**—I assume that that is a rhetorical question.

**Senator CROSSIN**—No, it is definitely not rhetorical. In estimates, we were told that they will get prefabricated houses. They are kit homes.

**CHAIR**—I am not sure that Mr Bree can answer that question.

**Mr Bree**—It is not a Territory Housing matter. Territory Housing continually looks at the level of housing that is provided in consultation with communities. I think, Senator, you know the standard of houses we generally provide there, and it is quite high.

**Senator CROSSIN**—Yes, but it is crucial. If in fact the 49 homes that Minister Brough is promising Elcho are actually going to be kit homes, which your entity will look after if Elcho agrees to the 99-year lease, it is related. Elcho Island agrees to the 99-year lease, they get 49 new homes—

**Mr Bree**—Sure. I see where you are going.

**Senator CROSSIN**—and the 49 new homes may well be the kit homes that OIPC kept talking to us about in estimates.

**Senator MOORE**—Could they be?

**Senator CROSSIN**—You need new houses. People will pay market rent for those new houses.

**Mr Bree**—It will depend on who owns them. I am sorry—I am not in a position to know who will own the houses that are promised. I am simply unaware.

**Senator CROSSIN**—So none of this detail has been thought through or worked out?

**Mr Bree**—Not with me.

**Senator MOORE**—We are getting down to the specifics of the role of the Northern Territory government in whatever comes next when this is passed—and it will be, because of the numbers. But in terms of what will happen, as a full partner in the future arrangements in the Territory under these processes, what do you envisage? With the process being put forward for the homes, which is the one we know about, if the Northern Territory government were not happy with the standard, the timeliness or anything, what would be the role of the Territory? From your understanding of what you hope to achieve in the detail, is there going to be some kind of objection phase? The contract is going to be between the community and the federal government, with the Northern Territory government being the entity that is going to be working through it in the future. If anything in the detail, in the implementation of the process, is not right or not accurate, what role does the Territory have in saying, ‘The kinds of homes that you are going to be putting in this community do not meet the standards that we want to have here’?

**Mr Bree**—This probably does not answer you directly, and I am sorry for that, but if the minister is offering, say, \$10 million for housing and wishes the Northern Territory government to deliver that then our first position would be to deliver on our standards. I do not think that is controversial. Are there other ways of delivering houses that fulfil community aspirations and needs? I am sure there are, and we should keep them under review at all times. But, having said that, we have formed a fairly conservative view on the standards of housing over quite a number of years, because we look at the life costs of housing and we think we have it kind of right at the present moment.

**Senator MOORE**—You know your area.

**Mr Bree**—Yes. So we would take some convincing to go into a situation where lower capital costs were accepted in return for higher maintenance costs and a shorter life. But that is a technical balance that one has to find. We think we are kind of right at the present moment, but we do not refuse to look at new technologies and proposals that come before us.

**Senator MOORE**—I am interested in the discussion we had earlier. We heard evidence this morning from the two large land councils and there was discussion about the fact that some areas have a very high financial attraction and have businesses already set up. There is already attraction in going to those communities. From the Central Land Council we heard that much of the area that they represent does not have financial attraction to investors at the moment, for whatever reason. I am wondering whether the Northern Territory government has looked into that aspect. You know very well that there is great variation amongst the communities in your area, but the discussions we have had have been about areas that may well be able to draw housing and create a market. What about the situation as presented by the Central Land Council? How do you get a financial institution, for instance, to invest money in an area? I will not even pretend to name a community—it would be too dangerous.

**Mr Bree**—I think there are two parts. In the broad, I would agree. This legislation at this point in time will only suit some communities. I think that is a fair comment. Following my discussions with people from the Central Land Council, I tend to agree with them. There are not a lot of communities down there at the present moment that would see benefit. That is probably correct. I think we are setting the framework for the next 20 or 30 years, though, so that the potential will be there for people, as they do see benefit, to take it up, because some of the benefit they will see will be from other people doing it. If it works as people expect it to then people will take it up.

The second point is about the attraction of private finance. I think that is a fair point. My belief is that the initial stages of private finance will not necessarily be just from banks directly. I think they are unlikely to hop in without wanting a much higher return than most people are willing to pay. There is potential, though, for people who know these communities well to invest—say, royalty associations associated with land trusts. There is certainly some degree of potential for individuals through things like the Indigenous Business Australia housing support programs. From what I have seen of those, they look pretty attractive to some people.

Some other areas are under discussion at the present moment in the Northern Territory government, and I can put them on the table if you accept that they are under discussion rather than public policy. An organisation such as Territory Housing may stand in the market to provide liquidity to the market. I think liquidity will be one of the great difficulties, even for people who want to buy—individuals, for instance, who have reasonable jobs in the community. I think particularly of Groote Eylandt, where there is a demand for houses and we have 30 people asking us to get this legislation through quickly. But we all know that over time people will want to sell for a variety of reasons, and it is unlikely that there will be liquidity in those markets for some time to come, in my view, and we are having discussions about how we might provide that through, for instance, Territory Housing standing in the marketplace and being a buyer of last resort.

**Senator MOORE**—Like an underwriter?

**Mr Bree**—Yes. There are a lot of details that need to flow from this. We are dealing with a very complex issue in terms of economic development of Indigenous communities. There is no question about that, and we have to be careful each step of the way. That is the purpose of our submission. We think the principles behind this legislation are correct; the implementation is always the issue, and we think that requires a great deal of discussion with people who want to go into it. It requires a selling of the benefits to people, and that is the position we will take.

**Senator MOORE**—Is that partly your job?

**Mr Bree**—We hope we will be engaged in that.

**Senator MOORE**—This will be my last question, Chair, I promise. The Central Land Council issued a challenge this morning and said that, if this is such a good system, would it not have been an option to trial such a scheme in areas over which you already have jurisdiction? They talked about the system of community living areas, which the Territory already has jurisdiction for. If this whole concept offers such potential benefit, why to all intents and purposes change legislation so greatly when you would be able to assess to an

extent the value of such change in a pre-existing area in the Territory? That was a direct question, so I would appreciate a response.

**Mr Bree**—I have also had that very direct question from David Ross. The Territory government is currently considering its legislation in that area and has made some in-principle decisions with regard to allowing economic development of these community living areas, which were actually set up for what they say and as part of negotiations between the then Australian and Territory governments.

Quite a number of constraints were put on these blocks of land that specifically prevented almost any economic activity. We regard that as a matter of public policy to be not very productive and the government has taken a decision in principle that we have to work through now and allow that sort of activity. There are a lot of stakeholders in that area, as you would be aware. They need to be spoken to but that process has started.

**Mr Adams**—To return to Senator Crossin's question on the Mining Act: what Senator Crossin referred to was a comment in the NLC's paper that the Commonwealth have not accepted one of the premises of the joint submission. It turns around the issue of compensation for mining and the suggestion by the joint submission that the compensation provisions should be amended to allow commercial negotiations when you are negotiating for access to land. Section 44A says that 'compensation shall not include compensation for the value of minerals removed' and further that, 'compensation shall be for damage or disturbance caused to the land, for the use of the land, the use of improvements on the land and severance from the land'. I can only presume that the Commonwealth, in reviewing the position put to them, said no, minerals are the property of the Crown and therefore the landowner should not benefit from the value of the minerals, although, as the NLC's submission says, generally there are wide-ranging compensation provisions incorporated in the agreements that are entered into at the exploration stage.

**Senator CROSSIN**—My question though is: does the Northern Territory government want the agreement made with land councils to stand?

**Mr Adams**—There has been no change in the Northern Territory government's view on what they put in that joint submission.

**Senator BARTLETT**—I appreciate you cannot control when the federal government brings on this legislation and I have taken on board what I have interpreted as your comments that it may be better if there were consultation with stakeholders first. I am a little surprised, given the dynamics that normally happen at federal and state and particularly at federal and territory government level in my experience—I believe even the ACT tend to get a little bit toey about federal legislation coming in over the top of them. Apart from the headlease, this legislation does seem to do some things to give greater power to the federal minister in a range of areas. I am surprised that there is not more concern at territory level that—as in the words you used before—this is setting up a framework. That is true and a lot will depend on how the framework is implemented, but it is also putting it in law and part of that law is giving the minister in Canberra more discretion and more power. Is that not a concern to the Territory?

**Mr Bree**—I said in my opening remarks that we do take some offence at the issue of removing Territory planning and building legislation from these communities. We disagree with that completely.

**Senator BARTLETT**—That is one. There is also potentially discretion over circumventing land councils, the breaking up of smaller land councils, ministerial involvement in the use of the Aboriginals Benefit Account money and discretion over funding for land councils and those sorts of things. I know that is land council rather than Territory government, but it does have a bit of a smell of more power to Canberra—normally something which does not go down well in any part of the world, even in Canberra if it is up on the hill rather than down in Civic.

I know part of this is political and you cannot comment on that. But the sales pitch for it from the federal government is that the Territory government signed off on this and they are happy with it—that is, state and territory both like it and Labor and Liberal both like it, so it has to be great. There is not a message there of dissatisfaction at least about making sure that parts of the key constituency are on board. Surely, your chances of it working will be vastly increased if people who are directly affected are comfortable with it.

**Mr Bree**—That last comment is exactly our position. I am not informed enough, to be honest, to comment on that detail. I will ask my colleagues if there has been some discussion on that matter. There clearly has not been a lot of discussion with regard to that, but the one specific is in the mining changes. There has been a change in delegation from the federal minister to the Territory minister, which we of course welcome. On the broader issue, I am not really able to comment. It does not appear that there has been a great deal of discussion on that interrelationship. I think you are referring to the relationship between the minister and the land councils. Is that right?

**Senator BARTLETT**—That is one of the components. I know you cannot make lots of vocal complaining noises; that is the politicians' role. It seems that the general message, including from the submission, which is signed by the Chief Minister, is, 'We are broadly happy; let it rip.' That does not seem to quite jell with even some of the evidence you have given here about the desirability—the strong desirability, I would have thought—of having the key stakeholders comfortable with what is getting put on them by the treacherous, centralised Canberra regime.

**Mr Bree**—You will draw something out of me, Senator! I think 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. 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.

**Senator BARTLETT**—Thank you. I will leave it there.

**Senator CROSSIN**—Mr Bree, you are putting to us that one option for this committee would be to recommend that the provisions that were agreed to should proceed through the Senate and that we should split the bill and give stakeholders further time to consult about this, particularly about the land-leasing aspects?

**Mr Bree**—We would not be unhappy with that.

**Senator CROSSIN**—Secondly, is the Northern Territory government planning any communications strategy with Indigenous people or TOs to inform them about the land-leasing arrangements or do you see that as the responsibility of the Commonwealth?

**Mr Bree**—We see that as primarily the responsibility of the Commonwealth, but we are speaking to them at officer level to engage in that process.

**Senator CROSSIN**—With a view to doing what?

**Mr Bree**—To providing information to communities that wish to have it.

**Senator CROSSIN**—You would be aware at this stage that the only thing communities have had to date is Senator Vanstone's 16-page booklet and her DVD. There has been nothing under the name of Minister Brough since he became federal minister. They are not particularly happy about the lack of consultation. There has certainly been nothing from the NT government.

**Mr Bree**—A letter was delivered to traditional owners at Galiwinku when I was there, but that is the only other one I am aware of.

**Senator CROSSIN**—That is the only community?

**Mr Bree**—Yes.

**Senator CROSSIN**—A letter from whom, sorry?

**Mr Bree**—Minister Brough.

**Senator CROSSIN**—We will ask the OIPC about that.

**CHAIR**—I have a couple of things before we close. I want to touch briefly on the proposals in the legislation for the establishment of new land councils. We have had some comment today that the arrangements that allow for 55 per cent of the vote of Indigenous people in a particular area to establish a new land council is wrong because the people included in such an electorate are Indigenous people living in that area who may not be traditional owners. What is the Northern Territory government's view about that provision?

**Mr Bree**—Senator, I cannot give you a policy position on this. I think that would be unwise of me at this stage. I would need to get further advice. I am happy to come back to you.

**CHAIR**—Okay. If you take that question on notice, that will be fine.

**Mr Bree**—Yes, I will take that on notice.

**Senator CROSSIN**—There is a really tight time frame, because we have to report Wednesday week.

**Mr Bree**—I will come back quickly—early next week.



**CHAIR**—That would be great. It has been suggested by some Indigenous groups that 55 per cent is too low a majority and the majority should be more like 75 per cent. Putting aside the question of who votes to get to that figure, could you indicate what the Northern Territory government's view about that alternative is, particularly whether you consider that a 75 per cent threshold would be achievable, irrespective of which particular electorate or pool of electors you take as the basis on which such a vote is conducted.

**Mr Bree**—We will take that on board.

**CHAIR**—It has been suggested to me that there was some work done by Westpac at one point about this question of the impact of land tenure issues on Indigenous people as to how much investment they make or what likely investment they would make in land based on land tenure. I am told it was work done or commissioned by the Indigenous Business Association but that they cannot track it down. Do you know anything about that?

**Mr Bree**—No. I am unaware of that.

**CHAIR**—Okay. I will look elsewhere. We have had a long session with you today, but it has been useful. I thank all of you for your appearance here today. We look forward to receiving the information to questions you have taken on notice in short order.

[5.02 pm]

**LANE, Mr Michael Francis, Manager, Aboriginals Benefit Account, Office of Indigenous Policy Coordination, Darwin**

**O'BRIEN, Mr Leslie Reginald, Acting Manager, Land Rights Legislation and Programs Section, Office of Indigenous Policy Coordination, Darwin**

**ROCHE, Mr Greg, Acting Group Manager, Land and Resources Group, Office of Indigenous Policy Coordination, Canberra**

**STACEY, Mr Brian Robert, State Manager, Northern Territory, Office of Indigenous Policy Coordination, Darwin**

**VAN BEURDEN, Mr John Charles, Land and Resources Group, Office of Indigenous Policy Coordination, Canberra**

*Evidence from Mr Roche and Mr Van Beurden was taken via teleconference—*

**CHAIR**—Welcome. I think you have got information on parliamentary privilege and the protection of witnesses and evidence. You are also aware that if you wish to give any evidence today in camera you can put that to the committee, and we can take evidence confidentially in that way. You are aware, of course, that the Senate has resolved that you should not be asked to give opinions on matters of policy. However, the resolution prohibits only questions asking for opinions on matters of policy; it does not preclude questions asking for explanations of policy or factual questions about when and how policies were adopted. We have a submission from the office; it is submission No. 1. Thank you for getting that in early. Thank you also for hanging around today until a little later than we had hoped it would be. As you would imagine, a very large number of issues have now been raised through this process which we need to go through with you. So I appreciate your patience. I invite one of you to make an opening presentation to the committee.

**Mr Stacey**—As I explained, I am the state manager of the Office of Indigenous Policy Coordination. My office is not responsible for the development of the legislation; that is done out of our national office in Canberra. That is why we have asked if my colleagues Greg Roche and John Van Beurden could join us. We apologise that they were not able to appear before you in person today. Nonetheless, I have had a bit of experience with the administration of the Northern Territory (Land Rights) Act—some 20 years, in fact. So I hope that I might be able to help the committee. I suggest that questions get put to me and then I will ask the Canberra end whether or not they might take that one, depending on what it is. Otherwise, I will try and answer myself. We have put in a submission. I think we will leave it at that.

**CHAIR**—That is probably a convenient way to proceed. As I said, a large number of issues have been raised in the course of proceedings today. It would be useful to have a whole range of those issues addressed. We may be able to fire the questions to you today, and either have you answer them here or take them on notice. On the basis that you have been able to hear the issues that have been raised today by a range of people in making submissions throughout the morning and the early part of the afternoon, there may be issues that you have

heard—and I understand you have had a representative here all day—to which you would like to respond. It would help the committee if a response could be provided to those issues because it is not necessarily clear at this point which issues we might pick up and want to report on in our report to the Senate and which not. So anything that you have heard today that you would like to respond to, I would warmly encourage you to put in writing to the committee as soon as you can. And I do mean as soon as you can, because we have a very short time frame in which to report.

A couple of issues I want to go through—first of all, the consultation process which has been used to develop this legislation. It has been put to us that the legislation has had a long gestation period. It has also been put to us that beyond the issues which were agreed a few years ago between the NT government, the land councils and the Australian government, a number of amendments have come forward in this legislation which do not reflect that earlier consultation process. We have had evidence that large numbers of Indigenous organisations in the NT are still unclear about or ignorant of what these provisions are. Can you comment on the consultation process and give us any satisfaction that these issues have been properly canvassed with affected parties and that discussion about them will be facilitated or has been facilitated in such a way that they will be able to take advantage of any opportunities the legislation presents?

**Mr Roche**—I thank you for your indulgence in allowing me and Mr Van Beurden to give evidence on the phone, as much as we would like to be with you. On the issue of consultation, I don't need to reprise with you the lengthy and extensive consultation that occurred with Mr Reeves. In relation to the township leasing, which I know has been of some interest to the committee today, the government is of the view that the principal stakeholder in this was the Northern Territory government. We met with Territory officials on 25 October last year to set out a proposal. We then provided them with draft legislation at the beginning of last year.

**CHAIR**—Do you have your phone on hands-free or do you have it at your ear?

**Mr Roche**—We have it on hands-free.

**CHAIR**—You are breaking up fairly badly as you speak to us. It might be better if you were to put the phone to your ear, so that we have a better reception at this end.

**Mr Roche**—Unfortunately, we have one of those machines that sits on the desk, so we cannot do that.

**Senator CROSSIN**—Mr Roche, before you proceed, can you give the committee a reason why you are both in Canberra, not in Darwin?

**Mr Roche**—I am afraid both of us had other commitments here which prevented us from being able to attend.

**Senator CROSSIN**—We cannot get every third or fourth word that you say. It is extremely unsatisfactory, given that these are the most significant changes to this legislation in its 20-year history.

**Mr Roche**—Could I suggest that we have an adjournment for a minute or two for us to transfer to another phone?

**CHAIR**—That would be great. Thank you very much, Mr Roche. I appreciate your capacity to make that change. It has made your voices rather clearer. I asked a question about the consultation process, and you were part way through an answer. I am not sure whether you can pick up from where you were before, but I ask you to proceed with your explanation of that.

**Mr Roche**—Certainly. We provided the draft legislation to the Northern Territory government in relation to township leasing in early December last year. We then followed that up with draft legislation in relation to mining matters to them on 31 March of this year. We met with Northern Territory government officials on 5 April this year and subsequently received comments from them in relation to mining and township leasing in May and June. Similarly, in relation to the Northern Territory land councils, whom we dealt with as the representative bodies particularly in relation to economic development matters to do with mining, we had a teleconference with the Central Land Council on 2 December last year. That was of course subsequent to the government's announcement in principle of the changes it wished to make to the land rights act. We then sent all the Territory land councils summary papers on those reforms, on 30 March this year. We met individually with each of the Territory land councils between 4 and 6 April this year and subsequently received comments from them. In addition, there have been the usual informal discussions between governments and the land councils.

**CHAIR**—Has there been any discussion with bodies other than those land councils and the NT government?

**Mr Roche**—Not recently.

**CHAIR**—There might have been some last year or the year before about these ideas? What do you mean by 'not recently'?

**Mr Van Beurden**—There have been discussions over several years with all the stakeholders about the land rights act. I am not aware of when the most recent ones were with those other stakeholders.

**CHAIR**—Moving on to the arrangements about facilitating different forms of land tenure in NT townships, proposals are being discussed today. The extent to which they are voluntary has been raised and I would like to explore that. It was put to us, for example, that some communities have had an offer of additional resources—for example, provision of a boarding school or the creation of 50 extra houses on Elcho Island. These offers of resources or services have been made, conditional on acceptance of leasehold arrangements with respect to some land within their jurisdiction. Can you comment on how voluntary these arrangements are envisaged to be and whether you envisage that there will be a policy of some carrots and sticks: provision of services to communities only on the basis that they accept leasehold arrangements?

**Mr Stacey**—To make it easier, I will try to answer some of those questions. 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. In the context of the

boarding school on the Tiwi Islands, which I have heard quite a bit of questioning about, I think we need to understand that a boarding school is a private school and not an essential service. None of that is meant to override the responsibility that the Northern Territory government has for providing education. The fact is that, over the past 25 years or earlier, we have not provided education to these remote communities. Both sides of politics need to take some responsibility for that.

I make the point that what was put on the table in the context of Tiwi was a private facility, not a public facility. It is something that the Tiwi people have been talking about for a long time with the federal and Northern Territory governments. I was directly involved in the consultations on the Tiwi Islands. They stretch back over two years. We have been talking about this for over two years, since the Northern Territory government originally put the proposal on the table in the form of a concept paper. But let me assure you that it was never presented in terms of, 'If you don't agree to the headlease, you won't get to a college.' It is the case that towards the end of the process, when we saw that there might be an opportunity to provide some funding in a very transparent way for the college as part of an overall deal, we said to the Tiwi Islanders, 'We would like you, as part of us providing the funding for the college, to also support a headlease.'

I think, with all due respect, some of that questioning I heard of Dennis Bree was just an oversimplification of what has occurred here. As far as I am aware, there is no policy of the Australian government which says that essential services should be on the table and that people be asked to agree to a headlease before they get essential services. I stress that a college, a secondary boarding school, on Tiwi Islands is not an essential service. It is highly discretionary. Governments do not normally fund the construction of private schools. Normally they are done by communities and churches, and governments might make a contribution. This is a private school. At the end of the day, the government has made a very significant contribution, which I think anybody living in the Northern Territory and the Tiwi would welcome.

**CHAIR**—As to those 50 houses or so on Elcho Island, am I correct in my understanding that the federal government said it would provide the 50 houses but that they would be provided on the basis that they are subject to a leasehold rather than the usual, 'Here are 50 houses for communal ownership'?

**Mr Stacey**—That is not the way that the government has presented it. Again, I think it is an oversimplification of the government's position. Galiwinku like other remote communities is eligible to receive support for housing from Commonwealth and Northern Territory programs. It has been receiving in dribs and drabs, very slowly over the years, some new housing. 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. The government has also talked about providing additional housing over and above a normal program allocation in that context. 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 the longer term there might be an opportunity for people to buy and own those houses.

I stress that there are a whole range of other aspects to the plan that the minister, in a very transparent way, has put on the table. We have nothing to hide. To be fair to the government, Minister Brough wrote an open letter to the community less than a month ago. I attended those meetings. We put quite openly the position of the government. I certainly do not mind providing a copy of that if that was what I was going to be asked. I think, with all due respect, it is an oversimplification to try and characterise the government as going around saying, 'Unless you agree to a headlease, you are not getting essential services.' Perhaps that is not what was being said, but the line of questioning seemed to me to be indicating that that might have been the perception, and I think we need to correct that now.

**CHAIR**—I think we will run through each of these issues, and when dealing with each issue we can all ask questions about that rather than jumping backwards and forwards between them. Do you have a question about this, Senator Crossin?

**Senator CROSSIN**—I do. Mr Stacey, I do not want to spend the rest of my time debating what schools this current federal government has funded and what ones it has not funded. But it has a track record of providing funding to private schools. Woolaning boarding school is one such example in the Northern Territory that was built by the federal government without any restrictions on the Woolaning community. If the people of the Tiwi Islands do not sign the final agreement to the head leasing—though they may have signed a memorandum of agreement—will they still get access to the \$10 million for their boarding school? I think the answer must be yes or no. That is exactly the question I asked of DEST officials and the answer I got in June following the budget was 'No.' Has the government's position changed? If you do not agree to the head leasing, at the end of the day, will they still get their money for the boarding school—yes or no?

**Mr Stacey**—I feel a bit as though you are trying to verbal me, but let me say to you that that is a matter for the government at the end of the day if that situation arises. I do not expect it is going to arise because I personally have been involved in the consultations with Tiwi Islanders and I have known them as long as you, if not longer, and I can assure you that they have consented fairly to signing a memorandum of understanding, a heads of agreement, to negotiate one of these headleases.

**Senator CROSSIN**—Can you provide the committee with a copy of that?

**Mr Stacey**—Hang on. We have already provided a copy but, yes, we can provide a copy.

**Senator CROSSIN**—The committee does not have a copy of that heads of agreement.

**Mr Stacey**—All right then. That is fine. It is not yes or no, with respect, and I do not have to answer yes or no. That will be a matter for the minister to make a judgment about. I do not make those sorts of judgments, but I can tell you that we are already in the process of releasing money for the site works to commence on the college. We have already started work.

**Senator CROSSIN**—In respect of Elcho Island, given the chronic lack of Indigenous housing in remote communities, why should there be a condition placed on a community such as Elcho that they get a benefit of 50 additional houses only on the proviso that they sign a lease agreement? What is driving this, Mr Stacey, so that you are pushing these conditions onto communities?

**Mr Stacey**—With respect, Senator Crossin, I think that is your interpretation of what is happening; it is not mine. I have never said anything like that to the Galiwinku community. The Galiwinku community got an open letter from the minister—which I am quite happy, as I said, to provide to this committee—which talked about working together in a new way over the long term, addressing education and getting better health outcomes. We are very worried about the health outcomes in places like Galiwinku where the average age of death is around 50 years.

**Senator CROSSIN**—I did not think we were talking about essential services.

**Mr Stacey**—There are a whole range of measures being proposed. As part of that overall plan we have also talked about wanting a headlease. I think it is an oversimplification to just present this as saying, ‘Agree to a headlease or you are not getting 50 houses.’ It has not been presented like that, with all due respect.

**Senator CROSSIN**—But if that community does not agree to the headlease, where does the offer of the 50 houses stand?

**Mr Stacey**—That will be a matter for the minister. He has written an open letter to them. He has suggested that he would like to come back in a couple of months. He was there last month—the second time he has been to the community since he has been minister. He said he would like to come back in a couple of months and see what the response of the community, traditional owners and out-station residents is to his proposals. We will wait and see what that response is. In the meantime, we are going through an extensive consultation process. We have had the cooperation of the Northern Land Council and we will see what people have to say and then the minister will think about what he wants to do next.

**Senator CROSSIN**—Can I just go back to where we started on consultation. Mr Roche, I want to put to you that the land councils have been briefed about the contents of this legislation rather than consulted on it. I want to ask you how many communities or traditional owners have been visited by officers of the OIPC to discuss this. Why is it that the only literature you can find in communities about these proposals is still under Senator Vanstone’s signature? Why is it that Minister Brough or FaCSIA have not made an attempt to get information out to communities other than through the land councils about these proposals?

**Mr Roche**—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. The reason why there is no new material is that substantially the bill is unchanged from what was announced last year. Therefore, there is no need to provide more complex details when outlines, particularly in relation to the funding provisions, are unchanged from what was announced last year.

**Senator CROSSIN**—Were land councils given additional funds to do the consultation on your behalf?

**Mr Roche**—No.

**Senator CROSSIN**—How would you expect them to do your bidding, then?

**Mr Roche**—We are not asking them to do our bidding; we are asking them to just do their job.

**Senator CROSSIN**—But surely, if you wanted to be convinced that traditional owners agreed to this or understood it, you would also make sure that literature from the federal government got out there. You do it with Centrelink changes, with child-care benefit changes and with every other portfolio that I can think of. Why is it not done when it comes to changes to the land rights act?

**Mr Roche**—Because these changes go to land councils in representing traditional owners in the Northern Territory. It is in their function to consult.

**Senator BARTLETT**—I presume, and this might be a Canberra question again, you would have read the submission by the Aboriginal and Torres Strait Islander Social Justice Commissioner. At the start it talks about the objectives agreed to by the General Assembly as part of the Second International Decade for the World's Indigenous Peoples and states that 'Australia has agreed to act in accordance with and promote these objectives'—I presume that means the Australian government—one of which is:

Promoting full and effective participation of indigenous peoples in decisions which directly ... affect their lifestyles, traditional lands and territories ... considering the principle of free, prior and informed consent ...

Are those objectives, including that particularly core one, automatically integrated in the work of the OIPC in areas such as this legislation? It would seem that, if the federal government has agreed to act in accordance with and promote those objectives, that would be something that would be pinned up on your walls in large print at OIPC. Is that something that you measure your activities against in considering whether you have consulted adequately?

**Mr Roche**—Certainly 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 wishing to delay the committee in a discursion 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.

**Senator BARTLETT**—I am going off the submission provided by the social justice commissioner on Indigenous affairs, which talks in regard to this principle about promoting full and effective participation of Indigenous peoples in decisions which directly affect their lifestyles, traditional lands, territories and other things, of which I would have thought this would be about as good an example as you could get. Is that principle which, according to the social justice commissioner, the Australian government has agreed to act in accordance with not a filter through which you measure your actions and whether or not you have done enough in consultation processes?

**Mr Roche**—Yes, we do so through consulting with their representative organisations.

**Senator BARTLETT**—So that is your idea of full and effective participation of Indigenous peoples, is it?

**Mr Roche**—Yes, to the extent that is practical, given, particularly, issues about consultation in the Northern Territory and the normal constraints we have in relation to our policy process. These are ultimately decisions for government.



**CHAIR**—In light of the fact that Senator Crossin has to leave, I might let her have the floor for the next little while.

**Senator CROSSIN**—I am sorry; I have a function at 6 o'clock that I have to attend. I might put some questions on notice, but I particularly want to ask two questions in the time that I have left. A study was done by Oxfam on the lack of demonstrated evidence that there would be economic benefits with the 99-year lease, and the Social Justice Commissioner's submission talked about a World Bank research report—and I raised this with Mr Bree. The Social Justice Commissioner's native title report of 2005 outlines the experiences of the United States and New Zealand, where the trend to individualising title is being reversed—that is, being broken up and, in fact, going from communal to individual leases. The World Bank found that the strategy is not effective in producing Indigenous economic benefits for people. Can you tell me if the government looked at the Oxfam study or the World Bank report or commissioned any independent economic analysis or assessment of the benefits for people of a 99-year lease?

**Mr Stacey**—Greg, will I answer that?

**Mr Roche**—Yes, and I might supplement your answer.

**Mr Stacey**—I am not aware of when that Oxfam report was put out.

**Senator CROSSIN**—About two years ago, I think.

**Mr Stacey**—I do not know which one you are talking about specifically.

**Senator CROSSIN**—It was commissioned by CAEPR.

**Mr Stacey**—I have a couple of things to say. The first is that we are not transferring. It is very important to understand that what we are not doing here is upsetting the underlying tenure. Both sides of politics are very committed to Aboriginal land remaining Aboriginal land. What we are coming up with—and I think this is very important in relation to the previous question asked by Senator Bartlett, too—is a scheme in legislation that can facilitate so that, if traditional owners and land councils give their consent to one of these headleases to a township lease, the underlying tenure remains the same.

I am not aware of that study—and I would have to review it—but I think it is very important not to mischaracterise what is being proposed here as taking away communal title and replacing it with individual title. What we are doing is finding a way to retain the communal title as a fundamental part of the land rights act, but at the same time trying to find a basis for facilitating economic development in townships, and doing that by setting up a regime that requires extensive consultation and the consent of traditional owners and the land councils before we implement it.

I am not aware of the extent to which we commissioned independent studies, but it is very important to see this in the context of how we have been able to facilitate economic development in remote parts of Australia and in urban areas. An appropriate tenure arrangement is part of doing so, but it is certainly not the only thing. Education and housing are also very important—and a whole range of other contributions—but having a tenure arrangement is an important part of securing economic development. I think the Australian

government and the Northern Territory Labor government have both agreed that that is fundamental.

I might add that the land councils may have objected to some of the details but I do not believe they have objected to the principle of having long-term leasing in townships as a way to assist with home ownership over the longer term—and no-one expects that that is going to happen tomorrow, except in one or two places—business development and a secure environment for government investment. I think both governments have seen that one of the pre-conditions needed—but not the only one needed—if we are going to get economic development is some sort of normal tenure arrangement so that banks can provide loans to businesses, so that governments can get a long-term lease relatively quickly to build the facilities they need and so that there is the possibility of home ownership, which there has not been up until now.

I might finish by saying that I think this principle of giving communities an opportunity to easily obtain home ownership is the one that is absolutely driving this sort of reform. I know that people can secure leases now, but it is a lengthy and cumbersome process. Remote communities are not communities anymore—let us face it, they are townships. Places like Wadeye have a lot of people. There are 2 ½ thousand people at least. This is giving people the opportunity, if they want it, to own their own home. I might say that the government has backed it up with a very generous complementary loan scheme, to be administered by IBA.

**Senator CROSSIN**—You said that tenure arrangements are an important part of securing economic development—

**Mr Stacey**—But not the only one.

**Senator CROSSIN**—but you have no economic or academic assessment to suggest that section 19A is going to deliver that. Can you clearly articulate for me why section 19A is needed? Why can't this be achieved under the current section 19, bearing in mind that the Alcan development, the train line, Centrefarm and businesses on Elcho Island, to name four examples, have been negotiated and are operating under the current section 19? If your only problem is that it is a lengthy process then why are you not streamlining the process rather than setting up a new process?

**Mr Stacey**—There are quite a few questions in all of that. I will try to deal with them one by one. I might miss one, but you will correct me, I am sure. You said that there have not been any independent studies that have done this. I am certain that there would be many independent studies about the benefits of tenure arrangements as a way to facilitate economic development. We may not, I accept, have done one specifically in relation to Indigenous communities in Australia, but the principle is one that is well established. None of us think that economic development could occur in Darwin or Canberra unless we had some sort of arrangement to allow people to get leasehold in order to own their own home or establish a business. That is exactly what happens in Canberra and in Darwin. It happens everywhere across Australia. I think both governments have thought that is a reasonable thing to do in remote townships as well on a voluntary basis. We do not want to disturb the right of traditional owners to make a decision about this themselves.

I think you had a series of questions about why we should not stay with section 19; why we should set up a new scheme. I cannot understand why that would be such a controversial thing to do. No-one says that we cannot negotiate leases, including long-term leases, under the existing section 19. The government has not said that. Nonetheless, if we are going to try to implement this policy, we do need some sort of transparent and workable scheme that can facilitate it. I emphasise the need to have a transparent, workable scheme. All the government is doing here is putting in place a framework to allow this to happen if the land council representing traditional owners consents to it. Did I miss anything?

**Senator CROSSIN**—I put it to you that section 19 may well be compromised at the end of the day. People will be directed to use section 19A and it will become a major way by which economic development will occur. Section 19 will become a diminished and compromised section of the act.

**Mr Stacey**—I certainly do not want to stray into opinions, but section 19A, as I understand it, deals with a township. It is a scheme that facilitates leases over townships. That is it. It is just a scheme that facilitates that and puts in place a framework to allow that to happen. It has been done in a transparent and open way. None of that is meant to compromise section 19. I cannot possibly see how it will.

We are talking here about a scheme that only applies to townships. Over 45 per cent of the Northern Territory is Aboriginal land. By the time the land rights act claims are settled, it will be closer to 50 per cent. Section 19 will apply into all of that land. I might add that section 19 will continue to apply to the townships unless the traditional owners and the land councils consent to a headlease. I cannot see how putting in place a scheme that can facilitate a whole-of-township lease could possibly compromise the land rights act, let alone section 19.

**Senator CROSSIN**—I do not have the time now, but I will check that over the weekend and put a question on notice. I do not think that there is anything I can see in the new section 19 that refers to townships.

**Mr Stacey**—I may need to check it myself, but we have been talking about a township leasing scheme—a scheme that facilitates headleases over townships. That has been the subject of almost two hours of discussion today, if not more. We are not talking about a headlease scheme that goes across Aboriginal land.

**Mr Van Beurden**—I would like to bring your attention to a new section. It specifically provides for towns to be defined by regulation.

**CHAIR**—Could you repeat that reference to the clause in the bill?

**Mr Van Beurden**—There are two definitions in the bill at page 9—

**Senator MOORE**—I cannot hear any of that.

**CHAIR**—Again, it is actually very hard to hear what you are saying.

**Mr Stacey**—Excuse me, John. Perhaps I will explain. What John is telling us in effect is that section 19A applies to townships. There is a provision there that allows for townships to be under the two regulations identified.

**Senator CROSSIN**—So you can give us a guarantee that section 19, as opposed to section 19A, will not be compromised because 19A will specifically and only be used in relation to townships?

**Mr Van Beurden**—That is the intention of the legislation—

**Mr Stacey**—I am saying that the intention of the legislation is to provide a workable, transparent framework to facilitate headleases over townships. Section 19—with some very useful amendments that, for example, go to reducing the need for ministerial consent for contracting and things that also go against good economic development—otherwise remains the same.

**CHAIR**—Talking about the evidence of Indigenous behaviour in response to arrangements for land tenure, you said you were not aware of any studies. There is a study that has been suggested to me, being done by Westpac and commissioned by Indigenous Business Australia. Have you heard of that?

**Mr Stacey**—No. You will have to put that to Indigenous Business Australia. But I will say that I am aware that Westpac may have assisted the Northern Land Council—they will correct me if I am wrong—in terms of looking at the benefits of housing if you get one of these long-term leases of a remote community. I know that Westpac gave some very useful advice to the NLC about how you could set up a framework that would allow people to borrow money to build housing, and it was put to the government.

**CHAIR**—I see. Can I come back to the question of the extent to which leasing arrangements would be voluntary in communities and see if I can summarise what I understand you to be saying is the government's position on this, so that it is clear. I understand you to be saying that it is not the government's intention to suggest that any essential or basic services provided to Indigenous communities in the Northern Territory should be subject to any conditions such as leasehold arrangements before they are provided. But for the sorts of things that might be regarded as extras—things like access to a boarding school or use of a swimming pool, to take another example of recent times—there is no problem with the government forming a pact with a particular community and saying: 'We want to roll out a new arrangement. If you do this, we will do that.' Is that a fair summary of what the government is saying?

**Mr Stacey**—I agree largely with what you have said, other than that I do not want to categorise the last bit as: 'If you do that, we will do this.' I think it is about the government, in a transparent way, putting a plan to a community and saying, 'As part of that plan we think if we are going to succeed in what we want to achieve, a headlease is a pre-condition.' As I have said already before this committee, I think that just characterising it as going out there and saying, 'If you do this, we will do that,' is overly simplistic and, quite frankly, for someone who has been involved in discussions so far, somewhat offensive.

**Senator BARTLETT**—On that point, without getting into the differences of views that have been expressed to date, with a future government—for example, if an evil, nasty Labor government gets in or something like that and we cannot be as benign as we are under the current regime—are there adequate protections in the legislation itself against that type of

pressure being provided, where certain services would only be provided if headleases were drawn up?

**CHAIR**—With respect, I think that is an impossible question to answer. It is hypothetical and it is an opinion which, with respect, these gentlemen cannot give.

**Senator BARTLETT**—It is about the legislation. Concerns have been continually expressed that with this new stuff in section 19A people will be at risk of in effect agreeing to a headlease under duress. That has been put forward. Is there sufficient protection in the legislation against that happening?

**Mr Roche**—Senator, I draw your attention to section 19A(2), which refers to the need for the consent of the traditional owners and also for the land council to be satisfied that the terms of the proposed lease are reasonable. So there are a number of sections. Section 19A(2) is a copy of what is in the current section 19 of the act. So the current provisions are extended to the arrangements set out in section 19A.

**Senator MOORE**—Have the people from OIPC had a chance to read the submissions? I would like the people here and those in Canberra to respond to that with a straight yes or no. Have you read the submissions we as a committee have received?

**Mr Roche**—We have read all the submissions that were on your website yesterday.

**Senator MOORE**—Is that you personally? I have a reason for asking this question. I want to know, of the people who have come to this committee hearing from OIPC, who has read the submissions and who has not. That will make it easier for me to ask questions. So, you and Mr Van Beurden have, Mr Roche?

**Mr Roche**—I will answer myself and then I will hand the phone to Mr Van Beurden.

**Senator MOORE**—So, Mr Roche, you have read the ones that were on the website yesterday?

**Mr Roche**—Yes, and I glanced at the NLC ones this afternoon.

**Senator MOORE**—Good. Mr Van Beurden?

**Mr Van Beurden**—Senator Moore, do you want me to answer the question as well?

**Senator MOORE**—Yes, please.

**Mr Van Beurden**—It is the same answer as that Mr Roche gave.

**Senator MOORE**—Thank you. Mr Stacey?

**Mr Stacey**—I have not had an opportunity to look at all the submissions in detail. I have had a quick glance. But I am very familiar with the issues—

**Senator MOORE**—Fine.

**Mr Stacey**—that are being raised by land councils and others—

**Senator MOORE**—That is a yes and a no. Right.

**Mr Stacey**—having worked through the whole thing.

**Senator MOORE**—Mr Lane?

**Mr Lane**—No.

**Senator MOORE**—Mr O'Brien?

**Mr O'Brien**—I have glanced at those. I picked them up in the course of today. I have not looked at them in detail.

**Senator MOORE**—Thank you. In terms of the leasing process, the question I was asking the Northern Territory government representatives was about the concerns we have had raised in evidence today and also in some of the submissions about what happens after a lease has been signed. I will not go through all the tortuous discussion about how the lease is signed, but what happens after it has been signed? I was interested in the response from the NT government about the fact that there is possibly going to be variation, that protections can be written in and that it is not 'one lease fits all'.

The major concerns that have been raised by people about what happens after a lease are that they thought that they would have no involvement, that once the community had signed a 99-year lease and got involved with the process they had signed away their rights, for whatever purpose—and I will not go back through that—and the entity took over that area. They thought that in terms of the next 99 years, in terms of subleasing, in terms of what would happen next, they would be marginalised and that they would break the particular relationship that we have heard about in evidence between the land and traditional owners. I am sure you have heard that concern, or I hope you have. I would like to know what, from your perspective, is the response to people who are saying, 'If we sign the 99-year lease under the new proposal in this new legislation, what happens from then on?' Also, what is the response to protect against the concerns that people have raised about subleasing—that situations that they may not be comfortable with would then become active on their community lands? I know, Mr Stacey, that you have expressed your long-term familiarity. Knowing that, how do you respond?

**Mr Stacey**—Perhaps I will go to the framework first. That is your second question really, which I think is about the possibility that subleases might start being issued that people might not be happy with. I think it is very important—

**Senator MOORE**—That is a fear that has been expressed.

**Mr Stacey**—Yes. I have also heard that, and I agree that that is a view that has been expressed. But I think it is very important to understand 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. This legislation is proposing a Northern Territory government entity which holds that headlease or, if there is not an NT entity, the possibility of a Commonwealth entity being set up. 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.

I agree with the Northern Territory government that you can anticipate that, in different communities, if they are interested in negotiating one of these headleases—and certainly there may be some which are not—they might put different conditions around it. For example, a

community might say, 'We only want to have residents being able to own a home.' Or they might want to say that a particular area of the town should be excluded from development because it contains sites of significance, for example. These are negotiated with the land councils, representing TOs, and the government and they are agreed to, and then subleases have to be issued in accordance with the terms and conditions agreed to at the headlease stage.

Regarding the point about losing control, it is the case that, once one of the headleases is negotiated and comes into force, rather than somebody who, for example, wants to set up a business in a particular township going to a land council to negotiate a lease, they will go to the entity which is holding that headlease and seek to purchase or rent a sublease. To that extent, I can understand it. I know how important country is for Indigenous people. That is potentially always going to be a sacrifice. I understand that. As well, I put to the senators that in my experience, ultimately, just because of practicalities, traditional owners are not involved in all the activity that is happening in these townships anyway. There are many public facilities, government facilities, that have been constructed over the years without leases. We do not have much private sector investment.

The point I am trying to make is that, in fact, as these townships—such as Galiwinku, Wadeye and others—have grown bigger and the population increases quickly, the capacity for traditional owners to be involved or feel that they need to be involved on a day-to-day basis in what happens in these townships has lessened. I think that is a balanced response which also recognises the fact that country, wherever it is in the Northern Territory, is vitally important for Indigenous people. I would say to you that the fact is that townships are growing and much infrastructure et cetera has ended up in these townships without their consent or benefit. This goes to the third point I want to make. Under the scheme that is being proposed by the government, there is finally recognition of traditional owners and finally the opportunity, through rent, to actually benefit from the developments that are happening in their townships. They have not had that so far.

**Senator MOORE**—Has the department drawn up any kind of draft lease or guidelines to the development of a good and effective lease which would protect the kinds of issues that you have just so clearly identified? Under this legislation, this is going to be a model of activity which will be available on a voluntary basis to communities across the Northern Territory. For the time when such a significant decision will be made, has the department given thought to drawing up a model agreement, as they do with model rules for organisations?

Given the point that each community will be totally different and that you cannot just impose on one community what has worked for another—I would hope you cannot—in terms of process, there are really threshold issues which have come out in submissions and in evidence today and seem to have impact across a range of areas. They are to do with ongoing relationships, what will happen, complaint clauses and what happens if people do not agree in a community. I know that Senator Humphries will ask about the process for votes and things down the way with the setting up of land councils, but I am looking at particularly the leasing aspect.

Also, because of the experience, as you pointed out, where people may not have been happy with the things that have happened before and may already have a negative view and feel a little bit damaged by the processes through which they have been going, we are now setting up a whole new structure with significantly long-term impact. I am just wondering about how much work has been done to make that as effective as it can be. We also need to be really careful about the issue of involving people during the whole process. In terms of what the federal department, as a senior partner, has done—and I hope you heard that I have tried to involve the Northern Territory in a partnership role in this responsibility as well—what has been done to prepare people effectively for this?

I have forgotten which piece of evidence talked about this, but one particular piece of evidence gave me a response to the question of leases losing value the more caveats you put on them. If we are setting up a lease for the future, which is supposed to be for economic development, and we insert the kinds of caveats that people are talking about—on ongoing consultation, involvement and all those things, and areas that are going to be sacrosanct—does that not necessarily impact on the economic result? These are a lot of questions, but they go along the same line. Regarding the intent of the entity which is driving this and is focused on the economic response, will the focus be on the economic value of the lease or on whether people are going to be personally damaged by the lease? Is that too simplistic a question?

**Senator BARTLETT**—That is a long question.

**Mr Stacey**—With respect, Senator, that is very hard to answer.

**Senator MOORE**—They are threshold questions.

**Mr Stacey**—You have asked 10 or so questions in a couple of minutes.

**Senator MOORE**—I will go back, one by one.

**Mr Stacey**—When I am asked questions, the answers are yes or no. You have just asked about 10 questions and that is a lot for me to answer. This is a serious issue—

**Senator MOORE**—Mr Stacey, to protect your integrity, I will ask Hansard to supply the question after we go through this process. I will submit that very complex and threshold question about leasing as a question on notice. Given the urgency of this particular inquiry and our time constraints, we need a response back really quickly. My own experience at Senate estimates of responses by OIPC is that they have not been rapid. That is why I have been a little bit concerned about putting too many things on notice. But I take your point: it is a complex question. It goes around the economic integrity of a lease that is going to impact on traditional owners for 99 years, how it is developed and what kind of process will happen. The question was multifaceted. Hansard will be very good and give me that whole question in detail afterwards, we will give it to you again and then we can get the response. But I hope you understand how important it is for us.

**Mr Stacey**—Yes.

**CHAIR**—Senator Moore has foreshadowed the provision dealing with the establishment of new land councils. The comment has been made by some submitters today that the problem with the test—the 55 per cent majority in favour of a new council being established—is that the votes in an electorate include Indigenous people living in the area of the proposed land



council and would generally include people who are not traditional owners in that area. What is your response to that concern?

**Mr Stacey**—Greg and John, would you like me to try and answer?

**Mr Roche**—You can lead and we will follow.

**Mr Stacey**—I think that what you are asking about is the provisions that go to the holding of a plebiscite and voting on whether or not there should be a new land council—that in a plebiscite they only go to Aboriginal people living in the area of a vote.

**CHAIR**—That is what the proposals in the legislation say.

**Mr Stacey**—Of course we are aware of the view that is being put by land councils—the NLC and the CLC—that traditional owners live outside the area and they ought to have the opportunity to vote as well. Ultimately, that was a decision of the government, of course. In making that decision, I think they had regard to the fact that that provision is, in effect, unchanged. That has been the case since 1976. If a new land council is going to be established, it has always been the case that those living in the area of the land council will have the opportunity to vote. The first very important point to understand is that this has been the policy of successive governments since 1977. It has not been changed.

**CHAIR**—I see. Just to clarify, when a land council comes to deliberate and members of the council itself are elected, is it just the traditional owners within the area of that land council who vote or is it all Indigenous people within that area?

**Mr Stacey**—The method of choice of electing members is something for land councils to consider and then they submit something to the minister. It is always those living in the area. As I understand it, traditional owners and non traditional owners have the opportunity in the NLC and CLC areas to put a view, depending on the method of choice.

**CHAIR**—I see.

**Mr Stacey**—John or Greg, do you want to add anything to that?

**Mr Roche**—No. That is correct. It is in the current section 21(3).

**CHAIR**—That is a very good explanation, I must say. If the suggestion from the NLC that the threshold for establishing a new council should be 75 per cent, not 55 per cent, were adopted, would you have any expectation based on previous votes in these matters as to whether it would be likely that that threshold would be met? I realise it is a bit hypothetical. I suppose another way of putting the question is this: why have you adopted 55 per cent rather than 67 per cent, as someone suggested, or 75 per cent, as someone else suggested?

**Mr Stacey**—Greg and John, do you want to say something?

**Mr Roche**—I suppose the issue comes to trying to provide a level of substantiation as to what the term ‘substantial majority’ actually means. I notice, by the way, that the dictionary definition—and I am citing the *Concise Oxford English Dictionary*—of ‘substantial’ is ‘having substance actually existing, not illusory’. I would think that those higher figures are more than just not illusory but go closer to a definition like ‘overwhelming’ in the context of any plebiscite. It was simply that, because of the imprecision of the current term, it was necessary for the government to define it further and the figure of 55 per cent was chosen.

**CHAIR**—What you are saying is that you are basically replicating the existing arrangements but actually quantifying what ‘substantial majority’ means in your view.

**Mr Roche**—That is correct.

**Mr Stacey**—Could I add a supplementary response. This has been a problem when we have had to deal with new land council proposals over the past 10 years. The act talks about ‘substantial majority’. The question is: what does that mean? Over the course of the last 10 years and various inquiries, there have been different views put about what might constitute a substantial majority. I believe that all parties agreed that we needed to define it, but the question was what it ought be. The government, I think, took account of the different perspectives and ultimately decided on 55 per cent, whether or not the threshold might be achieved. I recall that for the land council set up on Groote Eylandt it was 64 per cent. The government chose on that basis to set up, having regard to a range of other factors, a new land council for Groote Eylandt. For south-east Arnhem Land, I believe it could have been around 66 per cent. Having regard to that and to a range of other factors, the government in 1990 decided not to set up a new land council.

**CHAIR**—You are saying this is basically the present arrangement but that it is crystallised in legislation somewhat better?

**Mr Stacey**—I think 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. We have one provision, section 23(3), from memory, which talks about what happens if there is a substantial majority and the minister thinks it is appropriate. 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. That is what I am saying: it is putting in place something that is workable. There are different arguments about what the majority should actually constitute; the government chose 55 per cent. I think the intention of these provisions is really to put in place a framework that is workable in the event that groups do decide that they want to consider setting up a new land council.

**CHAIR**—If these provisions were passed, would you hazard a guess, based on what you understand to be the politics of existing communities in the NT at the moment, as to how many areas of the Territory might be bidding for the status of a new land council? It is hypothetical and it is conjecture, but—

**Mr Stacey**—That is a bit of conjecture. If you want me to hazard a guess I suspect there would initially be none. I am not aware of any proposals on the table to set up new land councils at this point. There were quite a few in the course of the late eighties and early nineties. There have not been many, as far as I know, since about 1994 or 1995; in fact, I cannot really think of one. But I think when the government makes these sorts of changes it is thinking long term. This is very important legislation. It is not the sort of legislation that gets changed willy-nilly every year; it is long term. When amendments come before parliament both sides are careful; they are thinking about the long term and about what might arise, and about having a workable framework in place should it arise. But I am not aware of a whole lot of proposals and I do not think you are going to see a rush on new land councils at all.

**CHAIR**—There being no further questions about the creation of new land councils and the provisions dealing with that, I will turn back to the leasehold arrangements in townships. It has been suggested by the Northern Land Council that they would be much more comfortable with the arrangements proposed in the legislation if the entities which hold the headlease were basically Indigenous or Indigenous-controlled entities, rather than ones which, theoretically, might not be controlled by Indigenous people. Do you think that there is a compelling reason why their suggestion could not be adopted?

**Mr Stacey**—I cannot recall if that proposal has been specifically put, over the last 12 months or two years of this debate about township leasing. It has not been, as far as I recall; it could have been but I cannot remember it. So I guess that is really something for the government to consider. I cannot answer that question and I am not sure whether I would be giving an opinion in saying whether there is a compelling reason or not. I think that both governments will still need to work out the exact structure for these entities. A proposal was certainly put by the Northern Territory government that the entities should comprise representatives of both governments and land councils. So no-one is saying that there should not be Indigenous representation in this body. I think there is a view at this stage that it might need to be a statutory authority set up under legislation, but the legislation does not specify that. So there could be quite a bit of flexibility in the longer term about what sort of entity might be set up rather than that having to be decided now.

**Senator MOORE**—Does funding come under this?

**CHAIR**—Funding from the ABA? Yes, I suppose it would come under this.

**Senator MOORE**—Where did the figure of \$15 million over five years for leasing costs come from? It was actually specifically mentioned in the second reading speech and I know that in the House of Representatives questions were asked about whether \$15 million was in fact a realistic, transparent or reasonable figure. What science was behind that \$15 million?

**Mr Stacey**—That is one that I might leave with my colleagues in Canberra, because they put it together. John and Greg, I can come back if you need me to.

**Mr Roche**—That 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.

**Senator MOORE**—Are the things you have just mentioned the only variables used to model that, Mr Roche? I am trying to find out. I am just trying to figure out where the figure that has been publicly put out there came from. You have given us a list there which I will review in *Hansard*. I am just trying to find out whether that includes all the variables in the model. I will ask—and I know the answer: can we have that modelling?

**Mr Roche**—I would just stress that it was simply our estimate.

**Senator MOORE**—In terms of the money that has already been put on the table for this, questions have been asked about the use of the ABA. I know that that is a ministerial decision;

it is not yours. Is there any new money around, besides that coming out of the ABA, that has been put out publicly for this particular change?

**Mr Stacey**—I think not specifically in relation to rental payments in the context of an actual lease. It was very much an estimate, a best guess, having regard to some likely factors that would impact on the cost. But I will say to you that there are some complementary measures to this legislation, particularly around—

**Senator MOORE**—ABA?

**Mr Stacey**—Yes, ABA, and finding a way to provide the opportunity for people to own their own home, for example, and making it affordable. In that context, the government announced a significant increase in funding for its Home Ownership on Indigenous Land Program in this budget. There is also some funding to allow for a home purchase incentive scheme, to allow people to purchase an existing home on a remote community which has a headlease, at a discount price, on the basis that the community housing association which owns that house will then, if that happens, get additional funding from the government to build a new home to replace that home. Other than that, I cannot think of anything further at this stage.

**Senator MOORE**—So the public money that we are aware of for the program is all ABA money? The ones you have mentioned would be quite specific separate items that have been itemised in different media releases. I am looking at the proposal to change this legislation, because there are significant funding implications to it and there has been considerable concern raised in the submissions and in oral evidence about the funding mechanism mainly being from the ABA. That is a question for the minister, but the reason I am stressing it is that it has been a community and an organisational concern.

**CHAIR**—In section 19, as it stands now, there is a requirement for the terms and conditions of the headlease to be reasonable, but in proposed section 19A that provision has been removed. Why should township leases not have a requirement to be reasonable?

**Mr Van Beurden**—That provision is now in the legislation at 19A(2)(c), which requires that the land council be satisfied that the terms and conditions of the proposed lease are reasonable. It is there.

**CHAIR**—Great. The submission from the NLC said that it was not so I am glad that has been picked up. Thank you for that.

**Senator MOORE**—I know that there is some concern about that particular response. Rather than hold people up this afternoon, if there is any response to that we will expect the OIPC to take that on notice as well.

**CHAIR**—We will have to put a question on notice though to get them to respond to that but, if that is the case, we can do that.

**Senator MOORE**—That is fine.

**CHAIR**—I have one other question about the lease arrangements. It has been suggested again by the NLC that there is no capacity to terminate a 99-year lease in the event of a breach of the terms of the lease, for example, if rent is not paid or one of the purposes in the lease is

breached with respect, say, to a sublease. Can you comment on why that would be the case and why shouldn't there be a capacity to terminate a lease on the basis of breach?

**Mr Roche**—With respect, I agree with the NLC. This would be a normal commercial lease and a breach of a fundamental term such as failure to pay would of course, in our view, give rise to the normal remedies including revocation.

**CHAIR**—So you say that it does not need to appear in explicit terms for that to be the case?

**Mr Roche**—No, because it would be a normal commercial lease.

**Senator MOORE**—To get this on record this afternoon, I have got the specific question we have about the reasonable nature. Mr Roche, are you able to respond if I read out my particular concern?

**Mr Roche**—I will do my best, Senator.

**Senator MOORE**—In the schedule under (2)(c) it says:

(c) the terms and conditions of the proposed lease (except those relating to matters covered by this section) are reasonable.

That includes rent. So in terms of the response you gave us, that it is still in the new proposed legislation, how does that work?

**Mr Roche**—Are you referring to the—

**Senator MOORE**—I am referring to the new draft legislation. It is section 19A(2)(c) of the new legislation. It specifically says:

... (except those relating to matters covered by this section) are reasonable.

A chunk has been removed. The reasonable test—and I have problems generally with the reasonable test—if it is there, has been removed specifically except for those relating to matters covered by this section.

**Mr Van Beurden**—Issues covered by that section cover things like the lease must be of 99 years duration. In other words it cannot be judged for unreasonableness, and with the present legislation there are also restrictions on the amount of—

**CHAIR**—Sorry, Mr Van Beurden, again your voice is only coming through in fits and starts.

**Mr Van Beurden**—You may be aware that the minister announced in the House of Representatives in the summing up speech that the cap on rentals would be removed.<sup>1</sup>

**Senator MOORE**—Five per cent, yes.

**Mr Van Beurden**—So therefore that is no longer relevant. They are the key issues of concern, I think.

**CHAIR**—As I read that section that Senator Moore quoted, those words in the parenthesis are really designed to prevent someone arguing that a particular provision of section 19A is not reasonable and therefore cannot be allowed to stand.

**Mr Van Beurden**—That is correct, Senator.

**Senator MOORE**—That is the interpretation. So there are issues to do with rent and payment that would still come under the reasonable test?

**Mr Van Beurden**—They will, once those provisions are removed.

**Senator MOORE**—We may follow that up. It is of particular concern and we raised it with the Northern Territory government as well. Once we have people being expected to pay market rents and so on reasonableness becomes a critical issue.

**Senator BARTLETT**—I have two questions that I do not think have been asked yet. What is the justification for using the Aboriginals Benefit Account—Aboriginal people's money—to pay for the administration of this new leasing scheme and for rent payments on headleases?

**Mr Stacey**—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.

**Senator BARTLETT**—So you are using Aboriginal people's money to pay themselves rent?

**Mr Stacey**—I am aware that there is a strong view across the Northern Territory within many communities of 'This is our money,' but the reality, as you know very well, is that the Aboriginals Benefit Account is funded by way of an appropriation included in the appropriation bills. This government takes the view that it is government funding expressly there for the benefit of Indigenous people.

**Senator BARTLETT**—And the appropriation is not linked to implied royalties or whatever the terminology is?

**Mr Stacey**—No. Perhaps I should explain the funding arrangements for the Aboriginals Benefit Account, because they are unusual. I know there has been a view for a long time that mining royalties are paid into the Aboriginals Benefit Account. In fact, mining royalties get paid by companies which have projects on Aboriginal land. Most of them go to the Northern Territory government. Those relating to the Ranger uranium project go to the Australian government. Under the land rights act the equivalent amount 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.

**Senator BARTLETT**—On a separate matter, I think you would have heard my questions earlier regarding comments in the Central Land Council's submission on exploration and mining. They stated that there was a proposed amendment to part 4 of the act put forward by the land councils and the NT government—which was also apparently in recommendations from the House of Representatives committee and the national competition policy review—about what they described as removing the restrictions in the current section to prevent consideration of consequences from mining compensation for damage and disturbance and the like. I think you know the area I am referring to. The federal government chose not to adopt that particular amendment. Could you explain why the federal government took that

view, particularly given that, according to the CLC submission and I think one or two others there is the suggestion that this is actually a disincentive for exploration?

**Mr Stacey**—I might let John Van Beurden come to the phone to explain that.

**Mr Van Beurden**—This is something that has been in the act since 1987, when the mining provisions were extensively revised by 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.

**Senator BARTLETT**—So it does not accept the view that these existing provisions are a disincentive to enter into exploration agreements?

**Mr Van Beurden**—I cannot guess what was in the mind of the government. I cannot really answer that.

**Senator BARTLETT**—There has not been any statement made by the government to elaborate on why they rejected this recommendation?

**Mr Van Beurden**—Not that I am aware of.

**Senator BARTLETT**—Okay. Thank you.

**Senator MOORE**—I have a specific question about one clause. Mr van Beurden, you may want to take this on notice. It is to do with 19A(7) and the preclusion of the ability for rent to be paid to an individual. It opens the whole idea of what financial payments can be transacted and what cannot and it was referred to in the NLC submission. They had concerns about this whole section 19 but particularly 19A(7). Is that subsection able to be defined as anticompetitive?

**Mr van Beurden**—That section is likely to be removed when the provisions related to the cap on rentals is removed.

**Senator MOORE**—So it follows straight on. If the first bit is removed, which the minister has already indicated may be the case, it is likely that this particular clause could go as well?

**Mr van Beurden**—Yes, it is quite likely.

**Senator MOORE**—I hope that is transparent. We would hope it would, so we will work on that basis.

**CHAIR**—I think we have come to the point where we have asked all the questions that we need to ask live today in the committee. We may put some other questions on notice and, as indicated, because of the short time frame, if we do, we would greatly appreciate whatever expedition could be employed to get those answers to us. It has been a long session this afternoon and we are very grateful for the time that officers of the Office of Indigenous Policy Coordination have given to us. Those of you in Canberra, thank you for hanging on the line for so long and, to those of you here in Darwin, thank you for the time you have given us. That concludes the taking of evidence in the inquiry. I thank senators, I thank Hansard and I thank officers of the committee for the assistance they have given us.

**Committee adjourned at 6.37 pm**