29 June 1999 Our Ref: DS08:99/0236

Hon Lou Leiberman
Chairman
HORSCATSIA
Parliament House
Canberra ACT 2600

By facsimile: 02 6277 2219

Dear Mr Leiberman,

Issues raised at HORSCATSIA hearing 15 June 1999

Thank you for the opportunity provided to the NLC to address your committee again on 15 June 1999. Our intention at that meeting was to canvass with you a broad range of issues of workability of the *Land Rights Act* which would be of benefit to Aboriginal people, without diminishing any existing rights.

Following our discussions, and largely in response to questions raised by yourself and other committee members, we have produced the attached document to assist you further in your inquiry.

The NLC would be happy for the document to be tabled as a submission to HORSCATSIA. Please contact me if you have any further questions.

Yours sincerely

Norman Fry
CHIEF EXECUTIVE OFFICER

NLC Response to Issues raised at 15 June 1999 HORSCATSIA hearing

1. NLC Local Government policy

In its verbal submission to the Committee on 15 June 1999, the Northern Territory Government asserted that the Land Councils have an "implacable opposition" to the operation of the Northern Territory Local Government Act on Aboriginal land. This claim was made by Mr Neville Jones of the NT Office of Aboriginal Development.

It is important to clarify our position on this issue as it is one which intersects with the issues of regionalisation, regional authorities and agreements which have occupied much of the Committee's time.

As was made clear in the NLC's initial submission to Reeves (December 1997), the NLC considers that there are significant features of the *Local Government Act 1993* (Local Government Act) which are inconsistent with the *Aboriginal Land Rights (NT) Act 1976* (Land Rights Act). We provided a detailed paper on this issue, and Mr Reeves reproduced at Appendix R in his report. As Mr Reeves noted, the Local Government Act, like all NT laws, applies on Aboriginal land "to the extent that that law is capable of operating concurrently with [the Land Rights] Act" (s.74). The NLC has provided a table of 22 provisions which we consider are inconsistencies between the Land Rights Act and Local Government Act.

However, as we also made very clear to Mr Reeves, and to HORSCATSIA in our submission of April 1999, the NLC is developing mechanisms to ensure that the two Acts can operate concurrently. Our submission of April 1999 stated:

> The NLC wants to clearly identify and recognise the rights of Aboriginal residents on traditional lands by developing local government agreements which operate in the larger communities. These agreements delineate the roles of local governing bodies and land-owners in decision-making, and provide a clear agreed framework for participation in decisions over local issues and access to lands. (NLC, April 1999, p. 12)

The process of local government agreements is already underway in various communities, regardless of which Territory or Commonwealth legislation the local governing body is incorporated under.

We have also begun a process of discussion with the Northern Territory Government over proposed reforms to the Local Government Act, which we consider could be an opportunity to address some of the inconsistencies we have identified. Most recently, we requested membership of the Structural Reform Advisory Committee (SRAC), which is the key advisory body to the NT Government on the reform process. We have been invited by the NTG to be members of the SRAC, and NLC representatives will be attending a meeting on 24 June 1999. We have also been invited to nominate representatives on the Regional Reference Groups. It is therefore quite inaccurate for the NTG to suggest that the NLC is simply reactively opposed to any NT local government policies.

Clearly, the NLC is not "implacably opposed" to the Local Government Act, the NTG is well aware of this, and we have taken a number of direct steps to addressing the issues of concern to improve the operation of the Act in conjunction with the Land Rights Act for the benefit of both traditional Aboriginal owners and other Aboriginal residents on Aboriginal land.

2. Regionalisation mechanism

Our submission to you of 15 June made the following points about the NLC's regionalisation policy:

- Regionalisation is about the devolution of Land Council powers to regional committees of the Full Council;

- Currently, seven regional committees have been established under s.29A of the Land Rights Act. These committees have been operating formally since October 1996, and informally since December 1994.

- The NLC concurs with Justice Toohey's view that the regional committees must comply with s.23(3) of the Land Rights Act – a view which was unfortunately rejected by Mr Reeves.

- Section 28 (1) (a) – (d) of the Land Rights Act currently restricts the powers which can be delegated to these committees, and in effect requires that all major land use agreements are ratified by Full Council not by the regional committees.

The NLC considers that the Land Rights Act should be amended in the following manner:

1. s.28 of the Act to be amended to allow the delegation of all powers of the Full Council to a committee of the Full Council, except those powers held under ss.35 and 19(4)(b), the power of delegation, and the surrender of Aboriginal land.

2. s.22(2) to be amended to provide for tighter controls on the process of affixing the common seal of the Land Council.

The reason for reserving some powers to the Full Council and developing tighter controls on the common seal mechanism is that the integrity of agreements under the Land Rights Act is essential, and it is important to maintain a system of checks and balances to ensure that agreements continue to be as legally certain under the new arrangements as they are currently.

3. Royalties Management and Service Provision

The Chairman of the HORSCATSIA asked the NLC to advise on whether we considered that the management of royalties should be subject to the same structures of community management as we have proposed for health, housing, education and other services.

The NLC does not consider that either mining royalty equivalents or monies received as royalties from agreements over other activities on Aboriginal land are in nature or substance similar to the provision of basic citizenship services to Aboriginal people.

Mining royalty equivalents are distributed through the ABR according to a clearly defined formula which recognises the right of people in the "area affected" by mining to receive compensation for the effects of the mine; the right of all Aboriginal people to representation and service with regard to land matters from a properly-resourced Land Council; and the interests of the wider Aboriginal population. The formula is set out in section 64 of the Land Rights Act.

The subsequent discovery by the High Court of Australia of native title in Mabo no.2 has further clarified that the monies received through ABR as mining royalty equivalents are received as a right, not as a benefit.

It should be noted that the section 64(3) payments are made not only for the benefit of traditional owners but of other Aboriginal people, via incorporated Aboriginal associations, in the area of the mining activity. See section 35(2) of the Land Rights Act.

The NLC considers that the distribution of the s.64(3) monies could be clarified through an amendment to s 35(2) to the effect that the payments are made to "people affected" rather than "areas affected" by mining. This would be in line with the compensatory intent of the payments.

Other royalties or monies earned through agreements or joint ventures on Aboriginal land are clearly the result of private commercial arrangements which are entered into by traditional Aboriginal owners.

Several commentators, including the NLC in its submissions to Reeves and HORSCATSIA, have highlighted the danger of substitution, whereby ABR or royalty monies are used to substitute for the basic services which the government is obliged to provide for Aboriginal people. This is clearly inappropriate and the management and decision-making over the land, and monies generated from that land, should be kept separate from those monies which relate to services for the whole community. As the NLC has made clear, whilst land-related matters should remain the province of traditional Aboriginal owners, we consider that services to Aboriginal communities would be more effective if they were managed by Aboriginal people for the benefit of all Aboriginal people in a region or community.

4. Traditional owners and the Land Rights Act

In his submission to HORSCATSIA on 15 June, Mr Reeves made the unusual assertion that traditional Aboriginal owners do not "own" Aboriginal land, but that Land Trusts hold the title in trust for a much wider body of people.

The NLC has consistently pointed out that the Land Rights Act benefits all Aboriginal people on Aboriginal land, and that section 23(3) clearly obliges Land Councils to consult with all Aboriginal people with interests in land before executing an agreement. This is an important aspect which appears to have been overlooked in recent discussions by HORSCATSIA.

However, it is also clear that the Act assigns special rights to those people who have traditional rights to the land, and that these rights, which include a right to veto or withhold consent to any use of Aboriginal land, indubitably amount to ownership

rights. The Land Trusts operate as a mechanism to ensure that those rights are protected and that the wishes of traditional Aboriginal owners are upheld.

We consider that Mr Reeves' assertion that traditional Aboriginal owners do not own their land is quite absurd, and that it is simply an attempt to rationalise his radical rewriting of the Act to exclude traditional Aboriginal owners. His thesis is based on anthropological advice which has been completely refuted by the leading Australian authorities. (See submissions to HORSCATSIA by Peter Sutton, Howard Morphy, CAEPR, Nancy Williams and the Australian Anthropological Society; see also **Land Rights At Risk? Evaluations of the Reeves Report**, (J. Altman, F. Morphy & T. Rowse (eds))CAEPR monograph no. 14, June 1999.)

It is also important to address the claim that traditional Aboriginal owners operate as an "exclusive elite" in a manner contrary to the interests of the majority of people living on Aboriginal land.

First, as noted above, s. 23(3) clearly obliges the Land Council to inform and consult with all people with interests in the land in question.

Second, it is quite misleading to suggest that traditional Aboriginal owners are a separate or elite group in Aboriginal communities. While historical forces have moved people away from some of their traditional lands to the larger communities, the vast majority of people continue to have traditional interests in land, although the land to which they have rights and interests may not be the land on which they reside.

The submission of Leon Melpi of Port Keats on 16 June 1999 illustrated this point very clearly. As Mr Melpi pointed out, he lives at Port Keats but has traditional rights to land slightly to the south of the Port Keats township. He respects the rights of the traditional owners of the site of the town, and in turn is able to make decisions about his own land and the development of its resources for housing.

As your public hearings have demonstrated, Aboriginal people are acutely aware of their traditional lands and the continued operation of their land tenure system, and have rejected the Reeves model which seeks to destroy it.

It is also important to note that rights to land are transmitted through complex social and cultural processes which mean that the elders or senior members of the landowning group are recognised as the key decision-makers, but that other members of the group also have rights and will gain greater rights in accordance with Aboriginal law as they acquire and exercise the relevant cultural and spiritual knowledge. Thus, the group of "traditional owners" is a constantly evolving body, not an all-powerful, static elite.

The issue of recognition of traditional ownership rights is also central to the issues surrounding the operation of NTAC. The suggestion has been made that if NTAC were elected then the significant objections voiced by Aboriginal people would be addressed. This is far from the case. The fundamental problem with NTAC and the Reeves Regional Land Councils is that they can make decisions over land without reference to the traditional Aboriginal owners.

It is also misleading to suggest, as the Northern Territory Government did in its submission on 15 June, that other non-elected Aboriginal bodies currently operate effectively to protect Aboriginal rights. Neither the NT Aboriginal Areas Protection Authority nor the board of the Indigenous Land Corporation is even vaguely comparable to the functions and powers proposed for NTAC. NTAC and the Reeves Regional Land Councils would usurp the existing property rights of Aboriginal people in the NT. It should also be noted that while the NLC nominates members of AAPA and has every confidence in the senior Aboriginal people on the Authority, we have expressed serious concerns (see submission to Reeves, December 1997), about the role played by the NTG in the management of sacred sites issues. We do not consider this to be an appropriate or effective model.

5. The Land Rights Act and NT development

The Northern Territory Government claimed in its verbal submission to HORSCATSIA that the Land Rights Act has retarded economic development in the NT. This echoes the claims in the Reeves Report. There is no evidence for this assertion, and the only reputable studies which have been done have proved that it is not the case. The Committee is referred to Manning's report to ATSIC of 1994, and Bill Pritchard's 1995 study **The Black Economy** (NARU Discussion paper 1996). The NLC provided both these documents to Reeves, as well as detailed statistical refutation of the misleading mining statistics provided by the then Commonwealth Department of Primary Industries and Energy. It is unfortunate that he chose not to use them, and persisted in his ill-founded assertions about "poor" levels of mineral exploration and development.

As the NLC's submission to HORSCATSIA also demonstrates, Reeves' arguments about the cost of delays is similarly erroneous; see the study by leading economist John Quiggin provided at Appendix 4 of our March and April submissions.

The forthcoming Manning report to ATSIC for the Competition Review of Part IV of the Land Rights Act will be an important resource to assist the Committee to assess the impact of the mining provisions of the Land Rights Act on the NT. The Committee is urged to dismiss the unsubstantiated claims of Reeves and the NTG, and await Manning's report.

6. Translation and Interpretation

The issue of the translation of Aboriginal languages has been raised in several HORSCATSIA forums recently, and it is important that this issue is fully understood. The NLC is aware that it has been raised by Mr Ian Viner (transcript 9 June 1999); discussed with Mr John Reeves (15 June 1999) and was again raised by Rev. Dr Djiniyinni Gondarra (18 June 1999).

A fundamental conceptual issue needs to be clarified. Interpretation and translation are two different processes and have different outcomes. The purpose of interpretation is to provide an on-the-spot summary outline of the content of someone's speech where that speech has been made in a language unknown to the listeners. Interpretation is generally provided immediately after the speaker has finished.

Translation is a full, literal and subtle process of expressing the meaning of the speaker's words. Translation is generally a much more time-consuming process and as a result gives an accurate version of the full import of the speech.

It has been clearly established on the parliamentary record that Mr Reeves did not have any translations made from any of his public hearings. (See proceedings of Finance and Public Administration Committee 8 February 1999; and answers provided on notice; see also NLC April 1999 submission page 64) Most of his public hearings had interpreters available who provided an on-the-spot summary of what had been said, however as Rev Dr Gondarra pointed out to you on 18 June 1999, this is far from adequate and much of the important and subtle meaning of a speaker's words cannot be conveyed in such a context.

Mr Reeves only heard a quick snapshot version of the often lengthy and detailed verbal submissions given to him in Aboriginal languages. As a result of not obtaining full translations of such submissions, he denied those people their full right to be heard.

7. Fishing and Marine Agreements.

The Amateur Fishermen's Association NT (AFANT) representatives, Mr Bryan McManus and Mr John Harrison, also made a number of comments to the Committee which require response.

AFANT representatives detailed the recent access agreement reached with the Tiwi Land Council, but inferred that little formal recreational fishing access had been negotiated through the Northern Land Council. They suggested instead that private deals were in place between individual traditional owners and anglers for land under NLC jurisdiction. They complained about the limited access available to both Aboriginal owned pastoral properties and Aboriginal land trust land, and claimed that they found it more difficult dealing with the NLC than with the smaller coastal land councils. They also claimed to have had difficulties dealing with "exclusive" arrangements reached with some fish tour operators.

The following information is offered to correct the inaccuracies contained in those comments.

Formal access arrangements to Aboriginal land

The NLC conducts negotiations between traditional owners, the Department of Lands Planning and Environment, the Department of Primary Industry and Fisheries, the Parks and Wildlife Commission, AFANT and fish tour operators to facilitate increased angler access to Aboriginal land.

Formal angler access agreements are now in place for Browns Creek, the "Market Gardens" on the Daly River and Sandy Creek in North West Arnhem, and the relevant traditional owners have also agreed to increase angler access to Gurig National Park, Cobourg Marine Park and Elsey Aboriginal pastoral station. The NTG and AFANT have also been made aware that traditional owners are seeking consultations for similar access arrangements for the King River, Fitmaurise River, Croker Island and Urapunga Aboriginal pastoral station areas. Private anglers have greater access has

been offered by Aboriginal pastoral stations through the NLC than by non- Aboriginal pastoral stations.

Fisheries committees have been formed with AFANT, Larrakia and the NLC dealing with issues of common concern including fishing access to the Darwin region and the protection of sacred sites.

Formal access agreements have also been reached with several fish tour operators at Croker Island, Gurig National Park, Endlygout Island, and Gove, and over the Moyle Liverpool, Tonkinson, Cadell, Blyth, Goomideer, King and Glyde Rivers.

All are formal arrangements under the ALRA and many are legal agreements with the Northern Territory Government. .

Exclusive arrangements.

Traditional owners negotiate a variety of agreements according to different circumstances. Some arrangements reached with fish tour operators are exclusive of other fish tour operators (for obvious commercial reasons), but not exclusive of other sectors of the fishing industry including private anglers and commercial fishing licensees. In some cases traditional owners may make a commercial decision to support a single operator with a fixed number of clients at one time as opposed to open access to the general public with accompanying social concerns and concerns over the protection of sacred sites and road degradation. On other occasions they may chose to support a tour operator as well as anglers who are limited to numbers of vehicles or people at any one time. It is apparent that the traditional Aboriginal owners are facilitating greater access to their land and waters and at the same time exercising sensible commercial opportunities.

The attached ***Marine Agreements*** video (and literature) provides more information on the agreements entered into with the recreational fishing, fish tour, commercial fishing and aquaculture sectors of the fishing industry.