

**Senate Community Affairs Committee**  
**ANSWERS TO ESTIMATES QUESTIONS ON NOTICE**  
**FAMILIES, HOUSING, COMMUNITY SERVICES AND**  
**INDIGENOUS AFFAIRS PORTFOLIO**  
**2012-13 Supplementary Estimates Hearings**

**Outcome Number:**

**Question No: 449**

**Topic:** Banyala leases

**Hansard Page:** Written

**Senator Scullion** asked:

Will the NLC grant the Banyala lease applicant's leases as they requested?

**Answer:**

The NLC's position is stated in its correspondence to Mr Djambawa Marawili of Banyala dated 29 March, 6 June, 15 July, 24 October, 24 November, and 23 December 2011 (copies attached).

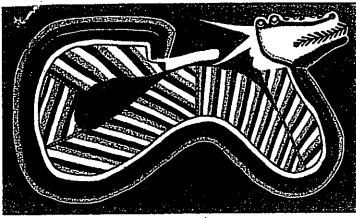
In essence, the NLC has requested that the applicants for the grant of leases first provide documentary evidence from a financial institution that it is prepared to loan funds secured against residential leases in Banyala, or documentary evidence that funding is available through the Commonwealth HOIL program.

Mr Marawili, and those advising him, have taken a contrary view, namely that the NLC should first grant long term peppercorn leases to residents of Banyala, on the basis that this will automatically or likely lead to financial institutions loaning funds through mortgages.

The NLC cannot accept, without any evidence, that this will necessarily or likely occur.

In short, the NLC is being asked to grant land for a period of 99 years without any consideration and without any evidence as to finance, despite s 19(5)(c) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) which requires that the terms and conditions of a lease are "reasonable". Bearing in mind the statutory context, that course would give rise to potential liability to the NLC.

The NLC awaits provision of the requested information.



# Northern Land Council

ABN 56 327 515 336

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**COPY**

POSTED 4/4/11

AJ (UO)

Our Ref:L03:F2011/0400

29 March 2011

Mr Djambawa Marawili AM  
Baniyala  
Via e-mail [terry.marawili@gmail.com](mailto:terry.marawili@gmail.com)

Dear Mr Marawili

## PROPOSED RESIDENTIAL HOUSING LEASES - BANIYALA

Thank you for your letter of 16 March 2011, in which you wrote about the desire of the Baniyala community to apply for individual housing leases. As requested, detailed below are Northern Land Council (NLC) requirements to enable processing of these proposed leases.

### List of information to provide to the NLC concerning the project

1. *Proposed identity of the Lessee*

I understand that an association or corporation may be established to hold the housing leases. If this is the case, the NLC would require details concerning corporate governance, including as to the identity of directors of the corporation and its constitution.

If an existing association or corporation is used, or if the project participants have had previous experience with similar projects, that information should also be included.

2. *Details as to the key terms of the lease*

Key terms you should provide information about include: (i) commencement date; (ii) term (i.e. duration of the leases); (iii) identity of the land you wish to include within the lease area; (iv) proposed subletting or assignment arrangements; (v) what the leased area will be used for (e.g. constructing housing, inhabiting residential housing, operation of a shop, etc.); (vi) proposed rental arrangements.

Additionally, if there are additional benefits that may flow to traditional owners and other Aboriginal peoples, such as employment or business opportunities, these additional benefits should also be made known.

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3. *Details of accountants and auditors of the Lessee*
4. *Details of funding sources*
5. *Details of any business plan or feasibility study that is applicable so as to indicate whether the Lessee has capacity to carry out the proposed activities and perform obligations that would be imposed under the lease*
6. *Details of any relevant industry licences (or permits) that might be required and held by the proponent to carry out the proposal*
7. *Details of any other relevant information or material that will assist the traditional owners gain an understanding of the proposal*

To facilitate the receipt of this information by the NLC, I have attached the NLC's 'Expression of Interest' Application Form. Upon receiving the information outlined above, my staff will enter details and assess the information, drawing on external advice where necessary. Anthropological advice would then be obtained, and discussions would commence concerning the lease terms.

In your letter of 16 March 2011 you have also asked when the next NLC Full Council meeting will be held. At this stage, the next Full Council meeting is planned for June 2011.

I look forward to receiving the above information from you.

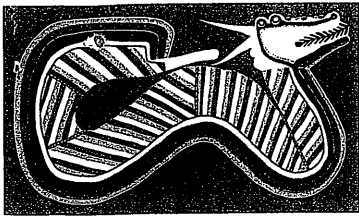
Yours sincerely



**Kim Hill**  
**CHIEF EXECUTIVE OFFICER**

cc. Andy Buttfield  
35 Bay View Street  
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→ POSTED  
4/4/2011



# Northern Land Council

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6 June 2011

Our Ref:L03:F2011/0400

Mr Djambawa Marawili AM  
Baniyala  
Via e-mail [terry.marawili@gmail.com](mailto:terry.marawili@gmail.com)

Dear Mr Marawili

## PROPOSED RESIDENTIAL HOUSING LEASES - BANIYALA

### Background

Thank you for your letter of 19 April 2011 in which you responded to the various questions posed in my letter of 29 March 2011.

In particular, thank you for clarifying the proposal as to the identity of the proposed lessee for housing leases in Baniyala by advising that leases from the Arnhem Land Aboriginal Land Trust are sought by individuals and not by a 'community-controlled Baniyala Association designed to be suitable to deal with land leases' that the Northern Land Council (NLC) understood was proposed to be the lessee following earlier discussions with your advisers.

### NLC requirements

As a statutory authority established under the *Land Rights Act*, where a grant of an estate or interest in Aboriginal land is contemplated the NLC is primarily concerned to ensure that the requirements in s 19(5) of the *Land Rights Act* are met.

It is for these reasons that the NLC has requested from you information as to the proposed model and identity of the lessee. These requests are designed to facilitate the NLC's faithful performance of its statutory functions, and to ensure that this is done in an efficient and timely fashion.

### Principles

I accept that you have certain views about the principles that should apply in relation to individual housing leases. I note in this regard that you have referred to the model that applies in the Australian Capital Territory (ACT), and expressed a desire that leases

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issued by the Arnhem Land Aboriginal Land Trust (as the entity which holds title to the land) be based on the same terms and conditions as ACT leases.

A fundamental difference between the ACT model and the situation which exists on Land Trust land is that the owner of the land in the ACT model is the government, which owns all of the rights in the land (but which then grants leases only for particular purposes). As you will appreciate, the ACT leasehold system as it presently exists has evolved since the 1920s (including being subject to many reviews and reports) and it now shares many of the attributes of private freehold.

Conversely, the scheme under the *Land Rights Act* (which has only been in existence since the late 1970s) is that a Land Trust holds title to the land for the benefit of traditional owners. Thus, it is not the government who holds the ultimate rights in the land. This key difference necessarily affects the ability to automatically renew the lease, as exists in the ACT model.

### **Security of title**

Despite my observations as to differences between the ACT model and that existing on Aboriginal land granted under the *Land Rights Act*, I appreciate that your overriding desire is to obtain secure tenure to facilitate access to finance. In that regard I note that leasing is commonly used to provide secure title – and that leasehold systems are utilised in a number of locations globally to support investment by offering secure title.

For Aboriginal land granted under the *Land Rights Act* you will be aware that the 2006 amendments to that Act by former Indigenous Affairs Minister, the Hon Mal Brough, introduced the concept of the 'whole of township lease'. These 'whole of township leases' are granted under s 19A of the *Land Rights Act*. That section provides that s 19A leases can be granted for a term between 40 and (no more than) 99 years.

Of course, notwithstanding the insertion of s 19A by the 2006 amendments, long term, secure leases were already available via s 19 of the *Land Rights Act* (and not just in townships), and this section has been used by the NLC and Land Trusts in the NLC region to grant leases which facilitate access to capital markets for a range of entities on Aboriginal land.

### **Access to government funds for private Indigenous housing**

In relation to the issue of secure title to underpin your commitment to private housing, I understand from your letter of 19 April 2011 that a primary driver for a lease from the Arnhem Land Aboriginal Land Trust is so that you and other residents of Banyala can access the 'Home Ownership on Indigenous Land' program (**HOIL program**). As I understand your proposal, the construction of new houses at Banyala will be funded primarily through this program.

Given that the most recent Annual Report for the Executive Director of Township Leasing identifies that funds have been accessed from Indigenous Business Australia (IBA) in relation to communities which are subject to leases under s 19A of the *Land Rights Act*, it is presumed that the term of those leases, and the subleases granted under them (which do not contain an automatic right of renewal), is sufficient for the purposes of accessing funds under the HOIL program.

I therefore propose that the term of residential leases at Baniyala be aligned with the minimum term required so as to access the HOIL program. Consistent with existing subleases issued by the Executive Director of Township Leasing (which support access to the HOIL program), there would be no automatic right of renewal.

As requested in your letter of 19 April 2011, I have attached an example of a lease for private housing issued under s 19 of the *Land Rights Act*. It is proposed that this draft form be the basis for future discussions concerning the leasing proposal at Baniyala.

#### **Access to the HOIL program by prospective lessees?**

However, prior to further progressing discussions as to the terms and conditions of leases for residential purposes at Baniyala, and as you will be aware, there are a number of key requirements that must be met before an applicant receives access to products delivered under the HOIL program.

I understand that priority areas for access to the HOIL program are those individuals living in larger towns, and that in relation to smaller outstations, IBA is reluctant to provide access to the HOIL program because the latter areas are considered a 'high risk for lending'.

It would therefore appear that in accordance with IBA policy Baniyala falls into a category that IBA classifies as a 'high risk for lending'.

Consequently, I would appreciate if you would identify the basis on which you understand access to the HOIL program will be granted to residents of Baniyala desiring leases from the Arnhem Land Aboriginal Land Trust.

Similarly, I would also appreciate receiving from you confirmation that applicants for access to the HOIL program in Baniyala (and thus for leases from the Arnhem Land Aboriginal Land Trust) are able to meet the 'HOIL Standard Loan Eligibility Criteria', and in particular confirmation that the applicants have the demonstrated capacity to meet housing loan repayments over the term of any proposed loan.

In my letter of 29 March 2011 I requested details as to funding sources. If it is proposed that funding sources other than the HOIL program will be accessed, I would appreciate being apprised as to both the identity and likely quantum of funding available from other potential sources.

You will appreciate that I am requesting this information for dual purposes: (i) so that I can ensure the efficient allocation of NLC staff resources to projects; and (ii) to ensure the Arnhem Land Aboriginal Land Trust only grants long-term leases to individuals who are able to demonstrate they can meet loan obligations.

#### **Further information**

I note that you have also asked in your letter of 19 April 2011 how long the NLC may take to process a lease once you confirm the names of the lessees and details of block surveys.

Naturally, the NLC endeavours to process all leases in an expeditious and efficient manner, and to prioritise appropriately the large number of applications received for grants of estates or interests in Aboriginal land.

As with all transactions involving land (whether on Aboriginal land or elsewhere), there are requirements including additional approvals over which the NLC has little or no control. For example, the *Land Rights Act* requires the consent of the Indigenous Affairs Minister to the grant of any lease with a term longer than 40 years in length, and NT planning laws require prior surveys for long term leases. These processes can take some time. Subject to such external processes, the NLC will naturally perform its functions expeditiously.

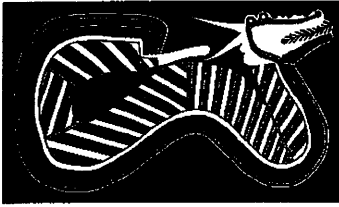
I look forward to receiving the information requested above, and to otherwise further discussing this matter with you.

Yours sincerely



**Kim Hill**  
**CHIEF EXECUTIVE OFFICER**

cc. Andy Butfield  
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# Northern Land Council

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15 July 2011

Our Ref:L03:F2011/0400

Mr Djambawa Marawili AM  
Baniyala  
Via e-mail [terry.marawili@gmail.com](mailto:terry.marawili@gmail.com)

Dear Mr Marawili

## PROPOSED RESIDENTIAL HOUSING LEASES - BANIYALA

Thank you for your letter of 20 June 2011.

The Northern Land Council (NLC) naturally shares your commitment to ensure that housing and socio-economic conditions are improved in all communities, including homelands such as Baniyala.

To that end the NLC has long exercised its statutory functions to ensure development on Aboriginal land, including almost 170 agreements processed by the Full Council in the last six months, most being s 19 leases in communities (including residential leases).

In turn these leases can be used to secure finance, including by mortgage. Before processing a lease for that purpose, the NLC requires written evidence from a bank or financial institution which confirms that money will be loaned by way of mortgage to the lessee.

In turn, before writing to that effect, a bank or financial institution must be satisfied that an individual has a demonstrated capacity to meet housing loan repayments over the long term (see further below).

Alternatively, if the Commonwealth HOIL program is being utilised, the NLC requires written evidence which confirms that money will be loaned under the program's guidelines to each individual concerned.

I welcome your advice as to contact with financial institutions (including Aussie Home Loans), other funding sources, and the HOIL program. However at this stage you have not provided any written evidence from those institutions that a loan will be granted to an identified individual by way of mortgage if a lease is granted.

This is an important issue, because the NLC's longstanding advice is that banks and financial institutions will not loan money for housing unless, first, the individual is employed and, secondly, the loan can be secured against property which can be sold to recover the loan. The HOIL program imposes similar, albeit less stringent, requirements.

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The second point means that there must be a market whereby the bank can be confident that there are willing purchasers ready to buy any leases which become vacant due to foreclosure and repossession, in this case at Baniyala. The NLC's financial advice, however, is that such a market does not presently exist at remote communities such as Baniyala, and that at present it is unlikely that institutions will loan money for housing.

This has nothing to do with the land being Aboriginal freehold granted under the *Aboriginal Land Rights (Northern Territory) Act 1976*. Rather, it reflects remoteness, the low population density, and the lack of willing purchasers.

You may have received alternative advice from Aussie Home Loans or other institutions. If so, I would appreciate if you would detail that advice, preferably by means of a written letter from the institution which confirms that funds will or may be loaned to certain individuals and the conditions under which that may occur. Alternatively, you may wish provide contact details so that the NLC can contact the institution directly to obtain information.

Likewise, if a Baniyala resident expects to obtain funds through the HOIL program, written documentation should be provided to confirm that this is the case.

The other option identified in your letter was for houses to be constructed without a mortgage using funds from other sources. Naturally traditional owners are entitled to use Aboriginal land in this way, due to traditional rights of occupation and use recognised under s 71 of the *Land Rights Act*.

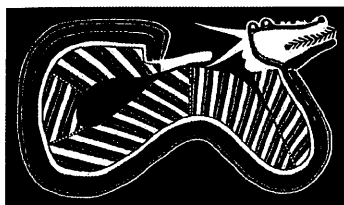
I look forward to receiving requested documentation or other information (after which drafting and related issues may be considered), or to discussing this matter directly with you and Baniyala residents regarding what appear to be significant misconceptions as to the financial realities which apply.

Yours sincerely



**Kim Hill**  
**CHIEF EXECUTIVE OFFICER**

cc. Andy Butfield  
35 Bay View Street  
North Sydney NSW 2060



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24 October 2011

Our Ref:L03:F2011/0400

Mr Djambawa Marawili AM  
Baniyala  
Via e-mail [terry.marawili@gmail.com](mailto:terry.marawili@gmail.com)

Dear Mr Marawili

## PROPOSED RESIDENTIAL HOUSING LEASES - BANIYALA

Thank you for your letter which was received by e-mail on 4 October 2011.

As noted in my letter of 15 July 2011 (attached for your reference), the Northern Land Council (NLC) shares your commitment to ensure that housing and socio-economic conditions are improved in all communities, including homelands such as Baniyala.

That letter also repeated a request in my earlier letters of 29 March 2011 and 6 June 2011 that you provide further information noting that before the NLC is able to process a lease such as that presently in discussion that written evidence must be provided from a bank or financial institution which confirms that money will be loaned by way of mortgage to the proposed lessee (being yourself and Waka Munungurr).

As also identified in my letter of 15 July 2011, if you wish to construct houses without a mortgage for example if funds are available from sources other than a bank, financial institution or the HOIL program for this purpose, then traditional owners are entitled to use Aboriginal land in this fashion, due to traditional rights of occupation and use being recognised under s 71 of the *Land Rights Act*, and in which case it is not necessary to conclude any leasing arrangement.

Once the requested documentation has been provided drafting and related issues may be considered and further discussed. I look forward to receiving this information from you.

In the interim I can advise that the next NLC Full Council meeting is scheduled to commence on 14 November 2011.

Yours sincerely

**Kim Hill**

**CHIEF EXECUTIVE OFFICER**

cc. Andy Buttfeld  
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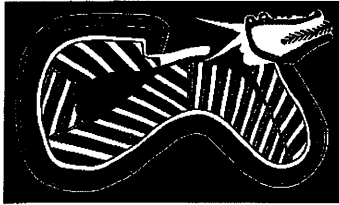
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24 November 2011

Our Ref:L03:F2011/0400

Andy Butfield  
35 Bay View Street  
North Sydney NSW 2060  
Via e-mail: [andybutt@optusnet.com.au](mailto:andybutt@optusnet.com.au)

Dear Sir

## PROPOSED RESIDENTIAL HOUSING LEASES - BANIYALA

I refer to your e-mail of 22 November 2011.

Naturally the Northern Land Council (NLC) would welcome the opportunity to meet with Mr Djambawa Marawili AM, but also yourself – given that it is your advice to Mr Marawili which is the point of difference.

That is, you suggest that a statutory entity should grant a long term lease without full financial information. This proposition cannot be correct particularly because it misunderstands and misrepresents the statutory scheme that exists under the *Aboriginal Land Rights (Northern Territory) Act 1976*.

The requests for information about access to finance in my letters of 29 March, 6 June, 15 July and 24 October 2011 are reasonable and consistent with standard practice. A lessor must understand the capacity of a potential lessee to obtain finance and meet the terms of any lease.

Yours sincerely

**Kim Hill**

**CHIEF EXECUTIVE OFFICER**

cc. Mr Djambawa Marawili AM  
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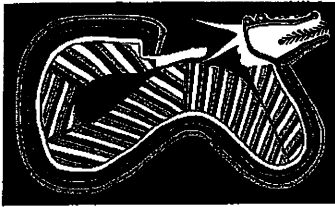
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23 December 2011

Our Ref: L03:F2011/0400

Mr Djambawa Marawili AM  
Baniyala  
Via e-mail [terry.marawili@gmail.com](mailto:terry.marawili@gmail.com)

Dear Mr Marawili

## PROPOSED RESIDENTIAL HOUSING LEASES - BANIYALA

Thank you for meeting in Darwin on 30 November 2011 to discuss the above matter.

There is much common ground between your aspirations and the Northern Land Council's (NLC's) commitment to implementing changed Commonwealth and Northern Territory Government policy to facilitate leases in Aboriginal communities including home ownership.

The initial focus of this policy has been on major communities, with over 150 leases executed in the NLC's region over the last two years. The importance of securing government and other infrastructure with leases will extend to smaller communities as resources permit.

Nonetheless it was evident at our meeting that significant differences exist as to fulfilling the above outcomes in the context of the statutory scheme. In turn, those differences appear to reflect, from the NLC's perspective, a misunderstanding as to the operation of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and related matters

I draw your attention to s 71(1) of the Act which provides as follows:

*Subject to this section, an Aboriginal or a group of Aboriginals is entitled to enter upon Aboriginal land and use or occupy that land to the extent that that entry, occupation or use is in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals with respect to that land, whether or not those rights are qualified as to place, time, circumstances, purpose, permission or any other factor.*

Your right (and that of other residents of Baniyala), under both Aboriginal and statutory law, to "occupy" and "use" that land is very broad, having been recognised by the High Court as a form of property (*Wurridjal v Commonwealth* 2009 HCA 2). This provision entitles traditional owners of Aboriginal land to reside in towns, communities or homelands, including in modern houses, and also to use that land.

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There are, however, two significant matters which this provision does not deliver. First, an Aboriginal resident of housing provided by the NT Government cannot readily exercise legal rights such as under landlord and tenant law. This includes the right to require the NT Government to repair and maintain housing in a proper and habitable state, in accordance with a landlord/tenant lease. At the same time, such a lease empowers the NT Government to require a tenant to ensure that housing is looked after and not damaged, with rent regularly paid.

The introduction, through leasing, of landlord and tenant law to housing in Aboriginal communities is a fundamental reform whose long term beneficial impact should not be underestimated.

Secondly, as you recognise, s 71 does not enable a resident to borrow funds secured against a title to construct or renovate a house, or establish a business. To achieve those objectives, a long term lease of Aboriginal land under s 19 is required.

However, regardless of whether or not a lease exists no bank or financial institution (including the Commonwealth HOIL program) will loan funds against a lease or other title in the absence of a market whereby that title may be bought and sold (ie to recover the debt if the mortgage is not paid). It is not uncommon, in remote parts of Australia and whether or not on Aboriginal land, for there to be no market. A market will not come into existence simply because a lease, or leases, are granted. Much more is required, particularly an economic base whereby employment is generated such that there is demand and thus a market for home purchase.

The NLC has confirmed the above advice with major banks and financial institutions. Like the Commonwealth and Northern Territory Governments, financial institutions advise that the focus must be on major communities because that is where a market exists or may be fostered due to the existence of supply and demand.

Nonetheless you and your advisers urge the NLC to facilitate the grant of long term peppercorn leases to residents of Baniyala, on the basis that this will automatically or likely lead to financial institutions loaning funds through mortgages. The NLC cannot accept, without any evidence, that this will necessarily or likely occur.

Put another way, if financial institutions were prepared to loan funds secured against residential leases in Baniyala, they would undoubtedly be prepared to write to the NLC and say so. It is standard practice regarding many transactions for such evidence to be provided, and the fact that documentation of this nature has not been produced - despite the NLC's requests - confirms the above advice and the NLC's concerns as to your proposal.

I trust the above advice regarding the operation of the Act and related considerations assists in showing a way forward regarding this matter. Naturally, if the requested advice from a financial institution is forthcoming, the NLC will consider the lease proposal in accordance with the statutory scheme.

Please contact me or responsible officers should you wish to discuss this matter further.

Yours sincerely



**Kim Hill**  
**CHIEF EXECUTIVE OFFICER**

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