



Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Bill 2007

Bronwen Jagers
Law and Bills Digest Section

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Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Bill 2007

Date introduced: 24 May 2007

House: House of Representatives

Portfolio: Families, Community Services and Indigenous Affairs

Commencement: The Bill has various commencement dates. See the table on page 2 of the Bill. The main amendments, which are contained in Schedule 1, are to commence either on a day to be fixed by Proclamation, or six months after Royal Assent.

Purpose

The Bill seeks to establish the office of Executive Director of Township Leasing, to enter into and administer township leases on Aboriginal land in the Northern Territory, under the [Aboriginal Land Rights \(Northern Territory\) Act 1976](#).

Background

Basis of policy commitment

The *Aboriginal Land Rights (Northern Territory) Act 1976* ('the ALRA') was significantly amended in 2006 to, amongst other things, facilitate 99-year leases of Aboriginal townships in the Northern Territory. For a detailed background on these amendments see the [Bills Digest](#) by Jennifer Norberry and John Gardiner-Garden (June 2006). The Senate's Community Affairs Committee also conducted an [inquiry](#) into the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006.

A brief overview of the township leasing scheme is provided below.

Township leasing

In 1976 the ALRA established communal Aboriginal land ownership in Australian law. Title to land granted under the ALRA is held by a Land Trust on behalf of the traditional owners. Title is inalienable and equivalent to freehold title, but is held communally, reflecting the nature of Aboriginal land ownership.¹

Since its introduction in 1976 the ALRA has been reviewed a number of times, with the most significant review tabled in Parliament in 1998. The [Reeves Report](#) recommended significant change to the ALRA, including changes to the Land Council system, the

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removal of the permits system for access to Aboriginal land, giving the Northern Territory (NT) Government power to compulsorily acquire Aboriginal land for public purposes, and the development of leasing arrangements to enable Aboriginal people to own their homes on communal land.²

The Reeves report prompted several further reviews, including one by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HORSCATSIA); and a joint response to the Reeves Report by the NT Government and Land Councils.³

The NT Government was also developing its own model for township leasing, and in July 2004 sent an options paper to the four NT Land Councils for consideration. However, the Commonwealth's amendments to the ALRA overtook this plan and in 2005 the NT Government wrote to the Australian Government suggesting a voluntary leasing plan which would recognise the right of traditional owners to make decisions over their land.⁴ In June 2005 the National Indigenous Council (the advisory body to the government on indigenous matters) presented its [Indigenous Land Tenure Principles](#) to Government.

A scheme to facilitate township leasing was included in the 2006 ALRA amendments. Under **section 19A of the ALRA**, a Land Trust may grant a 99 year lease of a township to an 'approved entity', which means either a Commonwealth or NT entity, if both the Minister and the Land Council agree to the granting of the lease. After 69 years, the Land Trust may grant another lease to the same entity, to ensure certainty for home owners and other lessees (subsection. 19A(5) of the ALRA).

The need for a Commonwealth entity

As outlined above, in the lead-up to the ALRA amendments the NT Government had expressed its in-principle support for a township leasing scheme. In an October 2005 [press release](#) the Chief Minister Clare Martin stated that an NT Government entity established to issue sub-leases would do so on terms agreed by traditional owners and land councils:

An independent statutory authority with a board including an independent Chair and representation from Land Councils and both the Northern Territory and Australian Governments is the favoured structure at this stage.⁵

At the public hearing for the Senate inquiry into the ALRA Amendment Bill, the NT Government again stated its intention to establish an entity to issue and manage leases:

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.⁶

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However, to date the NT Government has not established such an entity as required by the ALRA. In his second reading speech for the Bill the Minister stated:

It was the Government's understanding that the Northern Territory Government would establish an entity to hold township leases, issue sub-leases, collect rent and administer township leases. However, this has not yet occurred.⁷

According to a press report, the NT Government's delay may be caused by internal caucus deliberations within the NT ALP.⁸

To account for the possibility that the NT Government would not establish a township leasing entity (as is now the case), a last-minute addition to the 2006 ALRA amendments included a provision for the Commonwealth to establish such an entity. This bill implements that provision.

The first lease agreement

Traditional owners of the town of Nguuu on the Tiwi Islands have in principle agreed to arrangements for a 99 year lease of the township.⁹ Should it proceed, the Nguuu lease will be the first granted under the 2006 amendments to the ALRA.

Public comment on the township leasing scheme

There was significant community comment regarding the 2006 amendments to the ALRA, particularly surrounding the townships leasing scheme (see the Bills Digest and submissions to the Senate inquiry, referenced above). Comments regarding the specific issue of the entity which is to manage a lease scheme are outlined below.

Interest groups and academia

A number of groups, including Land Councils, Aboriginal interest groups and academia, expressed concern regarding the township leasing entity. For example, Sean Brennan of the Gilbert + Tobin Centre of Public Law at the UNSW Law School stated:

The headlessee under the [ALRA] stands to become a very important player in the Northern Territory. It will hold a lease, or more likely, multiple leases over some of the potentially most valuable Aboriginal land in the Northern Territory (remembering that almost half of the NT landmass is Aboriginal land). It will enjoy the dominant property rights in an Aboriginal township for the lifespan of an Aboriginal person and, statistically, through the lifespan of their grandchild as well.

The Government speaks of the headlessee as a driver of economic development in a new era of prosperity for Indigenous people. It will certainly have complex legal and financial responsibilities because, to a significant extent, the Bill puts the economic fate of many Aboriginal people in the Northern Territory in its hands.

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Parliament is accustomed to passing laws that establish public bodies with long-term objectives and weighty responsibilities. Typically, it does so on the strength of detailed legislative provisions spelling out basic features of the body, such as:

- its composition and structure
- its powers, duties and functions
- its method of doing business, and
- its lines of accountability.

The 2006 Amendment Act said almost nothing about headlessees. A last-minute amendment means that the headlessee might be a Commonwealth rather than a Territory entity. This suggests policy-making on the run about one of the Act's most critical features. Aboriginal people might find the headlease later transferred to another body whose identity is exclusively determined by a government minister, with no parliamentary oversight through tabling and disallowance and, it appears, no reference back to traditional owners.¹⁰

In their submission to the Senate inquiry into the 2006 ALRA Amendment Bill, Associate Professors Maureen Tehan and Lee Godden from University of Melbourne Law School said:

In the absence of any institutional arrangements for the involvement of traditional owners in decision-making about the land, at least in the short to medium term disruption and disharmony is likely to continue to be feature of townships with non-traditional owners occupying traditional lands without apparent consent (in customary law terms). This is exacerbated by the removal of the operation of the permit provisions of the Act from the townships.

If the new scheme is to proceed then at the very least there should be incorporated into the head lease provisions that permit or even mandate the involvement of traditional owners in land management, planning and environmental and cultural heritage management (even though the last of these will still presumably be covered by the Northern Territory aboriginal heritage protection scheme).¹¹

The Northern Land Council submitted:

The provisions of the s 19A scheme are in broad and unconstrained terms, and do not identify or specify its purpose or provide guidance as to the character or exercise of powers by the head lessee. The provisions allow for a lease of a township area (as distinct from an area for township purposes), and there is no requirement that the area be used for any particular purpose and no regulation of the granting of subleases to ensure that power is directed at that aim.¹²

A number of other submissions made similar arguments.¹³

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Political parties

The ALP, Australian Democrats and the Greens were all critical of the new leasing scheme contained in the 2006 amendments to the ALRA (see the Digest for that Bill). See also the Debates in the House of Representatives and the Senate.¹⁴

The Senate's Community Affairs Committee conducted an [inquiry](#) into the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006. Regarding 99 year leases on communal land, the majority Committee found:

The fundamentals of the [ALRA] such as inalienable Aboriginal land title and the role of traditional owners will be preserved. Ninety-nine year head leases over townships with individual subleases under the head lease will make it significantly easier for individuals to own their own homes and establish businesses. The bill enables the Northern Territory government to establish its own legislation to administer the scheme.¹⁵

However dissenting reports from the ALP, Australian Democrats and Greens members of the Committee criticised the lack of consultation over the township leasing scheme, and its possible ramifications for traditional owners' rights over their land.¹⁶

The Nguiu township lease

There has been some criticism of the recently announced agreement by the Nguiu township in the Tiwi Islands to a 99 year lease. The *National Indigenous Times* newspaper reported that some traditional owners accepted the agreement in the belief that they were signing for a benefit payment.¹⁷ Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma has also questioned the long-term ramifications of the lease agreement:

I have real concerns about the timeliness and level of information that has been given to this community to provide informed consent in the lead-up to their agreement on Wednesday of a 99-year government head lease over Nguiu. This arrangement now means Nguiu is open for business to anyone who wants to set up shop. The Tiwi People will now have a limited say in what can occur on their land.¹⁸

The ALP's Senator Trish Crossin (a Senator for the Northern Territory) stated that the Nguiu traditional owners were taking a 'great leap of faith' in signing the agreement. Senator Crossin also criticised the linking of funding for 25 new houses and health initiatives to the lease agreement. She went on to state:

There are still many unanswered questions about the lease and how it will be administered by the Commonwealth and traditional owners once rights are signed over. It is unclear how basic local government services and rates will be levied under the scheme.¹⁹

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Financial implications

The Explanatory Memorandum states that the costs of the Executive Director of Township Leasing will be met for up to \$15 million, to be provided over five years from 2006-07 to 2010-2011.²⁰ The funds will be sourced from the Aboriginals Benefit Account (ABA).

The ABA is a Special Account administered under the ALRA, for the receipt of royalties from mining on Aboriginal land. The money in the ABA may be distributed to Aboriginal people by the Minister for Indigenous Affairs, on the advice of the ABA Advisory Group which includes members of the four NT Land Councils.²¹

The use of the ABA to fund the administrative costs of the headlease entity was widely criticised in the debate surrounding the 2006 amendments to ALRA, with opponents stating that by using the ABA to fund such entities, traditional landowners are being asked to pay for the administration of renting their own land.

Main provisions

Schedule 1 to the Bill inserts **new Part IIA – Executive Director of Township Leasing**, into the ALRA.

Division 1, new section 20B establishes the office of Executive Director of Township Leasing.

Division 2, new section 20C lists the functions of the Executive Director as:

- to enter into, on behalf of the Commonwealth, leases under section 19A
- to administer leases and subleases and other rights and interests derived from such leases, in accordance with their terms and conditions, and
- any other functions that are prescribed by the regulations, related to the above two functions.

Division 3 sets out the administrative provisions for the Executive Director including:

- appointment by the Governor-General for a period of no longer than five years (**section 20D**), on a full-time basis (**section 20E**), with the Governor-General able to terminate the appointment for a range of reasons including ‘misbehaviour’ (**section 20M(1)**) or bankruptcy (**20M(2)**)
- remuneration and leave conditions to be set by the Remuneration Tribunal, or by regulation (**ss. 20G and 20K**)
- the Executive Director is not to engage in paid employment outside the duties of his or her office without the Minister’s approval (**section 20H**)

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- the ability for the Minister to appoint an acting Executive Director (**section 20J**), and
- the requirement for the Executive Director to advise the Minister of any interest, pecuniary or otherwise, that could conflict with the proper performance of the Executive Director's functions (**section 20N**).

Division 4 enables the Executive Director to employ staff under the *Public Service Act 1999* and appoint consultants (**sections 20P and 20Q**).

Division 5 requires the Executive Director to provide an Annual Report to the Minister at the end of each financial year (**section 20R(1)**) and any other reports as the Minister requests (**section 20R(2)**).

Division 6 (section 20S) provides for a repeal of this new Part IIA of the ALRA in the event that all leases granted to the Commonwealth have been transferred to another approved entity (ie a NT Government entity), and there is no likelihood of further leases being granted to the Commonwealth. To enable the repeal, the Executive Director must have provided an annual report to the Minister for the previous financial year, and a report on the operations of Executive Director for the part of the current financial year requested by the Minister. The Minister may specify a day for repeal via legislative instrument.

Schedule 2 to the Bill makes technical amendments to the ALRA.

Concluding comments

The scheme to introduce 99 year township leases, implemented by the 2006 ALRA amendments, is controversial. While proponents of the scheme argue it will provide Aboriginal people with the opportunity for home ownership and greater economic independence, those against it argue that it may result in traditional owners losing control over their land, and question the economic benefits for Aboriginal people.

The town of Nguiu on the Tiwi Islands looks set to become the first to agree to a 99 year lease. This Bill seeks to facilitate that lease and others by establishing a Commonwealth office of Executive Director of Township Leasing. The Commonwealth decided to move to establish the office of Executive Director of Township Leasing (an 'entity' as required by the 2006 ALRA amendments in order to issue a township lease), in the absence of NT Government action.

Concerns raised regarding the scant detail in the 2006 ALRA amendments about how township leasing entities were to be established have been partly answered in this Bill, as the functions and administrative duties of the Executive Director are defined. However, there is no legislated requirement for the Executive Director to undertake ongoing consultation or negotiation with traditional landowners or Land Councils regarding

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management of their land, once the headlease is agreed. It will be up to Land Councils and traditional owners to negotiate such terms before the lease is granted.

Endnotes

1. Jennifer Norberry and John Gardiner-Garden, *Bills Digest No. 158, 2005-06: Aboriginal Land Rights (Northern Territory) Amendment Bill 2006*, Parliamentary Library, Department of Parliamentary Services, June 2006.
2. John Reeves, *Building on Land Rights for the Next Generation. The Review of the Aboriginal Land Rights (Northern Territory) Act 1976*. Report, 1998.
3. See House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs: *Unlocking the Future: the report of the inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, August 1999, at: <http://www.aph.gov.au/house/committee/atsia/reeves/tblcontrecom.pdf>; and NT Government and NT Land Councils: *Detailed Joint Submission to the Commonwealth: Workability Reforms of the Aboriginal Land Rights (Northern Territory) Act 1976*, at: http://www.nt.gov.au/dcm/people/pdf/200306_ALRA_JointSubmission.pdf.
4. NT Government, evidence to the Senate Community Affairs Committee: *Inquiry into the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006*, 21 July 2006 at: <http://www.aph.gov.au/hansard/senate/commtee/S9506.pdf>.
5. NT Chief Minister, press release: *Federal land rights changes – step in right direction*, 5 October 2005, at: http://www.nt.gov.au/dcm/ocm/media/2005/10%20October/20051005_MartinLandRights%20.pdf, accessed 29 May 2007.
6. NT Government evidence to Senate Committee, op. cit.
7. Hon Mal Brough MP, Minister for Families, Community Services and Indigenous Affairs, ‘Second reading speech: Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Bill 2007’, *House of Representatives Debates*, 24 May 2007. at: <http://www.aph.gov.au/hansard/reps/dailys/dr240507.pdf>.
8. ‘NT Blackfellas labour for a better life’ at <http://www.onlineopinion.com.au/view.asp?article=4007>, accessed 28 May 2007.
9. Hon. Mal Brough MP, Minister for Families, Community Services and Indigenous Affairs, *Media Release: ‘Breakthrough Agreement on Aboriginal Land in the NT’*, 9 May 2007.
10. Sean Brennan, ‘Economic development and Land Council power: modernising the Land Rights Act, or same old same old?’ in *Australian Indigenous Law Reporter*, 2006, vol. 10, no. 4, at: http://www.gtcentre.unsw.edu.au/resources/docs/IRLG/Sean_CommentaryExtract.pdf, accessed 28 May 2007.

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- 10 *Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Bill 2007*
11. Senate Community Affairs Committee: *Inquiry into the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006*, at:
http://www.aph.gov.au/Senate/committee/clac_ctte/aborig_land_rights/report/c01.htm
 12. Northern Land Council, submission to the Senate Community Affairs Committee, at:
http://www.aph.gov.au/Senate/committee/clac_ctte/aborig_land_rights/submissions/sub13.pdf
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 13. For example, see submissions to the Senate Committee Affairs Committee from Australians for Native Title and Reconciliation, Central Land Council, Sean Brennan, and Raymattja Marika.
 14. House of Representatives, *Debates*, 19 June 2006, pp. 83 – 127. Senate *Debates*, 8 – 9 August 2006, 14 – 17 August 2006.
 15. Senate Community Affairs Committee: *Inquiry into the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006*, at:
http://www.aph.gov.au/Senate/committee/clac_ctte/aborig_land_rights/report/c01.htm,
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 16. *ibid.*
 17. ‘Confusion could have caused lease: TLG’, *National Indigenous Times*, 17 May 2007, at:
<http://www.nit.com.au/News/story.aspx?id=11053>, accessed 28 May 2007.
 18. Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Media Release: ‘Today’s actions could be tomorrow’s tragedy’*, 11 May 2007, at:
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 20. Explanatory Memorandum, p. i.
 21. For more information on the Aboriginal Benefits Account see
<http://oipc.gov.au/programs/AboriginalsBenefitAccountNT.asp>, accessed 28 May 2007.

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