

**Northern Land Council**

**Submission to the House of Representatives Standing Committee on  
Economics, Finance and Public Administration**

**Inquiry into Local Government and Cost Shifting**

**December 2002**

**Inquiry Terms of Reference**

The Minister for Regional Services, Territories and Local Government has asked the Committee to inquire into:

Cost shifting onto local government by state governments and the financial position of local government. This will include an examination of:

1. Local government's current roles and responsibilities.
2. Current funding arrangements for local government, including allocation of funding from other levels of government and utilisation of alternative funding sources by local government.
3. The capacity of local government to meet existing obligations and to take on an enhanced role in developing opportunities at a regional level including opportunities for councils to work with other councils and pool funding to achieve regional outcomes.
4. Local government expenditure and the impact on local government's financial capacity as a result of changes in the powers, functions and responsibilities between state and local governments.
5. The scope for achieving a rationalisation of roles and responsibilities between the levels of government, better use of resources and better quality services to local communities.
6. The findings of the Commonwealth Grants Commission Review of the Local Government (Financial Assistance) Act 1995 of June 2001, taking into account the views of interested parties as sought by the Committee.

The inquiry is to be conducted on the basis that the outcomes will be budget neutral for the Commonwealth.

House of representatives Standing Committee on Economics, Finance and Public Administration	
Submission No:	335
Date Received:	
Secretary:	6/1/03

## **Introduction**

The NLC welcomes this opportunity to provide a brief submission to this Inquiry, particularly in light of comments made regarding the role of Land Councils during committee hearings in Katherine and Darwin.

The NLC is not in a position to comment on each of the terms of reference, and will instead focus on clarifying purpose of the *Aboriginal Land Rights (Northern Territory) Act 1976*; the role of Land Councils under this Act, and the issues surrounding the interaction between this Act and the *Local Government Act (NT)*.

The *Aboriginal Land Rights (Northern Territory) Act 1976* (Land Rights Act) was assented to in 1976 and gave Aboriginal people title to most of the Aboriginal reserve lands in the NT, and the opportunity to claim other land not already owned, leased or being used by someone else.

In short, Land Councils have a statutory responsibility to ascertain and express the wishes of Aboriginal peoples in its region, and to protect their interests in Aboriginal land.

## **Role of the Land Councils**

The NLC is a statutory authority operating under the *Aboriginal Land Rights (Northern Territory) Act 1976*. It is also a recognised Native Title Representative Body (NTRB) under the *Native Title Act 1993*.

Under the s.23 of the Land Rights Act, the Land Councils have specific statutory functions:

- To ascertain and express the wishes and the opinion of Aboriginals living in the area of the Land Council as to the management of Aboriginal land in that area and as to appropriate legislation concerning that land;
- To protect the rights and interests of traditional Aboriginal owners of, and other Aboriginals interested in, Aboriginal land in the area of the land Council;
- To assist Aboriginals in the taking of measures likely to assist in the protection of sacred sites on land (whether or not Aboriginal land) in the area of the Land Council;
- To consult with traditional Aboriginal owners of, and other Aboriginals interested in, Aboriginal land in the area of the Land Council with respect to any proposal relating to the use of that land;
- Where the Land Council holds in escrow a deed of grant of land made to a Land Trust under section 12 –
  - (i) to negotiate with persons having estates or interests in that land with a view to the acquisition of those estates or interests by the Land Trust; and
  - (ii) until those estates or interests have been so acquired, to negotiate with those persons with a view to the use by Aboriginals of the land in such manner as may be agreed between the Land Council and those persons;
- to negotiate with persons desiring to obtain an estate or interest in land in the area of the Land Council –
  - (i) where the land is held by a Land Trust – on behalf of traditional Aboriginal owners (if any) of that land and of any other Aboriginals interested in the land; and
  - (ii) where the land is the subject of an application referred to in paragraph 50(1)(a) – on behalf of the traditional Aboriginal owners of that land or on behalf of any other Aboriginals interested in the land;
- to assist Aboriginals claiming to have a traditional land claim to an area of land within the area of the Land Council in pursuing the claim, in particular, by arranging for legal assistance for them at the expense of the Land Council;

- to negotiate and enter into agreements, as necessary, for the purposes of subsection 70(4);
- to compile and keep –
  - (i) a register recording the names of the members of the Land Council; and
  - (ii) a register recording the names of the members of the Land trusts holding, or established to hold, Aboriginal land in its area and descriptions of each area of such Aboriginal land; and
- to supervise, and provide administrative or other assistance for, Land Trusts holding, or established to hold, Aboriginal land in its area.

The NLC area covers the Top End of the NT. There are approximately 28,000 Aboriginal people in the NLC area, and at least 40 different Aboriginal language groups.

The Council is made up of 83 elected traditional Aboriginal landowners from over 72 communities throughout Central Australia. The Council is the supreme policy making body, and meets twice a year.

Land Councils are not direct service delivery agencies, nor do they distribute funds for service delivery. Land Councils are also not "councils" in the sense of being local governing bodies or having local government roles and responsibilities.

### **Local Government in the NT**

Local Government in the NT is unique and complex. Some key points are summarised here:

- With the exception of Queensland, no other State has a significant number of local governing bodies specifically set up to provide services to Aboriginal communities. There are other significant differences between the situation in the Northern Territory and the States:
  - Aboriginal people in the NT are significant land-owners, through Land Trusts established under the Land Rights Act. Currently 44% of the NT is inalienable Aboriginal freehold. This affects the rate base of local government thereby limiting the ability of local governing bodies to raise own-source revenue;
  - the Northern Territory Aboriginal population is disproportionately located in remote and rural areas;
  - Northern Territory local governing bodies have a different pattern of expenditure compared to the States, with a significantly higher proportion of the Northern Territory expenditure being on housing and community amenities, and education, health, welfare and public safety.
  - Northern Territory Government policy during the past decade encouraged the proliferation of a relatively large number of small local governing bodies in remote and rural communities (Government policy has particularly been based on the establishment of Community Government Councils in the remote Aboriginal communities); and
  - a large proportion of the local governing bodies in the remote Aboriginal communities are small and are unlikely to meet the [viability and efficiency] criteria established by the Government.
- Community government councils, established under the *Local Government Act*, represent only about half of the recognised local governing bodies in Aboriginal communities.

Most of these other bodies, which are still legally recognised as local governing bodies and receive financial assistance from both the Commonwealth and Northern Territory Governments, have rejected incorporation under the *Local Government Act*, despite the financial incentives offered by the Government to do so.

- The previous Northern Territory Government's own local government policy resulted in an ever increasing number of small under resourced councils. The number of councils established in the Northern Territory is now approaching the number in Victoria.
- The uneasy relationship between the *Aboriginal Land Rights (Northern Territory) Act 1976* and the *Local Government Act* – see below for detail.

### **Local Government Funding Arrangements**

Given the NLC does not participate directly in funding for service delivery, it is not appropriate to comment in detail on the issue of cost shifting and funding arrangements. This is best left to those organisations directly involved.

However, the NLC asks that the Committee note :

- There is often a focus on the fact that councils on Aboriginal land cannot charge rates. With 95 per cent of the Northern Territory's land area outside the jurisdiction of local government, there is often a failure to mention that pastoral leases, the overwhelming majority of which are owned by non-Aboriginal interests, are also not rateable.
- That rates, while still the most important source of revenue for local councils in the States, have declined in relative importance since the mid-1970s. Rate revenue in the Northern Territory, as a proportion of total revenue, is consistently well below the average for the States.
- That the Commonwealth allocation of funding to the States and the Northern Territory is allocated in an equal per capita basis, not the horizontal fiscal equalisation basis of the other Commonwealth financial assistance grants to these governments. Were the funding for local government to be allocated in a similar way, the Northern Territory would receive a higher level of local government funding. The net effect of that change, however, for small remote communities may not be more funding, since it is likely that the Northern Territory Government would reduce its own local government funding (such as Operational Subsidies) to compensate for the increase in Commonwealth funding.
- That there is no doubt that councils in remote communities are being forced to undertake a wide range of service delivery and in this way are subsidising many government services. Appropriate funding must be provided to ensure that remote councils are compensated for the provision of these services, thereby allowing them to deliver these services more effectively and efficiently. The submission to this Inquiry from the Barunga Manyallaluk Community Council (submission no. 295) illustrates this issue very well; the Council is incurring costs in order to deliver a Centrelink service to its constituents.

### **Response to findings of the Commonwealth Grants Commission's Review of the Operation of the Local Government (Financial Assistance) Act 1995.**

The NLC's submission to this Inquiry is appended to Attachment A. In relation to its recommendations:

- The NLC supports (as noted in its submission) the recommendation that the Aboriginal Peoples and Torres Strait Islanders Principle be retained, and that it should be strengthened to make it explicit that relative need requires an assessment of the impact of Indigenous people on the expenditure requirements and revenue raising capacity of LGBs.
- The NLC supports the recommendation that the National Report should monitor and report on the extent to which LGGCs' assessment methods recognise the needs of Indigenous people, and the performance of LGBs in providing services to Indigenous people (performance measures should be developed for this purpose).
- The NLC also supports 'in principle' the concept of dividing Commonwealth funding into three distinct pools;
  - A Per capita pool to provide every LGB with a share of assistance;
  - A Local Roads pool to contribute towards LGBs costs of maintaining their local roads;
  - A Relative Need pool to improve equity by providing additional assistance to the more disadvantaged LGBs.

However, this 'in principle' support is conditional on the development of the details of the arrangements (ie the amount allocated to each pool) and is premised on an assumption that this would deliver more, rather than less, funding to LGB's servicing remote Aboriginal communities.

- The NLC endorses the finding that the Commonwealth should retain the right to declare bodies that are providing local government-type services but are not LGBs under state legislation, to be eligible to receive financial assistance grants. However, the NLC does not agree that both the Commonwealth and State Minister should both be required to agree to this decision. While the relevant State Minister should be consulted, the Commonwealth should retain the right to make a final declaration, with or without approval from the State. This is particularly important for Aboriginal organisation in the NT who may have a dispute with the NT Government, and require direct Commonwealth assistance.

#### **Relationship between the *Aboriginal Land Rights (Northern Territory) Act 1976* and the *Local Government Act***

A lingering obstacle to the promotion, and effective operation of local government in Aboriginal communities is the structural conflict between the Land Rights and Local Government Acts.

Twenty five of the thirty community government councils in the NT are situated on Aboriginal land. The title to such land is held by an Aboriginal Land Trust (ALT) 'for the benefit of Aboriginals entitled by Aboriginal tradition to the use and occupation of the land concerned'. The Land Trust exercises its powers as owner of the land in accordance with directions from the Land Council for the area in which it is situated. The Land Council cannot give 'directions' unless it has consulted with and obtained the consent of traditional Aboriginal owners.

The Land Rights act establishes a regime which recognises the rights of traditional Aboriginal landowners to the use and occupation of land in accordance with Aboriginal traditional law and custom.

The Local Government Act does not recognise the Land Rights Act or its provisions for administration of Aboriginal land. Over many years the Land Councils have proposed amendments which would seek to make the Local Government Act consistent with the Land Rights Act to no avail.

There are other more specific problems with the LGA:

- Section 98 purports to allow a community government scheme to provide for declaration of rates on Aboriginal land without the consent of its owners;
- Section 119 purports to allow members and officers and employees of councils to enter any land in the council area 'for the purpose of making an inspection or carrying out work required or authorised to be done' under the LGA. No provision is made for obtaining consent from the owners of the land.
- Council operations are subject to the authority of the NT Minister for Local Government. For example, under s.181A the Minister may direct a Council to take action in respect of 'an irregularity in the affairs of the council'. Just what constitutes irregularities is not defined in the Act.
- Councils may make by-laws which are consistent with the LGA under s.182. Such by-laws are not bound to have the consent of traditional Aboriginal landowners or reflect the wishes and interests of Aboriginal people. Appropriate consultation is not even necessary.

These matters can give rise to serious conflicts between the Land Rights Act and the Local Government Act. The latter Act appears to diminish the rights of traditional Aboriginal landowners and other Aboriginal people that are provided for in the Land Rights Act.

The NLC will continue to seek amendments to the LGA which ensure the delivery of a high quality service, whilst also recognising the Land Rights Act and the rights of traditional Aboriginal landowners.

#### **Recommendation**

- That the NT Government engage in negotiations with the Land Councils aimed at:
  - developing an agreed package of amendments to the Local Government Act to resolve the fundamental conflicts between the Land Rights Act and the Local Government Act; and
  - considering the need for a new legislative framework for indigenous regional governance structures.

#### **CGC Indigenous Funding Inquiry**

The Commonwealth Grants Commission (CGC) Report on Indigenous funding is of great relevance to this current Inquiry into Local Government and Cost Shifting. For instance the report recognised that :

There are important principles and key areas for action that should guide efforts to promote a better alignment of funding with needs. These include :

- the full and effective participation of indigenous people in decisions affecting funding distribution and service delivery;
- a focus on outcomes;
- ensuring a long term perspective to the design and implementation of programs and services, thus providing a secure context for setting goals;
- ensuring genuine collaborative processes with the involvement of government and non-government funders and service deliverers to maximise opportunities for pooling

of funds, as well as multi-jurisdictional and cross-functional approaches to service delivery;

- recognition of the critical importance of effective access to mainstream programs and services, and clear actions to identify and address barriers to access;
- improving the collection and availability of data to support informed decision making, monitoring of achievements and program evaluation; and recognising the importance of capacity building within indigenous communities.

*(summary recommendation 21.)*

It goes on to say that an essential feature of creating an effective partnership between service funders, service providers and indigenous people is: ....

(iv) Indigenous control of, or strong influence over, service delivery expenditure and regional and local service delivery arrangements that emphasise community development, inter-agency co-operation and general effectiveness.

*(summary recommendation 23.)*

The Federal Government's response to this Inquiry has been inadequate thus far, and has failed to deal with the important structural and governance issues raised by the report.

### **NLC Policy on Local Government on Aboriginal Land**

The NLC has pursued a policy of negotiating agreements between the traditional owners of land (via the Land Trust) and the LGB. The agreements seek to clarify and define the respective roles of the LGB and traditional owners, and authorise all relevant local government activities within a certain area.

To date, only one agreement (with the Minjilang Community Council) has been finalised, but there are a large number of other agreements in train, including with the proposed restructured Thamarrurr Council (formerly Kardu Numida Incorporated) at Port Keats (Wadeye). This development is referred to in the EFPA transcript at 275.

The NLC's approach recognises the importance of the role of LGBs in providing services, not just of a municipal nature, but on behalf of the Territory and Commonwealth Governments. It also recognises that LGBs must provide services to all residents, yet the rights and interests of traditional land owners need to be recognised and protected in the interests of good governance and community harmony.

### **NLC response to some comments from the transcripts**

- "the land rights act is a constraint on the activities of councils" (Mr Bullemore, Darwin transcript, page EFPA 268) and
- "One of the principle questions that I pose to this inquiry is whether or not community government councils do in fact have any authority to govern at all. Under the Native Title Act, the authority that would normally fall to these councils is transferred to the various councils, in this case the Northern land Council, the Central Land Council, and other councils." (Mr Maisey, Katherine transcript, EFPA 191.)

**NLC response :** There are jurisdictional boundaries between the functions of the Land Councils under the Land Rights Act and the Local Government bodies under the Local Government Act. These need to be clearly understood. The term 'constraint' is not accurate.

Local councils cannot usurp the decision making powers of traditional Aboriginal landowners under the Land Rights Act. Councils cannot make decisions over Aboriginal land held by an Aboriginal Land Trust. However, this does not necessarily mean that a council cannot develop a business enterprise involving Aboriginal land. It simply means that due process needs to be followed, traditional Aboriginal landowners need to be consulted by the Land Council and an agreement reached. These perceived 'constraints' can be resolved through agreements, as the NLC's policy provides.

- "You made comment about the difficulty in getting investors to come along, because of the fact that the land is all under the NT land rights act. You suggested that that may need changing. Is there any support for that?" (Chair, Darwin transcript, page EFPA 273).

**NLC response :** The Land Rights Act allows for the leasing of Aboriginal land, provided there has been consent from traditional Aboriginal landowners. There is a clear process for consulting traditional Aboriginal landowners about any land use or development proposals on Aboriginal land, and many of these development proposals are approved. For example the Alice Springs to Darwin railway has been successful in attracting investor funding, and is based on 99 year leases for some portions of Aboriginal land. Again, the Land Rights Act and the Native Title Act do not hinder development or investment, they simply ensure that rights are protected in the process.

- "I think there is a big question there about the whole role of land councils in this respect because it seems to me that the local council is being short changed as far as services are concerned." (Mr Nairn, Darwin transcript, EFPA 274) and
- "Do the land council contribute to any of the services that you are providing, either separately or collectively?" (Chair, Katherine transcript, EFPA 158)

**NLC response :** Land Councils are statutory bodies with specific functions, they are not funding bodies or service delivery agencies. As described in detail above, the Land Councils have a clear role in protecting the rights of traditional Aboriginal landowners. The funding from the Aboriginal Benefits Account (referred to at EFPA 274) is explicitly to provide those functions to traditional owners outlined in section 23 of the Land Rights Act. Section 64 of the Land Rights Act makes clear how the funding (which is directly related to mining activity on Aboriginal land) is distributed.

Mr Nairn's similar comment at 263 that "funding does not appear to be coming back into the communities from land councils" is a further misunderstanding. For nearly every agreement reached (except for agreements relating to beneficial community infrastructure and services) the NLC negotiates a royalty or rental payment which goes directly back to the relevant people in the community, usually through a community organisation. In the NLC's region there are hundreds of such agreements which provide income and benefits to Aboriginal people from the use of their land.

However, Land Councils are not direct service providers, and there is no statutory role or mechanism for providing funding contribution to councils. These comments above demonstrate a disturbing misunderstanding of the role of Land Councils and the purpose of the Land Rights Act.



**ATTACHMENT A: COPY of SUBMISSION TO CGC LOCAL GOVERNMENT INQUIRY**

14 May 2001

Mr Alan Morris  
Chairman  
Commonwealth Grants Commission  
Cypress Court  
5 Torrens Street  
CANBERRA ACT 2612

By Facsimile: 02 6229 8821

Dear Mr Morris

**Local Government Inquiry**

Please accept this brief submission on the Draft Report of the Indigenous Funding Inquiry. I apologise for its lateness; the Northern Land Council only became aware of the Inquiry very recently. While this submission is brief, the issues it canvasses are extremely important to Aboriginal people in the Northern Territory and it is our responsibility to bring them to your attention for consideration in your Final Report.

The NLC is greatly concerned at the implications of your recommendation to remove the "Aboriginal and Torres Strait Islander" (ATSI) principle from the five principles under which the *Local Government (Financial Assistance) Act 1995* operates. While your arguments regarding the lack of consistency in the formulation of the principles, and the obviation of the requirement for specific mention of ATSI people if a "relative needs" funding principle is applied, are understood, the NLC considers that there are some problems with this analysis and the conclusions drawn in the report.

On the broadest level, the NLC is most disappointed that the Terms of Reference did not allow this Inquiry to tackle one of the major causes of inequitable services from local government. The per capita grant to State Local Government Grants Commissions (LGGCs) means, at the outset, that the most populous states (Victoria and NSW, which are also the states best served in terms of infrastructure, access to and range of services etc.) receive the lion's share of local government funding. In the less populous States and Territories, generally those with the highest proportion of Aboriginal residents, it is therefore impossible for the LGGCs to then attempt to apply principles of horizontal fiscal equalisation to the per capita grants they receive. This is particularly so in the Northern Territory where Aboriginal people make up 30% of the population, the majority of whom live in remote areas and are disproportionately reliant upon local government services.

It is also contrary to the principles of "needs based" relative funding to retain the minimum grant (albeit re-badged as a "per capita pool") for each LGB (chapter 4). It is clear that such an arrangement will further entrench the privileged structural position of municipal councils in large urban centres which collect rates based on property values and also have other income streams. The cost of providing services in these urban centres and cities is much lower than, for example, the Maningrida Council, which is located more than 400 kilometres from the nearest large town and cannot collect rates. The minimum grant or "per capita pool", along with the per capita distribution to states, perpetuates the disadvantage of small, remote LGBs with poor infrastructure and for that reason the NLC rejects it in the strongest possible terms.

The recommended retention of a minimum grant indicates ongoing support for funding on the basis of population rather than a more sophisticated method based on needs, cost of services and existing resources. Clearly, your recommendation for a "per capita" or minimum grant to each LGB, combined with the per capita distribution to LGGCs, mean that needs-based funding cannot become a reality. To claim, then, that the ATSI principle is not necessary "provided a needs based approach is retained", is unsustainable.

It is also inconsistent to argue in paragraph 60 that the ATSI principle is unnecessary because "in the application of the horizontal equalisation principle, it is implicit in the assessment of relative needs that the needs of all Indigenous peoples must be taken into account" given that you acknowledge in paragraph 23 that "horizontal equalisation is not being achieved under the current arrangements and, without substantial changes going beyond the scope of this review, cannot be."

In urban centres, ATSI people are a minority group who might easily be marginalised or excluded without such requirements; in remote areas where ATSI people can comprise the majority, the particular structural disadvantage of the group as a whole needs to be considered in the allocation of funds.

In the Northern Territory, a number of unique conditions operate which, in the NLC's estimation, make it crucial for the Act to retain a focus on ATSI interests in this jurisdiction. As the Northern Territory Government's (NTG's) submission pointed out, eighty five percent of local governing bodies (LGBs) in the NT are Aboriginal councils or associations, most of which operate on Aboriginal land under the *Aboriginal Land Rights (NT) Act 1976*. These LGBs often provide an extraordinarily wide range of services to Aboriginal communities, including postal services, social security, banking, retail outlets, and local administration.

One of the recommendations of the 1991 Royal Commission in Aboriginal Deaths in Custody was that Aboriginal organisations which provide LGB-type services should be recognised as such and funded accordingly. The NTG applies a discriminatory policy to the provision of its supplementary local government funding by only providing an operational subsidy to those organisations which are incorporated under the NT Local Government Act. However the financial assistance grants (FAGs) are distributed to all such bodies. The NLC has long been concerned by the inequities which result from the discriminatory distribution of the NT operational subsidy. This is an issue which should be addressed in its own right, and the NLC considers that these inequities may increase if the ATSI principle were removed from the Act.

Thank you for the opportunity to provide this late submission to your Inquiry. I trust that you will be able to consider the issues the NLC has raised in the finalisation of your report. If you require any further information on the matters outlined, please contact Katy Haire on 08 8920 5113 or [katy.haire@nlc.org.au](mailto:katy.haire@nlc.org.au).

Yours sincerely

**Norman Fry**  
**CHIEF EXECUTIVE OFFICER**