DEPARTMENT OF FAMILIES, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS

SUBMISSION TO THE SENATE COMMUNITY AFFAIRS LEGISLATION COMMITTEE INQUIRY INTO THE ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) AMENDMENT BILL 2006

Submitted by the Office of Indigenous Policy Coordination

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OFFICE OF INDIGENOUS POLICY COORDINATION SUBMISSION TO THE SENATE COMMUNITY AFFAIRS LEGISLATION COMMITTEE INQUIRY INTO THE ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) AMENDMENT BILL 2006

PURPOSE OF THE SUBMISSION

The purpose of this submission is to provide information on the reforms contained in the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 (the Bill). In particular the submission seeks to explain the rationale for and objectives of the reforms, and to provide a description of the reforms in the context of those objectives. The submission also provides information on how the reforms will be implemented.

RATIONALE AND OBJECTIVES OF THE REFORMS

The *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) was enacted 30 years ago. Other than some amendments in 1987, mainly affecting the exploration and mining provisions, there has been little substantive change to the ALRA since 1976. Commencing in 1997 a series of reviews of the ALRA all recommended reforms to streamline and modernise the ALRA.

In terms of outcomes, the ALRA has been successful in returning land to Aboriginal traditional owners. Around 45 per cent of the Northern Territory is now Aboriginal land. However the ALRA has not been particularly successful in terms of improving the overall well being of Aboriginal people in the Northern Territory. In particular, Aboriginal people have derived little lasting economic benefit from the land they hold.

The reforms to the ALRA are intended to deliver better outcomes for Aboriginal people in the Northern Territory and other stakeholders. They seek to promote economic development on Aboriginal land through providing greater opportunities for Aboriginal people to own homes and businesses in townships, quicker and more certain processes for exploration and mining and more flexibility in relation to the leasing and mortgaging of Aboriginal land.

The reforms also seek to facilitate localised decision making by Aboriginal communities through allowing the delegation of Land Council powers to regional groups and clarifying the procedures for the establishment of new Land Councils.

Another objective of the reforms is to improve the performance and accountability of Land Councils and incorporated bodies which receive payments for the use of Aboriginal land. This will include funding Land Councils on the basis of workloads and ensuring that specified purposes are attached to payments made by incorporated bodies.

The reforms also seek to expedite the finalisation of the land claim process by disposing of land claims which cannot proceed or which it would be inappropriate to grant.

The reforms do not change the fundamental features of the ALRA including inalienable communal title and the right of traditional owners to consent to development on their land.

BACKGROUND

History of the Act and previous reforms

Following the 1970 Gove land rights case, in which the Aboriginal plaintiffs failed to establish a proprietary interest in land, momentum to provide a form of Aboriginal land rights increased. The newly elected Whitlam Labor Government established the Aboriginal Land Rights Commission which reported in 1973 and 1974, leading to the development of a Bill. The Fraser Coalition Government passed the ALRA in 1976 and it commenced operation in 1977.

A review of the Act in 1984 by Justice Toohey did not result in any significant changes. The only significant amendments were in 1987 and they were primarily restricted to the exploration and mining provisions. The traditional owner right of consent or veto was made exercisable only at the exploration stage and not at the mining stage of development.

Current reform process

The current reform process commenced in 1997 when the then Minister, Senator the Hon John Herron, commissioned John Reeves QC to conduct a comprehensive independent review. Reeves reported in 1998. In 1999 the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs reviewed Reeves' recommendations, and a national competition policy review of the exploration and mining provisions was also undertaken. The three reports comprise an extensive consideration of possible reforms and involved wide consultation with stakeholders.

In 2002 the then Minister, the Hon Philip Ruddock MP, issued an Options Paper on reforms to the Act. The Northern Territory Government and the Northern Territory Land Councils jointly responded in 2003. Many of the proposed changes to the ALRA including those related to the mining provisions are based on that response.

The Northern Territory Government submitted further proposals on township leasing to the Australian Government in February 2005.

In October and November 2005 the then Minister, Senator the Hon Amanda Vanstone, announced the details of the proposed reforms to the Act including a new voluntary township leasing scheme. In October 2005 the then Minister

and other relevant Ministers also announced two complementary measures (a new Home Ownership on Indigenous Land Programme and a Home Purchase Incentive Scheme) to support the township leasing scheme.

Since those announcements consultation occurred with the Northern Territory Government on the provisions of the Bill requiring complementary Northern Territory Legislation, in relation to township leasing and exploration and mining. The Land Councils were consulted on the details of reforms affecting their operations. Some workability improvements were made as a result of these processes.

In May 2006 the Budget included substantially increased funding for the Home Ownership on Indigenous Land Programme. $107.4 million has been committed over four years.

DESCRIPTION OF THE REFORMS

Promoting economic development

Townships

The new township leasing scheme in the Bill is intended to normalise land tenure arrangements to make it easier for people to own their own home and to develop businesses in townships on Aboriginal land.

The 45 per cent of the Northern Territory that is Aboriginal land includes major communities that are essentially towns, such as Wadeye, Maningrida, Galiwin'ku and Nguiu. Since the land in these locations is held on a communal basis it is difficult for individuals or any other town users to obtain security of tenure.

Currently under the ALRA an individual resident of a town, whether a traditional owner or not, must go through the same complex and time consuming processes to obtain an individual interest in land that a major developer must use. The result has been that there have been few attempts to do so and there is therefore little secure tenure in these towns for town users including residents and government instrumentalities alike.

This situation has denied residents the opportunity to use their land for home ownership or business purposes. Lack of secure tenure also affects investment decisions by others including business and government.

The township leasing provisions in the Bill remedy this situation by providing a framework for the issuing of long term individual interests in land. The scheme is entirely voluntary.

The Bill enables the Northern Territory Government or the Commonwealth to establish an entity to hold a 99 year lease of township areas. It is intended that the Northern Territory establish the detail of the scheme, including

establishing the entity, but provision is made for the establishment of a Commonwealth entity if this becomes necessary in the short term.

Headleases will be able to be transferred between entities with the approval of the Minister, including from a Commonwealth to a Northern Territory entity. This will facilitate the intention that the scheme be administered by the Northern Territory.

Negotiations will take place with the traditional owners of the township area through the relevant Land Council for a fair rental and general terms and conditions for the use of the land. Once a 99 year headlease is in place the entity will be able to issue subleases to town users in accordance with the general terms and conditions of the headlease. General terms and conditions negotiated might include matters such as restrictions on alcohol outlets or gambling establishments.

The Bill includes prohibitions on any consent or rent for subleases contained in the headlease. The entity will be able to issue long term subleases to town users without the need to negotiate with traditional owners and Land Councils. Town users will be able to mortgage, sell or transfer their subleases.

Existing rights, titles or other interests in the township prior to the granting of a headlease are protected.

The Bill provides for the renewal of headleases at least 30 years prior to the expiry of the lease in order to provide certainty for sublessees.

The scheme is intended to be self financing in the longer term with sublease rental payments covering the costs. Until then all reasonable costs will be met from the Aboriginals Benefit Account (ABA). ABA funds would be used on the basis that the scheme is for the benefit of Northern Territory Aboriginal people and is designed to resolve impediments created by the ALRA.

Mining

One of the principal means whereby Aboriginal people gain economic benefits from their land in the Northern Territory is from exploration and mining on that land. The ALRA contains detailed provisions which allow Aboriginal people to decide whether they will permit exploration and possible future mining on their land. The current processes are complex and have led to protracted and often inconclusive negotiations. The aim of the reforms is to expedite the negotiation process and provide more certainty for all parties.

Currently the ALRA provides for an initial period of 12 months during which traditional owners and a mining company negotiate about whether and on what conditions the company should be granted an exploration licence by the Northern Territory Government (NTG). However this period can be extended by agreement between parties or by the Minister. This often results in regular extensions without any clearly defined deadline.

The amendments provide for a standard negotiating period of two "field seasons" (April to October inclusive) followed by an extension of up to two years if agreed by the parties. After that period of time the negotiating period could be extended by agreement between the parties for 12 months at a time. At any time after the end of the standard negotiating period the Minister will be able to set a deadline of at least 12 months at which time negotiations must be concluded. If no agreement has been reached by the deadline, the NTG's consent to allow the company to negotiate will be deemed to have been withdrawn. Under an intended amendment to the NT Mining Act the NTG will also have the power to withdraw a consent to negotiate if a company is not seriously pursuing negotiations.

In order to allow greater opportunities for exploration, the current five year moratorium period which usually applies after traditional owners have rejected exploration will be able to be set aside at any time if the traditional owners agree.

In order to expedite processes and decision making, most day to day decisions on exploration and mining matters will be able to be delegated by the Commonwealth Minister to the NT Mining Minister.

Leasing and contracts

Aboriginal land holders can also obtain economic benefits from their ownership of land through the leasing of land to other parties for commercial purposes such as pastoralism or tourism. Under the current provisions of the ALRA the Minister's consent for such leases is generally required if the period of the lease exceeds 10 years. The Bill increases this period to 40 years. The Bill also raises the threshold for Ministerial approval of contracts entered into by a Land Council or a Land Trust (often associated with the granting of leases) from $100,000 to $1million.

An impediment to economic development on Aboriginal land arises from the current requirement in the ALRA for the Land Council and, in certain circumstances, the Minister, to consent to the transfer of a lease granted by traditional owners. One of the circumstances in which the transfer of a lease may be necessary is if the lease constitutes security for a mortgage entered into to facilitate economic development on the land. In the absence of an assurance that the lease can be transferred in the event of a default of the mortgage it is unlikely that a financial institution would be willing to accept the lease as security for the loan. The Bill will allow for advance consent to be given to the transfer of leases so that money can be raised against the value of the lease.

Land under claim

Under the current provisions of the ALRA, agreements related to the use or development of land under claim can only come into effect once the land is granted. In order to provide traditional owners and other parties with

immediate benefits from such land, the Bill will allow such agreements to be effective immediately.

Aboriginals Benefit Account

Under the current provisions of the ALRA, up to 30 per cent of mining royalty equivalents received by the Aboriginals Benefit Account (ABA) are available for the benefit of Aboriginals living in the NT. The Minister decides on the expenditure of these funds and is advised by an ABA Advisory Committee in making these decisions. The Advisory Committee consists of a Chair appointed by the Minister and members elected by the Land Councils.

The Bill provides that the Minister will be able to appoint up to two additional members of the Advisory Committee. These members will have to have professional expertise in land management or business or financial management. This will enhance the ability of the Advisory Committee to focus on the economic benefits of the expenditure of ABA moneys.

The Bill also confirms that the Minister can set a minimum balance for the ABA to ensure its viability over the longer term. This will ensure that the ABA can, when appropriate, be used to fund strategic economic development initiatives.

Facilitating localised decision making

Devolution of Land Council powers

The ALRA currently provides for the delegation of a limited range of Land Council powers to Committees established by the Land Council. However most decisions about the use of Aboriginal land including the granting of leases and agreements related to exploration and mining cannot be delegated. Such decisions are therefore made by the full Land Council which generally meets only two to three times per year.

The Bill seeks to devolve and expedite the decision making process on land use matters by allowing Land Councils to delegate relevant powers to committees of the Land Council. Delegation to regional committees already established by the Land Councils would foster more localised decision making by people affected by land use decisions. In addition the Bill allows the Land Councils to delegate land use decisions to incorporated regional bodies independent of the Land Council. Such bodies are also likely to represent a region and would provide a further avenue for devolving decision making to local communities. The Bill gives the Minister the power to override a decision by a Land Council not to delegate powers to an incorporated body provided that the Minister is satisfied that the body will be able to satisfactorily perform the powers it is seeking to have delegated. The Minister will be required to consult the Land Council before making such a decision.

New Land Councils

The ALRA includes provisions allowing for the establishment of new Land Councils. The provisions require that for a new Land Council to be established a 'substantial majority' of affected Aboriginals must be in favour of a new Land Council. Because the ALRA gives no guidance as to what constitutes a substantial majority the legislation has been difficult to administer.

The Bill will clarify the provisions by establishing a requirement that 55 per cent of Aboriginal people voting in a plebiscite support the establishment of a new Land Council, before a decision can be made by the Minister to establish a new Land Council. The Minister will also have to be satisfied that a proposed new Land Council will have sound governance structures and administrative capacity and the ability to satisfactorily represent all Aboriginal people in the area of the proposed new Land Council.

The new provisions are intended to facilitate more localised decision making by providing clear procedures for the establishment of new Land Councils.

Improving performance and accountability

Land Council funding and accountability

The ALRA currently provides for Land Councils to receive 40 per cent of ABA receipts for their administrative costs, with the possibility of additional funds if agreed by the Minister. The relative distribution to each of the Land Councils is determined on the basis of the Aboriginal population in the area of the Land Council. The percentage figure has proved to be of little relevance with the Land Councils regularly receiving more than 40 per cent to enable them to carry out their statutory functions. The amendments contained in the Bill recognise that the Land Councils should be funded to undertake the tasks they are required to perform. Should the Land Councils require less than 40 per cent, the change will allow the remaining moneys to be used in other ways for the benefit of Aboriginal people.

A number of other amendments to the ALRA are designed to improve Land Council performance and accountability. This includes requiring the Land Councils to provide greater details in their Annual Reports of fees received for services provided (for example to mining companies), mining royalties and certain other moneys paid to Aboriginal bodies, delegations made, consultants engaged and the activities of Land Council committees. The role of the Office of Evaluation and Audit (Indigenous Programs) in investigating Land Councils will be confirmed. In addition a person will not be able to become a member of a Land Council if they have a recent serious criminal conviction, and Land Council members will be required to provide written disclosures of interests.

Royalty associations payments and accountability

Royalty associations are incorporated Aboriginal bodies which receive mining royalty equivalent payments for mining on Aboriginal land. There are also other incorporated Aboriginal bodies which receive other types of payments for the use of Aboriginal land. At present there are no restrictions in the ALRA on what the mining royalty equivalents and other payments can be used for and there are only limited accountability requirements placed on bodies making payments.

The Bill contains a number of measures designed to improve the way in which these moneys are used and accountability for expenditure. In order to encourage the better use of the moneys, bodies will be required to specify a purpose for the use of moneys paid to Aboriginal groups or individuals and to include details of payments in annual reports which they will be required to submit to the relevant Land Council. To further improve accountability the bodies will be required to be incorporated under the *Aboriginal Councils and Associations Act 1976*; and the Bill will clarify that the bodies can be investigated by the Office of Evaluation and Audit (Indigenous Programs).

Finalisation of the land claim process

Although a 'sunset' clause in the ALRA has prevented any further claims after 1997 there is still a large number of land claims which have not been finalised. A number of these (for example, claims to stock routes) cannot proceed because the ALRA prevents the Aboriginal Land Commissioner from hearing the claims. However there is some legal doubt about whether those claims are finally disposed of. There are other claims which cannot proceed because the Aboriginal Land Commissioner is awaiting the provision of information but cannot require the information to be supplied within a particular time frame. In addition there are claims to areas such as inter-tidal zones and to beds and banks of rivers which are not contiguous to other Aboriginal land and which it would be inappropriate to grant.

The Bill seeks to expedite the finalisation of the land claims process by disposing of claims which cannot proceed or are inappropriate to grant. It also provides processes whereby the Aboriginal Land Commissioner can dispose of claims where information is not provided in a timely manner.

IMPLEMENTATION

Township leasing scheme

Implementation of the scheme will require the establishment of an entity to hold title to township leases. The intention is that an entity be established by the end of 2006.

On 4 May 2006 the Minister for Families, Community Services and Indigenous Affairs, the Hon Mal Brough MP, signed a Heads of Agreement with the Tiwi Land Council committing the parties to commence negotiations on the

normalisation of land tenure arrangements for the township of Nguiu with a view to reaching agreement by 31 December 2006.

On 19 June 2006 the Minister met with traditional owners and other residents of Galiwin'ku to outline a plan for a 99 year headlease for Galiwin'ku. The Department of Families, Community Services and Indigenous Affairs, the Northern Land Council and Indigenous Business Australia are discussing the proposal with the community.

Mining

The new regime for exploration and mining on Aboriginal land in the Northern Territory includes the changes to the ALRA and complementary changes to Northern Territory legislation. The Bill includes a delayed commencement date for the exploration and mining changes to enable them to come into effect at the same time as the Northern Territory legislative changes. It is the intention of both Governments that the new regime commence on 1 July 2007.

There will be an independent review of the operation of the new regime for exploration and mining after five years of its operation.