Law Council
OF AUSTRALIA

Aboriginal Land Rights (Northern Territory) Amendment Bill 2006

Senate Committee on Community Affairs

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GPO Box 1989, Canberra,
ACT 2601, DX 5719 Canberra

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

19 Torrens St Braddon ACT 2612
www.lawcouncil.asn.au

Table of Contents

Executive Summary

This submission relates to the Australian Government's proposed amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (the ALRA).

The Law Council of Australia is concerned about the truncated timeframe allowed for comment on the proposed *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006* (the Bill) and believes the prior informed consent of Indigenous communities affected by this legislation must be obtained for all aspects of the Bill before enactment.

The Law Council believes enabling Indigenous communities to achieve development and self-sufficiency are worthy aims and the right of Indigenous people to own land should be supported, where circumstances allow. However, the Law Council does not support the bill at the present time, as there are a number of impediments to the realisation of its objectives in many communities affected by this legislation, which are summarised as follows:

- the existence of native title interests or claims over land subject to a lease interest may conflict with the commercial interests of lenders and investors who consider dealing with the land;

- imposition of free-market notions of property tenure on Indigenous communities observing customary laws and traditional lifestyles has the potential to disturb the connections of communities with their land. This may have very serious ramifications, particularly in light of recently reported unrest within remote Aboriginal townships;

- there is presently insufficient funding and resources available to Land Councils and remote Aboriginal communities, affecting their capacity to appropriately govern and provide essential services to local areas. This will significantly affect the value of property community members seek to use as collateral for mortgages and development, or any incentive community members might have for entering into such investments;

- the fact that widespread mortgaging and leasing of Aboriginal lands in other areas has not yet occurred is likely to be a result of the low economic value ascribed to many properties over which Aboriginal community title is asserted;

- even if such property was capable of generating sufficient collateral for a loan, individual wealth and income in remote Indigenous settlements are a fraction of median incomes enjoyed by the broader Australian community, creating serious doubts about the capacity of many within Indigenous communities to meet mortgage repayments; and

- high unemployment, the poor state of Indigenous health (which is evident from numerous recent reports) and high rates of alcoholism and substance abuse in many Aboriginal communities may lead to a real danger of disenfranchisement through ill-informed commercial or personal decisions.

The Law Council submits that, before the proposed amendments can be considered a viable means of development for Indigenous communities, governments must address the underlying economic, social and infrastructural problems faced by many of the communities that will be affected by this legislation.

Objectives of the Amendments

1. The key objectives of the Bill are stated as being[1]:

   - to allow changes to land tenure in Aboriginal townships;
   - quicker processes for exploration and mining;
   - to provide for the establishment of "devolved decision making structures"; and
   - facilitating economic development.

2. The Minister for Indigenous Affairs ("the Minister") stated that the reforms would "help create future opportunities for Aboriginal people. These amendments allow for 99 year leases which will make it easier for Indigenous people to own a home or establish a business in Aboriginal townships". A process of normalisation of townships would then initially be required.

3. While promoting the creation of future opportunities for Aboriginal people, the amendments are clearly aimed at gaining greater access to Aboriginal land for development, especially mining. The Law Council is advised that streamlining of provisions of the ALRA with respect to procuring mining agreements are proposed at the request of the Northern Territory Government and Land Councils.

Lack of proper consultation

4. Importantly, the Law Council is concerned that there may not have been a proper process of consultation with Indigenous communities and other stakeholders in the Northern Territory. The Minister has referred to a process of 10 years of consultation and 3 reviews[2], which have "enabled a narrowing of the differences among stakeholders". In view of the length of time taken to draft and introduce this legislation and the fundamental nature of the changes the legislation will make to Aboriginal land rights and tenure, it seems extraordinary that stakeholders have been given little more than 2 weeks to provide comments to the Senate Committee, which in turn must report to Parliament within 1 month. Moreover, the Law Council is not aware of any publicly available report or digest of the consultations to which the Minister refers.

5. The Law Council has been advised by practitioners working closely with Indigenous communities in the Northern Territory that most community leaders and members were unaware of the proposed amendments. This position was also confirmed during speeches made to the House of Representatives during the course of debate on the proposed amendments, in particular by Warren

[1] See Media Release from the Hon Mal Brough MP dated 31 May 2006 and entitled 'Historic reforms to NT land rights'. Available at http://www.atsia.gov.au/media/media06/3506.aspx

[2] The Hon Mal Brough MP, *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006*, Second Reading Speech, 19 June 2006, Official Hansard, House of Representatives, Parliament of Australia.

Snowden, whose constituency resides in the electorate of Lingiari, in the Northern Territory. Mr Snowden reports that traditional owners and others are "deeply concerned that the government feels absolutely no compulsion to sit down and talk with them, let alone to consult or negotiate with them" [3].

6. The Law Council is concerned that support for the amendments is based upon an assumption by government and others that indigenous peoples naturally desire the lifestyle and value changes which go with economic development, including the opportunity to own homes in Aboriginal communities. The Law Council notes that the concept of private ownership is directly contrary to the present focus of the ALRA which is on community based interests and consistent with the concept of communal indigenous title as discussed in *Mabo*, Concepts such as 'mortgage', 'leasehold interest' or even the process by which a house or land is bought and sold, have no role to play in traditional indigenous communities.

7. That is not to deny the role of cultural change, however it is important that such change is one which is derived from the aspirations of the Aboriginal communities themselves and not by governments or even by land councils purporting to act in their best interests. Unless changes of the type contemplated are positively sought by Aboriginal people, the risk is that the traditional culture of these communities will not be able to adapt to accommodate the changes, with potentially devastating effects on the continuation of that culture.

8. The Law Council submits that a full and robust consultation process with communities should be undertaken before legislation affecting the land rights of Aboriginal townships and communities is contemplated. The Bill should not be passed before affected communities themselves have given their full prior and informed consent. The Law Council believes, if it has not done so, the Senate Committee should seek an extension of its reporting date so that the informed views of Indigenous communities and stakeholders can be obtained. The Senate Committee might also consider whether it would be appropriate for its members to visit Indigenous communities in the Northern Territory that will be affected by the proposed amendments, to assist in understanding the circumstances many communities are facing and to determine whether traditional owners have a sufficient understanding of the proposed amendments and a positive desire that the changes occur..

Context

9. Before considering the Law Council's concerns about the Bill, it is important to consider the background against which the amendments are being proposed.

10. As the Senate Committee will be aware, the great majority of Aboriginal land held by Indigenous communities in the Northern Territory is communally owned. Townships are generally administered and by Community Governance Councils, which are provided for under the *Local Government Act* (NT).

11. There are presently four Land Council's operating in the Northern Territory, which are primarily funded by the Aboriginal Benefit Account (ABA), previously the

[3] The Hon Warren Snowden MP, *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006*, Second Reading Speech, 19 June 2006, Official Hansard, House of Representatives, Parliament of Australia. See also Peter Garratt MP's Second Reading Speech.

Aboriginal (Benefits from Mining) Trust[4]. The Trust was established in the 1950's to receive royalty payments from mining agreements for ventures carried out on Indigenous lands. Further discussion of the ABA is set out below.

12. Aboriginal townships often consist of a number of different tribal 'clan' groups, whose traditional lands exist in the surrounding areas. Indigenous communities and townships are administered in different ways, with certain communities choosing to operate a 'dry' policy – not permitting alcohol to be sold or consumed – while others accept the sale and consumption of alcohol. It is generally reported that more severe problems exist with respect to violence, sexual assault and substance abuse in those communities where alcohol consumption is allowed (although it is understood that alcohol is often brought on to communities that maintain a 'dry' policy).

13. While it is not often noted in discussions about Indigenous disadvantage, there exist many well functioning communities and townships in the Northern Territory, with strong traditional governance systems and community structures. Reports about the successes of such communities are generally overshadowed by sweeping statements about communities experiencing high levels of crime, substance abuse and community unrest.

14. The challenges with respect to the Bill, as outlined in this submission, apply not only to less functional communities but also to those which have demonstrated a capacity to self-govern and live in relative harmony.

15. Aspiration toward individual ownership of property is not inimical to Indigenous culture. However, it is clear that Indigenous communities observing traditional lifestyles maintain and share a unique relationship with their land, which should not be disrupted by commercial agreements, regardless of their intent. People in the broader community have been subject to commercial concepts such as 'mortgages' and 'leases', which are outside the ordinary experience of most Indigenous people in regional and remote communities in the Northern Territory. The Law Council believes Indigenous communities themselves – not only Land Councils – need to be properly informed about such concepts before being asked to agree to amendments on the assumption that commercial opportunities are what they desire.. Without allowing time and ensuring the people affected by these changes have an understanding about, for example, what a standard mortgage involves, many people living in Indigenous communities may risk losing rights over their land through ill-informed decisions made possible under the proposed amendments.

16. The risk of disenfranchisement for Indigenous communities is given gravity when the present economic circumstances of many Indigenous communities are considered. Employment levels in remote Indigenous communities are far lower than that of people living in regional centres and major cities of the Northern Territory. It is also noted that the true extent of unemployment in many communities is often disguised by the fact that the majority are employed under the Commonwealth Development Employment Program (CDEP). Levels of education are generally well below that of the broader Australian community and average incomes are a fraction of those in major cities and townships. Basic services taken for granted in the broader community are scarce in most remote

[4] The Northern Land Councils also receive funding from other sources, but primarily from the ABA. See http://www.nlc.org.au/html/abt_fund.html for information.

communities, which also impacts upon the investment value of the land in question.

Impediments to individual ownership

17. The following outlines the impediments faced by Indigenous communities in obtaining the benefits sought by the Minister under the Bill:

Commercial interest in inferior title

18. A distinction is made between native title lands and lands granted to Indigenous people under the ALRA. While native title rights vary between communities whose pre-existing rights over the land are recognised and defined by their traditional beliefs and customs, land rights are granted by the Commonwealth and the States, and apply uniformly throughout the jurisdiction to which the legislation applies. However, 'land rights' and 'native title rights' are capable of co-existing over the same land, such that the community with an inalienable freehold interest over land under the ALRA may also assert native title rights, arising from an unbroken connection with that land.

19. The Aboriginal and Torres Strait Islander Social Justice Commissioner (ATSISJC) considered this issue in the "Native Title Report 2005", a report prepared under the auspices of the Human Rights and Equal Opportunity Commission and presented to the Attorney-General.

20. The ATSISJC noted that the doctrine of extinguishment tends to undermine the legal title of Indigenous communities over native title lands. Legal title is considered an essential element of legal dealings with land and there may be difficulties associated with securing a loan in exchange for an inferior legal interest[5].

21. For example, an interest recognised under the *Native Title Act 1993* may be quashed at any time by a future act declared by the Commonwealth or a State Government, forcing affected Indigenous communities to negotiate with commercial interests (usually mining companies) for any remaining rights or interests in the land.

22. The lack of any full freehold interest in the land would seem to undermine the negotiating position of Indigenous communities and their representatives when securing loans sufficient to establish businesses and build homes.

23. The existence of native title rights, which are separate and inalienable, does not appear to have been contemplated the drafters of the Bill. Where native title rights do exist, it is unclear what effect the declaration of a head lease will have on those rights, whether those rights would be quashed and whether the existence of those rights will undermine their position in negotiating a loan or mortgage against their land.

[5] *Native Title Report 2005*, report of the Aboriginal & Torres Strait Islander Social Justice Commissioner and Human Rights and Equal Opportunity Commission to the Attorney General under the *Native Title Act 1995*.

A bundle of rights

24. The ATSISJC also notes that, following the decision of the High Court in *Ward v Western Australia*[6], native title is viewed by the courts as "a bundle of rights", each separate and distinct from the other, and which are defined by reference to their traditional exercise – e.g. a traditional right to fish does not translate to a commercial fishing licence; a traditional right to minerals does not translate to a mineral exploration or production licence.

25. This understanding of native title rights is derived from the traditional relationship of Indigenous people with their land. Communal ownership and the intrinsic connection of Aboriginal people with their land is an inherent feature of all traditional laws and customs observed by many different Indigenous communities[7]. This understanding not only applies to communities whose rights and interests are recognised under the *Native Title Act* – many communities whose land rights have been granted under the ALRA also maintain that connection with their laws, customs and the land, which remain unbroken despite outstanding or extinguished claims.

26. The Law Council is concerned about proposals that may see free-market land tenure and ownership imposed upon Indigenous communities that observe traditional lifestyles. While it may be argued that the proposed changes will create options, not impositions, it must be accepted by proponents of the Bill that Indigenous notions of land tenure do not conceive of the types of commercial dealings with land that are common-place in the broader community. However, if appropriate resources and education are deployed, people in Indigenous communities may seek out the opportunities the Minister now seeks to offer. The Law Council believes that the fundamental changes being proposed under the Bill should be community driven – not driven by governments or Land Councils.

27. In the past, policies of assimilation have been tested with devastating effects for Indigenous communities. It is clear that governments must instead acknowledge that Indigenous connections with their land continue strongly and positively today, and work with Indigenous communities toward culturally appropriate and sustainable development.

Connections to Land

28. The amendments will enable the establishment of statutory authorities, which may declare and govern head leases over the land of individual clan groups. It is submitted that, rather than improving peace and autonomy for Indigenous people, the amendments may further remove the possibility for exercise of autonomy and the enjoyment of peace which is gained by owning and utilising one's own space.

29. Once the head lease is secured, one of the most important areas to be controlled by the statutory authority will be all future commercial developments over the particular area of land. The Law Council is concerned that this may relegate Aboriginal people to being passive recipients of services, now provided by both government and private operators. Rather than promoting self-reliance, this

[6] (2002) 191 ALR 1

[7] This was an essential feature of the decision of the High Court in *Mabo v Queensland (No.2)* [1992] 175 CLR 1.

proposal may deny communities control of the very commercial opportunities the Minister is seeking to promote in Aboriginal townships.

30. The fact that many Indigenous groups affected by the proposed amendments observe traditional lifestyles is very important in the context of these amendments and what they seek to do. The core public message has been one of opportunity – opportunities for home ownership and businesses. The proposed method is to enable provision of sub-leases to Aboriginal people of their own land, or the land of another. Therefore, it is foreseeable that people who do not come from the community asserting traditional rights over the land concerned may be able to assert proprietary rights over any property, including lands traditionally owned by a different clan.

31. For example the statutory authority may grant a sub-lease to an Aboriginal person who owns traditional land elsewhere in order that they have a block of land in a township. By doing so, they will then have the opportunity to own a home or establish a business, with rights to that land as against the traditional owners guaranteed by ALRA and supported by law and order agencies.

32. In effect, the amendments would allow that individual and/or family to own land that is acknowledged to be owned by another Aboriginal clan group. Anecdotal evidence provided to the Law Council by practitioners in the field notes that such an eventuality has the potential to exacerbate current negative situations in various towns and communities, with possible dire consequences.

33. The Law Council submits that governments should assist Aboriginal communities to have greater control of their own lands and enhance their capacity to deal with them as they see fit through appropriate service delivery, including infrastructure, education and training.

Lack of funding

34. Land Councils (as well as Native Title Representative Bodies and Prescribed Bodies Corporate) do not have adequate funding, diminishing the capacity of those bodies to effectively negotiate on behalf of Indigenous communities under the 'streamlined' processes to be established by the Bill. Some have argued that this has been largely the result of a lack of agreement and coordination between State/Territory and Federal governments over responsibility for funding these bodies[8].

35. The Aboriginal Benefit Account (ABA), previously the Aboriginal (Benefits From Mining) Trust, was established by the Federal Government in the 1950's to, among other things, provide funding for Aboriginal land councils in the Northern Territory. Funds held by the ABA are derived from royalty agreements with mining companies and other commercial interests. As it is within the Minister's discretion[9], $15 million will be drawn from the ABA to fund surveying of Aboriginal townships and to administer the new scheme.

[8] *Native Title Report 2005*, Ibid, p.45

[9] The Minister for Indigenous Affairs has discretion to apply 30 per cent of spending under the ABA toward: Aboriginal Land Rights (Northern Territory) Act 1976, s 64

36. However, it is significant that the Bill will amend the ALRA to extend the Minister's discretion in this regard, as the Minister does not presently have the power to use funds held in the ABA for any other purpose than for the benefit of Aboriginal communities residing in the Northern Territory, or to administer the ABA. It is concerning that the Commonwealth has not volunteered its own funding to assist in implementing the scheme it is proposing and the Law Council does not support the use of ABA funds for this purpose. The ABA has been established to assist Aboriginal communities in reaching some semblance of self-government, not to fund the implementation of Commonwealth Government policies and legislative schemes.

37. It is also proposed that new land councils be established to administer the scheme and the Minister for Indigenous Affairs has stated the amendments will also ensure that funding will no longer be allocated according to "an artificial formula", but will be allocated "on the basis of workloads and results"[10]. In fact, funding is presently based on the size of the Aboriginal population served by each of the four land councils in existence and it is difficult to understand how this can be regarded as an 'artificial formula'. The size of the population for whom the funding is to be provided must be considered a key indicative factor in this assessment. The terms 'workloads' and 'results', by contrast, appear far more nebulous and would seem to be designed to give the Minister ultimate discretion over expenditure of all funds held on trust for Aboriginal peoples under the ABA. This suggestion is given weight in light of other proposed amendments that will give more direct control to the Minister over the ABA, such as provision to include additional members on the ABA advisory committee and greater oversight of royalty associations.

38. If this is the case, the Law Council believes that the proposed amendments would, if enacted, represent a significant step backwards from the progress of the last three decades toward facilitating self-determination for the Northern Territory's Indigenous population.

Economic value

39. There already exist provisions under various land rights legislation allowing Indigenous people to mortgage or lease land. Accordingly, the fact that widespread leasing or mortgaging of traditional lands for economic development has not occurred is more likely to do with transactional difficulties and issues concerning the nature and location of the land. Whether there exists a market for the rights being sold or leased or whether those rights are capable of generating sufficient collateral to secure a loan will depend on certain factors, such as the quality of the soil, relative abundance of mineral resources, availability of government services and infrastructure, rainfall, or the presence of activities or sites of interest for tourism[11]. Moreover, there are other means of raising finance that do not involve a risk to Indigenous communities of losing rights over their land.

[10] Mal Brough MP, *Second Reading Speech*, Ibid (1).

[11] 'Overcoming Indigenous Disadvantage: Key Indicators 2005', *Steeering Committee for the Review of Government Service Provision*, Productivity Commission, Commonwealth of Australia, p.11.20-11.21

Low individual wealth and income

40. In 2002, the labour force participation rate for Indigenous people in the Northern Territory was below 50 per cent[12], while nationally, the Indigenous unemployment rate in regional areas was around 27 per cent. In very remote areas, 67 per cent of Indigenous people participate in the Community Development Employment Program (CDEP). The average household income for Indigenous Northern Territorians is lower than all other jurisdictions, at just over $300 per week[13]. Annually, individual income for Aboriginal people in the Northern Territory has been estimated at $13,460 (according to Warren Snowden MP, who refers to the 2001 census[14]). However, average annual income levels for Indigenous people living in remote areas such as the Thamarrurr Region, the locality of the often-publicised township of Wadeye, have been estimated to be far lower at approximately $8,632, while 84 per cent are estimated to be either unemployed or not participating in the workforce[15].

41. It is difficult to imagine any person being able to maintain mortgage payments on such low incomes, or being interested in leasing and development of businesses where there is such poverty and lack of social infrastructure. It is also highly unlikely that lending institutions will have any interest in lending any sum of money to people on such small incomes, or who are predominantly unemployed. Even if finance for development could be secured under the Federal Government's proposed 'Home Ownership on Indigenous Land Scheme', it is worth noting that median age of death for Indigenous Northern Territorians is 57 for males and 65 for females[16]. In the Thamarrurr Region the median age of death for Aboriginal people is 46. Given the deplorable state of Indigenous health and morbidity rates that are comparable to the Third World in some regions, there would be limited appeal attached to a standard mortgage repaid over 30 years for most Aboriginal people living in regional or remote areas.

42. It is also noted that, while incomes are low, the cost of transport, food, services and other amenities remain high in regional and remote areas. Moreover, the significant reported problems with alcohol and substance abuse, low literacy and education levels and poor understanding of English and the laws governing contracts, insurance and property mean that the majority of Aboriginal people may be, at best, confused by the proposed amendments and, at worst, in real danger of entering into agreements without a proper understanding of the legal ramifications.

[12] Ibid, page 3.32.

[13] Ibid, p.3.43.

[14] Ibid (3).

[15] J. Taylor & O. Stanley, 'The Opportunity Cost of the Status Quo in the Thamarrurr Region', ANU Centre for Aboriginal Economic Policy Research, Working Paper No. 28/2005.

[16] Overcoming Indigenous Disadvantage: Key Indicators 2005, Ibid (9), p.3.4.

Law Council Position

43. It must be acknowledged that there is no foreseeable means of escaping the fact that "a sizeable fiscal response is unavoidable"[17]. Investment is required by governments at all levels to address the serious problems faced by Indigenous communities. These issues must be addressed before the changes proposed by the Bill are considered a viable means of economic development for Indigenous Australians.

44. The Law Council does not yet support the proposed amendments, as it does not believe granting individual property rights in this fashion will, without more, assist in development and creation of wealth and productivity within Indigenous communities.

45. The Law Council believes there is a significant risk the proposed Bill will lead to further disenfranchisement of Aboriginal people in the Northern Territory at the present time, given the vast gulf in education, wealth and basic services existing between remote Indigenous communities and the broader Australian community. These amendments may potentially result in dispossession of entire Indigenous communities, an eventually against which there appears to be no safeguard under the Bill.

46. However, ultimately Indigenous communities may actively seek out the opportunities the Australian Government now seeks to create. As what is contemplated is grounded on a change in traditional lifestyles, Aboriginal communities themselves should be extensively consulted about the proposed amendments and should be provided with the appropriate information and training, service provision and resources to aid their understanding.

47. Before any effective debate can be had about alienability of Indigenous lands for economic development, Indigenous communities and leaders, where appropriate, should be provided with the necessary training and resources to ensure they are able to make informed decisions about such dealings with Indigenous lands. The debate over Indigenous land tenure should not overshadow the separate and non-delegable duty of governments to provide essential services and infrastructure to Indigenous peoples living in remote communities on Indigenous lands.

48. Further, the Law Council strongly asserts that these or any other services should not become bargaining chips, to be provided only in exchange for long term leases over Indigenous towns and other areas.

[17] Ibid (12), p.xiii.

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.