

Submission to the Senate Community Affairs Committee Inquiry into the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006

by

Australians for Native Title and Reconciliation (ANTaR)

Introduction

During his address to the May 2005 National Reconciliation Planning Workshop, Prime Minister, John Howard sought to allay the fears of Indigenous people that his Government's proposed changes to the *Northern Territory Aboriginal Land Rights Act* would wind back their communal land rights. Mr Howard said that his government recognizes:

the cultural importance of communal ownership of land, and we are committed to protecting the rights of communal ownership and to ensure that indigenous land is preserved for future generations.

And when I talk about land in this context let me make it clear that the Government does not seek to wind back or undermine native title or land rights. Rather we want to add opportunities for families and communities to build economic independence and wealth through use of their communal land assets. (http://www.reconciliation.org.au/i-cms.isp?file=156/Speech_by_Prime_Minister.doc)

Australians for Native Title and Reconciliation (ANTaR) is concerned that key elements of his Government's *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006* conflict with the undertaking made by the Prime Minister.

Instead of protecting the rights of Indigenous people to land, the Bill in its current form threatens to deny generations of Aboriginal Territorians control of their community lands.

It also threatens the autonomy and effective functioning of Aboriginal Land Councils in the Territory as well as the future sustainability of the Aboriginal Benefits Account.

Furthermore, the Bill appears to have been introduced into the Parliament without the free, prior and informed consent of Indigenous Territorians.

ANTaR's principal objections relate to the sections of the Bill concerned with township leases, rents and the Aboriginal Benefits Account (section 19A), the delegation of Land Council decision making (section 28), funding for Land Councils (section 64(1)) and the formation of new Land Councils (section 21). ANTaR supports the amendments to streamline mining provisions (Part IV).

Streamlined Mining Provisions

The past decade has seen significant and positive changes in the way that mining companies negotiate with Indigenous communities in the Northern Territory and elsewhere in Australia. These changes have resulted in benefits to both the mining industry and Indigenous communities.

Given this change in culture on the part of the mining industry, ANTaR considers that the measures proposed in Part IV of the Bill are appropriate.

Providing improved flexibility and streamlined exploration provisions will help facilitate the greater economic development that is essential to providing training and employment opportunities for Indigenous people as well as improvements to infrastructure.

ANTaR is aware that the amendments to the mining provisions to the Act are supported by the Central Land Council (CLC) and other Indigenous groups. ***We urge the Committee to also support the measures proposed in Part IV of the Bill.***

Township leasing

ANTaR considers that the elements of the proposed legislation relating to the leasing of communal lands to a government entity for 99 years are particularly contentious. We are concerned that these provisions could result in generations of Aboriginal people in the Northern Territory losing control of their community lands.

The proposed amendments are unnecessary

The Government claims that these provisions are needed to boost home ownership and business opportunities on Aboriginal land. ANTaR shares the Government's desire to increase home ownership and business opportunities for Indigenous people, but does not consider the drastic amendments proposed are necessary to achieve this.

The CLC cites the Alice Springs to Darwin railway development as an example of how successful business activity can occur under the current Act.

Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma points out that the *Northern Territory Aboriginal Land Rights Act* "already allows for leasing for any purpose and to anyone." (*Native Title Report*, 2005, p90).

According to Commissioner Calma:

The existing provisions generally already enable Indigenous people to engage in, or allow, commercial activity on their land using leases and mortgages. Indications that this may not have happened sufficiently to allow Indigenous people to engage more fully in the mainstream economy are not the fault of the existing provisions. (Native Title Report, 2005, p98)

In light of the comments by Commissioner Calma and others, ***ANTaR urges the Committee to examine the extent to which leasing, commercial activity and home ownership may be allowed under the current legislation.***

The proposed amendments will be ineffective in boosting wealth and home ownership

Research has also called into question the effectiveness of the proposed amendments in generating additional home ownership and business development opportunities for Aboriginal Territorians.

According to a report prepared for Oxfam Australia by Professor Jon Altman et al from the Australian National University's Centre for Aboriginal Economic Policy Research, evidence does not support the contention that "private individual ownership of low-value land in remote settings can be the driving force in addressing housing or other needs."
(<http://www.oxfam.org.au/campaigns/indigenous/docs/landrights.pdf>, p5)

According to the report, the principal issues in increasing economic development and home ownership are not land rights reform, but:

...contemporary Indigenous poverty, and the historic lack of services, housing and associated infrastructure. The notion that land rights reform can be the main driver for economic development should be reconsidered in light of the legacy of disadvantage, cultural difference and structural factors faced by these communities.
(<http://www.oxfam.org.au/campaigns/indigenous/docs/landrights.pdf>, p5)

The CAEPR/Oxfam report considers that improved economic development and housing will only be achieved if significant structural issues are addressed. These include:

...the remoteness of communities from mainstream markets; relatively low populations and population densities; the need for greater investment in education and vocational skills; poor infrastructure; and the generally economically marginal nature of most Aboriginal lands.
(<http://www.oxfam.org.au/campaigns/indigenous/docs/landrights.pdf>, p5)

These conclusions are supported by Commissioner Calma, who considers that:

Government attention is more appropriately directed to assisting Indigenous people to overcome any difficulties they have in meeting financial obstacles to such solutions than to overturning legislation that has done simple justice to a people who have been deprived of their land without their consent and without compensation. (Native Title Report, 2005, p98)

ANTaR asks the Committee to examine whether the proposed changes to leasing arrangements will make any real progress in solving the housing crisis in Indigenous communities or significantly boosting economic development.

There are better ways to improve Indigenous home ownership

ANTaR strongly supports the provision of greater home ownership opportunities for Indigenous Australians. We welcome the Government's expansion of Indigenous Business Australia's Home Ownership program and associated measures announced in October 2005.

However, these additional measures need not be contingent on traditional owners signing away their control of communal lands.

ANTaR considers that the most effective way to boost home ownership for Aboriginal people is to tackle the underlying factors – lack of educational and employment opportunities and poor health.

Put bluntly, people can't get a home loan if they're unemployed and they can't pay it off if their lives are cut short. The sad fact is that unless the Government commits to timelines for closing the life expectancy gap between Indigenous and non-Indigenous Australians and accompanies this with a dramatic lift in expenditure on Aboriginal health most Aboriginal people will continue to die before they have had the chance to pay a house off.

ANTaR urges the Committee to consider whether legislative change of the kind proposed is the best way of achieving the Government's aim of increasing Indigenous home ownership.

International experience casts doubt on removing communal title and control of land

A number of Indigenous leaders have expressed concern that the proposed amendments promoting individual property rights may in effect remove Aboriginal communal title to land. Noel Pearson has said that the principles on which the legislation is based may be a "Trojan horse" for something more sinister:

The concern from the indigenous community that I'm hearing is that the legitimate issue of home ownership might be used as a Trojan horse for a reallocation of land rights – a taking of rights away from Aboriginal people. (The Australian, 14 April 2005).

International experience cautions against replacing Indigenous communal title with freehold. In New Zealand and the United States of America this practice has resulted in the loss of land without the promised economic benefits. Both countries have since changed legislation to reverse this trend.

Commissioner Calma points out that:

As international experience in the United States and New Zealand demonstrate, the path to economic development or increased private home ownership is not necessarily realized through the individual titling of communally owned lands. These examples demonstrate to us the dangers of premature or ill advised attempts to change land tenure. (Native Title Report, 2005 p107)

ANTaR asks the Committee to take into account international experience in assessing the impacts of the Bill on the rights of traditional owners and other potential consequences.

Traditional owners could lose control over their land

The proposed amendments would allow whole township areas on Aboriginal land to be leased for 99 years to a Northern Territory Government entity. The entity would in turn sub lease the land to other parties. This has the potential to lock generations of Aboriginal people out of effective control over their land.

The Government entity, not the traditional owners would control access and development on the subleased land. This would discourage Aboriginal communities from determining their

own future and could result in the land being used for activities that the traditional owners do not want in their community. It could also lock traditional owners out of future commercial opportunities.

In this way future generations of Aboriginal people could be robbed of their land and the economic opportunities that go with it.

The changes would cut traditional owners out of the development process that would increase the value of their land. They would encourage the very problem the Government says it wants to address – passivity - by turning Aboriginal people into mere rent collectors rather than active developers of their communities.

ANTaR urges the Committee not to support measures that could result in generations of traditional owners losing control of their land.

Rental payments could be capped in a racially discriminatory way

Under the proposed amendments rental payments from the Government entity that leases Aboriginal land would be capped at five percent of the improved capital value of the land, regardless of that land's economic potential.

ANTaR is not aware of any other Australian citizens who have arbitrary limits imposed by Government on rents they can charge for land that they own. These proposed amendments are extraordinary from a Government that says it believes in free markets. The Northern Land Council considers that these amendments may also breach the *Racial Discrimination Act*. (http://www.nlc.org.au/html/files/06_06_01_NLC%20ALRA%20response.pdf)

ANTaR welcomes Minister Brough's undertaking to remove the five percent cap following discussions he had with the Northern Land Council. We hope this will lead to the government also reconsidering other aspects of the Bill that are contentious.

Rental payments will come from the Aboriginal Benefits Account

The Northern Territory Government entity leasing Aboriginal township lands will not pay the rent for these lands. These rental payments will come from mining royalty equivalents via the Aboriginal Benefits Account (ABA). The ABA was established for the benefit of Indigenous people, funded from mining activities on their land. It was never intended to be a subsidy for government.

The amendments would in effect result in a situation where the savings of the landlord are used to pay the rent of the tenant. It is difficult to conceive of the Government proposing this kind of arrangement for any other group of Australians. The ABA should be used for the benefit of Indigenous Territorians, in accordance with their own wishes and priorities. It should not be used for rental payments that should be met by Government agencies.

Administrative and surveying costs would also come out of the ABA. The Federal Member for Lingiari considers that the Federal Government has seriously underestimated these costs. He maintains that they are likely to be closer to \$100 million than the \$15 million the Government has estimated. If this is the case, then the operation of the ABA would be compromised. (<http://www.warrensnowdon.com/speeches/060619c.htm>)

ANTaR urges the Committee not to support any proposal that would misuse or compromise the ABA.

Communities may have to lease their land in return for basic services

The day the *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006* was debated in the House of Representatives, the Federal Minister for Indigenous Affairs announced a comprehensive and welcome range of initiatives for the Northern Territory community of Galiwin'ku.

The Federal Government would provide around 50 houses and construction jobs to Indigenous people who would also be given assistance to purchase their own homes. The Northern Territory Government would provide police as well as education and health services.

In order to receive this assistance, the traditional owners of Galiwin'ku would be required to hand over control of their township land for 99 years.

The Minister told the people of Galiwin'ku that he would return in two months to hear their response to the offer.

Better housing, real jobs as well as effective policing, education and health services are desperately needed in communities like Galiwin'ku and Government assistance is welcome and long overdue.

However, ***ANTaR believes the Government has a responsibility to provide adequate health, education, policing and housing to all Australian citizens. Provision of these basic services should not be contingent on one group of people – Aboriginal Australians handing over control of their land.***

ANTaR also questions the extent to which an impoverished community could make a free choice to lease its land if it believes that this is the only way it can secure basic services.

The CLC has proposed an alternative to contentious aspects of the Bill

ANTaR understands that the CLC has proposed a model of how large scale housing developments, the provision of government infrastructure and commercial development could be facilitated under the current legislation. However, we have been informed that this model has been largely ignored by both the Federal and Northern Territory Governments.

ANTaR urges the Committee to consider the CLC model as a possible alternative to section 19A of the Bill concerned with township leases, rents and the Aboriginal Benefits Account.

Land Councils

The Minister's delegation powers could take control of mining and leasing decisions away from traditional owners

The amendments would allow a range of Land Council functions and powers to be delegated to a body incorporated under the *Aboriginal Councils and Associations Act 1976*. Among the powers that could be delegated are the core Land Council functions of decisions relating to mining on and leasing of Aboriginal land.

Once a delegation has been made, it can not be varied or revoked except at the request of the delegate or with the Minister's approval. The Bill also gives the Minister approval to delegate these powers against the wishes of the Land Council.

This means that control over Aboriginal land could be delegated to a body that includes non-Aboriginal people, providing that a majority of members are Aboriginal residents (not necessarily traditional owners) in the area. The Minister could override the wishes of traditional owners by delegating powers relating to mining and leasing of land. In this way their ability to determine what happens on their land could be seriously curtailed.

ANTaR is opposed to any measures that would weaken the ability of traditional owners and their Land Councils to make decisions about mining and leasing on their land.

The effective governance and management of Land Councils could be weakened

The Bill makes it easier to establish new Land Councils. A single Aboriginal resident can apply to have a new Land Council established. The Minister can approve a new Land Council if a majority of 55 percent of Aboriginal residents entitled to vote are in favour of it. Approval is not required from traditional owners.

In many Northern Territory communities a large proportion of Aboriginal residents are not traditional owners. In these communities, traditional owners could lose the ability to decide whether or not a new Land Council is formed to administer their land.

The amendments could lead to the formation of a network of small, regionally based land councils throughout the Northern Territory. Experience in states such as New South Wales has shown that small, poorly resourced Land Councils can have difficulty in ensuring that governance and management systems are adequate to represent the interests of their members in a professional way. In extreme cases, this can make Land Councils more susceptible to corruption and mismanagement.

There is a danger that the creation of multiple, smaller Land Councils could in fact hinder the economic development of Aboriginal land by diminishing the certainty and confidence that mining and other industry representatives have in bodies representing Indigenous interests. Major infrastructure developments like the Darwin to Alice Springs railway would be far more difficult to negotiate under a regime of multiple, smaller and less well equipped Land Councils.

The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs made the unanimous recommendation in 1999 that new Land Councils should be established only with the support of at least 60 percent of Aboriginal residents, the informed consent of traditional owners and a range of other measures. ANTaR understands that this proposal has the support of Northern Territory Land Councils.

(<http://www.aph.gov.au/house/committee/atsia/reeves/tblcontrecom.pdf>)

ANTaR cautions the Committee against supporting amendments that could damage the effective governance and operation of Land Councils.

Removing the statutory guarantee of funding will attack the independence of Land Councils

The Bill would replace the existing statutory guarantee of funding to Land Councils with allocations determined by the Minister, based on estimates of work and expected income.

ANTaR is concerned that these changes would reduce the independence of Land Councils and make them more susceptible to the risk of future political interference.

Adequately resourced Land Councils are essential to protecting the interests of traditional owners and ensuring timely and efficient economic development of Aboriginal land that benefits Indigenous people.

ANTaR cautions the Committee against supporting amendments that could reduce the independence of Land Councils.

It has been suggested that the desire to open up Aboriginal lands for uranium mining is driving reform

The proposed amendments to the *Northern Territory Land Rights Act* were introduced during a time of renewed debate about uranium mining and nuclear energy in Australia.

Former Liberal Federal Aboriginal Affairs Minister, Peter Howson has suggested that “the prospect of the resurgence of the world’s nuclear power industry,” is one of the developments driving reform of the Act.

According to former Minister Howson:

The Northern Territory has long been regarded by exploration geologists as a uranium province of world class, and the prospect of uranium exports worth billions of dollars is, from a Commonwealth government perspective, very enticing. However, until the barriers to exploration and mining in the Aboriginal lands (which make up more than half the Territory) are dismantled, there is no prospect of such an outcome. (http://www.quadrant.org.au/php/article_view.php?article_id=1121)

There is no mention of uranium mining in the Explanatory Notes to the Bill or the Minister’s Second Reading speech.

However, given Mr Howson’s former position and continued links to the Government, ANTaR asks that the Committee investigate what basis he had for making claims that the amendments were introduced because of the Commonwealth Government’s desire to expand uranium mining.

There are mixed views among Aboriginal people about uranium mining on their land. However, the possible impact of the proposed legislative changes on uranium mining has not been adequately explored. Indigenous people should be informed about this issue so that they can then decide for themselves whether or not to support the leasing, delegation and formation of new Land Council provisions in the new legislation.

ANTaR urges the Committee to examine and report on the possible impact of the amendments on uranium mining on Aboriginal land.

Indigenous people have not been adequately consulted about the proposed changes.

The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs report, *Unlocking the Future* made recommendations about the appropriate consultation that should occur prior to any change of the *Northern Territory Aboriginal Land Rights Act*.

The Committee was Howard Government dominated and its recommendations were unanimous. It said that the Act should not be amended without:

traditional Aboriginal owners in the Northern Territory first understanding the nature and purpose of any amendments and as a group giving their consent; and

any Aboriginal communities or groups that may be affected having been consulted and given adequate opportunity to express their views

(<http://www.aph.gov.au/house/committee/atsia/reeves/tblcontrecom.pdf>)

Other than the amendments relating to streamlining mining approvals, much of the content of the Bill was put to Parliament without any indication that it is supported by traditional owners or Aboriginal communities more broadly in the Northern Territory.

Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma has spoken of the importance of governments upholding the principles of free, prior and informed consent in relation activities that affect Indigenous people. Commissioner Calma explains the principles as follows:

- ***Free*** requires no coercion, intimidation or manipulation;
- ***Prior*** requires that consent has been sought sufficiently in advance of any authorization or commencement of activities and respects time requirements of Indigenous consultation and consensus building processes;
- ***Informed*** requires that information is provided that addresses the purpose, scope, obligations and impact of any proposed activity; and
- ***Consent*** requires that consultations be undertaken in good faith; on a basis of mutual respect; and with full and equitable participation. It also requires that Indigenous peoples can participate through their own freely chosen representatives and customary or other institutions and ultimately it must allow the option for Indigenous people to withhold their consent. (http://www.humanrights.gov.au/speeches/social_justice/sj_nt_reports_05.html)

It would appear that the proposed amendments to the Act fall well short of adhering to the principles recommended by Commissioner Calma.

ANTaR urges the Committee not to recommend the support of any proposed amendments to the Act unless it is satisfied that they are consistent with the wishes of Aboriginal Territorians.

Changes to the Act do not have bi-partisan support

One of the defining features of the *Aboriginal Land Rights Act (Northern Territory) 1976* has been its bi-partisan support.

Introduced by the Whitlam Government, the Act was passed by the Fraser Government with only minor amendments. When a House of Representatives Standing Committee reviewed the Act in 1999, its recommendations were unanimous.

For thirty years, this Act, which ANTaR considers to be the high water mark of land rights in Australia, has been above party politics.

It has been a powerful example of the truth of Prime Minister Howard's statement to last year's National Reconciliation Planning Workshop that:

the things that unite as us Australians are greater and more enduring than the things that divide us. (http://www.reconciliation.org.au/i-cms.jsp?file=156/Speech_by_Prime_Minister.doc)

All this would change if the Senate passes the Amendment Bill in its current form.

The potential for achieving bi-partisan support is apparent from the widespread consensus that has been gained in support of the amendments to streamline mining provisions (Part IV).

Unfortunately, there have been inadequate negotiations to secure the same degree of support for other elements of the Bill.

ANTaR considers that there is sufficient goodwill across the political spectrum, within the mining industry and among Indigenous Australians and their non-Indigenous supporters for bi-partisan support to be achieved.

However, this will not occur unless the Government reopens negotiations with affected Indigenous communities, their Land Councils, the Federal Opposition and minor parties.

If these negotiations are to be genuine, the government must be prepared to amend elements of the Bill that are contentious.

ANTaR urges the Committee to not support any changes to the Northern Territory Aboriginal Land Rights Act that cannot be achieved in a bi-partisan way.

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