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LECTURER

Mr Elton Humphery
Committee Secretary
Senate Community Affairs Legislation Committee
Parliament House
Canberra ACT 2600

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Dear Mr Humphery

Inquiry into Aboriginal Land Rights (Northern Territory) Amendment Bill 2006

The Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 (the Bill) proposes a number of significant changes to the *Aboriginal Land Rights (Northern Territory) Act* 1976 (the Land Rights Act or, simply, the Act). It is to the credit of the Commonwealth and Northern Territory Governments and the Land Councils that many of the changes introduced by the Commonwealth draw upon a joint submission from the Territory Government and the Land Councils. There are, however, serious concerns with other aspects of the Bill. This submission deals with two issues:

- the 'delegation' of Land Council functions and powers to corporations
- the provisions for township headleases.

'Delegation'

The Land Rights Act currently permits a Land Council to delegate certain powers (sections 28 and 29A). The existing delegation provisions have the following features:

- the categories of people to whom powers can be delegated (Chair, other Council members, staff, committee of members) are limited to those within the organisation

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- the powers that can be delegated are limited so that important functions remain the responsibility of the Council as a whole

- the delegation of powers does not prevent the exercise of those powers concurrently by the Council as a whole

- any relevant Land Council obligations to consult and obtain informed consent are explicitly imposed on the delegate.

This is consistent with conventional legal notions of delegation. It is an internal and voluntary matter, designed to promote efficiency while preserving overall organisational responsibility. Subsection 34AB(d) of the *Acts Interpretation Act* 1901 reflects a parliamentary presumption that, in the ordinary case, the original repository of power will retain concurrent jurisdiction with its delegate. As the leading text Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, (3rd ed, 2004) puts it (in a different context): 'This is consistent with the view that delegation involves a replication rather than a transfer of power' (at 310).

The provisions in the Bill for delegation of Land Council functions and powers to a corporation (new sections 28A-28F) depart from these basic principles:

- powers and functions may end up being exercised by an external organisation

- the transfer of powers may be involuntary and indeed done over the objection of the original repository of power

- the original repository is forbidden from exercising the powers or functions while a 'delegation' is in place (and subsection 34AB(d) of the *Acts Interpretation Act* 1901 is expressly 'disapplied')

- the corporation is not explicitly subjected to obligations regarding consultation and informed consent.

These provisions prompt a number of concerns.

Involuntary 'delegation': If a corporation unsuccessfully applies to a Land Council for delegation of functions or powers then it can ask the Minister to over-ride that decision. It is misleading for the Bill to refer to the compulsory transfer of Land Council functions to an external corporation over the objections of the Land Council as a 'delegation'. The point is not just a semantic one. A significant policy change is being introduced into the Act by the Government, vesting new power in the Minister, but using language appropriate to voluntary internal adjustments by a Land Council. It appears to be an intermediate policy position, between:

- genuine internal delegation and
- formation of a new Land Council within a subset of an existing Land Council's boundaries.

The consequences of this intermediate policy choice are potentially as far-reaching as formation of a new Land Council, but by adopting an inappropriate paradigm

(delegation) the Government seems to have overlooked or dispensed with important checks and balances.

Informed consent and traditional owners: There is no evidence that a corporation to whom a Minister forcibly transfers Land Council powers and functions will necessarily enjoy the confidence and support of the people it purports to represent. The 'delegation' provisions contain no requirement for informed consent by traditional owners in the area. Instead of a model based on negotiation and consent, the Bill creates potential for unilateral action by a Minister on the key issue of representation, based on an inadequate process and criteria.

Capacity: Appropriate land use decision-making that conforms to the requirements of the Act and provides certainty to third party interests involves tasks and logistics that are complex and resource-intensive (eg identifying relevant traditional owners, bringing together participants and convening necessary meetings, research into proponents and their projects, ascertaining the views of a group as a whole etc). It is odd and unsatisfactory that a corporation can appeal to a Minister for the forced transfer of Land Council powers and functions without Parliament requiring the applicant to provide details demonstrating the capacity to exercise those powers and functions (subsection 28A(2)). While co-operation between organisations is an appropriate policy objective, the fact that the Bill allows a corporation to compel Land Council assistance if, for example, it found itself out of its depth (new subsection 28E(2)) suggests that issues of organisational capacity are being addressed at the back end instead of the front.

Safeguards: The omission of explicit obligations on the corporation, where relevant, to consult and obtain informed consent is curious and not addressed in the Explanatory Memorandum (compare existing subsection 28(4)). If the Government is confident that other provisions in the amended Act achieve this objective, it has not spelt that out in the Explanatory Memorandum and it does not explain why the explicit 'consultation and consent' provisions continue to apply to 'internal' delegates (amended subsection 28(4)).

Non-Aboriginal influence: The Bill says that a body incorporated under the *Aboriginal Councils and Associations Act* 1976 (the Councils and Associations Act) is eligible to apply for delegation of Land Council powers or functions. The Government currently has before Parliament the Corporations (Aboriginal and Torres Strait Islander) Bill (the CATSI Bill) which, together with a second Bill yet to be tabled, will replace the Councils and Associations Act. If Parliament passes the CATSI Bill then presumably it will be bodies incorporated (or recognised) under that law that will be eligible to apply for delegation of Land Council powers or functions. The CATSI Bill permits a significant level of non-Indigenous membership of Aboriginal and Torres Strait Islander corporations. In other words, a Minister could force the transfer of important powers and functions from a Land Council whose membership is exclusively Aboriginal to a corporation with a significant non-Aboriginal membership.

Concurrent exercise of functions: If a new Land Council is established under the Act, allowing its predecessor to retain functions in the same area could sow confusion and duplication. The Act prevents such an overlap occurring. On the other hand, the Government is clearly satisfied that if a Land Council voluntarily devolves functions onto internal delegates, there is no problem in the full Council retaining concurrent jurisdiction. When it comes to corporations under new sections 28A-28F, including

forced ‘delegation’ by the Minister, the jurisdiction of the existing Land Council is ousted. This is a dramatic consequence and, within its terms, equal to the establishment of a new Land Council, yet the ‘delegation’ paradigm sees it occur with minimal attention in the Bill to process, criteria and safeguards.

While the Act denies the Land Council concurrent jurisdiction, it compels the Land Council to assist the organisation that has ousted it from a role exercised for the past 30 years. Indeed presumably the Land Council will be deemed to have exercised the ‘delegated’ function (subsection 34AB(c), *Acts Interpretation Act* 1901). Forced co-operation, after an adverse decision on delegation has led to Ministerial intervention, creates a potential for antagonistic inter-organisational dealings and resulting inefficiency.

Double standards on disclosure of internal documents: The Bill introduces new levels of disclosure for true delegates on a section 29A committee, who exercise Land Council powers or functions because of voluntary steps taken internally by Land Council members (section 28). The Land Council must make procedural rules for the committee and make them available to the Minister and to Aboriginal people from or for the area. Minutes of committee meetings must be kept and made available as well. Land Councils themselves must comply with similar new requirements (new subsections 31(7)-31(7D) and 31(10)-(11)). There are no such provisions in relation to corporations that obtain jurisdiction either by application to the Land Council or Ministerial compulsion.

Variation or revocation: New section 28B continues the misleading use of ‘delegation’ to describe the allocation of powers and functions between a Land Council and a subsection 28(3) corporation. It strips the original repository – the Land Council – of significant control over the variation or revocation of a ‘delegation’ (whether the delegation was true or forced) and awards it in some instances to the delegate and in some instances to the Commonwealth Government.

Overall: The Act has always contemplated new organisations taking on responsibilities under the Act on behalf of traditional owners and other Aboriginal people. The Bill adds further policy and procedural detail on the question of forming new Land Councils, which no doubt will be debated during the committee’s inquiry. The Act, in the past, has also provided for true delegation of Land Council functions. Again the Bill augments these provisions at a policy and procedural level. The ‘delegation’ provisions in new sections 28A-28F, however, make several unsatisfactory changes to the Act. In doing so they distort the concept of delegation, stripping authority from the original repository of power and either giving it to the Government or to a delegate-made-superior. Through so-called delegation provisions, the Government can achieve a reduction in the authority of existing Land Councils without the due process, rigour and transparency that such a significant measure warrants, and without the informed consent of traditional owners for the area.

As currently drafted, the Bill offers too much scope for abuse by governments seeking particular outcomes in sensitive areas like the mining of uranium and other minerals on Aboriginal land or the creation of township leases. Camouflaged as ‘delegation’, the provisions effectively allow an external corporation that may have a significant non-Aboriginal and non-resident membership to make a government-supported ‘hostile takeover’ of Land Council functions, on important land use issues, according to unspecified standards of competence and capacity.

Providing for a 'partial takeover' of functions short of the establishment of a new Land Council is debatable in itself. If the Government is to insist upon that policy, it should make the case to Parliament on its merits, not disguise it with misleading statutory language. If it can demonstrate that an intermediate option between true delegation and formation of a new Land Council is necessary, then it needs to match the seriousness of that consequence with appropriate legislative detail.

Township headleases

I do not, in this submission, engage with the large policy question of whether creating multiple small individual landholdings within the 'township' area of Aboriginal land will generate appropriate and sustainable economic development for the people who live there. Others have written on this topic and will no doubt inform the committee's deliberations. Instead I will address what I see as obvious shortcomings in the legislation, whatever view one might take on that larger issue.

There are three problems I will discuss:

- the absence of information about the headlessee, given that it will enjoy control of Aboriginal land for 99 years at a time
- the slanted nature of the township leasing provisions, diminishing rather than promoting economic opportunities for traditional owners
- the inappropriate use of Aboriginal Benefit Account money to meet the costs of township leasing.

The ghost in the machine: who is the headlessee?

I will deal at the outset with the voluntary nature of the township leasing provisions. Clearly the Federal Government wants Aboriginal people to agree to headlease arrangements in Aboriginal townships, as a prelude to individual subleasing for residential and business purposes. The leasehold system contained in the Bill is not compulsory as such. But nor is it compulsory for State Governments to abstain from imposing income tax, or to accept school funding tied to particular testing regimes or the use of school flagpoles. When the Commonwealth controls the funding of vital infrastructure and services, financial leverage takes the place of legal compulsion. The Commonwealth has repeatedly emphasised its commitment to headlease/sublease arrangements across Australia and, like its predecessors, will use its financial muscle where necessary to achieve objectives in Indigenous affairs, as the recent run-up to the COAG meeting on 14 July 2006 demonstrated.

It seems reasonable to assume, therefore, that traditional owners in many parts of the Northern Territory will feel very strong pressure to enter into headleases over township land, despite the 'voluntary' nature of the scheme. But with whom will they be negotiating?

The headlessee under the Act, if amended, stands to become a very important player in the Northern Territory. It will hold a lease, or more likely, multiple leases over some of the potentially most valuable Aboriginal land in the Northern Territory (remembering that almost half of the NT landmass is Aboriginal land). It will enjoy the dominant property rights in an Aboriginal township for the lifespan of an Aboriginal person and statistically, roughly that of their grandchild as well. The Government speaks of the headlessee as a driver of economic development in a new era of prosperity for

Indigenous people. It will have complex legal and financial responsibilities and to a significant extent the Bill puts the economic fate of many Aboriginal people in the Northern Territory in its hands.

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

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

The Bill says that a headlessee is an 'approved entity' and that in turn means a person approved either by the relevant Commonwealth Minister (a Commonwealth entity) or a person approved by the Chief Minister of the Northern Territory (an NT entity). As well as a real person, that could be a corporation or a body politic. That is all that the Bill says about a headlessee.

Assuming that financial carrots and sticks compel widespread use of the township leasing arrangements, these provisions in the Bill will effect dramatic changes to land holding and land management in much of the Northern Territory. Such major revisions to the Land Rights Act warrant careful consideration by the Parliament. That is impossible in the absence of basic information about what an approved entity will look like. After what the Government calls a nine year consultation period, a last-minute amendment to an amendment means that the headlessee might be a Commonwealth rather than a Territory entity. This suggests policy-making on the run about one of the Bill's most critical features.

On one interpretation of the Bill, Aboriginal people might find the headlease later transferred to another body whose identity is exclusively determined by a government minister, with no parliamentary oversight through tabling and disallowance and, it appears, no reference back to traditional owners (new subsection 19(8)).

In short, the Bill facilitates the transfer of control over land from traditional owners to a dangerously under-defined entity. If Parliament agrees to these provisions in their current form, it is asking Aboriginal people, under financial pressure, to trust the government with their land for the next hundred years without any statutory assurances about what that entity will be. Given the history of land, governments and Aboriginal people in this country, that would be an irresponsible exercise of the Senate's legislative power.

Pre-set terms and conditions that reduce rather than enhance economic opportunity
Under the current Act traditional owners have the capacity to lease township land for a variety of purposes on terms and conditions that meet their requirements. They have flexibility as to duration, rent returns, non-monetary benefits and the degree to which they might exercise control over or derive benefits from subsequent transactions. While the Government has promoted its new township leasing arrangements as measures that will generate economic opportunities, the Bill in fact cuts back much of this flexibility.

The pre-set terms and conditions laid down in the legislation deny basic bargaining power to Aboriginal people in their negotiations with headlessees. With strong financial pressure to enter into township headleases likely to be applied, and statutory provisions curtailing potential benefits that might otherwise be negotiated, traditional owners look likely to be caught in a pincer movement of questionable benefit.

Leasing under the Act at present is a bilateral exercise. The new township leasing arrangements have been drawn up in a prescriptive way. To a significant extent government unilateralism substitutes for bilateralism, autonomous traditional owner decision-making over land use and relative freedom of contract. For example, the Bill:

- caps the rent that traditional owners can charge a headlessee (new subsection 19(6)) – although the Minister indicated in the House of Representatives on 19 June 2006 that the cap would be removed from the Bill
- bans attempts to derive non-rental benefits (such as educational measures that often characterise Aboriginal agreement-making in Australia) (new subsection 19(7))
- forbids traditional owners having a say over who might gain control of township land through subleasing (even where a commercial activity might be seen as completely incompatible with the views and concerns of traditional owners) (new subsection 19(14))
- prevents traditional owners having any influence on the issue of rent for subleases (new subsection 19(15)).

Other aspects of the Bill continue this theme of government unilateralism. One side to the transaction controls appointment of a valuer (new section 19B) – that matter could easily have been made the subject of agreement between the parties. The Commonwealth reserves the right to free itself from legal obligations that might otherwise apply due to the operation of NT laws dealing with land use (new section 19E).

The rights a headlessor would normally have under Australian law have been seriously abridged. Apart from the statutory cap on rent, their freedom of contract is limited in other ways. Even if the NT Government entity wanted to provide more than 5% of rent as payment for the lease (eg services, employment, capital grants etc) that could not be made a term of the lease. These provisions put the township leasing approach in an unnecessary policy straitjacket.

The inappropriate use of ABA money for township leasing costs
Under the current Act, if traditional owners leased township land the income would be paid to or for the benefit of the traditional owners. That money would be additional to other money that may come their way under the Act, for example, as compensation for the adverse effects of mining on Aboriginal land through the ABA.

Once more the Bill changes things in a unilateralist way that diminishes rather than enhances economic returns to traditional owners. New subsection 64(4A) permits governments to dip into the ABA for the rental and other costs of the township leasing scheme. A government entity will derive income from subleasing Aboriginal township land for 99 years – indeed, traditional owners are apparently prevented from sharing that income, once the upfront headlease has been negotiated according to the pre-set terms and conditions in the Bill. Yet, because of the way the Bill is drafted, governments do

not need to pay for the valuable set of additional rights it acquires over township land. Instead the costs will be met from money already earmarked for financial compensation and other benefits to Aboriginal people in the NT.

Conclusion

It is of course appropriate for sound amendments that improve the Act to be brought before the Parliament from time to time. But the Senate needs to act prudently, on the basis of evidence-based policy and well-drafted proposals. The Land Rights Act is iconic legislation, about which the Australian people, and both major political parties, can feel rightly proud. It has facilitated the return of almost 50% of the Northern Territory to traditional owners and given them a role in land use decision-making unparalleled since colonial land laws took effect. This Bill proposes some major changes to the Act, including potentially major reductions to the role of existing Land Councils and the long-term transfer of power from traditional owners to government over some of the most potentially valuable Aboriginal land in the Territory.

Very large challenges lie ahead for Aboriginal people in the Northern Territory. Land management, broadly defined, is the core business for Land Councils as the claims era draws to a close, and is closely connected to the achievement of people's socio-economic aspirations. The Land Councils are also long-standing advocates for their people and repositories of skills, resources and experience. In a national landscape populated with many small Indigenous organisations lacking critical mass and short on capacity, where economic development is eagerly sought on all sides, it is important that ideological antagonisms within government do not triumph over practical common sense. Parliament should also take great care before assuming that government will do better than traditional owners in achieving long-term sustainable economic development over township land. These are large issues with generational significance and it is regrettable that the Federal Government has sought to rush these major proposals for change through Parliament, truncating debate in the House of Representatives and allowing only a very brief opportunity for committee and community scrutiny of the Bill.

I would be happy to make oral submissions to the Committee about these issues.

Yours sincerely

Sean Brennan

Short biographical note:

I have been a Lecturer in the UNSW Law School and a project director with the Gilbert + Tobin Centre of Public Law since May 2002. Prior to that I was employed in the Law Group of the Parliamentary Library in Canberra. Between 1994 and 1998 I worked for several Aboriginal organisations, mainly in Queensland and I have worked with Central

Land Council, though not in a paid capacity. I teach and research in the areas of constitutional law and Indigenous legal issues.