SUBMISSION BY THE CENTRAL LAND COUNCIL

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

July 2006

To: The Committee Secretary

Community Affairs Committee

Department of the Senate

PO Box 6100

Parliament House

Canberra ACT 2600

Introduction

The Central Land Council (CLC) welcomes the opportunity to make a submission to the Senate Committee inquiry into the *Aboriginal Land Rights* (NT) *Amendment Bill* 2006. However, the CLC remains concerned that the truncated timeframe for this inquiry has meant that a number of groups that may otherwise have produced submissions have not been able to. In addition, the CLC is concerned that the one day committee hearing does not do justice to the complex nature of the matters to which the *Aboriginal Land Rights* (NT) *Amendment Bill* 2006 relate.

This submission details the major concerns of the Central Land Council in response to the amendments that are proposed to the *Aboriginal Land Rights Act* (NT) 1976 by the *Aboriginal Land Rights* (NT) *Amendment Bill* 2006 (hereafter termed the Amendment Bill), introduced into the House of Representatives on 31 May 2006.

The *Aboriginal Land Rights* (NT) *Amendment Bill* 2006 is the culmination of a nine year process of review of the *Aboriginal Land Rights Act* (NT) 1976 ('ALRA'). During this period the Act was the subject of three distinct processes:

- The review of the Act carried out by John Reeves Q.C. (1998)
- The review of Part IV by Dr Ian Manning (1999) and,
- The inquiry into the Reeves Review by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HORSCATSIA 1999).

In August 2003 the four Northern Territory Land Councils and the Northern Territory government made a joint submission to the Australian government of a package of amendments designed to improve the workability of the Act. Whilst these jointly-developed reforms were largely adopted in the Amendment Bill, and are supported by the CLC, there are several amendments that will detrimentally impact on the rights of traditional landowners and the functions of Land Councils.

It is the position of the Central Land Council that the amendments that most impact on the rights of traditional landowners and the functionality of the Land Councils are as follows:

- The amendment that allows for the leasing of communities on Aboriginal land to an Entity for 99 years (ALRA section 19A).
- The amendment that allows for the delegation of decision-making powers from the Land Councils (ALRA section 28C).
- The restrictions on mining negotiations contained in the existing s.44A should be removed.
- The amendment to allow for changes to the process of the creation of new Land Councils (ALRA section 21).
- The proposal to remove the statutory guarantee of funding for the four Land Councils out of the Aboriginal Benefits Account (section 64(1)).

1. CONCERNS WITH THE WHOLE-OF-COMMUNITY LEASING ARRANGMENTS

The Central Land Council remains particularly concerned about the proposed new whole-of-community leasing arrangements (amendment to insert section 19 A). Under these new lease arrangements, a community ["township"] on Aboriginal Land could be leased by a Land Trust to a Northern Territory or Commonwealth Government body ['the Entity'] for 99 years (19 A(4)). This would mean that:

- A head lease would be entered into with the Land Trust that would cover the whole of the community, including housing areas, commercial property and government infrastructure. These head leases would be held by the Entity which would be controlled by the Northern Territory Government or the Commonwealth government (amendment 19 A(1)) .
- In consideration for the lease rent would be paid on behalf of the Entity from the Aboriginal Benefit Account to the Land Trust. The amendments tabled on

the 31st May provided that this rent be capped at 5% of the improved capital value of the land (amendment 19 A(6)).[1]

- Once a community is leased anyone who wants to apply for a house on the community, or run a business on the community, would need to apply for a sub-lease from the Entity. The rent from these sub-leases would be retained by the Entity.

The Central Land Council has a number of concerns with this new whole-of-community leasing arrangement. First, the reasons given for the Australian and NTG for putting in place the new leasing arrangements are that they claim that it is difficult to own a house or run a business on Aboriginal land. However, it is clear that these tenure arrangements can currently be negotiated using the existing provisions of the Land Rights Act (as was the case in the Alice-to-Darwin railway development) and that changing the leasing arrangement over communities, by itself, will not result in more businesses being started nor will it increase home ownership[2]. Moreover, even if the Australian government's rationale was accepted that head lease arrangements will attract greater business interest in and development of Aboriginal land, it is neither reasonable nor acceptable that the traditional landowners on whose land the townships are situated are excluded from participating in the benefit. Under the proposed s.19A all of sub-lease rental will flow to the government Entity and the land owners are precluded from negotiating head lease conditions which contain provisions relating to the payment of sublease rental (s.19A(15)).

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[1] It is noted that Minister Brough in his second reading speech on the Amendment Bill has committed to removing the 5 per cent cap on the rent available for whole-of-community leases. However, as no further detail has yet been provided as to what form this may take, this submission focuses on the detail as included in the original Amendment Bill and subsequent stipulated amendments.

[2] A detailed discussion of these matters is explored in the paper produced by the CLC titled 'Communal Title and Economic Development' in response to the NTG's original model relating to whole-of-community leasing arranegments, which forms the basis of these leasing amendments. Copies of this paper are available from the CLC webbsite (www.clc.org.au) and will be tabled with the Committee.

The capacity to negotiate over head-lease arrangements is extremely abridged, when compared with the rights a headlessor would normally have under Australian law. Under the head-lease arrangements traditional landowners would have no say over the granting of sub-leases in townships. These decisions would be made instead by the Entity. This means that traditional landowners would have no say about sub-leases that are granted for enterprises which are not wanted by a community such as alcohol outlets or gambling establishments[3].

The new community leasing arrangements are targeted at communities on Aboriginal land whereas around half the remote Aboriginal communities in the CLC region are situated off Aboriginal land, on a form of Northern Territory (NT) title under which no leases can be granted except for very limited (non-commercial and non-residential) purposes, and then only with the approval of the NT Minister. The Land Council has requested that any trial of new arrangements that were proposed by the NT Government commence in communities off Aboriginal land where reform is clearly required, but the Northern Territory has taken no action whatsoever to change the tenure arrangements so as to allow for leases which would permit economic development of Aboriginal communities located on NT freehold land.

The Australian government has also said that community leasing agreements are voluntary agreements. However the CLC remains concerned that communities will be placed in a position where in order to access essential services or funding they will be told they need to sign up to these new arrangements. Moreover, the CLC is concerned that some communities may already have been given this ultimatum.

Other problems with the new leasing arrangement are:

- In deciding to enter into a head-lease traditional landowners may lose control over the decisions relating to the development of their community, for 99 years.

[3] By contrast, it is a long established principle in Australian law that the headlessor may withhold consent with respect to the issuing of sub-leases on certain grounds. See Halsbury's Laws of Australia,

- All money for putting this new arrangement in place on Aboriginal land will come out of the Aboriginal Benefit Account (ABA) which is unacceptable. It is unclear how much this may amount to, however, the Australia government estimates that it may cost $15 million over the next 5 years. This money will be needed to cover the costs of surveying land, valuations and any rental payments made to traditional landowners. By using money from the ABA traditional landowners are being asked to pay for renting their own land. The CLC is also concerned that the cost of surveying, valuation and rental may be far in excess of the estimates made by the Australian government, meaning that substantial ABA funds that could be used for economic development and land management projects on Aboriginal land will be diverted into the leasing scheme.

- The benefits that accrue from leasing are restricted to a maximum rental payment of 5% of the improved value of the land as assessed by the Valuer. It is extraordinary that the Land Trust can not choose to forego rent in order to obtain broader benefits such as Aboriginal employment, housing schemes etc that are of greater value to traditional landowners and the broader community [sub-section 19A(7)]. It is hoped that the Minister's commitment to amend this section will address these concerns.

- The composition of the Entity is not addressed. It is important that this is clarified, as well as the issue of what the body would actually do. The makeup and role of this body are fundamental to the operation of this amendment, and it is remiss of the Australian government not to have included more detail with respect to these matters.

- At the moment Land Trusts own most of the buildings and other fixtures that are on Aboriginal Land because government departments have often not applied for leases. This means that many of the buildings (or fixed assets) in communities belong to a Land Trust. If traditional landowners decide to lease

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Leases and Tenancies, paragraphs 245-1780 and 245-3685.

> communities to the Northern Territory Government body they will lose control of these assets and will need to be adequately compensated. It is arguable that a 5% rental cap will not provide adequate compensation for the economic value of these assets.

In response to these concerns the Central Land Council has approached the Northern Territory and Australian governments with our own alternative model of how arrangements over large scale housing developments, government infrastructure provision and commercial development can be facilitated in communities situated on Aboriginal land under current s19 provisions. This model has been largely ignored by both governments.[4]

In short, the amendments seek to promote private investment in housing and entrepreneurship by community residents, without also promoting such investment and entrepreneurship by traditional owners.

Instead traditional owners are expected to forgo their right to engage in commercial development over large areas of vacant land for 99 years, in return for a rental determined by valuation rather than negotiation.

These requirements restrict the freedom of traditional owners to bargain commercially, appear discriminatory, might invite international complaint, and may be unlawful. They are also unnecessary. Fair and reasonable outcomes will be achieved (eg the railway and gas pipeline) without imposing restrictions on the capacity of traditional owners or Land Councils to negotiate. These outcomes may be achieved through leases under s 19, without amendment to the Act. The current amendments are unnecessary.

[4] As noted, this paper is available from the CLC website and will be tabled with the committee.

2. DELEGATION OF LAND COUNCIL FUNCTIONS

The Land Councils, in the proposed package of amendments agreed with the Northern Territory government, sought the capacity to delegate certain Land Council functions to regional committees established by the Land Council. This would have allowed for certain functions to be performed at a regional level, rather than at Land Council meetings which occur only 3 times per year.

The Amendments Bill [*section* 61] amends section 28 of the Act to extend the capacity to delegate, to permit a Land Council to delegate functions regarding land use including leasing, exploration and mining (but not including decisions to allocate mining royalty equivalents or rental payments deriving from lease agreements) to a body incorporated under the *Aboriginal Councils and Associations Act* 1976 ('an Association') which applies to it pursuant to the new section 28A.

Section 62 of the Bill will insert the new section 28A into the Act. Section 28A provides that an Association, the majority of whose members are either traditional owners of part of an area for which a delegation is sought, or residents of that part, may apply to a Land Council to have certain powers delegated to it. A Land Council may refuse to delegate the requested functions or powers and must provide reasons for its decision. The amendment allows for the possibility that the powers of the Land Council could be delegated to a body that could include non-Aboriginal people, provided that the majority of members are Aboriginal residents in the area.[5] This is unacceptable as it would operate to disenfranchise traditional land owners and runs

[5] See the *Corporations(Aboriginal and Torres Strait Islander) Bill 2005*Note: under this Bill the minimum number of members is only 5, or less if the Registrar grants an exemption, [s.77-5]and the indigeneity requirement [29-5] is opaque because it is to be prescribed by regulations. This leaves open the potential for a corporation with a small membership being dominated by non-indigenous persons even though it may technically meet the 28A majority requirement. After the delegation has been made, there is no simple way to revoke it should it become apparent that the association no longer has either of the requisite majorities.

counter to the entire scheme of the Land Rights Act which is otherwise predicated on the informed decision making of traditional land owners.

The CLC is very concerned at the radical departure from normal administrative rules relating to the delegation of powers contained in the proposed sections 28B and 28C. The two highly objectionable features of s 28B are:

a) it provides that a delegation once made by a Land Council can not be varied or revoked except at either the request of the delegate or with the Minister's approval; and
b) the Minister may (effectively) grant a variation or revocation by written direction to a Land Council.

Section 28C is particularly problematic as it provides that the Minister may delegate the delegable powers, if a Land Council refuses to do so. This is clearly no longer a mere delegation power but a mechanism which allows the stripping and reallocation of core functions under the Act.

Furthermore the proposed s 28D provides that a Land Council may not exercise its functions regarding a sub-region while a delegation is in force and a Land Council "must", if requested, provide a corporation with facilities and assistance to perform delegated functions(s 28E).

These provisions will operate to ensure that Land Council decisions regarding complex issues (eg to resolve traditional owner disputes relating to lease payments) are never final and may be continually agitated against by disgruntled or self interested persons. This will promote disputes and litigation. For example, residents of a community or other persons who unsuccessfully claim to be traditional owners and entitled to lease payments from a development, would be enabled to undermine a Land Council decision regarding this issue by obtaining delegated power through an Aboriginal corporation to make alternative decisions regarding this issue when granting or renewing a lease under s 19. Despite the delegation, conflict would also arise regarding future decisions by a Land Council when it distributes lease payments

"to or for the benefit of" traditional owners under s 35(4) – which involves a specific decision as to the identity of traditional owners (this function cannot be delegated).

Budget management by Land Councils may be frustrated by the requirement that reasonable resources "must" be diverted to corporations - without sufficient consideration of a Land Council's other commitments and responsibilities.

The proposal is inconsistent with Commonwealth policy in native title matters, where small representative bodies have proven inefficient and dysfunctional.

The 'delegation' mechanism proposed in sections 28A-28F is unsatisfactory and in particular the provisions of s 28 C,D,E & F should be withdrawn. These latter sections do not frame a proper delegation procedure but an ill considered process to remove core functions from Land Councils without providing for the informed consent of traditional landowners.

3. EXPLORATION AND MINING

The proposed amendments to Part IV of the Act are broadly consistent with the joint NT Government/Land Councils reform package and, to that extent, provide welcome improvements to the efficiency and efficacy of the Act. However, there is one significant omission from the package of reforms in that the amendments do not remove the current restrictions regarding the negotiation of mining agreements. The present provisions of s.44A of the Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA) limit negotiations with mining companies at the stage at which traditional Aboriginal owners may provide their consent to compensation for damage and disturbance.

The Act provides for a once only consent at the exploration phase and traditional Aboriginal owners must therefore consider at this point how any resulting mine will impact their country, communities and lifestyles. However, the restrictions of the current s 44A operate to prevent this consideration forming the basis of discussions

and agreement. This provides a clear disincentive to enter into exploration agreements since traditional Aboriginal owners are asked to accept significant consequences arising from their consent without any compensatory framework. The Land Councils strongly believe that removing the fetters to agreements will provide traditional landowners with a greater level of confidence and greater incentive to provide their consent where appropriate and the net result will be greater certainty for both land owners and miners/explorers.

The proposal to amend s44A to remove restrictions on negotiations is integral to the package of reforms that have otherwise been accepted by the Commonwealth Government. It is simply an attempt to allow landowners and applicants to negotiate under commercial terms.

This recommendation was supported in all three major reviews of the *Land Rights Act* including the Reeves Review, the National Competition Policy Review and the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs.

4. ESTABLISHMENT OF NEW LAND COUNCILS

The *Aboriginal Land Rights Act* (NT) 1976 already allows for the creation of new land councils provided that a 'substantial majority' of Aboriginal adults living in the area agree to the creation of a new Land Council. The Land Councils, in the proposed package of amendments agreed with the Northern Territory government, asked the Australian Government to amend this section to ensure that traditional landowners would have to consent to any proposed new Land Council, in line with the HORSCATSIA Report recommendations (1999:'Unlocking the Future').

However, the proposed amendments provide that a single Aboriginal person who is a resident in the area can apply for the establishment of a new Council (amendment 21

A (a)). Other bodies that are also able to apply are a Council or Association or a company, the majority of whose members are Aboriginal (amendment 21 A (b-d)).[6]

The Amendment Bill provides that the Minister may approve a new Land Council if there is a majority of 55% of Aboriginal people entitled to vote are in favour of it (amendment 21 C (5)). A person is entitled to vote if they are an adult Aboriginal and they live in the area (amendment 21 C (3)). The Land Council position is that Traditional landowners have fought Land Claims to be accorded the rights they have under the Land Rights Act and so only traditional landowners should be involved in deciding whether to create a new Land Council. This amendment has the potential to be particularly problematic in townships and communities where are a large proportion of the Aboriginal population are not traditional landowners.

The diminution of the "substantial majority" test to a mere 55% of those voting is unacceptable, and will likely establish conditions whereby small Land Councils will find it difficult to avoid conflicts of interest. This comment also applies to the proposal that Land Council functions are delegated to small Aboriginal corporations.

Recommendation 7 of the HORSCATSIA Report states that a substantial majority should be defined as at least 60% of the Aboriginal people living in the area. The recommendation also states that the appropriate traditional Aboriginal owners need to give their informed consent to the setting up of a new Land Council. Recommendation 8 of the report sets out a detailed process that should be undertaken before the establishment of a new Land Council takes place. It is the position of the CLC that these recommendations should be the basis for any amendments that change the formula for establishing new Land Councils.

[6] See previous footnote.

5. LAND COUNCIL FUNDING

The Commonwealth proposes to remove the requirement whereby a minimum of 40% of ABA funds are available to fund the administration of all of the Land Councils.

The Land Councils consider that the 40% floor provides Land Councils with an appropriate guarantee of independence and should be retained. The Minister for Indigenous Affairs has noted in response to Land Council concerns that 'The Land Councils have nearly always received more than this.'[7] With respect, this is appears to be justification for increasing the figure rather than a policy basis for the arbitrary removal of a base that was designed to provide independence from Government approval.[8]

The Central Land Council has no difficulty with a performance based management framework and whilst we have no concerns about budgets being assessed on performance and workload, the abolition of the statutory guarantee allows for greater political interference.

[7] Letter from the Hon Mal Brough MP to the CLC Director dated 15 June 2006

[8] The Aboriginal Land Rights Commission, Second Report, April 1974: Woodward J. at para 608