

Central Land Council Policy Paper

Communal Title and Economic Development

March 2005

Introduction.....	2
Communal Land Ownership	3
The Land Rights Act.....	4
Economic development for remote communities on Aboriginal land.....	5
Economic Development for Remote Communities Off Aboriginal Land.....	7
Access to Finance	9
Individual title and home ownership.....	11
Northern Territory Government’s Proposals regarding tenure and town planning in remote communities.....	15
Central Land Council Proposed Model.....	18
Category 1 - Community Housing.....	19
Category 2 - Government Infrastructure.....	21
Category 3 - Commercial operators.....	22
Planning	23
Agreement with Local Council.....	23
Ongoing role of the CLC	24

Introduction

There has been prominent public debate about the supposed constraints of inalienable freehold title granted to Aboriginal people, as a result of Land Rights processes. The debate seems to centre on the merits of individual ownership versus communal ownership of land with respect to generating economic development.

This paper seeks to address key issues in this national tenure debate, specifically economic development on Aboriginal lands and indigenous home ownership, while also posing an alternative model to that proposed by the Northern Territory Government in relation to tenure and planning in remote communities.

The CLC is strongly of the view that the key to increasing economic development across Aboriginal lands does not lie in abolishing the customary tenure system; it lies in adapting this system to resolve any specific and genuine problems, with the consent of title-holders. In this sense it is critical that any mechanisms designed to facilitate raising finance on Aboriginal land do so without threatening the underlying inalienable freehold title and are subject to the consent of traditional landowners.

In June 2004 the Northern Territory Government issued a confidential concept paper titled 'Tenure and Town Planning in Remote Communities' (the concept paper) for discussion with the four Territory Land Councils.

The CLC has significant problems with the concept paper and the proposed model.

Firstly, the concept paper fails to explain why existing statutory mechanisms are not used to clarify any 'legal and planning uncertainties', nor does it detail what these legal and planning uncertainties actually are. Second, the concept paper is based on a number of assumptions which are neither tested nor substantiated. It presumes that there is a demand for these new arrangements, or that the new arrangements will stimulate demand. This is particularly the case for commercial operations.

Tenure is not the key barrier for increased commercial operations in remote communities, and this assumption that the Territory's proposed new model will result

in increased commercial activity is flawed. Indeed, if the NT Government is so convinced that tenure is the key impediment to economic and commercial development they why has it failed to amend relevant Territory legislation imposing stringent restrictions on communities based off Aboriginal land?

Similarly, in relation to individual rights to housing assets, the concept paper presumes there is a demand for individual rights. This assumption is not substantiated and the CLC asserts that communities are concerned with increased access to housing as opposed to individual home ownership. Third, the proposed model is complex and unworkable and will completely disenfranchise traditional landowners and other community residents.

The CLC's model is designed to address many of the issues raised in the NT Government concept paper. It provides for:

- amendments to section 19 (8) of the ALRA to allow for the transfer of an interest in a mortgage,
- improved access to public housing on Aboriginal land through a housing head lease,
- standard terms and conditions for lease arrangements for government infrastructure located on Aboriginal land,
- lease arrangements for commercial operators, and
- agreements between traditional land owners and local Councils clarifying community planning processes, service delivery, community boundaries and council governance arrangements.

Communal Land Ownership

In central Australia alone nearly 400,000 square kilometres of land are under traditional Aboriginal ownership in the form of inalienable freehold title. Adding to this, a further 12 national parks are about to be scheduled Aboriginal land this year (and then leased back to the Territory Government as parks). The vast majority of this area is desert and of no value for traditional non-Aboriginal economic activities of grazing, agriculture or horticulture. Although most areas of value for tourism are largely captured in the national park system, there remains potential for tourism on a modest scale.

For our region the move to abolish communal land ownership would create widespread social chaos, have a major detrimental effect on traditional law and culture, threaten the security of the significant Aboriginal land base, and further entrench poverty.

Much of the national debate is based on an assumption that land rights (and therefore communal title) are a direct cause of the extreme level of poverty suffered by indigenous people. The merging of the distinctly separate issues of land rights and indigenous poverty, as though the first caused or should have alleviated the second, provides a convenient scapegoat for successive governments' failures to deal with a decades-old poverty crisis.

It is critical that any mechanisms designed to facilitate raising finance on Aboriginal land do so without threatening the underlying inalienable freehold title and are subject to the consent of traditional landowners.

The CLC is strongly of the view that the key to increasing economic development across Aboriginal lands does not lie in abolishing the customary tenure system; it lies in adapting this system to resolve any specific and genuine problems, with the consent of title-holders.

The Land Rights Act

The issues relating to communal land ownership are extremely relevant in the Northern Territory. Not only do we have the only Commonwealth land rights regime, the *Aboriginal Land Rights (Northern Territory) Act 1976*, the Territory has the greatest area of Aboriginal land – just under 50 per cent of the Territory landmass.

The Land Rights Act provides for Aboriginal land successfully claimed to be held as inalienable freehold title. This is a form of communal customary title which reflects traditional systems of law and responsibility for country.

The Land Rights Act already provides clear and efficient statutory processes for granting leases and subleases for residential, commercial, public purposes and for the

exploration and mining of minerals. The CLC has thirty years of experience negotiating leases on Aboriginal land. The most common requests for leases of Aboriginal land (other than mining and exploration) are:

- leases for government infrastructure, such as schools and police stations
- leases to Telstra for the installation of telecommunications infrastructure
- leases for jointly managed parks on Aboriginal lands;
- leases to allow a third party to graze cattle on Aboriginal land
- leases allowing Aboriginal service delivery agencies to build infrastructure on Aboriginal land, ie adult study centres, CLC regional offices.

Long-term leases can be used to raise capital. This was used to particular effect to secure funding for the Alice Springs to Darwin railway (see further detail below).

In relation to mortgaging arrangements there is one problem that requires resolution through amendment to the Land Rights Act. Section 19 (8) prevents the person or body holding a grant or interest in Aboriginal land from transferring this interest to another person, except with the consent of the Land Council and the Minister. This appears to restrict a mortgagee's ability to enforce a mortgage over a lease (or other interest) in Aboriginal land by providing that the consent of the Land Council and the Minister is required at the time of enforcement

The Land Councils and the Northern Territory Government have agreed on an amendment to the Act which would clarify that section 19(8) applies subject to the terms and conditions on which the initial grant of the estate or interest was made. Commercially expedient lease provisions can then be developed, such as stating that no further consents would be required for later transfer or mortgage purposes.

Economic development for remote communities on Aboriginal land

The CLC strongly disagrees with the premise that a major barrier to economic development on Aboriginal land is inalienable freehold title.

While economic development is constrained in remote Aboriginal communities this is due to a significant number of other factors, rather than tenure. Aboriginal communities in central Australia are extremely remote, meaning that there are high

transaction costs in getting goods from remote communities to a market. The only goods that are profitable in this context are those that have high marginal returns, where there is a competitive advantage in production- such as Aboriginal art. Goods that do not offer such competitive advantages are not worth producing.

All Aboriginal communities in central Australia have populations of less than 1000 people. This means that communities themselves represent a limited market. This is an issue of limited economies-of-scale. With such a limited market, the production of most goods becomes unviable. In fact, in thirty years there have only been two applications for leases for a commercial operation within a community – both community stores. There are very few small business operations in remote communities irrespective of the tenure of the community, this reflects the problems of remoteness and market. Changes to tenure arrangements will not solve these barriers.

Another major impediment to economic development in remote communities is the lack of a skilled, or even semi-skilled, labour force. Adult literacy and numeracy are low and many Aboriginal people did not even complete primary school. With such low levels of education Aboriginal people are limited in their ability to participate in the real economy.

The lack of infrastructure needed to conduct business is another major impediment to economic development in remote Aboriginal communities. Most communities lack decent roads and access to telecommunications is seriously limited.

Telecommunications and roads are regarded as essential precursors for most business. The viability of running a business is seriously curtailed by these structural barriers.

Another constraint on economic development in remote Aboriginal communities in central Australia is the environment in which they are situated. All Aboriginal communities in central Australia are located in arid, or semi-arid environments. This means that pastoralism, and many other agricultural activities, are often marginal enterprises. It also means that access to water is seriously limited.

While many of these barriers are difficult to address a significant barrier, that it is within the Australian and Northern Territory government's power to address is, a lack

of access to finance for Aboriginal businesses in remote communities – this issue is addressed in some detail below.

In the CLC region almost half of the communities are situated on land that is not Aboriginal land. Effective economic development in these communities faces the same barriers, and the results are similar. Economic development opportunities in all remote Aboriginal communities are limited, regardless of the tenure they are situated on.

Economic Development for Remote Communities Off Aboriginal Land

In the CLC region almost half of the communities are situated on land that is not Aboriginal land. For the reasons outlined above, economic and commercial development opportunities in all remote Aboriginal communities face many barriers, of which tenure is the least challenging. In relation to Aboriginal land, leasing provides legal certainty and security for raising finances, while maintaining the inalienability of the land. However there are specific impediments to economic development for communities situated on land held under NT freehold, and even more stringent restrictions for communities declared as Community Living Areas under the *Pastoral Lands Act*. These impediments are legislative and could easily be resolved by legislative reform at the discretion of the NT Government.

Communities such as Atitjere, Engawala and Alpurrurulam (Lake Nash) are all situated on land held under NT freehold title by an association. Each title has a dealing recorded on it which gives notice that the land is “prescribed property”. The purpose of these endorsements is to put third parties on notice that any dealings with the title are subject to Ministerial consent. In the absence of Ministerial consent all dealings are void.

The endorsements are recorded where the title falls within the definition of “prescribed property” in Section 4 of the *Associations Act*.: -

"prescribed property" means property that was acquired from, or using funds obtained under a grant from, the Territory or the Commonwealth, and includes an interest, whether legal or equitable, in such property,....”

All of the freehold titles held by associations for land where communities are located, fall within this definition. The restriction on dealings is set out in Section 110 of the *Associations Act* –

“110. Dealings with prescribed property

(1) An incorporated association must not dispose of, charge or otherwise deal with prescribed property (other than prescribed property that is a lease under the *Special Purposes Leases Act* or the *Crown Lands Act*), other than by way of -

(a) a disposal to, or a charge as security for a loan or other benefit by, the Territory; or

(b) a lease, including a sublease, for a term of 12 months or less,

except with the consent in writing of the Minister and in accordance with any conditions that the Minister imposes in relation to the consent. “

It is entirely within the Minister’s discretion whether to consent to dealings in ‘prescribed property’ and what conditions should apply to this consent. This appears to be an impediment to commercial development, but one that can easily be changed through an amendment to the Act by the Northern Territory Government.

Titles issued under the community living areas provisions of the *Pastoral Land Act* and its predecessor are also prescribed property but there are no large communities located on land held under those titles. This class of titles is subject to even more stringent restrictions on dealings than the larger communities, specifically a prohibition on commercial and other dealings in land. Community living areas land use is more restricted than Aboriginal land under the Land Rights Act as there is no capacity to lease land for commercial and other purposes. The CLC has requested that the NT Government amend relevant legislation to include provisions similar to section 19 of the Land Rights act to allow CLAs some capacity to engage in commercial enterprises. The NT Government has not taken any action.

The CLC supports amendments to relevant Territory legislation to remove these types of restrictions, however it must be remembered that legislative reform alone will not result in a dramatic increase in economic and commercial enterprises. To the best of the CLC’s knowledge, there is no evidence that the Northern Territory Minister responsible for administering the Act has received any applications for commercial

leases in any of the relevant communities. This may be because, as argued above, many of the other barriers to economic development that operate in remote Aboriginal communities are more significant than issues of tenure, either on or off Aboriginal land.

In terms of home ownership in remote communities not situated on Aboriginal land, Aputula (Finke) is a gazetted town in the CLC region in which all of the freehold land is owned by Aboriginal interests. As this is a town off Aboriginal land it should mean, in theory, that there are no tenure related difficulties to individuals owning their own home, or to commercial businesses being established. Kalkarinji is similarly a gazetted town, but land ownership there is more diverse. The CLC is not aware of any move by the NT Government towards encouraging home ownership in these communities and there has been little third-party or local interest in commercial development. This seems to indicate that tenure is not the significant barrier to either commercial enterprise development or home ownership on Aboriginal land.

Recommendation 1.

The CLC recommends that the NT Government move to reform relevant NT legislation to remove impediments to economic and commercial development for those communities situated on NT freehold and Community Living Areas, while protecting the intention of inalienability. This can be achieved by replicating the s.19 provisions of the Land Rights Act.

Access to Finance

Lack of access to finance is a major barrier to economic development on Aboriginal land. The experience of the Central Land Council suggests that a lack of access to capital can be a significant impediment to the generation of real economic benefits to Aboriginal people, particularly in the case of joint-venture projects.

Commercial developments that involve or are initiated by Aboriginal people, where these are viable, are unable to access finance from either private or government sources. The popular misconception is that this finance is unavailable because of

problems with the use of Aboriginal land as collateral. The experience of the Central Land Council is that even where tenure arrangements are secure, and 99 year leases are offered, there is a difficulty in generating financial support for projects initiated in a remote Aboriginal context.

The fact that tenure is not a barrier to financial lending for major commercial development on Aboriginal land is also demonstrated by the Alice Springs to Darwin railway project. The railway lease constituted a major commercial lease over Aboriginal land. There have been other commercial leases, such as the pipeline leases, but the mechanics of the railway leases illustrate how a commercial lease can be developed which can by itself, or through sub-leases, be used as security to finance the overall commercial enterprise.

The railway was a large project with complex financing relationships between parties. Despite that, the head-lease between the Land Trust and the AustralAsia Railway Corporation, is a reasonably simple leasing arrangement.

In essence, the head-lease makes provision for future leases and sub-leases by recording the Land Council's and the Minister's 'one off' consent to those transactions, as well as the grant of the original lease. The special conditions in the lease states that, no further consent needed to be obtained from the Minister or the Land Council, and that any sub-lease granted under the head lease may be mortgaged by the Lessor without any further requirement of consent.

The Railway lease in effect demonstrates the practicality of commercial leases and sub-leases on Aboriginal land, and the capacity for those instruments to be accepted as sound security for advancing money on mortgage. The lease is thus an example of the way in which tenure can be secured in Aboriginal land and used as a basis of equity in an overarching economic development project.

The Central Land Council has also had experiences of developing joint-venture arrangements between Aboriginal traditional land owners and private enterprises. This is based on a joint venture model where Aboriginal landowners provide land, water,

equity and labour whilst the joint venture partner brings investment, technical expertise, management and marketing.

The lack of seed funding needed to bolster Aboriginal equity in these activities creates major issues for the viability of joint-venture activities. The experience of the CLC is that even when all elements of the joint-venture are negotiated, including 99 year lease arrangements, these joint-ventures fail because the Aboriginal partners have not been able to access finance to provide for additional equity in the business. The CLC considers that access to finance is a far more significant barrier to joint-ventures operating, than tenure related issues.

The Australian and Northern Territory governments could take a number of steps to address barriers to access to capital in remote Aboriginal communities. The American and Canadian experience suggests that governments, in partnership with financial institutions, can ease many of the misconceptions that financial institutions have about lending on Aboriginal land.

One strategy that has been pursued effectively in Canada is the development of an ‘On-Reserve lending Guide’ by the Bank of Montreal, to help financial institutions understand the different processes involved in lending on Aboriginal land. Such a guide would also be useful in an Australian context. The Central Land Council would be happy to partner with the Australian and Northern Territory Government, and representatives of the Australian Bankers Association, to develop a similar guide for lending on Aboriginal land.

Recommendation 2.

That the Australian and Northern Territory Government and the Australian Bankers Association work alongside the CLC to a guide for lending on Aboriginal land.
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Individual title and home ownership

Some have argued that there is a need for individual title rather than communal title to facilitate indigenous homeownership. In central Australia this issue is largely

irrelevant as it is already possible for individuals to obtain leases which could then be used to raise capital to build or buy a house.

The real impediments to individual home ownership are the income levels of the majority of Aboriginal people in the region. The average income of Aboriginal people living in the ATSI central remote region is \$9,133, or 25% of the average annual income of a non-Indigenous person in the region¹. Most individuals and families are simply not in a position to enter into a mortgage given that level of income. Not surprisingly, the issue of individual home ownership is not raised as an aspiration of traditional land owners living on Aboriginal land. Perhaps if living standards and income levels were to rise it may become an aspiration for future generations.

The low income status of Aboriginal people living in remote communities in central Australia means that, regardless of the tenure they are situated on, they are unable to access a mortgage from mainstream financial institutions, should they wish to do so. Government subsidised lending schemes are also failing to meet the needs of Aboriginal people, and in particular Aboriginal people living on Aboriginal land. The current Australian government subsidised housing product available to Aboriginal people- the previous ATSI housing loan program, that is now managed by Indigenous Business Australia- is not available to people living on Aboriginal land.

If Aboriginal people in remote communities in central Australia wish to own their own home it is clear that neither mainstream lending institutions or government subsidised schemes would meet this need. If the Australian and Northern Territory governments wish to support home ownership in remote Aboriginal communities, and assuming there is a demand for this kind of support, a new solution must be found.

International examples demonstrate that governments elsewhere have developed innovative mechanisms to increase their public housing stock and facilitate indigenous home ownership, without undermining communal title arrangements. One

¹ Mitchell J, Pearce R, Stevens M, Taylor J, Warchivker I, *Baseline social and economic profiles in central Australia*, A report prepared for the Centre for Remote Health in conjunction with ATSI and the ANU, Alice Springs, 2005.

such model involves using government guarantees to facilitate lending to individual Aboriginal borrowers or tribal groups. Given the success of this program in the United States it may also be a viable alternative in Australia.

Government guarantees are a strategy used in the United States to encourage home loan lending to Native Americans. These guarantees take two forms. First, as a pledge by the US Government to private lenders, such as banks, to repay up to 95 percent of the unpaid principal balance and accrued interest in a loan. These guarantees are offered to tribes who are eligible in accordance with the Indian Housing Block Grant scheme. These tribes are then able to use the guarantees to provide affordable, low-income public housing on reservation or Native American land.

United States Government guarantees are also available for loans to individual Native American borrowers. Created under the *Housing Community Development Act* (1992) section 184, guarantees are available to private lenders who offer mortgage loans to low-income Native Americans living on Indian Country. Managed by the United States Department of Housing and Urban Development (HUD) Section 184 loans are available to low-income Native Americans regardless of whether they live on fee simple land in an Indian area, tribal trust land or individually allotted land on a reservation. However, different loan procedures exist depending on the type of land a borrower is situated on. For a home loan on tribal trust land, the eligible individual borrower leases the property from the tribe on a lease approved by the Bureau of Indian Affairs (BIA) and by HUD. It is the house itself that is mortgaged so that in the event of a foreclosure ownership of the land remains in trust for the tribe. By contrast, for a home loan on individual or “allotted” trust land, both HUD and the BIA must approve the loan applicant. In the event of a foreclosure, the lender or HUD cannot sell the property to anyone other than an eligible tribal member, the tribe or the housing authority serving the tribe. Thus in each case the status of the trust land is protected. The number of mortgage loans that had been made to individual Native American borrowers in accordance with a section 184 guarantees, as at April 30 2001, was 826 loans. The total value of these mortgages amounted to over \$US 80 million.

The United States experience indicates that Government guarantees are an effective way to generate home ownership for Native Americans. Such an approach in

Australia, in conjunction with the development of a lending guide, could make significant changes to the barriers that remote Aboriginal communities face in accessing capital.

The section 184 guarantees offer another model for developing public housing, that is privately financed, on Aboriginal land. This model has a serious advantage in that the United States government is offering support for public housing via a government guarantee rather than actual funding of housing stock. Given the critical housing needs that exist in remote Aboriginal communities, and the fact that government allocations are not in a position to meet current, let alone projected, demands for housing, this model is worth further serious consideration.

Recommendation 3

<p>That the Australian and Northern Territory governments consider offering government guarantees as a way of addressing the barriers to accessing finance for housing in remote Aboriginal communities.</p>
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Northern Territory Government's Proposals regarding tenure and town planning in remote communities

In June 2004 the Northern Territory Government issued a confidential concept paper titled 'Tenure and Town Planning in Remote Communities' (the Concept Paper) for discussion with the four Territory Land Councils. Initial discussion between the NT Government and each of the Land Councils has commenced however a formal process of negotiation has not yet been entered into.

Essentially, the NT Government's model for Aboriginal communities is based on:

- whole of community leases to be held by a new statutory entity comprising representatives of the NT Government and the Land Councils;
- sub-leases to be provided for different land-uses by the new statutory entity without further reference to traditional land owners; and
- traditional land owners to receive rent for community leases.

The NT Government's models apparently aims to resolve the "situation where a legal and planning vacuum for individual stakeholders and communities, both generally and within town environments in particular, has arisen."² According to the concept paper, the NT Government is concerned about the ownership of assets on Aboriginal land, and proposes to address the severe housing shortage in remote communities through leasing arrangements which could then be used as security to attract additional housing capital.

The CLC has significant problems with the concept paper and the proposed model.

Firstly, the Concept Paper fails to explain why existing statutory mechanisms are not used to clarify any 'legal and planning uncertainties', nor does it detail what these legal and planning uncertainties actually are. Proper application of the Land Rights Act and the Territory's Planning Act would solve any 'uncertainties' in relation to planning matters, and the ownership of assets is easily resolved by using existing

² Tenure and town Planning in remote communities: A Concept Paper developed by the Northern Territory Government, June 2004. Page 2.

provisions in the Land Rights Act. The paper specifically states “the existing mechanisms under s.19 ALRA...have not in practice operated to produce structures under which the principal users of land in towns on Aboriginal freehold land have obtained security and established rights.”³ This is not a result of failings of the statutory provisions but a direct result of successive Territory Governments’ refusal to acknowledge and therefore utilise the provision in the Land Rights Act. It is unreasonable to propose a whole new tenure model simply because the NT Government has failed to methodically utilise existing statutory provisions.

Secondly, the concept paper is based on a number of assumptions which are neither tested nor substantiated. It presumes that there is a demand for these new arrangements, or that the new arrangements will stimulate demand. This is particularly the case for commercial operations. As discussed above, tenure is not the key barrier for increased commercial operations in remote communities, and this assumption that the Territory’s proposed new model will result in increased commercial activity is flawed. Indeed, if the NT Government is so convinced that tenure is the key impediment to economic and commercial development they why has it failed to amend relevant Territory legislation imposing stringent restrictions on communities based off Aboriginal land?

Similarly, in relation to individual ownership of housing assets, the concept paper presumes there is a demand for individual home ownership. This assumption is not substantiated and the CLC asserts that communities are concerned with increased access to housing as opposed to individual home ownership.

Thirdly, the proposed model is complex and unworkable and will completely disenfranchise traditional landowners and community residents. The following aspects are highly problematic:

- The proposed new statutory entity is apparently based on the Jabiru Town Development Authority, although few details are provided. Such a model effectively disenfranchises traditional land owners by allowing for a new

³ Tenure and town Planning in remote communities: A Concept Paper developed by the Northern Territory Government, June 2004. Page 2

statutory entity that does not allow for traditional owner control over any land related decisions in communities.

- Traditional land owners are being asked to forfeit their rights to negotiate over future commercial operations in their communities. The CLC believes that traditional land owners must maintain the right to negotiate on a case by case basis over commercial leases. This allows traditional land owners to specify benefits other than rent, particularly the possibilities for joint ventures, training and employment.
- The paper stipulates that there is little commercial development on Aboriginal land. This is not because ALRA processes are 'slow and cumbersome' but because in reality, there are a number of barriers to economic development on Aboriginal land which means that there are very few applications for commercial leases. The Central Land Council has only received two applications for commercial activity to take place on Aboriginal land in communities in the last 30 years, both of which were for community stores.
- The concept paper fails to explain why the Territory Government's aspirations for increased public housing, proper planning and legal certainty in remote communities has not already been implemented in remote communities not situated on Aboriginal lands. If Aboriginal land and the Land Rights Act is the key impediment to achieving these aims, why not tackle the same problems in remote communities on alternative tenures, where legislative reform is entirely at the discretion of the NT Government.
- The concept paper fails to discuss the costs of implementing a new tenure and leasing system for remote communities. The CLC is particularly concerned about the costs for surveys and other related administrative costs, which are likely to run into hundreds of millions of dollars. The paper does not demonstrate that the benefits will outweigh the substantial costs, particularly when remote communities are desperate for service provision.
- These tenure and leasing discussions are very complex and will require slow and thorough community consultations. It is extremely unlikely that traditional land owners will agree to hand-over their rights over remote communities to a new Territory-wide statutory body. A staggered approach will achieve the same aims, be equally as efficient and is much more likely to be acceptable.

The model proposed by the CLC below would allow each land user to have secure tenure but would also maintain the involvement of traditional land owners in commercial operations and economic development.

It is most unfortunate that the NT Government model has been forwarded to the Australian Government as a credible and detailed proposal requiring amendments to the Land Rights Act outside the scope of the agreed package of amendments put forward by the four Territory Land Councils and the NT Government.

The CLC argues that further analysis and discussions with the Land Councils would have resulted in a more rigorous assessment of the issues requiring resolution, and the development of a far more appropriate and effective model. It is our hope that agreement with the Territory Government may still be possible.

Central Land Council Proposed Model

The CLC's model is designed to address many of the issues raised in the NT Government concept paper. It provides for:

- amendments to section 19 (8) of the ALRA to allow for the transfer of an interest in a mortgage (as discussed above),
- improved access to public housing on Aboriginal land through a housing head lease,
- standard terms and conditions for lease arrangements for government infrastructure located on Aboriginal land,
- lease arrangements for commercial operators, and
- agreements between traditional land owners and local Councils clarifying community planning processes, service delivery, community boundaries and council governance arrangements.

The CLC proposes a three tiered leasing approach based on the main categories of land users in communities: residential housing, government infrastructure and commercial operations. The CLC's model will ensure we can tackle the most immediate issues relating to community housing stocks as a priority, while still clarifying and streamlining other leasing and service delivery arrangements. The

CLC is firmly of the opinion that addressing each of these categories separately will ensure we have a meaningful and practical way forward. It does not require any changes to the Land Rights Act.

It must be emphasised that there has not been an opportunity to undertake broad community consultations on this complex issue. Therefore this proposed model does not have the endorsement of Council or traditional land owners throughout the region. This model has not been the subject of discussions between the four Land Councils and it should not be construed as a Territory-wide model. Consent to any new community leasing arrangements must rest with the traditional land owners, as it currently does in the Land Rights Act.

Category 1 - Community Housing

Research indicates that the average house in remote communities is inhabited by at least ten people. The CLC and the Territory Government agree that overcrowding is a severe problem, and there is an urgent need to increase the available housing stock. There is no doubt that existing indigenous housing funds will never provide enough housing to fill the significant backlog of needs in addition to catering for the growing population in many communities.

The CLC accepts the Territory Government proposition that the provision of standard leasehold tenure for residential housing would provide the necessary security to borrow additional housing funds and provide greater public housing stock on remote communities. The CLC would consider new housing leasing arrangements an advantage, provided that substantial funds are made available for additional public housing in remote Aboriginal communities.

The CLC proposes that the CLC and the Territory Government agree on standard lease conditions for all residential land as a “residential head lease” and lease that land in bulk to a statutory housing corporation. IHANT already exists and the CLC understands that a current review of IHANT includes a recommendation that IHANT become a statutory authority. IHANT could be given the capacity to be the head lessee of housing land, provided the CLC and traditional land owners were confident

about IHANT statutory functions, funding and Aboriginal governance arrangements. These proposed reforms to IHANT will require some negotiation.

Agreement should also be reached regarding standard practices for allocation of land for housing in communities and standard procedures under which government will have the right to call for a lease, or variation of an existing lease to incorporate an increased area.

One issue of complexity is that of existing rather than new housing stock. The CLC recommends that in order to streamline arrangements all residential housing (excluding employee housing) should be included in this system, otherwise we risk the development of a two-tier or multi-tier system of housing administration. Virtually everyone on a community is currently living in existing housing stock. These residents, including traditional landowners, will need to be very carefully consulted about the future ownership of the houses they are living in, the likely prospect of increased rent and benefits of a new scheme for existing housing stock.

In the proposal put initially to the CLC about increasing public housing stock in remote Aboriginal communities would require a more secure tenure arrangements. In addition, the suggestion was made that for the roll-out of public housing to be financially viable, thereby allowing for private sector interest, it would need to occur on the scale of 50-100 houses and would therefore take place, at least initially, only in larger sized communities of approximately 800 or more people. The Central Land Council has only three communities of this size: Yuendumu, Lajamanu and Alpururulam (Lake Nash). Of these, Alpururulam is located on NT Freehold. Providing public housing in this community is a tenure issue that could be resolved by the Northern Territory government and requires no changes to the Aboriginal Land Rights Act. The idea that the provision of large scale public housing blocks to remote Aboriginal communities, is somehow dependent on changes to the Aboriginal Land Rights Act is not true for the large number of communities that exist off ALRA Land.

One approach could be to trial the proposed public housing provision model off Aboriginal land first. If it is deemed successful then the CLC can pursue discussions with the other two large communities to which this rationale would also apply.

Recommendation 4

The CLC proposes that the CLC, Traditional land owners and the Territory government agree on standard lease conditions for all residential land, and then lease this land in bulk to the a statutory housing corporation, possibly IHANT.

Recommendation 5

The CLC recommends that the NTG trial the proposed public housing provision model off Aboriginal land first. If it is deemed successful then the CLC can pursue discussions with the other two large communities to which this rationale would also apply.

Category 2 - Government Infrastructure

The concept paper correctly notes that s19 of the ALRA has been used by both the Australian and NT Governments to enter into leases. It is the CLC's position that these existing arrangements are efficient and should continue. The CLC strongly disagrees with the NT Government position that these arrangements are 'slow and cumbersome'. Evidence should be provided to substantiate this claim.

Government agencies can easily enter into leases to create certainty in the tenure of their assets. From the CLC's perspective leases have been provided for all government assets, upon request. Where assets remain without tenure this is because no application has been made to the CLC for a lease.

In order to further streamline CLC processes, the Land Council is prepared to negotiate a set of common terms which will apply to all remaining leases relating to government infrastructure. In the past, leases for a community purpose have been provided on the basis of a peppercorn rent. Government housing, where it is being used to house employees who are delivering services to the community, will also be covered by this arrangement.

Recommendation 6

That the CLC and NTG, as part of this package, negotiate a set of common terms which will apply to all remaining leases relating to government infrastructure.

Category 3 - Commercial operators

It is the CLC's position that these existing arrangements that operate under s.19 of the ALRA are efficient and should continue. Long term leases are clearly able to be granted for commercial leases under s.19, subject to Ministerial consent.

Any changes to current arrangements need to resolve real and identified problems.

In relation to commercial leasing of Aboriginal land inside communities, there have been very few applications to the CLC for leases. In fact, to date there has been two applications for leases for a commercial operation within a community in thirty years. The problem therefore seems to be the impediments to commercial and economic development discussed above rather than tenure.

It is important that traditional landowners should retain control over commercial leases. This will be where they get the true benefit of any future development of the communities. Benefits that can accrue to traditional land owners from commercial leasing agreements are not only rent. In relation to mining agreements the CLC has substantial experience in negotiating for specific employment and training outcomes and negotiating trust fund initiatives for specific community purposes. These arrangements will vary according to the size and scope of the commercial enterprise being proposed. Lease conditions therefore cannot be standard but would certainly emphasise benefits in addition to rent, and negotiations may include options for joint venture arrangements.

Recommendation 7

That traditional landowners should retain control over commercial leases. Lease conditions therefore cannot be standard but would certainly emphasise benefits in addition to rent, and negotiations may include options for joint venture arrangements.

Planning

In terms of planning, the CLC would firstly point out that the so-called “planning vacuum” on remote communities has nothing to do with tenure arrangements.

Remote communities not situated on Aboriginal land do not appear to have any greater access to decent planning mechanisms than those on Aboriginal land. The CLC suggests that communities of over 1000 people, such as those in the Top End, probably do require more thorough planning mechanisms than those with populations of well under 1000. The Territory Government should develop appropriate mechanisms based on the size and planning requirements of remote communities, irrespective of tenure.

To facilitate better planning and clarity about the role of local councils, the CLC suggests that an agreement be entered into between traditional land owners and the council that sets out the parameters for a more considered planning process, including building on the current SLAP plans, and whole of community site clearances.

Planning processes may well require specific additional resources and expertise from the Territory Government, and possibly agreement to clarify the application of the *Planning Act* to Aboriginal land in communities for the purposes of section 74 of the Land Rights Act.

Recommendation 8

The CLC recommends that an agreement be entered into between traditional land owners and the council that sets out the parameters for a planning process. Planning processes may well require specific additional resources and expertise from the Territory Government, and possible agreement on the application of certain planning provisions to Aboriginal land.

Agreement with Local Council

The CLC proposes that an agreement be negotiated between the traditional land owners and the local Council which would:

- detail community planning processes (as above)

- map out areas that would be under the purview of the local council and not require any additional TO consent, based on whole of community site clearances;
- clarify and reserve the rights of traditional land owners regarding significant land use decisions;
- clarify community boundaries; and
- clarify council governance processes.

The Territory Government will need to amend existing local government schemes for Community Government Councils, particularly those that for political purposes were created to incorporate entire land trusts rather than community boundaries.

Ongoing role of the CLC

Obviously, with respect to housing head leases and government infrastructure leases the CLC will need to negotiate the terms and conditions of the leases and undertake consultations with relevant traditional land owners. This is a large undertaking and may require additional resourcing.

Once housing head leases are negotiated, the CLC would not envisage any further role other than the requirement to distribute income to traditional land owners, other involvement specified in the lease (ie review clauses) and possibly nominating representation to IHANT.

In relation to leases for government infrastructure, the CLC has no ongoing role except actions specified in the lease (ie review clauses) and any required income distribution, although currently all such leases are for peppercorn rent.

It is crucial that traditional land owners maintain the right to control and negotiate benefits, and possibly involvement in commercial arrangements on communities on Aboriginal land. These leases would be negotiated on a case by case basis.

With respect to the agreement between local councils and the traditional land owners, the CLC will have an ongoing role in facilitating those agreed actions that require traditional owner input, for example some aspects of planning. The CLC will conduct

whole of community site clearances, where appropriate, and will continue to administer the permit system.