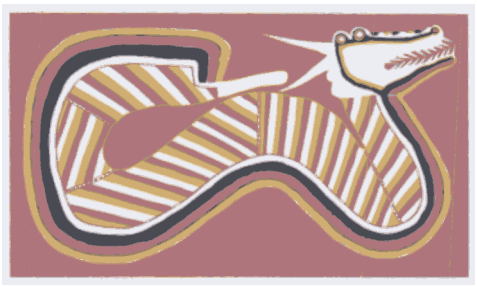

Parliament of Australia

Senate

Community Affairs Committee (Legislation)

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

Northern Land Council Submission

21 July 2006

NLC POSITION PAPER: LAND RIGHTS ACT AMENDMENTS – 21 JULY 2006

1. SUMMARY

Workability amendments re exploration, mining and other developments which were jointly recommended by the NT Government and Land Councils in 2002 have largely been adopted.

The Northern Land Council (NLC) has very serious concerns regarding other amendments which:

- appear to breach and/or impliedly repeal the *Racial Discrimination Act 1975*;
- appear directed at effectively implementing the 1998 Reeves report model by breaking up Land Councils and by removing financial independence, and forcing them to disclose confidential minutes (in effect, publicly) and "delegate" functions to small and unrepresentative corporations;
- terminate non-contiguous land claims to the intertidal zone and rivers (including "esplanade" areas), and enabling termination re claims to NT Land Corporation land.

The NLC appreciates the Commonwealth's commitment to facilitate economically healthy communities including entrepreneurship and private ownership of sub-leases in towns on Aboriginal land.

The NLC considers current proposals include significant deficiencies and unforeseen consequences which will hamper and impede Commonwealth policy, and also inhibit agreed outcomes with traditional owners. Certain restrictions do not apply regarding other freehold land or native title in towns (eg Alice Springs), and appear discriminatory and to impliedly repeal the *Racial Discrimination Act 1975*.

It is also wrong and unfair that the NT Government, at least initially, will be able to access the Aboriginal Benefits Account (generated from mining royalties on Aboriginal land) to meet its rental and administration costs. This fund commenced in 1952 and has always been earmarked to assist Aboriginal people and communities. It should not be used to meet NT Government costs.

The 1998 Reeves report recommended that the large Land Councils be broken up into 18 small bodies, with limited oversight by a new body called the NT Aboriginal Council (NTAC). This model was expressly rejected in the 1999 bipartisan report by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs chaired by the Hon Lou Lieberman.

The current amendments achieve the same result by empowering the Minister to direct Land Councils (which are comprised by traditional owners) to divest their land use functions to small Aboriginal corporations - the majority of whose members must be Aboriginal from the relevant region, but whose other members may be from elsewhere and may be non-Aboriginal. The Land Council would retain a largely fictional oversight role. By this means the Northern and Central Land Councils would take on a role similar to NTAC – thus implementing the Reeves model.

In addition the Minister's power to establish small Land Councils will be increased, by removing the "substantial majority" requirement and replacing it with a 55% plebiscite.

The removal of the requirement whereby a minimum of 40% of Aboriginal Benefits Account funds are earmarked to Land Council administration means that the circumstances to justify break

up of Land Councils may readily be achieved by the exercise of Ministerial funding discretion. The NLC considers that the 40% floor provides Land Councils with an appropriate guarantee of independence and autonomy and should be retained. The current requirement that the Minister approve budgetary estimates ensures that funding may be linked to workload and performance.

It is proposed that the minutes of a Land Council meeting must be disclosed to traditional owners and any Aboriginal resident (subject to exceptions such as confidentiality and privilege).

This proposal is absurd. One third of the Northern Territory's population is Aboriginal and, being residents, would have access to a Land Council's minutes. The practical result would be that all residents of the Northern Territory, including the media and political bodies, would directly or indirectly have access to a Land Council's minutes. Consequently a Land Council could not perform its statutory functions, often regarding politically sensitive issues, without potential and permanent media scrutiny of internal matters. Other Commonwealth bodies are not subject to such an unworkable requirement.

It is proposed that non-contiguous claims to the intertidal zone or to the beds and banks of rivers which are not adjacent to or contiguous with Aboriginal land be terminated. This is the case notwithstanding that various claims have been heard and recommended for grant. This termination is said to be justified so as to ensure that adjoining pastoralists have access to the beach and to the sea, or to rivers. The NLC accepts that adjoining pastoralists should have such access, and has always anticipated grants of Aboriginal land would be conditional to that effect.

This proposal is an attempt to limit the possible effect of the current Blue Mud Bay case (Arnhem Land) which will be heard on appeal in the Federal Court in August 2006, and it is anticipated by the High Court in 2007. The NLC is seeking to establish that commercial fishing interests cannot take fish in tidal waters above Aboriginal land in the intertidal zone or in tidal rivers.

Approximately 80% of the Territory's coastline is Aboriginal land or freehold to low water mark, with most of the remainder being subject to claim. If the litigation is successful the NLC will grant a (say) 12 month amnesty to enable a negotiated outcome, such as has occurred in New Zealand for Maori offshore interests (this outcome also derived from the settlement of litigation). The remaining 20% (excluding Darwin) of the intertidal zone of the Territory's coastline is subject to claim, and three claims have been heard and recommended for grant as Aboriginal land. Traditional owners of this land should also be able to benefit from any negotiated outcome flowing from the Blue Mud Bay litigation, rather than having their land claims terminated.

The enabling of termination of claims to land vested in the NT Land Corporation is also unfair, and rewards efforts by successive NT Governments since 1979 to thwart Commonwealth legislation. The Land Corporation owns large areas of vacant crown land pursuant to a legal device which prevents existing claims being heard.

Rather than terminating the claims there should be an amendment to enable them to be heard, or alternatively a settlement whereby the more significant areas are scheduled as Aboriginal land. It may be appropriate to request the Land Commissioner to assist in identifying these areas.

2. EXPLORATION AND MINING

The proposed amendments appear broadly consistent with the joint NT Government/Land Councils submission in 2002.

One amendment not included in the Commonwealth position paper is the removal of restrictions regarding the negotiation of mining agreements. These restrictions are contained in s 44A, and on their face appear to preclude exploration agreements which specify a formula for royalty payments when mining occurs.

All minerals exploration agreements negotiated by Land Councils include provisions regarding mining payments. These provisions are included because since the 1987 amendments, if traditional owners consent to minerals exploration, they lose the right to object to the subsequent grant of a mining interest.

In other words, unlike the regime under the *Native Title Act 1993*, since 1987 exploration/mining agreements under the *Land Rights Act* have been in a conjunctive form (rather than disjunctive).

The joint submission recommended that there should be no restrictions on the content of agreements, leaving the parties to be governed by general commercial law. 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.

3. DELEGATION OF LAND COUNCIL FUNCTIONS

3.1 Delegation within Land Council or to officers

The Land Councils sought greater power to delegate functions from their Full Councils, including to committees established under s 29A of the *Land Rights Act* (ie of the Full Council) but also to the Chair, Executive Council, and the CEO/Director. The primary intention was to maximise flexibility and ensure that opportunities for the commercial development of Aboriginal land are not compromised by delay. The current situation requires commercial proponents to await a Full Council meeting to process a proposal.

The Commonwealth has proposed that a Land Council be able to delegate all functions to committees established under s 29A of the *Land Rights Act* (ie to the Executive Council and regional councils) other than determinations under s 35 (ie payment of mining royalty equivalents) and such functions as may be prescribed.

The Commonwealth proposal will not resolve the difficulty of delay. Delays will still arise in relation to periods between scheduled executive and regional council meetings. The Commonwealth proposal does not create an environment of optimum efficiency.

Comparable functions under the NTA such as the execution of agreements, may be executed by the CEO/Director through a delegation. No basis exists for a different approach being taken regarding such functions under the *Land Rights Act*.

3.2 "Delegation" (ie transfer of power) to Aboriginal corporations

The Commonwealth has proposed that a Land Council (which is comprised by traditional owners) be able to "delegate" (ie transfer) its functions regarding land use regarding Aboriginal land or land subject to claim, including exploration, mining, and the grant of leases and licences (but not including decisions to allocate mining royalty equivalents or rental payments deriving from lease agreements), to an Aboriginal corporation incorporated under Commonwealth legislation.

The majority of the corporation's members must be traditional Aboriginal owners or residents of the Land Council's region, and the corporation must specify a sub-region in which it wishes to operate. Other members may be from elsewhere and may be non-Aboriginal (up to 49%, although this may be limited by determinations under the *Corporations (Aboriginal and Torres Strait Islander) Bill* 2005 when enacted).

If a Land Council refuses to "delegate" its functions it must provide reasons to the corporation and to the Minister. The Minister may override the Land Council and require functions to be "delegated" to the corporation.

A "delegation", whether made voluntarily or through Ministerial override, may only be varied or revoked with the corporation's consent or with the agreement of the Minister.

A Land Council may not exercise its functions regarding a sub-region while a "delegation" is in force, nor can it revoke a "delegation".

The legal concept of delegation ordinarily contemplates that the delegator retains power to exercise a function, notwithstanding that it has been delegated. The concept also contemplates that the delegator may revoke the delegation. The removal of these powers means that the Commonwealth's proposal constitutes a mandated transfer of power. It is a misnomer to describe it as a power of delegation.

The corporation must inform the Land Council of decisions made under "delegation".

A Land Council "must", if requested, provide a corporation with facilities and assistance to perform "delegated" functions.

This proposal is unworkable. It will mean 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 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).

The proposal would mean that over time a myriad of Aboriginal corporations would seek delegated power from Land Councils and apply to the Minister to override an adverse Land Council decision regarding this issue. (It is noted that there are presently 532 registered Northern Territory Aboriginal Corporations, of which up to 257 appear to exercise some functions within the NLC region.) In turn consideration of litigation would be likely by Land Councils where a Minister overrode a decision regarding delegation. Thus considerable resources would likely be diverted from more productive activity.

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.

In contrast to Land Councils, corporations exercising "delegated" power are not subject to a detailed statutory scheme which prescribes the proper and responsible performance of their functions.

The proposal also arguably may mean that litigation regarding a corporation's decision under "delegated" power must be brought in the name of the relevant Land Council, which must then devote resources to defending the litigation. This is because legal proceedings are initiated in the name of the delegator (being the legal entity or personality), rather than a delegate. Such a result is obviously unsatisfactory.

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

The proposal is also inconsistent with sound administrative practice which requires that decision making power regarding particular subject matter is vested in one body, not effectively in competing bodies.

Other Commonwealth bodies are not subject to such an unworkable requirement.

The proposal should be withdrawn.

4. ESTABLISHMENT OF NEW LAND COUNCILS

Currently the Minister may establish a new Land Council where "a substantial majority of adult Aboriginals living in an area … is in favour" of the proposal.

It is proposed that this test be amended so that the Minister may establish a new Land Council where 55% of Aboriginal persons living in an area vote for the proposal. The new Land Council must also "demonstrate sound governance structures and the ability to satisfactorily represent all Aboriginal people in its area."

It may be appreciated that the Commonwealth wishes to be able to resolve the potential difficulty of a non-performing Land Council through increased executive power rather than by legislation. Nonetheless the diminution of the "substantial majority" test to 55% is unworkable, 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" (ie transferred) to small Aboriginal corporations. Advice that such small bodies may be able to obtain a Ministerial exemption underlines that the Commonwealth proposal regarding this issue is flawed.

The nature of a Land Council's functions (which, in essence, are governmental functions) involves making decisions regarding complex and difficult issues, such that at any particular time there will be significant sections of its constituents who may be unhappy with the Land Council. Under the Commonwealth's proposal a Land Council, after making a difficult decision, will then be prone to having to defend itself against a submission that a breakaway Land Council should be established. Opening the door to this situation will mean that significant resources will likely be devoted to responding to such submissions (including possible litigation), rather than devoting resources to

productive activity. The threat of a breakaway Land Council submission will also inhibit a Land Council from properly making difficult decisions.

The current statutory formula should be retained, or alternatively replaced with a 75% requirement.

Further the legislation (on the basis of the same formula) should explicitly provide that a Land Council may amalgamate with, or be reincorporated into, the area of another Land Council. Representations to that effect have previously been made by traditional owners and communities, however neither the current legislation nor the proposed amendments explicitly provide for this option.

5. LAND COUNCIL GOVERNANCE IMPROVEMENTS

5.1 Disclosure of minutes

The Commonwealth has proposed that Land Councils will be required to keep minutes of meetings and make them available to traditional owners and (presumably Aboriginal) residents. Certain matters could be excluded from the minutes and thus not subject to disclosure including matters related to staffing, personal hardship, commercial confidentiality, s 23E confidentiality, legal professional privilege, law enforcement, Land Council security, or sacred or other significant matters.

This proposal is unworkable. Approximately one third of the Northern Territory's population is Aboriginal. These persons, being residents, would be entitled to access a Land Council's minutes. The practical result would be that all residents of the Northern Territory, including the media and political bodies, would directly or indirectly have access to a Land Council's minutes. Consequently a Land Council could not perform its statutory functions, often regarding politically sensitive issues, without potential and permanent media scrutiny.

One example may suffice. At its October 2005 meeting the NLC Full Council considered, and called for an amendment to, the *Commonwealth Radioactive Waste Management Bill 2005* so that a Land Council can nominate an alternative site in the Northern Territory for a radioactive waste facility - provided that the traditional owners agree and sacred sites and the environment are protected. The meeting was attended by officers of the Commonwealth Department of Education, Science and Technology. An amendment was subsequently made which is consistent with the NLC's position.

The Commonwealth's proposal means that, despite its political sensitivity, the NLC Full Council would be required to disclose its confidential minutes regarding national interest matters such as the *Commonwealth Radioactive Waste Management Bill 2005* to all Aboriginal residents in its region (whether or not traditional owners). This disclosure would concern not only the Full Council's internal deliberations, but also its discussions with Commonwealth representatives. The disclosed minutes would inevitably be obtained by, and published in, the media.

Such disclosure of confidential discussions and deliberations by a statutory authority is unprecedented and cannot be said to be in the public interest.

The Commonwealth's subsequent advice as to exceptions which would not be subject to disclosure simply underlines that this proposal is unworkable (proposed legislation is not the subject of exception).

Other Commonwealth bodies are not subject to such an unworkable requirement.

The proposal should be withdrawn.

5.2 Annual reports

It is proposed that annual reports prepared by Land Councils be required to include fees received for services provided, details of mining royalty equivalents and lease payments made to Aboriginal bodies, delegations, consultants engaged, and the activities of Land Council committees.

Privacy concerns may arise regarding this proposal, particularly commercially confidential payments by private companies, and in relation to payments to Aboriginal bodies of moneys which are (or are analogous to) private moneys. For example, payments deriving from native title land use agreements under the NTA are not subject to public disclosure. Such payments in relation to Aboriginal land should not be subject to public disclosure.

This legislative requirement does not appear to be generally applied regarding other Commonwealth departments or authorities, in which case Land Councils should be treated similarly.

6. LAND COUNCIL BUDGETS

6.1 Limit on the ability to spend funds in excess of the total estimates

Section 34(3) currently provides that a Land Council's expenditure regarding an item in the estimates approved by the Minister (for example, salaries, operations or capital) may exceed the specified amount by up to 20%. The effect of this provision includes that a Land Council may exceed its total approved expenditure by 20%.

The Commonwealth proposes that a Land Council continue to be able to exceed approved expenditure for an item by up to 20%, but only provided that reductions are made in relation to other items so that total approved expenditure does not exceed the approved estimates.

This proposal is neither practical nor justifiable. The current 20% requirement provides flexibility bearing in mind that it is not possible to predict expenditure in advance. The proposal recognises this fact in enabling expenditure of up to 20% over the approved estimate for a particular item, but not in relation to the total expenditure of a Land Council. Instead, where a Land Council finds it necessary to exceed the approved estimate for a particular item, it can only do so by reducing its expenditure regarding other items.

The proposal should be withdrawn.

6.2 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 Land Councils.

The NLC considers that the 40% floor provides Land Councils with an appropriate guarantee of independence and should be retained.

6.3 Public benevolent institution status

In 2002, after protracted litigation with the NT Government, the NT Supreme Court of Appeal determined that Land Councils are prescribed benevolent institutions for Territory taxation purposes (the Commonwealth Government had so recognised Land Councils since the 1980s).

Part of the rationale for the Supreme Court's decision was that Land Councils are structurally independent of the Commonwealth Government. Changes to funding arrangements feasibly may cause this issue to be revisited, in which case any shortfall in funds will need to be provided directly from the Aboriginal Benefits Account or from another source.

7. ROYALTY ASSOCIATIONS

7.1 Limit on duration of royalty equivalents determinations

It is proposed that Land Council determinations under s 35 regarding mining royalty "and other mining related payments" be required to be in writing and for a maximum period of five years. Currently a determination need not have a temporal limit.

The making of determinations may be resource intensive, especially where it is necessary to resolve the contested positions of a range of persons and groups. A requirement that this process be regularly repeated requires careful consideration. From a practical perspective a period of five years is likely to be the minimum required to be workable.

7.2 Royalty association payments to specify purpose

It is proposed that royalty associations be prohibited from making payments "without a purpose" to an individual. The intention is to ensure that payments "benefit the whole community", and presumably also to encourage transparency, accountability and the appropriate expenditure of payments.

While appreciating the important purpose underlying the reform, care may be required to ensure that it operates in a workable fashion. Royalty associations ordinarily represent small groups of traditional owners which are analogous to an extended family. A charitable trust for an extended family will make payments to individuals. Australia operates on a cash economy, and this includes Aboriginal Australia.

It is noted that transparency and accountability will also be addressed through current amendments to the Aboriginal association legislation, and by ensuring that the Registrar of Associations is resourced to enforce the legislation. The Commonwealth's proposed amendments to the legislation which were released in 2005, and recent increases in resourcing, are directed to this outcome. In particular, the amendments will ensure that there is greater transparency and that aggrieved Aboriginal persons may complain to the Registrar regarding the operation of an association.

8. FINALISATION OF THE LAND CLAIMS PROCESS

8.1 Non-contiguous intertidal zone land claims

It is proposed that claims to the intertidal zone or to the beds and banks of rivers (tidal and non-tidal) which are not adjacent to or contiguous with Aboriginal land be terminated.

The termination of non-contiguous intertidal zone claims is unnecessary, unfair and unprecedented, especially given that most such claims have been heard and are the subject of positive recommendations by the Land Commissioner, Justice Howard Olney QC. In the history of the *Land Rights Act* all land recommended for grant after successful claims has been granted, often with agreed conditions to protect stakeholders' interests.

Intertidal zone claims which have been recommended for grant include (being land predominantly from southern Arnhem Land to the Queensland border):

- McArthur River Land Claim (No 184) and part of Manangoora Region Land Claim (No 185) - report submitted by 15 March 2002;
- Maria Island and Limmen Bight Land Claim (No 71) and part of Maria Island Region Land Claim (No 198) - report submitted 28 March 2002;
- Lorella Region Land Claim (No 199) and part of Maria Island Region Land Claim (No 198) - report submitted by 18 June 2002;
- Seven Emu Region (No 186), Wollogorang Area II (No 187), and part of Manangoora Region Land Claim (No 185) - report submitted to 17 April 2003.

The remaining non-contiguous intertidal zone claims are located between the mouth of the Victoria River and the West Australian border, with other small claims adjacent to Labelle Station and in the Kakadu region.

A major purpose of the non-contiguous intertidal zone claims is to ensure that all coastal traditional owners in the Northern Territory may be part of a comprehensive negotiation with the fishing industry if the Blue Mud Bay litigation is successful. This litigation, in a series of cases which commenced in 1997 and build upon the 2001 Croker Island native title seas decision (on appeal in the High Court), is the subject of a Federal Court appeal which will be heard in August 2006.

Approximately 80% of the Territory's coastline is Aboriginal land to low water mark, with most of the remainder being subject to claim (the main exception being land adjacent to Darwin which is within the town boundary). If the litigation is successful commercial fishing in the intertidal zone or in tidal rivers above Aboriginal land will be unlawful unless with the permission of traditional owners under the *Land Rights Act*.

The High Court will likely resolve this litigation during 2007, and if successful Aboriginal interests will grant a (say) 12 month amnesty to enable a negotiated outcome. It is appropriate that traditional owners of the remaining 20% of the Territory, at least insofar as it is subject to valid claims and especially given most claims have been heard and recommended for grant, may also benefit from this negotiated outcome.

In proposing that non-contiguous intertidal zone claims be terminated the Commonwealth does not refer to the Blue Mud Bay litigation, or to the importance of a negotiated settlement regarding commercial fishing. Rather the Commonwealth justifies the termination on the basis that it is necessary to ensure that adjoining pastoralists have access to the beach and to the sea.

The NLC accepts that adjoining pastoralists should generally have access to the beach and to the sea (provided sacred sites and development such as private wharves are protected), and has always anticipated that the Minister would not grant Aboriginal land unless this issue was resolved in favour of the pastoralist prior to the grant. The NLC would be happy to ensure that pastoralists are aware of its position, for example by formally advising the NT Cattlemen's Association to that effect.

As stated above since the inception of the *Land Rights Act* all land successfully claimed has been granted as Aboriginal land, often with agreed conditions such as above to ensure that interested stakeholders have access for appropriate purposes. The Minister has full power under the current legislation to facilitate the grant (subject to conditions), or refuse the grant, of non-contiguous intertidal zone claims. In these circumstances it is inappropriate that Parliament in effect perform this task for the Minister by terminating the claims.

The proposal should be withdrawn.

8.2 Non-contiguous claims to beds and banks of rivers (including adjacent esplanade areas)

The termination of non-contiguous claims to the beds and banks of rivers (including adjacent esplanade areas) likewise is unnecessary and unfair. Such claims have been made since the inception of the *Land Rights Act*, and have resulted in the grant of Aboriginal land which has led to economic benefits for traditional owners. Some such grants have been on the basis of arrangements to ensure access for amateur fishing, and this approach may be utilised regarding outstanding claims to resolve concerns of this nature.

Most such claims have been heard and are the subject of positive recommendations by the Land Commissioner, Justice Howard Olney QC. This includes (noting that some of the intertidal zone claims also concern the beds and banks of rivers):

- Lower Daly Land Claim (No 68) - report submitted 30 April 2003 (this claim is contiguous to Aboriginal land with the exception of Palmerston Island which arguably may be excluded by the proposed amendments);
- Garrwa (Wearyan and Robinson Rivers Beds and Banks) Land Claim (No 178) - report submitted 30 July 2002;
- Lower Roper River Land Claim (No 70) – report submitted 7 March 2003 (some of this claim is not contiguous to Aboriginal land).

The comments generally made above regarding intertidal zone claims are applicable, particularly that the Minister should determine whether or not grant Aboriginal land to the beds and banks of rivers rather than relying on Parliament to perform that function (and to do so contrary to Aboriginal interests).

The proposal should be withdrawn.

8.3 Claims to land vested in the Northern Territory Land Corporation

Shortly after the commencement of the *Land Rights Act* in 1977 the Northern Territory implemented a scheme to prevent land claims. Two statutory corporations were created by legislation in 1979, and were expressly defined to be separate from and independent of the Crown (ie independent of the NT Government). These bodies are the Northern Territory Land Corporation and the Conservation Land Corporation. Although defined as independent of the Crown, the Land Corporations are totally controlled by the NT Government (its members are appointed by the NT Government and usually include senior public servants, it has no independent funding, and management of Corporation land is vested in the NT Government).

Since their creation the NT Government has vested substantial areas of Crown land (over 10% of the Territory) in the Land Corporations. This includes most Territory National Parks, and also

areas such as the St Vidgeon, Nathan River, and Billengarrah (former) pastoral stations. In 1984 the High Court held that land vested in the Land Corporations was not "unalienated Crown land", and thus could not be claimed under the *Land Rights Act* (*Japanangka's* case).

In 1997 the NLC obtained legal advice that it may be possible to distinguish, or overturn, *Japanangka's* case. Accordingly claims were lodged to all land which is vested in the Land Corporations prior to the 1997 sunset clause regarding the lodgement of claims coming into effect.

Various legal issues were raised in a number of subsequent proceedings including that land had been vested in the Land Corporations for the ulterior and improper purpose of preventing or defeating land claims made under superior Commonwealth legislation.

Compelling evidence was adduced before the Land Commissioner in the Billengarrah land claim as to the existence of an improper purpose. This included that the fact that the NT Government (ie the Crown) upon purchasing the pastoral lease over Billengarrah Station immediately transferred it to the NT Land Corporation (ie 8 seconds later) for nil consideration. This is the standard mechanism whereby the NT Government this land in the NT Land Corporation, and thus thwarts the prospect of land claims under Commonwealth legislation.

Documents were discovered which showed that the NT Land Corporation goes to great lengths to create an appearance that it operates at arms length from the NT Government - although it is common knowledge in the Northern Territory that it does not.

Documents were also relied upon which were obtained during the improper purpose case conducted regarding town boundaries in the Kenbi Land Claim. In Kenbi the claimants relied on documented legal advice (dated 28 November 1978) provided by the NT Department of Law, at the request of the Solicitor-General (Ian Barker QC), to the NT Government as to methods to make land immune to claim under the *Land Rights Act*. One such method, found to be unlawful, was the notorious expansion of the town boundaries of Darwin.

The 1978 legal advice (copy attached) also considered:

> "the alternative proposal that the lands be vested in the Northern Territory Development Land Corporation (or some such body) which would simply hold the lands until they are to be utilised properly."

The 1978 legal advice advised that "a major change in the legislation" would probably be required to enable the Land Corporation to provide a mechanism to make land immune to claim. On 13 July 1979 just such major changes in the legislation, with the Land Corporations being defined as independent of the Crown (but management of land and funding remaining with Crown), were made.

Unfortunately, especially bearing in mind that the land was vested in the NT Land Corporation prior to the lodgement of a land claim, the Billengarrah claim and subsequent appeals were unsuccessful. Nonetheless the claims remain in existence and may be agitated should the NT Land Corporation transfer the land to the Crown or be disestablished.

The NLC considers that the land corporation scheme is manifestly unfair and cannot be justified. The true purpose of the scheme is well known in the Northern Territory (see attached 1999 article entitled *Clever sleight of land keeps claims at bay*, reproduced from the Australian, by the journalist Paul Toohey).

The proposed termination of claims to land vested in the NT Land Corporation rewards efforts by successive NT Governments, including the current Government, since 1979 to thwart Commonwealth legislation.

Rather than terminating the claims there should be an amendment to enable them to be heard, or alternatively a settlement whereby the more significant areas are scheduled as Aboriginal land. It may be appropriate to request the Land Commissioner to assist in identifying these areas.

To promote such a settlement the NLC will shortly make a formal application under s 50(1)(b) of the *Land Rights Act* (by contrast land claims are made under s 50(1)(a)) which requests that the Land Commissioner inquire and report to the Minister as to the likely extent of traditional land claims by Aboriginals to alienated Crown land vested in the NT Land Corporation and some Conservation Land Corporation land.

9. TOWN OR COMMUNITY LEASES OF ABORIGINAL LAND

9.1 Summary

The NLC appreciates the Commonwealth Government's commitment, through sub-leases of Aboriginal land, to promote housing and other development and to facilitate economically healthy communities including entrepreneurship and private ownership of interests in land.

The NLC also recognises that government activities like public housing may be more appropriately administered through sub-leases to tenants. The NT Government has no power to sub-lease, although it is entitled under the *Land Rights Act* to administer communities (including public housing) and occupy and use Aboriginal land therein (rent free). Public statements that traditional owners or Land Councils control communities are incorrect.

The NLC considers current proposals include significant deficiencies and unforeseen consequences (including the potential implied repeal of the *Racial Discrimination Act 1975*) which will hamper and impede Commonwealth policy, and also inhibit agreed outcomes with traditional owners.

These deficiencies derive from fixed positions expressed by the NT Government in a June 2004 paper, which give only passive welfare. Further consideration is required.

In short, the proposals 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 an approved valuer 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 NLC supports outcomes whereby, in return for leases for housing and other activities, up front capital will enable 'blue chip' investments by traditional owners in communities (eg a government centre, petrol station, motel or housing construction) - through a professional corporation modelled on the Larrakia Development Corporation and Bunuwal Investments Pty Ltd.

The Larrakia Development Corporation has largely completed a $25 million suburban development from a native title settlement at Darwin, with a board comprised by traditional owners and professionals. A similar body, Bunuwal Investments Pty Ltd, is presently engaged in a $10 million commercial housing development on leases of Aboriginal land at Nhulunbuy.

The importance of promoting entrepreneurship by traditional owners also arises in a native title context in towns which are not located on Aboriginal land (eg Timber Creek, Borroloola etc). Native title, possibly in exclusive form, will likely be found to exist over vacant crown land in most NT towns. Agreements which promote entrepreneurship by traditional owners will enable residential and other land to be available for ownership and development free of native title concerns.

This major policy issue has received little attention. Relevantly Governments have not proposed that commercially valuable native title in NT towns should be vested in a government entity for 99 years in return for passive rent.

9.2 Background

On 5 October 2005 a package of reforms to the *Land Rights Act* proposed that Aboriginal communities be the subject of 99 year head leases to an NT Government statutory authority which would take responsibility for granting sub-leases within the community.

The purpose of the reforms included to promote housing and other development and to facilitate economically healthy Aboriginal communities including entrepreneurship and private ownership of interests in land.

It may be accepted that over time private ownership of sub-leases of Aboriginal land will promote investment by owners in improvements to the land (thus reducing pressure on public housing funds), and also enable entrepreneurship whereby owners of sub-leases may develop businesses (including by raising finance against sub-leases).

The NLC considers there is potential for much common ground between traditional owners of communities and Commonwealth objectives.

Traditional owners have long complained to the NLC that they receive little recognition, whether symbolic or in terms of rent or economic opportunities, regarding the use of their country for communities. This position flows from ss 14 and 15 of the *Land Rights Act*, which provides that Governments and their authorities may continue to use and occupy Aboriginal land after the enactment of the Act in 1976, and that while so used and occupied buildings and improvements are deemed to be owned by the Government or authority. Where that use and occupation concerns a community purpose (such as, housing, education, police, an airstrip etc), no rent is payable. It is for this reason that the main economic opportunity for traditional owners in communities is the community store, almost all of which are subject to current leases in the NLC's region.

In these circumstances public statements that traditional owners or Land Councils control communities are incorrect.

Given population increases, some communities have expanded and additional land has been used to construct houses and other facilities. Sections 14 and 15 do not authorise such development. Accordingly, since the 1980s the NT Government has employed officers to consult with traditional owners and Land Councils to obtain consent regarding such construction. While consent has been granted, the construction has not proceeded by way of lease - the effect being that the NT Government has avoided any obligation to pay rent, but also has no power to sub-lease.

Appropriate leasing arrangements provide an opportunity to address these concerns, as well as to facilitate expansion and promote economically healthy communities. The fact that the Commonwealth leasing scheme is voluntary with flexibility regarding appropriate lease conditions is welcome, and should mean that pragmatic outcomes may be achieved.

9.3 Concerns deriving from Northern Territory Government position

The NLC is concerned that in their current form the reforms include significant deficiencies and unforeseen consequences which will hamper and impede the Commonwealth's policy of promoting private investment and entrepreneurship, as well as reducing the likelihood of agreed outcomes with traditional owners.

These deficiencies derive from fixed positions expressed by the NT Government in a June 2004 paper, and require further consideration.

A primary concern is that the reforms seek to promote private investment in housing and entrepreneurship by residents of communities, 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 the Australian Valuation Office 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.

The outcomes which are sought by the proposed amendments may be achieved through leases under s 19, without amendment to the Act.

The NLC also considers it is inappropriate that the Aboriginal Benefits Account be used to fund rental payments by the NT Government.

The NLC supports outcomes whereby, in return for leases for housing and other activities, up front capital will enable ‘blue chip’ investments by traditional owners in communities (eg a government centre, petrol station, motel or housing construction) - through a professional corporation modelled on the Larrakia Development Corporation and Bunuwal Investments Pty Ltd.

The Larrakia Development Corporation has largely completed a $25 million suburban development from a native title settlement at Darwin, with a board comprised by traditional

owners and professionals. A similar body, Bunuwal Investments Pty Ltd, is presently engaged in a $10 million commercial housing development on leases of Aboriginal land at Nhulunbuy (Gove). (See further below.)

A related concern arises from the Territory's inappropriate endeavours to promote Aboriginal commercial development in communities through local government or other corporations which represent all residents, notwithstanding that the substantial majority are not traditional owners. (Often this is proposed as a non-profit enterprise, which could hardly be said to be a sound foundation for commercial activity.)

Mere residents should not benefit from entrepreneurship until such time as they have obtained ownership of property (eg sub-leases or company shares) through their own endeavours. Put another way, enabling residents to obtain economic benefits from development on country belonging to another Aboriginal group inevitably leads to conflict and dispute - since it is seen by traditional owners as being unfair (and is unfair).

This omission to properly recognise the position and rights of traditional owners has caused significant difficulties regarding current endeavours to improve the socio-economic position at Wadeye (Port Keats). The Thamarrurr Community Government Council is comprised on a democratic basis by representatives of 20 clan groups from the Daly River Port Keats Aboriginal Land Trust (an area of 3,200 square kilometres) who speak 10 different languages or dialects.

It is appropriate that all residents of an Aboriginal community are able to participate in local government matters on a democratic basis, and the Council and its dedicated officers properly perform local government functions in a difficult environment. Commercial development and use of land, however, is initially the responsibility of the traditional owners (other than land administered, occupied or used by Governments under ss 14 and 15), who may directly development land through a corporate entity, or lease to a private developer and receive rent. In the case of Wadeye this is one clan, the Diminin group - not 20 clans, or a larger regional body.

Government programmes to fund commercial development of land by Aboriginal groups should be focused upon the traditional owning group, rather than a ‘community’ comprised of many persons or groups brought together by historical circumstances which does not own property either under Aboriginal tradition or under non-Aboriginal law. Significant difficulty will always be encountered where appropriate recognition is not accorded to traditional ownership.

At Wadeye traditional owners should be accorded the first option to operate ‘blue chip’ investments such as a government centre, petrol station, motel or housing construction- with capital being raised by other land being leased and sub-leased to other developers (including Aboriginal persons who are not traditional owners). By this means outcomes will be achieved whereby all Aboriginal residents will be able to own property and engage in private investment and entrepreneurship.

9.4 Technical and drafting concerns (including as to apparent implied repeal of Racial Discrimination Act 1975)

In contrast to proposed amendments regarding exploration and mining, there has been little consultation with either Land Councils or traditional owners regarding the detail or drafting of the statutory scheme proposed by the Commonwealth or NT Governments.

Such consultation is important because it is necessary to ensure that the significant benefits which may flow from the scheme are supported by traditional owners through agreed outcomes, and are not subverted by misunderstanding or confusion.

The NLC considers that technical and drafting concerns give rise to significant deficiencies and unforeseen consequences which will hamper and impede Commonwealth policy, and also inhibit agreed outcomes with traditional owners.

These concerns broadly include:

- the unforeseen consequence that aspects of the scheme may be racially discriminatory so as to offend the International Convention on the Elimination of All Forms of Racial Discrimination and to impliedly repeal the *Racial Discrimination Act 1975* (Cth) (ie they do not constitute a special measure);
- that aspects of the drafting including as to the bestowal of power to establish entities to hold a head lease are in very broad terms, so as to provide little guidance as to the purpose of power and to leave it potentially open to abuse.

Specific concerns are as follows.

(i) Implied restriction of current leasing power in s 19 (apparent implied repeal of Racial Discrimination Act 1975)

Section 19 empowers a Land Trust (with the consent of the traditional owners) to create an estate or interest in Aboriginal land "to any person for any purpose" (s 19(5)). The provision also empowers a Land Trust to grant an estate or interest for specified purposes, including to a Government or statutory authority "for any public purpose".

The proposed s 19A, pursuant to a detailed scheme, empowers a Land Trust "to grant a [head] lease of a township to an approved entity".

The NLC is concerned that an unforeseen consequence of the s 19A scheme is that it may impliedly restrict the power in s 19 such that, in relation to an area of Aboriginal land prescribed as a township (under the proposed s 3AB) but not subject to a head lease, it could no longer be used to grant estate or interests for the purposes covered by s 19A (which are not specified and are thus in broad terms).

This outcome would be racially discriminatory so as to offend the Racial Discrimination Convention, which protects the rights of property owners (whether communal or individual) and ensures equal treatment. If so, the *Racial Discrimination Act 1975* would be impliedly repealed to that extent.

This issue is sensitive not only because it concerns the important and acknowledged public policy against racial discrimination. It is also sensitive given the NLC's experience from considerable litigation in the 1980s regarding the expansion of Darwin's town boundaries to defeat the Kenbi Land Claim (which was ruled invalid in 1989). In these circumstances caution is appropriate.

This concern may be resolved by expressly stating that nothing in the proposed s 19A constrains or restricts the power of a Land Trust to grant an estate or interest of Aboriginal land under s 19 (noting of course that a Land Trust cannot grant a further lease over land which is already subject to a lease).

(ii) Restrictions on power to negotiate conditions regarding a town head lease (s 19A)

The proposed s 19A(7) provides that negotiated benefits regarding a head lease cannot involve the "payment of a pecuniary or other benefit" other than "annual rent" as identified by an approved valuer (s 19A(6)).

First, the NLC anticipates that traditional owners, particularly in relation to land used for commercial purposes, may seek to negotiate a range of financial benefits which are not encapsulated by the term "annual rent". Owners of commercial land, for example, may negotiate payments by reference to a percentage of turnover of commercial operations rather than by annual rent determined by a valuer. Also, traditional owners may seek up front payments to facilitate commercial development through their corporations (as detailed below).

Secondly, the proposed s 19A(7) precludes traditional owners from negotiating non-financial benefits such as, for example, the employment and business opportunity clauses which are regularly included in mining and s 19 lease agreements.

Restricting the capacity of traditional owners, as distinct from other land owners, to negotiate such financial and non-financial benefits will simply have the effect of discouraging and inhibiting agreed outcomes regarding head leases. Such discouragement does not promote Commonwealth policy.

Such restrictions do not apply and are not proposed regarding other negotiations under the *Land Rights Act*, and were not required to ensure agreed outcomes regarding national interest developments such as the Alice Springs to Darwin railway, gas pipelines, or mining developments.

Further, for the reasons explained above, an unforeseen consequence of the restriction in s 19A(7) is that it may offend the Racial Discrimination Convention, and thus may impliedly repeals the *Racial Discrimination Act 1975* to that extent.

The restriction encapsulated in the proposed s 19A(7) should be withdrawn.

(iii) Restriction on annual rent at 5% per annum of approved capital value of land

The NLC welcomes the Minister's announcement in Parliament in June 2006 that the proposed cap on annual rent at 5% per annum of the land's approved capital value will be withdrawn.

This will ensure that the Racial Discrimination Convention is not apparently contravened, and that the *Racial Discrimination Act 1975* is not thus impliedly repealed.

It also promote agreed outcomes, not only because in some circumstances a fair outcome may conceivably exceed the 5% cap (such as for commercial land), but also because the specification of 5% may have had the effect of engendering unrealistic expectations regarding non-commercial land by operating as a benchmark or 'floor' as to a fair rental.

(iv) Removal of requirement that terms and conditions of a head lease be "reasonable"

Under the statutory scheme a Land Trust cannot grant an estate or interest in Aboriginal land unless it is so directed by the responsible Land Council (s 19(4A). A Land Council in turn may not give a direction unless satisfied that the traditional Aboriginal owners consent, and that the terms and conditions of the grant are "reasonable" (s 19(5)).

This is an important requirement which ensures that agreements regarding Aboriginal land are carefully negotiated and considered by reference to comparable agreements and valuation advice.

In relation to the grant of a head lease under the s 19A scheme this requirement has been expressly removed (s 19A(2)(c)). Consequently there is no legal requirement that annual rental or other conditions specified in s 19A be reasonable. (The removal of this requirement suggests awareness by the draftsperson that the constraints referred to above may breach the Racial Discrimination Convention and may impliedly repeal the *Racial Discrimination Act 1975*.)

The NLC accepts that the Commonwealth or NT Governments intend to negotiate head lease agreements whose terms and conditions (regarding rental or otherwise) are reasonable.

Accordingly no basis exists for removing the requirement of "reasonable" which is otherwise applicable regarding a Land Council's functions when granting an estate or interest in Aboriginal land.

(v) Failure to specify statutory purpose for s 19A scheme

The provisions of the s 19A scheme are in broad and unconstrained terms, and do not identify or specify its purpose or provide guidance as to the character or exercise of powers by the head lessee.

The provisions allow for a "lease of a township" area (as distinct from an area for "township purposes"), and there is no requirement that the area be used for any particular purpose and no regulation of the granting of subleases to ensure that power is directed at that aim.

If a lease has no specified purpose or use, it cannot readily be determined or otherwise remedied in relation to breach, and in theory a head lessor could occupy and use the land for any purpose.

Similarly the provisions do not specify, as might be expected, that the head lessee like similar government bodies should operate on a non-profit basis, or alternatively that any profits should be paid into the Aboriginal Benefits Account (in a different context such provisions currently apply to Land Councils, see ss 23(1)(ea) and 35(1)). Indeed the scheme contemplates that the head lessee need not be a statutory entity or departmental body, but can be a natural person or a corporation (see definitions of Commonwealth entity and NT entity in proposed amendments to s 3(1)).

By contrast s 73 of the current Act, which empowers the NT Government to enact laws for certain purposes, identifies those purposes and regulates the exercise of power.

This concern is augmented by the fact that to date neither the NT (or Commonwealth) Government has produced a detailed policy paper for comment regarding any statutory entity it may establish, nor are the Land Councils apprised of any drafting in that regard which may have been undertaken.

Consideration should be given to specifying the purpose of the s 19A scheme, and providing legislative guidance as to the character or exercise of powers by the head lessee as occurs in s 73 of the current Act.

(vi) Definition of townships

The proposed s 3AB enables areas of Aboriginal land to be prescribed by regulation as a township, either by reference to "generic descriptions of townships … under particular Northern Territory legislation" or by specific delineation (see explanatory memorandum item 13, para 17).

As stated above sensitivities may arise given the NLC's experience in relation to the expansion of Darwin's town boundaries (and also boundaries of other towns in Northern Territory) to defeat the Kenbi Land Claim. Legislative guidance as to the exercise of this regulatory power may be appropriate.

(vii) Removal of statutory protection of s 71 traditional rights of use or occupation of Aboriginal land

Section 71(1) ensures that Aboriginal persons or groups who are traditionally entitled to use or occupy Aboriginal land are so entitled under the statute (notwithstanding that the land is vested as freehold in a Land Trust; see also ss 4(1) 11(1)(a), and 23(3)).

This statutory protection does not apply where such use or occupation would interfere with the use or enjoyment of an estate or interest in Aboriginal land by a third party (s 71(2)).

Arguably the exclusion in s 71(2) may apply so as to remove the statutory protection presently enjoyed by Aboriginal people regarding land subject to a head lease (but not subleases).

To avoid doubt this statutory protection should be expressly extended to all land subject to a head lease under s 19A, other than land which has been subleased from the head lease.

(viii) Remedy for breach of lease

The head lease has a fixed term of 99 years (s 19A(4)), and appears to be incapable of determination for breach. This is the case even if the head lease is not used for its (implied) township purpose, or if the rent is not paid.

In the absence of the Land Trust as an owner possessing the ordinary remedies for breach of lease, the statute should identify appropriate remedies so as to ensure that the Land Trust may enforce its interest.

(ix) Payments for Crown occupation of Aboriginal land

Section 15(1) provides that, where the Crown occupied Aboriginal land prior to its vesting in a Land Trust for a purpose that is not a community purpose, it must pay rental to the Land Council for its continued occupation.

The proposed s 15(1A) provides that, where such occupied Aboriginal land becomes subject to a s 19A head lease, the payments must be paid to the head lessor. This is the case even if the head lessor has not granted a sublease to the Crown in relation to that occupation.

The NLC considers that payments from Crown occupation should continue to be paid to the Land Council (unless agreed otherwise), unless and until such time as its occupation is pursuant to a sublease from the head lessor.

(x) Payments from existing leases of Aboriginal land

The proposed ss 19A(10 to (12) prevents a Land Trust from retaining the benefit of an existing lease of Aboriginal land in a township if a head lease is executed.

The guarantee of rent free (pre-existing) occupation and use of Aboriginal land in favour of Governments and authorities in s 14 means that commercial leases, particularly in relation to shops and stores, are the primary source of rental income to traditional owners in Aboriginal communities.

Almost all shops in the NLC's region are subject to leases, and in the larger communities this rental income is a significant source of funds for traditional owners. In these circumstances, particularly if a head lease delivers a low rental, including such shop leases in a head lease may be unattractive to traditional owners.

The scheme would be more attractive if, through negotiation, a Land Trust could retain the benefit of an existing lease of Aboriginal land (including any replacement leases). Consideration should be given to removing the constraint in ss 19A(10 to (12), and enabling this approach.

9.5 Traditional owner development corporations

9.5.1 Larrakia Development Corporation Pty Ltd

In February 2002 the NLC facilitated the establishment of the Larrakia Development Corporation Pty Ltd (LDC), so as to implement a settlement whereby potential native title rights were waived (by the Larrakia group) in return for an option to purchase a commercial lease of 50 hectares to develop 376 suburban lots at Darla, Palmerston (a fast growing satellite city of Darwin). The LDC was incorporated under the *Companies Act* for that purpose.

The funds to purchase the commercial lease were raised by mortgaging freehold which derived from an earlier settlement in 2001 regarding the new East Arm Port (located in Darwin at the railhead). The Larrakia waived potential native title rights in return for a nearby freehold block of industrial land which was then valued at $0.5 million.

As part of the settlement the Larrakia dealt with an internal dispute by striking out two competing native title applications which had been filed by individuals in dispute with the larger group. This was the first occasion in which the Federal Court decided to strike out native title applications - as it happens at the request of an Aboriginal group rather than of a Government or developer.

The $25 million Darla development has been very successful, as have subsequent commercial projects (see attached Larrakia Development Corporation newsletter). The $7 million debt has been discharged, subsequent income being profit, and employment and training has been generated for the Larrakia. Income may be invested in future commercial projects, or distributed pursuant to a charitable trust for the benefit of the Larrakia.

The LDC's success derives from its structure. The company rules require that three members of the eight person board have professional or commercial expertise. The other five members are Larrakia persons with an aptitude for commercial matters. To ensure good governance and that instability cannot arise from the above-mentioned internal dispute, the NLC Chief Executive Officer is presently responsible for appointing all board members. The Larrakia may alter this arrangement after resolution of the dispute by the Federal Court.

The Chair of the LDC Board is Richard Barnes Koolpinya. Professional board members include John Anictomatis AO, the former NT Administrator (and also a developer), former executive officers of the Territory Insurance Office, and previously the manager of LJ Hooker in Darwin.

In December 2000 Justice Gray reported in favour of the Larrakia in the Kenbi Land Claim under the *Land Rights Act*. This claim concerns the Cox Peninsula on the western side of Darwin Harbour, and was lodged in 1979. The claim is the longest running and most hard fought under the *Land Rights Act* (with considerable Federal and High Court litigation during the 1980s), a fact which reflects the economic value and interest of many stakeholders in the land.

Justice Gray found that traditional owners existed regarding most of the Cox Peninsula, and recommended that most of the land be granted as Aboriginal land. The decision to grant is made by the Commonwealth Minister, in light of negotiated arrangements between traditional owners and stakeholders.

Negotiations with the NT Government and stakeholders will be actively pursued during 2006, with a view to identifying an agreed position whereby Aboriginal land will be granted. The LDC may be prominent in these negotiations, since it provides a vehicle whereby land may be earmarked for development with the involvement of the Larrakia in a manner which benefits all stakeholders and recognises that the city of Darwin will not prosper if landlocked.

Notwithstanding the success of the Kenbi land claim, on 13 April 2006 Justice Mansfield of the Federal Court determined that native title did not exist regarding adjacent land in the Darwin region. This decision appears inconsistent with Justice Gray's findings (especially his finding that all Larrakia persons have a non-exclusive traditional right to forage), and it is anticipated that an appeal will be filed.

9.5.2 Bunuwal Investments Pty Ltd

In October 2004 the NLC facilitated the establishment of Bunuwal Investments Pty Ltd, so as to enable the Rirratjingu traditional owners to take advantage of commercial opportunities deriving from the current expansion of Alcan's alumina refinery at Nhulunbuy (Gove).

Bunuwal Investments operates, and is structured, in a manner similar to the LDC, with both traditional owners and persons with commercial expertise on the board, and income distributed pursuant to a charitable trust for the benefit of the Rirratjingu.

Bunuwal Investments is presently engaged in various commercial developments, including a $10 million housing development involving 29 houses and units on leases of Aboriginal land at Malpi Village, Nhulunbuy.

9.5.3 Aboriginal Investment Group

The Aboriginal Investment Group (AIG) (which is comprised by the Northern Aboriginal Investment Corporation Pty Ltd and related bodies) was established by the NLC to enable traditional owners to participate in commercial development opportunities on their country.

In particular, the NLC's experience is that there are few affordable options whereby traditional owners may obtain commercial and business advice and assistance regarding development opportunities. Professional advice from accounting firms, for example, is ordinarily too expensive for Aboriginal groups engaged in small commercial enterprises.

AIG is intended to fill that niche, bearing in mind that in the absence of sound advice small businesses invariably fail. AIG operates on a commercial basis, and provides commercial advice to traditional owners including Bunuwal Investments, Kakadu groups and the Larrakia.

9.5.4 Community leasing - establishment of traditional owner development corporations

The NLC intends to apply the LDC and Bunuwal Investments model by establishing similar development corporations for traditional owners of Aboriginal communities (or native title in towns - see below). Mechanisms such as ensuring that persons with commercial expertise are on the board will ensure good governance.

Such development corporations will fulfil Commonwealth policy by promoting entrepreneurship and private investment by Aboriginal groups, as well as providing a basis whereby lease and sub-lease arrangements may be negotiated in communities thus enabling residents (who are not traditional owners) to own property (ie sub-leases) and engage in private enterprise.

The NLC's preliminary discussions in major communities are that traditional owners would support this approach.

9.6 Proposed Aboriginal communities for initial negotiations

Negotiations for leases and sub-leases in Aboriginal communities are likely to be complex and resource intensive, and to require significant time to finalise. This is the case particularly given the importance of ensuring the interests of traditional owners to engage in commercial development through development corporations.

These negotiations will be the first occasion upon which traditional owners have been accorded full recognition of their rights under the *Land Rights Act* in communities, and it can be expected that they will take a cautious and close interest in proposals.

It can also be expected that they will take a close interest in the approach taken by other Aboriginal groups such as through the LDC and Bunuwal Investments, with a view to ensuring that their traditional interests receive similar recognition.

In these circumstances the NLC proposes that Commonwealth policy should be implemented by focusing on up to three communities (depending on available resources): Wadeye, either Galiwinku (on Elcho Island) or Maningrida, and Yirrkala.

Wadeye, Galiwinku and Maningrida respectively are the three largest Aboriginal communities in the Northern Territory (with populations of over 2,000), and are areas where the NLC has recently negotiated agreements and also updated anthropological research. The NLC's discussions at Wadeye are that the Diminin traditional owners would support outcomes whereby they may engage in commercial development through a development corporation. Similar advice was provided by Maningrida and Galiwinku traditional owners in preliminary discussions in 2005, and these have recently been confirmed in more comprehensive discussions at Galiwinku in 2006.

Yirrkala is a smaller community whose traditional owners include the Rirratjingu and Gumatj. A development corporation, Bunuwal Investments, is already operating successfully. Another development corporation, Lawuluwa Investments Pty Ltd, has been established for the Gumatj which are also traditional owners of land in the Yirrkala and Nhulunbuy region. The existence of

these corporations and their current involvement in commercial activity in light of the Alcan expansion provides a basis for further outcomes in relation to community leases and sub-leases.

9.7 Native title in Northern Territory towns

All towns (other than Darwin) in the Northern Territory are adjacent to Aboriginal land which has been granted after successful land claims under the *Land Rights Act*. Accordingly the NLC does not anticipate difficulty proving that native title exists over vacant crown land in these towns (indeed on 17 July 2006 the Federal Court determined that native title exists over vacant crown land in Timber Creek). At least, such native title will be in the form of non-exclusive rights (as in Alice Springs), and possibly exclusive (as in *Mabo*, living areas in Keep River National Park, and some areas of Broome).

A significant issue will be whether exclusive traditional rights have been partially extinguished by the grant of expired pastoral leases in the 19th century such that, legally, native title is non-exclusive (93% of the NT was subject to pastoral leases in the 19th century). Even if so, negotiations will still be required when development is proposed. In Alice Springs, to date, non-exclusive native title has been treated as being half the value of freehold in negotiated settlements.

Accordingly the above policy considerations are also relevant regarding the existence of native title in towns.

The NLC intends to apply the LDC and Bunuwal Investments model to promote negotiated outcomes regarding native title issues in Northern Territory towns. An example of a win-win outcome which should receive widespread support would be to utilise traditional owner development corporations to construct facilities such as a government centre in a remote town, with finance generated from upfront payments (used to leverage a commercial loan) from surrender of native title to free up residential development.

This major policy issue has received little attention. The NT Government does not appear to have developed a comprehensive policy response regarding the existence of native title in towns, or as to likely compensation claims regarding the extinguishment of native title in towns since 1975.

Relevantly Governments have not proposed that commercially valuable native title in NT towns should be vested in a government entity for 99 years in return for passive rent.