Jodeen Carney, MLA
Leader of the Opposition

GPO Box 3700, Darwin NT 0801 Telephone: 08 8901 4188 Facsimile: 08 8901 4192

Senator Andrew Bartlett
Chairman
Environment Communication Information Technology and the Arts Committee
Room S1.57
Parliament House
CANBERRA ACT 2600

Dear Senator Bartlett,

RE: **Submission to The Inquiry into Australia's National Parks, Conservation Reserves and Marine Protected Areas.**

Please find attached a submission to your inquiry pertaining to the proposed 'hand back' of the Territory Parks Estate.

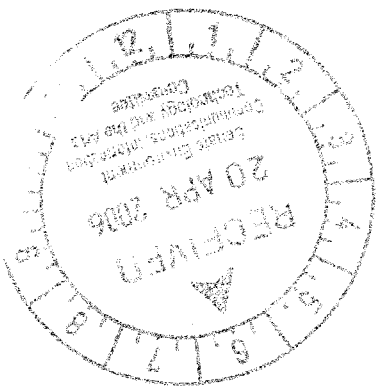
The submission is self explanatory and suggests four recommendations pertaining to the issues raised in the submission.

If you require any further information don't hesitate to contact my office.

Yours faithfully.

JODEEN CARNEY

13th April 2006



Submission to:

The Inquiry into Australia's National Parks, Conservation Reserves and Marine Protected Areas.

This submission is made to the committee regarding the radical plans in the Northern Territory to dispose of the Public Parks Estate into the hands of private owners with a lease back arrangement.

The plan has been born out of the Government's refusal to accept its responsibility to test the claims that may be made against property that is currently the property of the people of the Northern Territory. It has done so in an environment of secrecy and out of the public arena in spite of assertions that it has consulted the public about the proposal.

The Government has relied on legal advice that it has refused to make public and it has refused to state the value of the property that is being given away.

CHRONOLOGY

1978 – 1998 Parks estate developed by NT Government to become one of the finest estates in the world using the *Territory Parks and Wildlife Conservation Act.*

On the **8th of August 2002** the High Court made its determination in the 'Ward Case', (Ben Ward was the principal claimant for the Mirriuwung Gajerrong People).

> *Inter alia* there was a finding that the wording of s12(1) of the *Territory Parks and Wildlife Conservation Act* revealed problems. Prior to March 1998, the effect of the section was that a parcel of land could only be declared as a park if "*all the right, title and interests*" in the land to be declared as a park was "*vested in the Territory*". This was an exclusive element of the legislation and could operate only if no one other than the Northern Territory Government (NTG) or the Conservation Land Corporation had a "*right, title or interest*" in that land.
>
> Further, the Court made several observations regarding the operation of the *Discrimination Act 1975 (Cth).* The application of Part 2 of the *Native Title Act 1993 (Cth)* and its effect on the State and Territory Validation Acts to transactions taking place after 31 October 1975 may have been affected by the *Discrimination Act 1975 (Cth).*
>
> It was stated that it is necessary to consider the operation of the *Racial Discrimination Act 1975 (Cth).* In some cases, the *Racial Discrimination Act 1975 (Cth)* may be inconsistent with State legislation to the extent that the State legislation permitted transactions with land that would otherwise extinguish Native Title rights and interests. The *Racial Discrimination Act 1975 (Cth)* invalidates the State legislation to that extent.

On the **25th of October 2002** the Chief Minister announced her intention to '*hand back*' the parks without testing the legitimacy of the claims over the parks.

On the **26th of November 2002** Chief Minister outlined the proposal to Parliament saying the Government was going to negotiate rather than litigate all claims.

In **November 2002** the 38 Parks subject to potential Native Title claim validated by Parliament.

On the **8th of October 2003** the Chief Minister introduced the *Parks and Reserves (Framework for the Future) Bill.* Amongst other things it put the absolute deadline for negotiations at the 31st of December 2004. This Act removes the negotiation process from the public arena and leaves negotiations in the hands of the Chief Minister.

On the **30th June 2004** the first deadline passed.

On the **31st of December 2004** the second deadline passed with no outcome.

In late **January 2005** the deal to hand back the parks was finalised with no legal framework to support it. This demonstrated the Government's eagerness to compromise on the conditions it set.

On the **9th of February 2005** the Government forced through the *Parks and Reserves (Framework for the Future) Revival Bill* into law. This had the effect of reviving the lapsed law and retrospectively making the hand over legal. The Government stated that it was legitimate to revive the law in this fashion to make an agreement that had been formed outside the law, lawful.

During this time the Parks Master Plan has been circulated but not completed. The hand back will occur prior to a completed plan leaving few clues to what the result will look like and how it will affect any number of industries.

On the **25th of November 2005** the Alice Springs Town Council wrote to the Chief Minister in an effort to slow proceedings because of the lack of public consultation.

On the **11th of April 2006** a meeting was held in Alice Springs attended by 200 people. In Central Australia anger is beginning to build over the lack of consultation with Territorians.

BACKGROUND

On the 8th of August 2002 the High Court made its determination in the Ward Case.

The Court made a number of observations. Firstly, it said that the language of NT legislation governing the parks estate was worded in such a way that it had the effect of possibly rendering the declaration of the parks as being void on the grounds that there may have been other interests in the land at the time of declaration. These potential interests existed in spite of the fact that the declarations occurred before the discovery of Native Title in the Mabo (*No2*) Case. Secondly, and less central to this issue is that the operation of racial discrimination legislation may have an effect on the operation of state/territory legislation.

The effect of these observations by the High Court raised the question over the declaration of 49 parks in the Territory. It may be argued by future claimants that the parks were not originally validly declared and therefore their title rights may not have been extinguished. 38 of the Parks were affected by Native Title issues but were easily re-declared (validated). 11 parks were affected by the blanket claims that were lodged as a result of the 1997 sunset clause for Land Rights claims under the *Aboriginal Land Rights Act 1976 (Cth)* (ALRA).

In an effort to side step the operation of ALRA, in the 1980's the 11 parks were converted into freehold (fee simple) and held by the Conservation Land Corporation. Two challenges have been mounted to argue that the Conservation Land Corp land was claimable and on both occasions the High Court has determined that they were not claimable under ALRA. It is clear that it was always intended to use the Conservation Land Corporation's ownership as a means of preventing claims on Territory Parks.

In the most recent Annual Report of the Land Commissioner he determined that he cannot hear the claims saying "*...on the basis that current judicial opinion is that such land is not available to be claimed.*" (Aboriginal Land Commissioner: Annual Report for the year ended 30 June 2005 p 6)

Some concern was expressed that the original declaration (conversion to Conservation Land Corp Freehold) of the 11 parks that were the subject of the 1997 blanket ALRA claim may be found to be invalid and that the claims may be proceeded with, thus raising the spectre of losing title to the parks.

THE NT GOVERNMENT'S RESPONSE

The NT Government entered into negotiations with potential claimants and it was determined that the NT Government would transfer title to all 49 affected parks to a new form of "Parks Freehold", and then lease the parks back for a period of 99 years. The "Parks Freehold" is a form of inalienable title. This means that the new owners cannot be divested of, or divest themselves of ownership. Even if a Court determines that the leasing arrangements have been deliberately and wilfully breached there will be no opportunity to have land returned. The Chief Minster expressed the Government's position in her second reading speech when introducing the Parks and Reserves (Frameworks for the Future Bill) on the 8th of October 2003:

> *It defines this comprehensive system as one that:*
>
> *(a) is developed in partnership between the Territory and traditional owners of the parks and reserves;*
>
> *(b) benefits those traditional owners by recognising, valuing and incorporating indigenous culture, knowledge and decision-making processes;*
>
> *(c) protects biological diversity;*
>
> *(d) serves the educational and recreational needs of Territorians and visitors to the Northern Territory;*
>
> *and*
>
> *(e)* ***enjoys widespread community support.*** (Emphasis added).

She went on to say:

> *Part 2, sections 8 to 16, lay out the framework offer. Section 8* ***authorises the Chief Minister*** (emphasis added) *to do certain things and these include: requesting the Commonwealth minister responsible for ALRA to schedule the parks and reserves set out in Schedule 1 of the bill; grant NT freehold title over parks and reserves set out in Schedule 2 of the bill; execute on behalf of the Territory leases to the Territory of each of the parks and reserves, in Schedules 1 and 2; execute on behalf of the Territory a joint management agreement for each of the parks and reserves specified in Schedules 1, 2 and 3; and execute on behalf of the Territory one or more indigenous land use agreements.*
>
> *Section 9 provides an explanation of the nature of the NT freehold title and the conditions that apply to the future use of the land held under this title. This includes: conditions to whom the grant may be made; establishment of a park land trust to hold title; restrictions on sale or mortgaging; and provisions for surrender and compulsory acquisition. It*

also sets out the relationship of a title to the necessary provisions of the Crown Lands Act.

Section 10 of the bill makes it clear that the Chief Minister is only authorised to do the things specified in section 8, provided certain conditions are complied with, on, or before, a specified date. These conditions include:

> *the withdrawal of claims under ALRA for those parks specified in Schedules 2 and 3;*
>
> *indigenous land use agreements executed in respect of the parks Schedule 1, 2 and 3 that deal with compensation for the effect of the declaration and use of those parks on native title rights and interests, and facilitate future developments in those parks and reserves;*
>
> *the terms of the leases have been agreed consistent with the principles set out in Schedule 4;*
>
> *that is, lease term is 99 years; options for good faith negotiations for renewal; preference for Aboriginal participation and commercial activities conducted in the lease; use and enjoyment by traditional owners; and provision of living areas subject to the joint management agreement;*
>
> *the terms of the joint management agreement have been agreed consistent with principles at Schedule 5; and*
>
> *traditional owners have agreed to lease existing ALRA land to the Territory for use as a park and reserve on terms consistent with the principles set out in Schedule 4 and the joint management agreement at Schedule 5.*

Section 12 of the bill creates a reservation from occupation under section 178 of the Mining Act, which will protect mining interests, while also suspending further applications over the land in question, until the offer either lapses or is executed by the Chief Minister exercising the relevant authorisations provided for under section 10. This clause is necessary to comply with the core principle that ensures existing mining interests are protected.

Section 13 provides the Chief Minister with the discretion to omit parks and reserves and Aboriginal land from the schedules, on the basis that the relevant land council advises her in writing that the traditional owners will not comply with conditions set out in section 10(1), and the Chief Minister is satisfied that the omission will not defeat the purpose of the act. This power can only be exercised once, and must occur on or before the 31 July 2004.

Section 14 provides for the Chief Minister to amend, by notice in the Gazette, the schedules to either excise or include Aboriginal community living areas on the parks, identified in the Schedules 1, 2 or 3.

Section 15 provides for the planning scheme, under the Planning Act, to include provision that constrain the use of the land granted under NT freehold for park and related park purposes. Land can be used for other purposes, with the consent of the planning minister.

Section 16 sets out a sunset provision for the framework offer, which takes effect on ***30 June 2004*** (Emphasis added), *but allows the Chief Minister to prescribe a later date only if satisfied there is substantial acceptance of the offer and that the full compliance will occur within a set time frame, but no later than* ***31 December 2004*** (Emphasis added).

The time frame of 31st December 2004 to bed down the lease agreements was not achieved and further legislation was introduced to revive the Framework for the Future law. In fact the negotiations were not completed *until* early 2005 and a subsequent bill the Parks and Reserves (Framework for the Future) Revival Bill was introduced.

This bill had the effect of ratifying the deal that was done after the cut off date the Chief Minister announced in the original bill. This indicates a propensity to compromise which diminishes the Government's decision making process and the firmness with which they will apply themselves to conditional arrangements.

UNRESOLVED MATTERS

Before and after the Framework for the Future package became law there were several issues that demonstrated that the process was flawed.

The Legal Advice

The Chief Minister cited legal advice she had received from both the Solicitor General of the NT and another independent source as the basis for the decision to proceed with negotiation. This legal advice has never been made public and the Chief Minister has refused to make the legal advice public.

The Value of the Parks Estate

The Government has estimated the cost of litigation to be in the vicinity of $100 million to $150 million. This estimation is entirely speculative as the cost of future litigation cannot be known in circumstances such as this. This has formed a substantial part of the argument for refusing to test the veracity of the claims. There has been no valuation placed on the park estate. The Chief Minister has refused to make public the value of the estate. It is also worth noting that both the Northern Land Council (NLC) and the Central Land Council (CLC) have been extremely aggressive in terms of land acquisition but almost completely passive in terms of land development. It is for this reason that some of the worlds largest land owners are welfare dependent. Large amounts of Land Council money is directed to litigation rather than development.

Negotiations Held Behind Closed Doors

The Framework for the Future package meant that the last time the Parliament had any oversight of the transfer of one of the Territory's major assets was during the passage of the bill. Since that time, all negotiations have been conducted behind closed doors and have been presented to Territorians as a *fait accompli*. Few Territorians have understood the enormity of what is proposed by Government. Only in recent times in Alice Springs has a realisation begun to occur that the package actually represents the transfer of title from public to private ownership of the parks.

This has expressed itself in growing public concern that the process has not been transparent and that there has been no public consultation on the process of transferring the property.

Briefings are not Consultation

The Chief Minister reported that briefings were held with various stake holders in industry. It is understood that the stakeholders went into those meetings without any pre-briefings and were not given an opportunity to respond beyond that time.

There is no information as to what hoops future concession holders will have to jump through to get access. They will have to organise access rights with a parks board that have a majority of members who will have direct links with the CLC and NLC.

It is clear that access will be limited for new concession applicants and that such applicants will be discriminated against on grounds of race. The CLC has stated in a handout "*preference will be given to Aboriginal interests wherever possible.*" The potential for this approach to decay into a 'jobs for mates' environment, to the exclusion of all others, may lead to a future of allegations of nepotism and corruption.

Based on current successes in the area of land development the expectation is that the NT Government will do the majority of the giving in the give/take relationship that the Parks Master Plan envisages.

As part of the "comprehensive system" suggested by the Chief Minister in her second reading speech she said that the process could only go forward when it "*enjoys widespread community support.*" The question begs as to how there could be widespread community support when there has not been wide spread community consultation?

It is contended that for this reason the process should be slowed down until that criteria is satisfied.

The Final Master Plan

The Parks Master Plan has yet to be finalised. The likelihood is that the Government will seek to have the transfer completed before the Master Plan is made public.

Inconsistent Approach by NT Government

The NT Government, as outlined by the Chief Minister, is committed to a process of negotiation rather than litigation. This is not reflected in the NT's participation in Native Title actions that affect Darwin and a recent Native Title decision over Yulara which, incidentally, determined that Native Title had been extinguished. The Government continues to aggressively fight some Native Title actions but not others.

The Nitmiluk Model

There has been an example in the Northern Territory of a park being successfully claimed by Aboriginal People under ALRA and that was Nitmiluk (Katherine Gorge). Under that arrangement, the claim had been established and the Traditional Owners agreed to joint Management with the NTG. The model has proved successful inasmuch as the park is still accessible to all, but the major difference is that **the claim had been established** and the land granted. None of the parks in question currently are of that status and 38 of them cannot gain that status.

No claim has been established for any of the 49 parks that are being given away under the current policy.

The issue turns again on the legal advice that the Government is relying upon to give away the parks. This legal advice is not available for scrutiny.

Uluru-Kata Tjuta and Kakadu

It is interesting to note that the NTG is welcoming the input of the Federal Parks bodies in their Master Plan. If the promise for the future of Aboriginal people is for a better future, then there is little in the development of Federally managed parks to suggest good outcomes. Both parks that were handed back in the early 80's have yet to demonstrate any real outcomes for the people who live there. In the case of Mutitjulu, the community at the base of Uluru, the outcomes have been awful in spite of the enormous amounts of money that have been and continue to be spent there for the locals.

Petrol sniffing continues to be endemic and liquor abuse as well as drug abuse is rampant. The standard of living in the communities in and around the two Federally managed parks continue to be as poor there as anywhere else. The models that have been used by the Federal government have not seen the development of the parks in a fashion that leads visitors to feel that they have had anything but limited access to the park.

The parks have also been subject to unannounced closures and unannounced limitations on access for cultural reasons. These unannounced events further diminish the parks as a place to visit when there is a risk that access will be limited to people who travel from around the world to visit the assets.

Potential Change in Parks Management Philosophy

The philosophy of parks management that has operated in the NT up until recently has been one of inclusion. This means that people and tourist operators have been given excellent access to the parks and management practices have maintained those high levels of access. The experience in Uluru and Kakadu has demonstrated a philosophy of exclusion. Limitations have been placed on visitors in many places with photography and some visiting rights banned altogether.

No Fee No Permit Guarantee

The Government's assurances of no fees and no permits also cannot be guaranteed. Even if no fees are charged at the entry points to the parks there will be a temptation to raise revenues by other means. As time passes these financial pressures will grow.

As the title of land that will be granted will be inalienable freehold then there is no means to enforce the conditions in the lease. Any court hearing a

complaint that there has been a breach of lease agreements will only have damages available as a remedy as once the land has been declared to be inalienable freehold the court will not be able to apply a remedy that holds the contracts to be *void ab initio.*

Nothing prevents the new owners demanding that entry fees be charged in contravention of the lease arrangements. Even if legal action ensued there could only be a claim of damages which, in every likelihood, would not be more than the amount of the lease fee, in this case $1 million per annum. If the new owners feel that they can make more out of gate fees, (e.g. Uluru) it may be more cost effective to break that part of the lease knowing that there is no chance that ownership can be transferred back to the Territory.

The worst that can occur, as far as the new owners are concerned, in future litigation is the requirement of the new owners to pay damages for breaching the leasing arrangement. If damages are assessed at being nothing more than the lease fee then it may be worth the new owners while to wilfully break the lease and charge entry fees.

Public Consultation

Public Consultation has been limited to stake holder groups only. The general public has been advised but not allowed to engage in the debate. The only time that the public have been given an opportunity to respond is to the Parks Master Plan which as pointed out is yet to be completed. Public comment on the Parks Master Plan is entirely predicated on the basis that the hand back is already a done deal.

There has been no attempt to widely consult on the issue and the public have largely and deliberately been kept in the dark about the hand back. Pamphlets were delivered to home throughout the Territory but once again were written in such a way as to demonstrate the package as a done deal.

For a decision, as monumental as this sort of decision, a broad spectrum of consultation should have occurred. No such broad approach was adopted. It can only be surmised that the reason for not adopting this approach appears to be driven by the desire maintain general public ignorance of what is occurring.

Anecdotally, it appears that the public remains largely unaware of the steps being taken by this Government. If independently organised public meetings held in Alice Springs are any sort of yardstick then it is clear that the pubic has little knowledge of what has occurred. It has always been presented as something that is unavoidable and necessary.

Recommendations

It is the belief of the CLP that the public should be fully informed as to what is occurring and why.

- Consequently, the parks should not be 'handed back', until there has been full public consultation on the issue in accordance with the principles outlined by the Chief Minister.

- The legal advice from Government should be made public and should be scrutinised publicly. Therefore the Senate Committee should use its powers to subpoena the legal advice given to the NT Government or to seek its own legal advice.

- Before the parks are transferred, the AVO should do a valuation of the property that will be transferred including the infrastructure that has been put in place by successive NT Governments.

- The negotiations should be returned to formative stages and conducted in such a way the public is able to scrutinise the effect of each decision independently.

There is no need at all to rush this transition process. The effects turning these parks into inalienable freehold will be irreversible. The lease arrangements will allow for the construction of outstations in the parks and will also allow for hunting to occur in the parks. This includes the use of firearms for that purpose. It is in the national interest that the parks estate in the Northern Territory be managed effectively for the benefit of all Australians.

If the transfer of title occurs in controversial circumstances it may harm Australia's reputation as a fair and just society.