



## Aboriginal Land Rights (Northern Territory) Amendment Bill 2006

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## Aboriginal Land Rights (Northern Territory) Amendment Bill 2006

**Date introduced:** 31 May 2006

**House:** House of Representatives

**Portfolio:** Families, Community Services and Indigenous Affairs

**Commencement:** The formal provisions commence on Royal Assent. Most items in the Schedule commence on proclamation or six months after Royal Assent, whichever occurs first. However, the mining provisions come into effect on proclamation, with no default commencement provision, because they are designed to commence at the same time as complementary Northern Territory legislation.<sup>1</sup>

### Purpose

To amend the *Aboriginal Land Rights (Northern Territory) Act 1976* ('the ALRA') in a variety of ways including:

- changing the rules for the establishment of new Land Councils and dealing with Aboriginal land
- enabling the granting of 99-year township leases to 'NT entities' and for sub-leasing to occur
- expediting the granting of exploration licences on Aboriginal land
- removing the statutory formula governing allocations from the Aboriginals Benefit Account to Land Councils for their administrative costs
- enabling certain of the Commonwealth Minister's powers under Part IV (Mining) to be delegated to the Northern Territory Mining Minister—including the power to bring negotiations in relation to exploration licences to an end
- disposing of certain land claims under the ALRA, and
- providing for a statutory review of Part IV (Mining).

### Background

#### Land rights in the Northern Territory

In a 2005 lecture, Fr Frank Brennan provides a useful background to the passage of the ALRA.<sup>2</sup> In 1963, the Commonwealth excised 300 square kilometres from the Aboriginal reserve in Arnhem Land in order to grant a bauxite mining lease to Nabalco. The Yirrkala

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people of the area, with the assistance of Methodist missionaries, sent a bark petition to Canberra asking for a parliamentary committee to be established to hear their views before the excision occurred and requesting that no arrangements be entered into that would destroy their livelihood and independence. This approach was unsuccessful and in 1968 the Yirrkala commenced legal action.

In 1971, the Federal Court handed down its decision in *Milirrpum v. Nabalco*—the case that had been brought by the Yirrkala. They had argued that, as holders of communal native title, they owned land and minerals the subject of mining leases granted to Nabalco. They argued that the leases and the statute under which they were granted were unlawful and invalid. In the Federal Court, Blackburn J recognised that the Yirrkala had a complex and elaborate system of rules and customs constituting a ‘government of laws not of men’.<sup>3</sup> However, he held that their relationship to the land under those rules did not constitute a property right. He also held that the common law did not recognise communal native title. Partly in response to Blackburn J’s decision, the Labor Opposition announced in 1972 that, once in government, it would legislate to give Aboriginal people in the Northern Territory communal freehold ownership of their land.

In 1973, the Whitlam Labor Government appointed Mr Justice Woodward to inquire into and report on ‘the appropriate means to recognise and establish the traditional rights and interests of the Aborigines in and in relation to land, and to satisfy in other ways the reasonable aspirations of the Aborigines to rights in or in relation to land.’<sup>4</sup> Justice Woodward handed down his first report in July 1973, recommending the establishment of a northern and a central Land Council to present him with the views of the Northern Territory’s Aboriginal people, together with expert legal advice on the subject of land rights. Justice Woodward’s second report was presented in April 1974.

In response to the second Woodward report, an Aboriginal Land (Northern Territory) Bill was presented to Parliament in October 1975 but lapsed when Parliament was dissolved. In June 1976, the Coalition Government introduced an amended bill—the Aboriginal Land Rights (Northern Territory) Bill 1976. In his Second Reading Speech Ian Viner MP, then Minister for Aboriginal Affairs, said:

The coalition Parties’ policy on Aboriginal affairs clearly acknowledges that affinity with the land is fundamental to Aborigines’ sense of identity and recognises the right of Aborigines to obtain title to lands located within the reserves in the Northern Territory. The Bill gives effect to that policy and, further, will provide Aborigines in the Northern Territory with the opportunity to claim and receive title to traditional Aboriginal land outside reserves.

... the Government’s proposal to recognise Aboriginal land rights in legislation is one more expression of the Government’s commitment to liberal and progressive reform.  
...

The Australia we, as a Government, look to is one in which there is diversity and choice, because it is in diversity that people can pursue the lives they want in ways

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that they determine. Securing land rights to Aborigines in the Northern Territory is a significant expression of this objective.<sup>5</sup>

The 1976 Act vested Aboriginal reserves, the Hermannsburg and Santa Teresa missions in Central Australia and the Delissaville area near Darwin in Land Trusts holding title on behalf of the traditional owners. Since then, land grants—either through the land claims process before an Aboriginal Land Commissioner or via parliamentary amendment to the ALRA following a negotiated agreement settling a land claim—have added considerably to the amount of Aboriginal land in the Northern Territory. As at 28 June 2006, it is anticipated that there will be 593,942.75 km<sup>2</sup> of ALRA land in the Northern Territory.<sup>6</sup> This equates to about 44% of the Northern Territory, with a further 10% being subject to claim.<sup>7</sup>

As stated above, title to land granted under the ALRA is held by a Land Trust on behalf of the traditional owners. Title is inalienable and equivalent to freehold title but is held communally, reflecting the nature of Aboriginal land ownership. The ALRA also provides for Land Councils who represent traditional owners and negotiate with developers on their behalf; enables traditional owners to exercise a veto over exploration on their land; provides that royalty equivalents from mining on Aboriginal land are paid into an Aboriginals Benefit Account ('ABA') and then distributed to Land Councils and others according to a statutory formula; and requires anyone wishing to enter Aboriginal land to obtain a permit from the relevant Land Council.<sup>8</sup> Initially, there were two Land Councils—the Northern Land Council and the Central Land Council. Two smaller Land Councils were subsequently established—the Tiwi Land Council and the Anindilyakwa Land Council. A 1987 amendment to the ALRA prevents the Aboriginal Land Commissioner from dealing with claims lodged after 5 June 1997. However, there are a number of land claims still under consideration or not disposed of.

The ALRA was followed in the 1980s and early 1990s by other state-based land rights legislation, by Aboriginal heritage legislation (Commonwealth and State), by joint management legislation and by legislation setting up land acquisitions programs in various jurisdictions. In 1992, the High Court's decision *Mabo [No. 2]* held that the common law recognises that native title to land can survive the acquisition of sovereignty by a colonising power.<sup>9</sup> In response to that decision, the *Native Title Act 1993* recognised and protected native title rights, established a system for the adjudication of native title claims and provided a right to negotiate over future acts on native title land.

Throughout this period the ALRA was reviewed on a number of occasions,<sup>10</sup> but the most significant review started in October 1997 when the Commonwealth appointed barrister John Reeves to examine the overall effectiveness of the legislation, the operation of its exploration, mining and royalties provisions, the operation of the Aboriginal Benefits Trust Account and the future role and structure of the Land Councils.

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## The Reeves Report and beyond

In August 1998, the Reeves report—[\*The Aboriginal Land Rights Act \(Northern Territory\) 1976, Building on Land Rights for the Next Generation\*](#)—was tabled in the Senate. Reeves concluded that the ALRA has been very effective in granting traditional Aboriginal land in the Northern Territory and that ‘the benefits of the Land Rights Act have greatly exceeded their costs for Aboriginal Territorians.’<sup>11</sup> However, he made many recommendations for change, including:

- the establishment of a new central body, the Northern Territory Aboriginal Council (with members appointed by the Northern Territory and Commonwealth) to replace the Northern and Central Land Councils
- the formation of a system of 18 Regional Land Councils to make all decisions in relation to Aboriginal lands at the regional level
- the removal of the permit system to enter Aboriginal land and the application instead of the Northern Territory’s trespass laws, and
- giving the Northern Territory the power to compulsorily acquire Aboriginal land for public purposes.

In December 1998, the Minister for Aboriginal and Torres Strait Islander Affairs referred the Reeves Report to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HORSCATSIA). HORSCATSIA released its [report](#) in August 1999. Though concurring with some of Reeve’s findings, it did not fully endorse Reeves’ recommendations.

In 2002, the Federal Government provided the Northern Territory Government with an options paper—*Reform of the Aboriginal Land Rights (Northern Territory) Act 1976*. The Northern Territory Government and the Land Councils together produced a response in June 2003 in their *Detailed Joint Submission to the Commonwealth - Workability Reforms of the Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA)*.<sup>12</sup>

## New Land Councils and the Land Council funding formula

The Bill provides for the creation of new Land Councils by a 55% vote of Aboriginal people in any qualifying areas and for the removal of the guarantee to Land Councils of 40% of annual ABA revenue—reflecting some of the spirit of the Reeves report.

Reeves concluded that monies received under the Act (ie mining royalty equivalents paid into what is now the ABA) had ‘largely been dissipated in Land Council administrative costs and cash payments to individual Aborigines in particular areas of the Territory.’<sup>13</sup> He suggested that accountability in the Land Councils’ administration of these funds was often poor and also referred to the development of a ‘strident, oppositional political culture’ in the Northern Territory between the two large Land Councils and the NT

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Government.<sup>14</sup> He proposed reforms to the financial framework of the legislation, recommending its replacement by discretionary allocations determined by a new statutory authority—the Northern Territory Aboriginal Council (NTAC). As stated above, he recommended dismantling the two large mainland Land Councils and establishing 18 regional Land Councils. He also recommended that mining royalties only be distributed in accordance with a statement of purpose, and then only through the mediation of the new NTAC.

The HORSCATSIA report also recommended some changes to the Land Council system. It recommended that Aboriginal landowners be able to opt out of Land Council representation. It also proposed that new Land Councils be established with the support of at least 60% of Aboriginal people living in the area and the informed consent of relevant traditional owners; that mining royalties only be distributed in accordance with a statement of purposes; and that more attention be paid to directing funds to Aboriginal people in areas affected by mining. However, HORSCATSIA did not share Reeves' belief that the ALRA should primarily be a vehicle for Aboriginal economic advancement. Further, it rejected Reeves' recommendation for the establishment of 18 autonomous Regional Land Councils to replace existing Land Councils.

Since the Reeves report another significant report has been less critical of the Land Councils. The Australian National Audit Office (ANAO) report on [\*Northern Territory Land Councils and the Aboriginals Benefit Account\*](#) found that all five agencies (ATSIC and the 4 Northern Territory Land Councils) could improve their effectiveness, performance monitoring, governance arrangements and communication with stakeholders. It concluded that there was a need for the Land Councils to place greater emphasis on outcomes, outputs and cost effectiveness, rather than simply reporting on the level of inputs. However, it found no evidence of financial mismanagement.

In their June 2003 Joint Submission to the Commonwealth, the Northern Territory Government and the Land Councils recommended that no change be made to the distribution formula but that:

... subject to the implementation of the ANAO recommendations, that adjustments be made to the Land Council budgets to ensure they are adequately resourced to carry out their statutory functions.<sup>15</sup>

The Joint Submission also recommended that proposals for new Land Councils should require the consent of a substantial majority of adult Aboriginal people living in the area, the traditional owners and other Aboriginals with traditional interests in the area.<sup>16</sup>

The Bill changes the requirements for the establishment of new Land Councils and contains delegation provisions—including provision for Ministerial override where a Land Council has refused to delegate its powers. It also removes the existing funding formula for Land Councils and makes funding decisions the responsibility of the Minister.

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## Private ownership and communal land

The ALRA enables interests or estates in land to be granted for residential, business and other purposes to Aboriginal people and to others—with Land Council consent and, additionally, in some circumstances with the consent of the Minister. Nonetheless, the issue of private ownership on Indigenous communal land has been discussed for some years. In his review, Reeves remarked:

At present, all houses and other buildings (with certain exceptions specified in the Act) are owned by the Land Trust that holds the title to the land. During the course of the Review a number of persons proposed that the residents of Aboriginal communities on Aboriginal land should be given the opportunity to sub-lease their house, or land within the community for business purposes.

In their oral submission to the Review, members of the Ngukurr community in South East Arnhem Land expressed the desire to be able to own their houses at Ngukurr. One speaker felt that Aboriginal people would be ‘proud’ of their houses if they owned them. Assuming that could occur, home ownership on Aboriginal communities might represent part of the solution to the very serious housing problems on Aboriginal communities (see Appendix F).

The town of Nhulunbuy is situated on Aboriginal land. However, the residents of the town are able to sub-lease their houses from the corporation that holds the head lease to the township. The residents are able to sell their sub-lease and obtain finance to purchase a sub lease. This system is similar to the leasehold system that operated in the Northern Territory prior to the introduction of freehold title in the early 1980s.

I have already recommended (above) that all Aboriginal communities should be afforded the opportunity to obtain secure title to the land upon which their community is situated. Taking into account the submissions referred to above, the ability of the Community Council, or other body, if it wished, to sub-lease its land for housing or business purposes, would be a sensible refinement of this arrangement. I therefore recommend it.<sup>17</sup>

In late 2004, the issue of private as against communal ownership of Aboriginal land was raised by Warren Mundine, a member of the National Indigenous Council (a Government appointed body).<sup>18</sup> Mr Mundine said:

We need to move away from communal land ownership and non-profit community businesses and take up home ownership, economic land development and profit-making businesses.<sup>19</sup>

This call was taken up by the Government, with the Prime Minister stating in April 2005:

I believe there is a case for reviewing the whole issue of Aboriginal land title, in the sense of looking towards private recognition. ... I certainly believe that all Australians should be able to aspire to owning their own home and having their own business. Having the title to something is the key to your sense of individuality; it’s the key to

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your capacity to achieve, and to care for your family and I don't believe that indigenous Australians should be treated any differently in this respect.<sup>20</sup>

In June 2006, the National Indigenous Council endorsed the Indigenous Land Tenure Principles and presented them to the Government. While acknowledging that communal interest in land is fundamental to Indigenous culture and should be inalienable, the Council considered that 'individuals and families [should be able] to acquire and exercise a personal interest in those lands, whether for the purposes of home ownership or business development.' Further, it said, the consent of traditional owners should not be unreasonably withheld to requests for individual leasehold interests and that 'involuntary measures should not be used except as a last resort.'<sup>21</sup>

A number of Indigenous leaders have criticised these proposals. Former Social Justice Commissioner, Professor Mick Dodson, and former Northern Land Council Chairperson, Galarrwuy Yunipingu, took the view that such proposals are the first step in trying to remove communal ownership.<sup>22</sup> Noel Pearson has commented:

The concern from the indigenous community that I'm hearing is that the legitimate issue of home ownership might be used as a Trojan horse for a reallocation of land rights – a taking of rights away from Aboriginal people.<sup>23</sup>

In his *Native Title Report 2005*, Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma pointed to existing leasing provisions in statutes like the ALRA and commented:

As a consequence, it is not necessary to put the communal tenure of Indigenous land at risk as the NIC Principles propose. ...

Furthermore, both the United States of America and New Zealand had made significant attempts to convert Indigenous customary land to individual freehold title, and recently both countries have taken steps to overturn this approach due to adverse impacts. The major adverse impacts have been:

Significant loss of land by the Indigenous peoples;

Complex succession problems – that is, who inherits these land titles upon the death of the owner – in relation to both freehold and leasehold interests;

Creation of smaller and smaller blocks (partitioning) as the land is divided amongst each successive generation; and

The constant tension between communal cultural values with the rights granted under individual titles.<sup>24</sup>

Mr Calma added:

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The NIC Principles are premised on the idea that private land ownership will lead to economic development because the land owners will have an economic interest in seeing land value improved. The NIC Principles also assume that communal land ownership will not lead to development, and the interests of the land will not be protected. ...

International experience demonstrates that individual title does not lead to improved economic outcomes.<sup>25</sup>

In a 2005 Oxfam Australia report, an Australian National University team found ‘no evidence to suggest that individual land ownership is either necessary or sufficient to increase economic development or housing construction.’<sup>26</sup> They concluded:

The evidence does not support the notion that private individual ownership of low-value land in remote settings can be the driving force in addressing housing or other needs. The principal issues for any new policy framework continue to be contemporary Indigenous poverty, and the historic lack of services, housing and associated infrastructure. The notion that land rights reform can be the main driver for economic development should be reconsidered in light of the legacy of disadvantage, cultural difference and structural factors faced by these communities. Such debates must also recognise that there are fundamental Indigenous cultural reasons for attachment to land, irrespective of its commercial potential, as well as unique and diverse Indigenous perspectives on what development is appropriate for their communities and country.

The report concludes that very significant structural issues must be addressed to encourage economic development and address housing needs, including the remoteness of communities from mainstream markets; relatively low populations and population densities; the need for greater investment in education and vocational skills; poor infrastructure; and the generally economically marginal nature of most Aboriginal lands.<sup>27</sup>

A contrary view has been taken by others—including researchers at the Centre for Independent Studies. In *A New Deal for Aborigines and Torres Strait Islanders in Remote Communities*, Professor Helen Hughes and Jenness Warin argue:

Communal ownership of land, royalties and other resources is the principal cause of the lack of economic development in remote areas. Commonwealth, State and Territory legislative and regulatory frameworks have to make it possible for Aborigines and Torres Strait Islanders who choose to do so to become individual land owners and entrepreneurs. Royalties from mining, fishing, telecommunications and other sources must become transparent and flow to individuals. An end to communal ownership and asset management would cut into the power of councils, associations and their ‘big men’, making income distribution more equitable and greatly reducing the need for bargaining and political power plays that make life miserable and lead to incessant violence. Investment in land and other assets has to become viable. With individual property rights, land could be used for collateral to borrow for business,

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allowing the application of capital and technology to create productive enterprises with employment capacity. Private property rights in land are essential to attracting outside investment that is a pre-requisite to a major expansion in employment opportunities.<sup>28</sup>

On 30 May 2005, the Prime Minister said that his Government was:

Committed to protecting the rights of communal ownership ... And ... that the Government does not seek to wind back or undermine native title or land rights. Rather we want to add opportunities for families and communities to build economic independence and wealth through use of their communal land assets.<sup>29</sup>

On 5 October 2005 the Federal Government announced new initiatives to support Indigenous home ownership.<sup>30</sup> According to the Government's press release, the three initiatives (expected to commence in 2005-06) were:

- an initial allocation of a \$7.3 million addition to the successful Home Ownership Programme run by Indigenous Business Australia (IBA) for a [new programme](#) targeted to Indigenous Australians living in Aboriginal communities. Under this program people can borrow money from the IBA at concessional interest rates.<sup>31</sup>
- an initial allocation of up to \$5 million from the Community Housing and Infrastructure Programme to reward good renters with the opportunity to buy the community house they have been living in at a reduced price.
- use of the Community Development Employment Projects (CDEP) programme to start building houses, support home maintenance, and to maximise employment and training opportunities.

The Bill seeks to promote individual property rights on Aboriginal land by enabling an 'NT entity' (such as the Northern Territory Government or a statutory authority established by it) to be granted a 99-year township lease. Long-term subleases can then be granted to Aboriginal people and others by the NT entity without each lease being negotiated with the relevant Land Council. The Government takes the view that this will 'make it significantly easier for individuals to own their own homes and establish businesses',<sup>32</sup> and points to the availability of low-interest home loans under its Home Ownership Indigenous Land Program. The Bill also reforms section 19 of the ALRA, which relates to dealing in Aboriginal land.

## Changing mining exploration processes

Originally, the ALRA provided that both exploration and mining on Aboriginal land needed the approval of the traditional owners. However, a 1987 amendment to the ALRA removed the 'second veto' that could block mining once an exploration licence had been granted.<sup>33</sup> As the ALRA stands, once consent has been given to exploration it cannot be withheld from mining.

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Some have been critical of the mining regime in the ALRA. The Reeves review claimed that mining transaction costs in the Northern Territory had:

Undoubtedly led to a reduction in the rate of exploration and, therefore, the potential development of new mines.<sup>34</sup>

Reeves recommended deregulating mining to the point where small regional Land Councils could reach agreements with mining companies without government or big Land Council involvement, and then present the agreement to the Northern Territory Government to issue the relevant tenement.

The HORSCATSIA report, although making several recommendations intended to facilitate the decision making process, did not call for the same fragmentation of the present Land Councils as did Reeves. It also referred to claim and counter-claim on the question of whether the ALRA has impacted on mining activity in the Northern Territory. It referred to some equivocation in the Reeves report. On the one hand, Reeves claimed that that transaction costs had negatively impacted on the rate of exploration and mining in the Northern Territory. On the other hand, he said that the ALRA has probably had a negligible impact on costs and benefits for the mining industry. HORSCATSIA concluded:

... there has been some loss of opportunity and impact due in part to the Act's operation. ... Given improved goodwill, improved leadership and a genuine commitment to develop meaningful partnerships and work to achieve shared strategies, the Act can continue to work well for the people of the Northern Territory.

That said, the Committee concludes that some changes to Part IV of the Act and streamlining of the application processes should be considered. They are needed and can assist all parties to achieve worthwhile outcomes and an improved future.<sup>35</sup>

In its submission to the House of Representatives Standing Committee on Industry and Resources inquiry into impediments to increasing investment in mineral and petroleum exploration in Australia, the Minerals Council of Australia stated that the Land Council structure is cumbersome and causes significant delays in the processing of applications for exploration licences.<sup>36</sup> It proposed allowing Regional Councils to ratify the decisions of traditional owners in relation to exploration submissions. The Northern Territory Minerals Council stated in its submission that the ALRA is responsible for a considerable decline in exploration and subsequent development of ore bodies in the Northern Territory.<sup>37</sup> It claimed that:

No new mines have opened up on Aboriginal freehold land, with the exception of the approval of subsequent deposits in the Tanami region, since the inception of the *Aboriginal Land Rights Act (NT) 1976*.<sup>38</sup>

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The Central Land Council and Northern Land Council rejected this claim, stating that several new mines have resulted from exploration carried out under exploration licences granted under the Land Rights Act:

The “no new mines” claim has a certain superficial plausibility due to the fact that a number of these new mines use processing facilities which existed at the time of discovery. However, without the ore from mines discovered on exploration licences granted under the [*Aboriginal Land Rights (Northern Territory) Act 1976*] these facilities would have been junked 15 years ago, when the original finds ran out.<sup>39</sup>

In its final report, [\*Exploring: Australia’s Future – impediments to increasing investment in minerals and petroleum exploration in Australia\*](#), the Committee declared that it did not wish to enter a debate about the extent of mining activity in the Northern Territory. However, it expressed concern ‘... at the amount of time expended by companies in obtaining exploration licences in the Northern Territory over land subject to the provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976*’; and noted that ‘these delays amount to a significant deterrent to minerals and petroleum explorers’ and that ‘there is a need to address negotiation time frames and associated costs’.<sup>40</sup> The Committee accordingly recommended:

The Minister for Immigration and Multicultural and Indigenous Affairs implement a simplified and accelerated process for granting exploration licences on land granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* with a view to reducing the economic transaction costs emanating from the existing provisions of the Land Rights Act.<sup>41</sup>

The Bill seeks to improve flexibility and streamline the exploration and mining provisions of the ALRA. As indicated earlier, these amendments have generally been welcomed by Land Councils.

## Responses from political parties and other interested groups

The federal ALP has acknowledged that the Bill contains ‘a number of positive measures that are broadly consistent with the reforms agreed to by the Land Councils and Northern Territory Government.’<sup>42</sup> It has welcomed amendments to the mining regime as helping to facilitate economic development on Aboriginal land and also said:

Labor is pleased that the consent of traditional owners is still protected under the 99 year leasing scheme.

However we are keen to ensure that traditional owners are not pressured into trading off their legal rights in return for basic entitlements, like health clinics, housing and schools.<sup>43</sup>

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Additionally, the federal member for Lingiari, Warren Snowdon MP (ALP), has noted amendments that will enable money from the Aboriginals Benefit Account to be used to pay rent to traditional owners who lease their land to the NT Government. Mr Snowdon is quoted as saying that the Government is using the Aboriginals Benefit Account as a 'slush fund' and discriminating against Aboriginal people by capping their rent payments. He added, 'Aboriginal people pay tax like every other Australian and should get the same benefits from that pool.'<sup>44</sup>

The Central Land Council has welcomed some of the amendments, especially amendments to the ALRA's mining provisions. It says that the amendments will make mining and exploration processes more flexible and remove time-consuming regulation. However, Central Land Council Director, David Ross, said:

We see whole-of-community leases by the Northern Territory Government on Aboriginal land as unnecessary, expensive and flawed. Rent will come from the ABA (estimated at \$15 million over five years) to pay traditional owners and this could cause significant tensions in the communities affected.

Leasing the entire community could also deprive the traditional owners of the benefits of commercial development in the future and runs the risk that commercial leases will be granted to businesses that the traditional owners do not want in their community.

There are also no guarantees that this amendment will improve the Northern Territory Government's service delivery record.

The delegation provisions also have some problems. While we generally support delegating decision making to more local groups, we do have concerns that devolving decisions about mining and commercial enterprises could encourage corruption.

...

We do not support the new funding arrangements which put the Land Council's funding at Government whim. It significantly undermines the CLC's independence.<sup>45</sup>

Like the Central Land Council, the Northern Land Council has supported amendments that improve workability. However, it has concerns that some of the amendments breach the *Racial Discrimination Act 1975*, appear to be aimed at breaking up Land Councils by removing their financial independence, and terminate valid land claims. The Northern Land Council also says that it is inappropriate for community funds from the Aboriginals Benefit Account to be used to meet the Northern Territory Government's rental expenses.<sup>46</sup> Northern Land Council Chief Executive, Norman Fry, said that:

"... it is wrong, and discriminatory, to provide that traditional owners may only receive rent rather than other benefits and that rent be capped at 5% per annum of the improved capital value of the land."

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“It is also unnecessary. Fair and reasonable outcomes will be achieved without imposing restrictions, such as the Alice Springs to Darwin railway and the ENI Blacktip gas processing plant near Wadeye” ...

“It is also inappropriate for community funds from the Commonwealth Aboriginals Benefit Account to be used to meet the NT Government’s rental expenses.”<sup>47</sup>

Following the Government’s announcement of changes to the ALRA in late 2005, Australians for Native Title and Reconciliation (ANTaR) expressed concern about changes relating to the funding of Land Councils and delegation of their functions and powers, the establishment of new Land Councils and proposed leasing provisions.<sup>48</sup>

Also responding to the Australian Government’s announcement of changes to the ALRA in 2005, the Northern Territory Chief Minister said:

... Commonwealth changes to leasing Aboriginal land was in principle a step in the right direction and as a broad policy direction could deliver lasting benefits to remote communities.<sup>49</sup>

The Northern Territory Chief Minister also referred to the Australian Government’s new home loan package for Indigenous Australians in remote communities:

The NT sees this as a practical commitment and a good start but the reality of unemployment and the limited ability to service mortgages needs to be taken into account.<sup>50</sup>

## Parliamentary scrutiny

The functions of the Senate Selection of Bills Committee include considering Bills introduced into the Senate and recommending whether each Bill should be referred to a Senate committee for inquiry and report. On 13 June 2006, the Committee deferred consideration of the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 until its next meeting. A possible reason for the deferral by the Committee may be concern that the Bill would be progressed very quickly through both Chambers and was likely to pass before a Senate committee could properly consider its provisions.

## Financial implications

The Explanatory Memorandum states that:

There are expected to be costs of up to \$15 million over five years from 2006-07 to 2010-2011 to assist with the establishment of the township leasing scheme. The necessary funds will be sourced from the Aboriginals Benefit Account.<sup>51</sup>

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## Main provisions

### Amendment of the Aboriginal and Torres Strait Islander Act 2005

**Item 1** enables the Office of Evaluation and Audit (Indigenous Programs) (OEA(IP)) to evaluate and audit Land Councils when requested to do so by the Minister. OEA(IP) will also be able to evaluate and audit the operations of persons receiving money or benefits under the ALRA.

### Amendment of the Aboriginal Land Rights (Northern Territory) Act 1976

#### Land trusts

When land is granted under the ALRA either by an amendment to the Act or through the claims process, a Land Trust is established by the Minister to hold that land on behalf of its traditional owners. Land trusts do not make decisions. Rather, they act in accordance with directions given to them by the relevant Land Council.

**Item 15** enables the Minister to establish new Land Trusts for the purpose of holding land transferred to it by another Land Trust.

#### Anindilyakwa Land Trust

As things stand, the Arnhem Land Aboriginal Land Trust holds the Aboriginal land covered by the Anindilyakwa Land Council (Groote Eylandt and Bickerton Island). **Item 34** amends the ALRA so that a new Land Trust, called the Anindilyakwa Land Trust, will hold the land.

#### Occupation by the Crown

Section 14 of the ALRA provides that where the Crown or its authorities have been occupying land granted under the ALRA, they can continue to do so. **Item 36** enables such land to be the subject of a township lease under **new section 19A** (see below). Nothing in section 14 will prevent the NT entity holding a section 19A lease from subleasing to the body entitled to occupation (the Commonwealth, Northern Territory or an Authority). However, if a sublease is granted, section 14 will cease to apply to the land. The Explanatory Memorandum remarks, 'The intention is that bodies entitled to occupation will move towards getting a sublease rather than rely on the statutory rights in section 14.'<sup>52</sup>

Section 15 of the ALRA provides that where a section 14 occupation is not for a community purpose, the Crown must pay rent to the Land Council at a rate fixed by the

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Minister having regard to the economic value of the land. **Items 37-38** provide that if land to which section 15 applies is subleased under **new section 19A**, then the Crown must pay rent to the NT entity rather than the Land Council. If there is no sublease, then rent will also go to the NT entity as the head lessee.

### Township leases

**Item 46, new section 19A** enables a Land Trust to grant a lease of a township to an 'NT entity'. The Land Trust can only act with the consent of the Minister and on the direction of the relevant Land Council. Before the Land Council issues a direction, the traditional owners must have consented, any affected Aboriginal community must have been consulted and the terms and conditions of the proposed lease must be reasonable. Failure to comply with these requirements does not invalidate the grant, unless the grantee obtained the Land Council's agreement fraudulently. In general, the term of a township lease is 99 years.

The expression 'township' is widely defined. 'Townships' are either prescribed types of land in relation to all Land Trusts (ie generic descriptions of land) or prescribed types of land relating to the applicable Land Trust only (**new section 3AB**, inserted by **item 13**).

An 'NT entity' is a person (including a body corporate or body politic) who is appointed by the Chief Minister of the Northern Territory. A media release issued by the Northern Territory Chief Minister in October 2005 stated that 'An independent statutory authority with a board including an independent Chair and representation from Land Councils and both the Northern Territory and Australian Governments is the favoured structure at this stage.'<sup>53</sup>

If an 'NT entity' is the Northern Territory, a Minister of the Northern Territory can enter into a lease for a township and exercise all the powers of a lessee (including the power to sublease) (**item 8** and **new section 3AA**, inserted by **item 13**) **New subsection 19A(14)** provides that a lease must not contain any provision requiring the consent of any person to the granting of a sublease of the lease.

A section 19A lease must provide for the payment of annual rent capped at 5% of the improved capital value of the land (**new subsection 19A(6)**). Leases cannot be transferred, except to another NT entity with the approval of the Minister (**new subsection 19A(8)**). **New subsection 19A(10)** preserves existing rights, titles and interests in a township once it is leased.

### Dealing with Aboriginal land

Land that becomes Aboriginal land under the ALRA is granted as inalienable, communal freehold title. However, section 19 of the ALRA enables Aboriginal land to be surrendered

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to the Crown by a Land Trust. Section 19 also enables Land Trusts to deal with Aboriginal land in other ways. At present, with the written consent of the Minister and at the direction of the relevant Land Council, a Land Trust can grant an estate or interest in land (such as a lease) to an Aboriginal person, an Aboriginal Council or an Incorporated Aboriginal Association for:

- residential purposes
- business purposes, or
- community purposes (subsection 19(2)).

Ministerial consent is not required in relation to business or community purposes if the term of the grant does not exceed 21 years (subsection 19(7)).

Once again, with Ministerial consent and at the direction of the relevant Land Council, a Land Trust can grant an estate or interest in land to the Commonwealth or the Northern Territory for any public purpose or to a mission for any mission purpose (subsection 19(3)). It can also grant an estate or interest in land to ‘any person for any purpose’ (subsection 19(4A)). In these cases, Ministerial consent is not required if the term of the grant does not exceed 10 years (subsection 19(7)).

**Item 43** repeals subsection 19(7). The effect is that Ministerial consent will not be required in any of the circumstances mentioned above if the term of the grant does not exceed 40 years.

**Item 45** provides that if an estate or interest in land is granted under section 19, then the Land Trust, at the direction of the relevant Land Council, can authorise persons or classes of person to enter or remain on that land for a specified purpose. This amendment is tied to **item 200**, which amends section 70—the net effect being that a person acting in accordance with such an authorisation will not be guilty of the offence of entering or remaining on Aboriginal land.

## Aboriginal Land Councils

The functions of Land Councils include ascertaining and representing the views of traditional owners, protecting their interests and negotiating on their behalf with people who want to obtain an interest or estate in Aboriginal land. In performing their functions, Land Councils must act in accordance with the directions of traditional owners and must obtain their informed consent before taking action.

**Item 51** repeals existing subsections 21(3)-(6) of the ALRA, dealing with the establishment of new Land Councils. At present, the Minister can establish a new Land Council if he or she is satisfied that a substantial majority of adult Aboriginals living in an area covered wholly or partly by a Land Council is in favour of setting up a new Land Council and that the area is an appropriate area for the operation of a new Land Council.

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The two smaller Land Councils—the Tiwi Land Council and the Anindilyakwa Land Council—were established under these provisions.

**Item 52** substitutes new provisions for the establishment of new Land Councils. It provides that an Aboriginal group or body can ask the Minister to establish a new Land Council. The application must set out boundaries, a name for the proposed Land Council, an estimate of the number of Aboriginal people living in the area, and proposed arrangements for consulting and representing Aboriginal people living in the area. The Minister may support the application and ask the Australian Electoral Commission to hold a vote. The Minister may also refuse the application. The Minister cannot support an application unless he or she is satisfied that the area is an appropriate area for the establishment of a new Land Council and that the proposed Land Council will satisfactorily perform the functions of a Land Council.

If a vote is held, then any adult Aboriginal whose name is on the Commonwealth Electoral Roll and whose place of living is in the qualifying area *or* who is entitled to vote under rules for holding the vote, can vote. The Minister may establish a new Land Council if at least 55% of the formal votes are cast in favour of the proposal.

These amendments can be contrasted with HORSCATSIA's recommendations. HORSCATSIA recommended the establishment of new Land Councils should require the support at least 60% of Aboriginal people living in the area and the informed consent of appropriate traditional owners.<sup>54</sup> HORSCATSIA also recommended that a working party consisting of relevant stakeholders should be established to define the boundaries of a proposed new Land Council; a discussion paper should be prepared for the Minister summarising the arguments 'for' and 'against,' the costs involved in establishing and operating a new Land Council and economic viability indicators; and that the working party inform affected Aboriginal people of the implications of the proposal.

Section 23 of the ALRA sets out the functions of a Land Council. **Item 56** inserts new **section 23AA** which sets out how those functions are to be performed. **New section 23AA** provides that a Land Council must determine priorities and must give priority to the protection of traditional owners and other Aboriginal people interested in Aboriginal land in the Land Council's area. Additionally, Land Councils must perform their functions in a timely manner and maintain organisational structures and processes that promote representation and consultation, and which operate fairly.

**Item 59** gives Land Councils a new power—that is, to provide administrative and other assistance to an Incorporated Aboriginal Association. Land Councils will be empowered to charge a fee for such services (see **item 74, new section 33A**).

**Item 60** amends subsection 27(3) of the ALRA. The effect of the amendment is that Land Councils must obtain Ministerial approval for contracts whose value exceeds \$1,000,000 or a higher amount (if prescribed). Currently, approval must be obtained for contracts exceeding \$100,000 in value.

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**Item 61** amends Land Councils' powers of delegation. In particular, the amendment will enable Land Councils to delegate decisions about exploration and mining. **Item 65** inserts **new section 28A** into the ALRA, thereby enabling a body corporate established under the *Aboriginal Councils and Associations Act 1976* to apply to a Land Council to have the Land Council delegate functions or powers to it. Such delegations can be revoked or varied by the Land Council (**new section 28B**). A Land Council cannot perform functions or exercise powers that it has delegated (**new section 28D**). A body corporate that has a delegation from a Land Council must advise the Land Council of any decision it makes under that delegation (**new section 28F**).

If a Land Council refuses to delegate its powers or functions, the Minister can agree to the delegation if satisfied that the delegate will be able to satisfactorily perform the functions or exercise the powers (**new section 28C**). However, there appears to be no provision in this case for reporting to the Land Council by the delegate or any prohibition on a Land Council exercising delegated functions or powers.

**Item 66** adds eligibility requirements to section 29 of the ALRA, the section that deals with membership of Land Councils. The amendments provide that a person cannot become or remain a member of a Land Council if they have been convicted of:

- an offence against Australian law and sentenced to 12 months or more in prison
- an offence against Australian law involving dishonesty and sentenced to 3 months or more in prison
- 2 or more offences against Australian law and sentenced to a total of 12 months or more in prison; or
- 2 or more offences against Australian law involving dishonesty and sentenced to a total of 3 or more months imprisonment.

If the person serves a term of imprisonment, then the period of ineligibility is 2 years starting on the day they are released. If they do not serve a term of imprisonment (for instance, if their sentence is suspended), the period of ineligibility is 2 years beginning on the day of their conviction.

**Item 67** requires Land Council members to make written disclosures of their direct and indirect pecuniary interests. These interests must be recorded in a register kept by the Council.

**Item 70** amends section 29A of the ALRA, the section that enables Land Councils to appoint committees to assist them in performing their functions. **Item 70** provides that committees established by Land Councils must have at least 7 members or such other number as is prescribed. Committees must follow meeting rules made by the Land Council, keep minutes of their meetings and allow the Land Council, traditional owners or Aboriginal people in the area to inspect the rules and the minutes. However, access cannot be given to any part of the minutes that contains 'excludable matter.' 'Excludable matter'

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includes matter relating to a Land Council staff member, personal hardship, trade secrets, confidential information, the security of a Land Council or its staff, or sacred information (**item 4**).

**Item 71** provides that a Land Council must make written meeting rules for itself and give a copy to the Minister for approval. Rules must be available for inspection by the traditional owners and Aboriginal people living in the area. **Item 73** provides that Land Councils must keep minutes of their meetings and, with the exception of ‘excludable matter’, allow them to be inspected by the traditional owners and any Aboriginal person living in the area.

**Item 74** enables Land Councils to charge fees for their services, so long as the fees do not amount to taxation. Costs incurred by Land Councils in providing fees for service will be included in the definition of ‘administrative costs’ (**item 80**).

**Item 77** amends section 34 of the ALRA, the section that requires Land Councils to prepare estimates of their expenditure for the Minister. The amendment provides that, when it submits estimates, a Land Council must also notify the Minister of the total amount of fees and other income it expects to receive. The Minister must take these amounts into account when deciding what amounts are to be debited from the Aboriginals Benefit Reserve—see **items 173 and 174**.

**Items 78 and 75** enable Land Councils to obtain funds for capital costs as well as administrative costs and require them to include capital costs as well as administrative costs in the estimates they prepare for the Minister.

**Item 102** adds to the annual reporting requirements of Land Councils. For instance, annual reports will be required to specify the total fees for services received during the financial year, details of section 35 determinations and amounts paid by the Council under section 35 determinations, details of amounts held in trust, details of section 28 delegations, details of section 29A committees, and details of consultants engaged.

**Item 103** empowers the Minister to give written directions to a Land Council about its finances. The Land Council must comply with such directions.

## Exploration and mining

The ALRA contains protections for Aboriginal people in relation to exploration and mining on Aboriginal land. They can consent or refuse consent to exploration, subject to a national interest override. However, once consent has been given to exploration, they cannot refuse consent to mining.

Under the *Mining Act* (NT), a company wanting to obtain an exploration licence on Aboriginal land must first obtain a consent to negotiate from the Northern Territory

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Minister for Mines and Energy. The ALRA then provides that exploration licences cannot be granted in respect of Aboriginal land unless the consents of the relevant Land Council and the Commonwealth Minister are obtained (section 40). In general, a detailed, written application must be sent to the Land Council by the company within 3 months after it receives a consent to negotiate from the Northern Territory Minister for Mines and Energy (section 41). The Land Council must identify the traditional owners of the area and organise a meeting between them and the applicant. The applicant can also attend subsequent meetings with the consent of the traditional owners (section 42). The ALRA also establishes negotiation timeframes.

**Items 106-107** amend section 41 to provide that a person applying for an exploration licence on Aboriginal land must make the application within 3 months of the Northern Territory Mining Minister consenting. In some circumstances, this period can be extended for a further 3 months.

At present, subsection 42(7) of the ALRA provides that a Land Council will be deemed to have given consent to an exploration licence application if, at the end of the negotiating period, it has neither consented or refused consent to the grant of the licence. **Item 115** removes this provision.

**Item 119** amends subsection 42(13) of the ALRA—the subsection that defines the ‘negotiating period’ in relation to exploration licences. At present, the negotiating period is the longest of the following:

- 12 months after the Land Council receives the application
- a longer period if this is agreed to by the applicant and the Land Council
- a longer period determined by the Minister, or
- the period of extension under subsection 42(15).

In other words, the period is open-ended. The new negotiating period will be a minimum of 22 months from the date of the application. This period can be extended by 2 years if the parties agree, with possible further extensions of 12 months at a time. However, in relation to extensions, the Minister will be able to step in and determine that specified day is the end of the negotiating period. This must be a day at least 12 months after the date of the determination.

As indicated above, the ALRA provides that an exploration licence cannot be granted in relation to Aboriginal land unless both the Minister and the Land Council have agreed or the Governor-General (acting on the advice of the Government) has proclaimed that the national interest requires the licence to be granted. Section 43 of the ALRA provides that in the case of a national interest override, the Land Council and the applicant must try to agree on the terms and conditions to which the licence will be subject. The Land Council must first consult the traditional owners and any other Aboriginal people who may be affected by the grant of the licence.

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**Item 121** amends section 43. It provides that in order to facilitate consultation between the Land Council and the traditional owners, the Land Council must convene meetings and give reasonable notice to the applicant and the Minister before each meeting. Representatives of the applicant may attend so much of the first meeting as enables them to outline their views of the terms and conditions. They may attend other meetings unless the traditional Aboriginal owners ‘as a group’ decide against this and notify them. Similar attendance rules apply to the Minister’s representative. The negotiating period in the case of national interest Proclamations is 180 days after the Proclamation takes effect. A longer negotiating period operates if agreed between the Land Council and the applicant *or* if the Minister agrees in writing.

**Items 122-124** provide that any arbitration under section 42 will be in accordance with the Commercial Arbitration Act (NT) rather than under section 44 of the ALRA. It appears that the section 44 arbitration provisions have never been used.

Section 45 of the ALRA provides that a ‘mining interest’ cannot be granted to an ‘intending miner’ unless the Land Council and the intending miner have entered into an agreement under section 46 and the Minister has consented. **Items 5, 6 and 126** make substantial amendments to this provision. Their effect is that no further agreement between the Land Council and the miner is needed if the terms and conditions of renewal were included in the original mining lease, licence etc. Further, **new subsection 45(3)**, inserted by **item 126** provides that the Minister can consent to a *renewal* when giving consent to the *original* lease, licence etc.

**Item 128** amends section 46 of the ALRA—the section that deals with negotiations for the grant of a mining interest on Aboriginal land. Subsection 46(6), which enables a representative of the Minister to attend the first negotiation meeting and, with the consent of the traditional owners any subsequent meeting, is repealed. It is replaced with a provision allowing the Minister to authorise a person or class of person to attend the first meeting and, with the consent of the traditional owners, any subsequent meeting.

If a Land Council refuses to consent to the grant of an exploration licence in relation to particular land, the ALRA places restrictions on further applications being made within certain periods (section 48). **Item 133** amends section 48 to distinguish between applications for petroleum exploration licences and applications for other exploration licences. The effect is that if an application for a petroleum licence is refused, this will not prevent an application for a licence for minerals other than petroleum being made, and vice versa. Section 48 also enables a Land Council to ask the Minister to authorise a further application not less than 2 years after its original refusal to grant an exploration licence. **Item 136** will remove the 2 year limitation and allow a Land Council to approach the Minister at any time after it refused the initial application.

Section 48A of the ALRA provides that a Land Council may enter into an agreement with a person who has applied for or who holds an exploration licence in relation to land that is

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subject to a land claim. **Item 146** amends section 48A to enable agreements to be made with a person who wishes to renew a mining interest.

Subsection 48J(1) of the ALRA creates an offence of making payments or gifts in connection with the granting of an exploration licence or a mining interest in Aboriginal land. **Item 159** ensures that fees for services paid to Land Councils under **new section 33A** will not be caught by the offence.

**Items 160 and 161** replace references to monetary penalties with references to penalty units in subsections 48J(2) and 48J(4) of the ALRA.

### Aboriginal Land Commissioners

The functions of Aboriginal Land Commissioners include hearing land claims under the ALRA, reporting their findings and making recommendations for the granting of land. Subsection 52(3) of the ALRA provides for a compulsory retirement age for Land Commissioners of 70 years. **Item 165** repeals this provision. **Item 166** allows for former judges to be appointed as Land Commissioners. At present, eligibility is restricted to serving judges.

Sections 54-54B of the ALRA contain offence provisions relating to failure to comply with requirements of the Land Commissioner—for instance, failure to answer questions or produce documents. **Items 168-170** change the current monetary penalties in these sections to penalty units.

### Aboriginals Benefit Account

In the 1950s, an Aboriginal Benefit Trust Fund was first established as a result of pressure to allow bauxite mining on Aboriginal reserves in the Northern Territory—land that was reserved for the sole use of Aboriginal people and on which mining had been, until then, prevented. The purpose of statutory royalties was compensatory.

The equivalent of royalties received by the Commonwealth and the Northern Territory in respect of minerals produced on Aboriginal land is now paid into a statutory trust fund called the Aboriginals Benefit Account ('ABA'). Funds provided from the ABA are used for the benefit of Aboriginal people in the Northern Territory. The Northern Land Council describes them as being designed to compensate traditional owners whose lands are affected by mining; to compensate more widely for loss of lands and for the disadvantage experienced by Aboriginal people; and to ensure that Land Councils, the representatives of Aboriginal people, can function effectively and independently. In the Northern Land Council's view, ABA funds are not designed to replace normal Government funding of services for Aboriginal people.

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Under section 64 of the ALRA, royalty equivalents are distributed from the ABA to Land Councils and Aboriginal people in the Northern Territory in the following way:

- 40 per cent is earmarked for Land Council administrative costs and is distributed to the four existing Land Councils in accordance with their respective populations of Aboriginal people
- 30 per cent is given to Land Councils for distribution to Aboriginal organisations in areas affected by mining, and
- the remainder is applied at the discretion of the Minister and can be used for grants for the benefit of Aboriginal people in the Northern Territory; extra payments to Land Councils; administration of the ABA; or increasing the equity of the ABA.<sup>55</sup>

**Items 173 and 174** remove the present requirement in section 64 of the ALRA that 40% of payments from the ABA goes to Land Councils for their administrative costs. Instead, the Minister will determine what will be paid having regard to Land Council estimates, their expected income from fees and other services, and any existing surplus.

**Item 177** enables the ABA to be used for the acquisition or administration of leases granted to ‘NT entities’ or for the payment of rent under leases granted to ‘NT entities’ under **new section 19A**. Thus, for example, rents payable to traditional owners who agree to lease their land under **new section 19A** will come, at Ministerial direction, not from the lessee (eg the NT Government) but from the ABA.

**Item 186** makes changes to the composition of the Reserve Advisory Committee. This Committee has the function of advising the Minister about the payment of grants mentioned above. At present, the Committee consists of a Chair appointed by the Minister and members elected by each Land Council. All must be Aboriginal people. **Item 186** enables the Minister to appoint 1 or 2 additional people to the Committee who have expertise in land management or business or financial management.

## Disposing of land claims

### Section 67A, ALRA

Section 67A sets out the circumstances in which a land claim will be disposed of. Claims will be disposed of when a claim is withdrawn; the Governor-General executes a deed granting the land to the traditional owners; the Commissioner advises the Minister that there are no traditional owners; or where, despite a finding that there are traditional owners, the Minister does not recommend that a land grant be made by the Governor-General.<sup>56</sup>

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### Stock routes and stock reserves

The issue of land claims over stock routes and stock reserves has been the subject of negotiation between the Commonwealth and Northern Territory Governments for many years. In 1995, an agreement was reached between the Commonwealth and Northern Territory Governments in which the Commonwealth agreed to amend the ALRA so that claims over stock routes and stock reserves that could not be heard by the Land Commissioner would be disposed of. In return, the Northern Territory agreed to amend its *Pastoral Land Act 1992* to expedite the granting of community living areas on pastoral properties to Aboriginal people.<sup>57</sup> However, Commonwealth Bills incorporating this undertaking were never passed by Parliament.

### The inter-tidal zone etc

Other vexed issues relate to claims over the inter-tidal zone not adjoining Aboriginal land, and claims relating to the beds and banks of rivers and creeks that form a boundary between Aboriginal and non-Aboriginal land or where rivers and creeks flow through areas that are not Aboriginal land or not claimable.

These issues were examined by the Reeves Review and by HORSCATSIA. The Reeves Review recommended that such rivers and creeks should not be claimable, while the HORSCATSIA recommended that a project team consider the matter. In submissions to the HORSCATSIA, the Northern Land Council and the Central Land Council argued that these matters should be determined through the normal claims process. In a media release issued on 1 June 2006, the Northern Land Council stated that some of outstanding claims ‘... have already been granted, or heard and recommended for grant, as Aboriginal land provided that the interests of adjacent stakeholders such as pastoralists are met.’<sup>58</sup>

The Northern Territory Government has also agreed that ‘outstanding land claims and land claims that cannot proceed be addressed through negotiation rather than legislative amendment.’<sup>59</sup>

### Amendments

The Government has attempted unsuccessfully in the past to amend the ARLA to add to the circumstances in which a land claim will be deemed to have been finally disposed of.<sup>60</sup> Three grounds contained in the Bill generally reflect amendments proposed by earlier, unsuccessful Bills. These grounds are that:

- the Land Commissioner reports that he or she is unable to make a finding that there are traditional owners of the area
- the land was claimed on or after 5 June 1997 (when a sunset clause took effect preventing new land claims being made under the ALRA), or

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- the claim relates to a stock route or reserve, which was lodged after 1 March 1990 (**items 191 and 192**).

**Item 192** also adds further grounds on which claims will be taken to have been finally disposed of. These are:

- where insufficient information has been provided to the Land Commissioner, the Commissioner has requested further information and this has not been provided within 6 months
- repeat claims where the Land Commissioner has been unable to make the requisite findings needed for a repeat claim
- where the consent of Aboriginal people with estates or interests in the land is required for the claim to progress and has not been obtained
- claims to the intertidal zone; beds and banks of rivers and creeks; and to islands in rivers and creeks, where the claimed land is not contiguous with other claimed land or Aboriginal land, or
- parts of a particular claim—Coomalie Shire/Deepwater Area (No. 238)—made by the Northern Land Council identified in **new subsection 67A(17)**.

The second reading speech for the Bill notes that ‘A separate Bill to come before the House will schedule substantial areas of land, including a series of claims to national parks and reserves settled between the Northern Territory Government and Land Councils.’<sup>61</sup>

### Granting of estates or interests while land is subject to a land claim

The ALRA enables claims to be made over unalienated Crown land in the Northern Territory. After the enactment of the ALRA, governments acted on occasion to change the status of land under claim (ie to alienate it) in order to deprive the Aboriginal Land Commissioner of his jurisdiction. As a result, section 67A was inserted into the ALRA in 1987. The effect of section 67A is that any grant of an estate or interest in land that is made after a land claim is lodged and before the claim is disposed of, has no effect.

**Item 193, new section 67B** will allow estates or interests in land subject to a land claim to be granted if the relevant Land Council enters into a written agreement with the person concerned and the Minister consents (Ministerial consent is required where the term of the grant exceeds 40 years). However, **new section 67B** will not apply to grants of fee simple or leases in perpetuity. A Land Council will not be able to enter into an agreement under **new section 67B** unless satisfied that the traditional owners have given informed consent to the grant, any Aboriginal community affected by the proposal has been consulted, and the terms and conditions of the grant are reasonable. However, failure to comply with these requirements will not invalidate the agreement.

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## Entering sacred sites and Aboriginal land—penalties and defences

It is an offence under section 69 of the ALRA to enter or remain on a Northern Territory sacred site except to perform functions under the ALRA or a Northern Territory law. **Item 194** repeals the existing monetary penalty and substitutes penalty units.

Section 70 of the ALRA creates an offence of entering or remaining on Aboriginal land. **Item 199** replaces monetary penalties in section 70 with references to penalty units. **Item 200** adds additional defences to the section 70 offence. At present, it is a defence to be on Aboriginal land in accordance with the ALRA or a Northern Territory law. It will be a defence for the person to be on Aboriginal land in accordance with an authorisation under subsection 19(13) of the ALRA. It will also be a defence if the person entered or remained on Aboriginal land leased under section 19A and was there for any purpose related to the use or enjoyment of an estate or interest in the land.

## Delegation of Ministerial powers

**Item 202** enables the Minister to delegate any of his or her functions or powers under Parts II, III, V, VI or VII of the ALRA, with the exception of those under **new section 19A** (leasing of townships to NT entities) This means that the Minister can delegate powers relating to grants of land to Land Trusts, Aboriginal Land Councils, Aboriginal Land Commissioners, and the Aboriginal Benefits Reserve.

Powers and functions under Part IV (Mining) can only be delegated to the NT Mining Minister. However, some Part IV powers cannot be delegated—including powers relating to the consent to the grant of an exploration licence, determining an extension of negotiating time in national interest cases, consenting to the grant of a mining interest to an intending miner and making national interest determinations.

## Review of Part IV

**Item 234** requires the Minister to establish an independent review of Part IV of the ALRA (the mining provisions) as soon as practicable after the commencement of the item—that is, on proclamation or 6 months after the legislation receives Royal Assent, whichever occurs first. A report must be given to the Minister and must be tabled in Parliament within 15 sitting days of receipt by the Minister.

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## Concluding comments

Parliament may wish to consider the following matters:

- as things stand, a new Land Council can be created if a ‘substantial majority of adult Aboriginals living in an area agree and the area is an appropriate area for the operation of a new Land Council.’ The amendments incorporate some but not all HORSCATSIA’s recommendations in relation to the establishment of new Land Councils. In particular, they do not adopt HORSCATSIA’s recommendations that ‘substantial majority’ be defined as at least 60% and that the informed consent of appropriate traditional owners is obtained. Instead, a 55% majority will be sufficient and there is no provision requiring consent from the traditional owners. Questions that might be asked include whether setting the threshold at 55% is sufficiently high (especially in areas where traditional owners may be outnumbered by other Aboriginal people) and whether the informed consent of traditional owners should also be required.
- whether a Land Council’s refusal to delegate powers and functions should be subject to Ministerial override
- whether amendments that enable 99-year township leases to be granted to NT entities and then subleased should be supported. The Government says that the ‘new tenure system for townships on Aboriginal land ... will allow individuals to have property rights. It is individual property rights that drive economic development.’<sup>62</sup> Others have argued that such leases have the potential to deprive traditional owners of the benefits of development and may unacceptably restrict their say over future development. Related questions include whether money from the Aboriginals Benefit Account should be used for the acquisition or administration of leases granted to NT entities or to pay their rent and whether the maximum amount of rent payable should be capped at 5% per annum of the land’s value.
- whether the existing funding formula for Land Council administrative costs should be replaced with Ministerial allocations based on estimates, expected income and any existing surplus. Will these amendments unacceptably compromise Land Council independence and viability as some have argued or, as the Government maintains should payments for administration be based on work to be done and outcomes achieved rather than on an arbitrary percentage?
- whether the legislation should dispose of land claims rather than allowing them to be the subject of determinations or agreements.

Finally, the Bill provides for an independent review of the ALRA’s mining provisions to be established by the Minister. However, the composition of the review is not dealt with. Parliament may wish to consider whether membership should be statutorily prescribed—for instance, providing by that Indigenous people or Land Councils should be represented.

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Nor does the amendment provide for a reporting time or empower the review to canvass submissions or hold public hearings.

## Endnotes

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1. Explanatory Memorandum, p. 18.
2. Frank Brennan, 'Standing deep in time; standing in the law: a non-Indigenous perspective on land rights, land wrongs and self-determination,' Oxford Amnesty Lecture, Sheldonian Theatre, Oxford, 11 February 2005 at: [http://www.uniya.org/talks/brennan\\_11feb05.html#ftref10](http://www.uniya.org/talks/brennan_11feb05.html#ftref10)
3. (1971) 17 FLR 141 at 267.
4. Quoted by Ian Viner MP, Second Reading Speech, Aboriginal Land Rights (Northern Territory) Bill 1976, House of Representatives, *Hansard*, 4 June 1976, p. 3081.
5. *ibid.*, pp. 3081, 3084.
6. Office of Indigenous Policy Coordination. At the time of writing there were 593,731.75 km<sup>2</sup> of ALRA land in the Northern Territory. This figure is expected to increase to 593,942.75 km<sup>2</sup> when the Borroloola No. 2 claim is added.
7. Department of the Chief Minister (Northern Territory), *Detailed Joint Submission to the Commonwealth. Workability Reforms of the Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA)* accessible at: <http://www.nt.gov.au/dcm/people/indigenous.shtml>
8. For a brief summary, see Heather McRae et al, *Indigenous Legal Issues. Commentary and Materials*, 3<sup>rd</sup> ed, Lawbook Co., 2003.
9. (1992) 175 CLR 1.
10. BW Rowland QC, *Examination of the Aboriginal Land Rights (Northern Territory) Act 1976-80. Report to the Minister for Aboriginal Affairs*, Department of Aboriginal Affairs, 1980; Mr Justice Toohey, *Seven Years On. Report by Mr Justice Toohey to the Minister for Aboriginal Affairs on the Aboriginal Land Rights (Northern Territory) Act 1976 and Related Matters*, AGPS, Canberra, 1984.
11. John Reeves, *Building on Land Rights for the Next Generation. The Review of the Aboriginal Land Rights (Northern Territory) Act 1976. Report*, 1998, p. v.
12. Accessible via: <http://www.nt.gov.au/dcm/people/indigenous.shtml>
13. Reeves, *op. cit.*, p. II.
14. *ibid.*
15. Detailed Joint Submission, *op. cit.*, recommendation 3.
16. *ibid.*, recommendation 1.
17. Reeves, *op. cit.*, p. 500.

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18. Material relevant to the debate about communal versus private ownership can be found on the website of the Australian Institute of Aboriginal and Torres Strait Islander Affairs at:  
[http://ntru.aiatsis.gov.au/research/resourceguide/PDF\\_FILES/Current%20Debates%20Indigenous%20Land%20Tenure.pdf](http://ntru.aiatsis.gov.au/research/resourceguide/PDF_FILES/Current%20Debates%20Indigenous%20Land%20Tenure.pdf)
- See also: Stuart Bradfield, 'White picket fence or Trojan horse? The debate over communal ownership of Indigenous land and individual wealth creation', *Land, Rights, Laws: Issues of Native Title*, vol. 3, Issues Paper no. 3, June 2005.
19. 'Land systems holds us back', *Sydney Morning Herald*, 7 December 2004.
20. Transcript of the Prime Minister, the Honourable John Howard MP, *Doorstop interview*, Wadeye, Northern Territory, 6 April 2005 at:  
<http://www.pm.gov.au/news/interviews/Interview1305.html>
21. National Indigenous Council, Indigenous Land Tenure Principles, reproduced in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, Annexure 2. Accessible at: [http://www.humanrights.gov.au/social\\_justice/ntreport05/](http://www.humanrights.gov.au/social_justice/ntreport05/)
22. See *Land Rights under Threat*, Australians for Native Title and Reconciliation:  
[http://www.antar.org.au/index.php?option=com\\_content&task=view&id=94&Itemid=104](http://www.antar.org.au/index.php?option=com_content&task=view&id=94&Itemid=104)
23. 'Pearson warns PM on home title fears', *The Australian*, 14 April 2005.
24. Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Chapter summary', *Native Title Report 2005* at:  
[http://www.humanrights.gov.au/social\\_justice/ntreport05/summary.html](http://www.humanrights.gov.au/social_justice/ntreport05/summary.html)
25. *ibid.*
26. Jon Altman, Craig Linkhorn and Jennifer Clarke, assisted by Bill Fogarty and Kali Napier, *Land rights and development reform in remote Australia*, Oxfam Australia, 2005, p. 5.
27. *ibid.*
28. <http://www.cis.org.au/IssueAnalysis/ia54/IA54.pdf>
29. Transcript of the Prime Minister, the Honourable John Howard MP, Address at the National Reconciliation Planning Workshop, Old Parliament House, 30 May 2005 at:  
<http://www.pm.gov.au/news/speeches/speech1406.html>
30. See [joint press release](#) by Minister for Immigration and Multicultural and Indigenous Affairs, Senator Amanda Vanstone, Minister for Family and Community Services, Senator Kay Patterson and Minister for Employment and Workplace Relations, Kevin Andrews.
31. The 2006-07 Budget committed \$107.7 million over four years, including capital investment in financial assets of \$54.6 million to an initiative that includes an expansion of the Home Ownership on Indigenous Land Programme. See:  
[http://www.atsia.gov.au/budget/budget06/Fact\\_sheets/factsheet08.aspx](http://www.atsia.gov.au/budget/budget06/Fact_sheets/factsheet08.aspx)
32. 'Government to reform Aboriginal land rights', *The World Today*, 31 May 2006.

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33. *Aboriginal Land Rights (Northern Territory) Amendment Act (No. 3) 1987*, subsections 46(12) & (13).
34. Reeves, op. cit., p. 563.
35. HORSCATSIA, op. cit., p. 97.
36. Submission No.81, p. 1181.
37. Submission No.26, p. 232.
38. *ibid.*
39. Submission No.62, p. 821.
40. House of Representatives Standing Committee on Industry and Resources, *Exploring: Australia's Future—impediments to increasing investment in minerals and petroleum exploration in Australia*, August 2003, p. 98.
41. Recommendation 21.
42. Senator Chris Evans & Warren Snowdon, 'Land rights amendments—housing crisis continues', *Media Release*, 31 May 2006.
43. *ibid.*
44. 'Anger at indigenous lease plan', *The Age*, 1 June 2006.
45. Central Land Council, 'Aboriginal Land Rights Act amendments', *Media Release*, 31 May 2006.
46. Northern Land Council, 'NLC has serious concerns regarding amendments', *Media Release*, 1 June 2006.
47. *ibid.*
48. Australians for Native Title and Reconciliation, 'Land Rights Act changes a smokescreen', *Media Release*, 6 October 2005; 'Government plans may force 30,000 people off their land', *Media Release*, 9 December 2005.
49. Chief Minister Claire Martin, 'Federal land rights changes – step in right direction', *Media Release*, 5 October 2005.
50. *ibid.*
51. Explanatory Memorandum, p. 1.
52. *ibid.*, p. 23.
53. Chief Minister Claire Martin, 'Federal land rights changes – step in right direction', *Media Release*, 5 October 2005.
54. HORSCATSIA, op. cit., recommendations 7 & 9.
55. Australian National Audit Office, *Audit Report No. 28 2002-2003, Performance Audit, Northern Territory Land Councils and the Aboriginals Benefit Account*.

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56. See Sean Brennan, *Aboriginal Land Rights (Northern Territory) Amendment Bill (No. 2) 1999*, *Bills Digest No. 181, 1998-99*.
57. For a background to this issue see Brennan, *ibid.*
58. Northern Land Council, 'NLC has serious concerns regarding amendments', *Media Release*, 1 June 2006.
59. Detailed Joint Submission, *op. cit.*, recommendation 8.
60. *Aboriginal Land Rights (Northern Territory) Amendment Bill 1997 and the Aboriginal Land Rights (Northern Territory) Amendment Bill (No. 2) 1999*.
61. House of Representatives, *Hansard*, Second reading speech, *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006*, 31 May 2006, p. 5.
62. *ibid.*, p. 4.

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