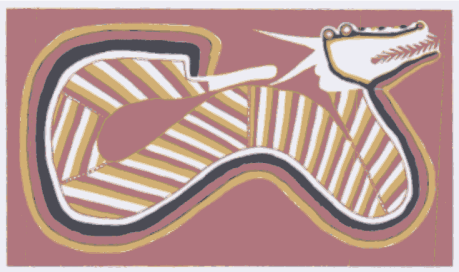

Parliament of Australia

Senate

Community Affairs Legislation Committee

Stronger Futures in the Northern Territory Bill 2011 & Two Related Bills

Northern Land Council Submission

10 February 2012

SENATE COMMUNITY AFFAIRS LEGISLATION COMMITTEE

STRONGER FUTURES IN THE NORTHERN TERRITORY BILL 2011 & TWO RELATED BILLS

Land reform: community living areas

The Northern Land Council (NLC) has joined with Aboriginal peak organisations in the Northern Territory (APO NT) in providing a comprehensive submission to the Committee regarding the *Stronger Futures in the Northern Territory Bill 2011* (the Bill) and two related Bills.

The APO NT submission does not concern proposed reform relating to community living areas, being freehold vested in Aboriginal associations incorporated under the *Associations Act* (NT) or Aboriginal corporations incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). This submission focuses on that proposal.

Community living areas under NT freehold title have been established in the Northern Territory to small areas ordinarily excised from pastoral leases for residential purposes. There are 54 community living areas in the NLC region, with freehold titles vested in associations or corporations. Many of these communities are small, and are referred to as outstations or homelands. In some cases these communities have grown into sizeable towns, such as Minyerri (Hodgson Downs), Yarralin and Bulla in the NLC region (each with 350 to 500 residents). Many residents may not be members - or entitled to be members - of the association for corporation which owns the freehold.

Section 110 of the *Associations Act* (NT) restricts the capacity of an association or corporation which owns the freehold in a community living area to lease that land for longer than 12 months, as follows:

- leases for health, education, housing or financial services are permitted, subject to Ministerial consent which may be subject to conditions (s 110(1), (6)(d) and (8)(d));
- leases for other purposes such as commercial (eg a store), infrastructure (eg electricity and sewage), or essential services (eg a police station) are not permitted.

Two observations may be made to. First, the restriction as to purpose appears directed at very small communities in remote locations which ordinarily would not generate commercial activity or justify government facilities such as a police station. This may reflect a presumption when the legislation was originally drafted in 1989 that communities on living areas would always be very small.

Over 20 years later it is plain that such a presumption or policy setting is misplaced. Sizeable communities exist on living areas, and the restriction whereby leases for broader purposes are prohibited cannot be justified. Sizeable communities cannot properly function unless there is capacity for secure tenure to be appropriately granted for commercial and government activity.

Secondly, the Ministerial consent requirement operates as a safeguard to ensure that corporations - which are often small and under resourced (ie not resourced at all) - do not mistakenly or inappropriately grant leases. Legislative safeguards of this nature are not uncommon. Other safeguards under Northern Territory legislation include the Land Council/Land Trust arrangements in the *Parks and Reserves (Framework for the Future) Act and Regulations* and the *Kenbi Land Trust*

Act (whereby a Land Trust, as owner of freehold land, may grant a lease provided that the responsible Land Council is satisfied that the traditional Aboriginal owners consent).[1]

Relevantly, the Ministerial consent safeguard does not extend to other actions which an association or corporation, as freehold owner, may lawfully take - such as arbitrarily or unreasonably excluding residents (especially where not members) from entering the freehold to access their homes or from using public facilities or areas thereon. Particularly for sizeable communities it is appropriate that safeguards exist to prevent arbitrary or inappropriate exercise of such power.

A third observation is pertinent. Aboriginal associations or corporations whose only role is to hold title in remote regions and which do not generate income or employ staff understandably have difficulty in maintaining documentation (including as to membership and office bearers) and complying with annual reporting requirements. In turn, non-compliance results in prosecution and deregistration with freehold title being forgone (in the case of NT registered associations, title is vested in the Commissioner for Consumer Affairs; in the case of Commonwealth registered corporations, title is vested in the Registrar of Indigenous Corporations).

At this point Land Councils - as responsible institutions of last resort - are ordinarily requested to assist associations or corporations to properly order their affairs, defend prosecutions, and arrange for revesting of the freehold title. The NLC regularly commits significant resources to this task only to find, within a few years, that the same associations or corporations are again in breach and require assistance.

The Registrar of Indigenous Corporations (Cth) is presently prosecuting nine corporations in the NLC's region for non-compliance with reporting requirements, four of which own the freehold title to their community living areas (this being their sole function). The NLC is assisting these corporations, including by facilitating legal assistance in Court. The NLC is also assisting seven NT registered associations,[2] four of which owned the freehold titles to community living areas (including the sizeable communities of Yarralin and Bulla) - but were deregistered in 2003, such that the freehold title is now vested in the NT Commissioner of Consumer Affairs. It is anticipated that in due course the freehold titles will be re-vested in the associations, except in the case of Yarralin which is the subject of a land claim settlement in 2009 whereby there will be a grant of Aboriginal land with lease arrangements.[3]

This continuing cycle whereby significant taxpayers' funds are unnecessarily dedicated to resolving non-compliance is directly caused by deficiencies in the statutory scheme. It is well known, and not at all surprising, that small associations or corporations holding title in remote regions but having no income or staff are at significant risk of continuing non-compliance. Particularly for sizeable communities, certainty as to the freehold title and its ownership is required including to ensure security regarding derivative leases and for the occupants (regarding residential housing, their use of public facilities, and access to the community). Sizeable communities cannot properly function

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[1] Examples of safeguards under Commonwealth legislation include the Land Council/Land Trust/Ministerial consent arrangements in the *Aboriginal Land Rights (Northern Territory) Act 1976*, and the requirement that a prescribed body corporate must consult with the responsible native title representative body before taking any action which affects native title (*Native Title (Prescribed Bodies Corporate) Regulations 1999* regs 8(2) and 9(6)).

[2] A total of 23 associations or corporations were assisted by the NLC in 2011.

[3] Wickham River Land Claim No 76. Under the settlement Aboriginal land will be granted when the Commonwealth five year lease under the *Northern Territory National Emergency Response Act 2007* expires on 17 August 2012.

without that security. Again, the policy setting whereby there is a continuing cycle of uncertainty as to freehold title and derivative tenures is misplaced and cannot be justified.

For that reason, together with the Central Land Council, the NLC has recommended that the Northern Territory implement a Land Council/Land Trust arrangement to ensure security of titles as in existing NT legislation. At this stage, that recommendation has not been accepted.

The above background informs the proposed reforms contained in the *Stronger Futures in the Northern Territory Bill 2011* and related Bills. Clause 35(1) of the Bill empowers the enactment of regulations which may modify NT law regarding community living areas as to the use of land, dealings in land, planning, infrastructure, or prescribed matters.

Three observations may be made. First, in circumstances where the Commonwealth is focused on improving socio-economic conditions in communities, the regulations provide certainty that anachronistic impediments to tenure for necessary commercial and government activity may readily be removed.

Secondly, clause 35 is sufficiently broad so as to empower regulations which incorporate appropriate safeguards such as Ministerial consent (albeit not Land Council/Land Trust arrangements). For example, the existing requirement of NT Ministerial consent for leases greater than 12 months could be adopted in Commonwealth regulations which enable leases for commercial purposes, infrastructure, essential services and housing.

Thirdly, before making regulations the Minister must consult including with the Northern Territory Government, the association or corporation which owns the living area, and the relevant Land Council. This consultative process will enable consideration of appropriate safeguards in proposed regulations. Indeed such consultations may well lead to agreement as to appropriate Northern Territory legislation, such that regulations are never promulgated. The fact that the Bill is subject to a seven year review (cl 117) and 10 year sunset clause (cl 118), and that the Northern Territory retains power to amend its legislation even where it has been modified by Commonwealth regulations (cl 35(3)(c)), evinces a legislative aim that that outcome occurs.

The NLC looks forward to working with both the Commonwealth and the Northern Territory with a view to resolving the above concerns through agreed legislation.

Schedule 2, item 4, of the related *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011* inserts a new provision, s 23(1)(eb), into the *Aboriginal Land Rights (Northern Territory) Act 1976* which expressly provides that Land Councils have a statutory function to assist Aboriginal associations or corporations which own community living areas when requested to do so.

This provision is clarificatory. It conveniently removes any doubt as to the ambit of a Land Council's statutory functions. Land Councils have provided assistance in relation to community living areas since their inception. Insofar as the NLC is aware, it has not been suggested that providing such assistance is inappropriate, or beyond power.[4]

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[4] It is noted that the functions of a statutory entity are not necessarily limited to those expressly stated, but may arise by implication from the legislation (see, for example, *Neill v Glacier Metal Co Ltd* 1965 1 QB 17 and *Varga v Jongen* 1970 92 WN (NSW) 1032). It is also noted that the existence of a statutory function does not oblige an entity to perform that

However as presently drafted the proposed s 23(1)(eb) inappropriately includes a constraint. If assistance is provided regarding a community living area, this must and can only be "at the Land Council's expense". This constraint - which appears inadvertent - is inappropriate, both in practical terms and also from the perspective of broader Commonwealth policy. Ordinarily Land Councils would meet the expense of providing assistance, however exceptions will appropriately arise especially where a proponent is able to contribute to those expenses. For example, a mining company which seeks tenure for a road across Aboriginal land would ordinarily contribute to expenses (eg the costs of meetings and sacred site surveys). There is no constraint in the statute to preclude such cost recovery; indeed s 33A contemplates that this will occur. Where a portion of that road also crosses a community living area, a mining company would likewise contribute to such expenses. As presently drafted, the proposed s 23(1)(eb) appears to preclude such contribution.

Since 2002 (pursuant to orders made by the Finance Minister), Commonwealth policy has required full recovery of costs by Commonwealth entities, including Land Councils, except "where it is not cost effective, where it is inconsistent with government policy objectives or where it would unduly stifle competition or industry innovation."[5] As presently drafted, the proposed s 23(1)(eb) is inconsistent with that policy.

The drafting of the proposed s 23(1)(eb) appears to have inadvertently been adopted from the existing s 23(1)(f), which empowers a Land Council to provide legal assistance in relation to traditional land claims "at the expense of the Land Council". That constraint has not caused difficulty in the context of land claim litigation, but is inappropriate where development is proposed on existing titles. The appropriate precedent is s 23(1)(e) which empowers a Land Council to negotiate leases regarding development on Aboriginal land. That provision does not include any cost recovery constraint.

It is submitted that the cost recovery constraint in the proposed s 23(1)(eb) should be removed. This can be achieved by deleting the words "at the Land Council's expense".

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function in any particular case (*Que Noy & Ors v Tapnguk & Ors and Northern Land Council* 1997 6 NTLR 118 par 21 per Mildren J). Land Councils are still required to prioritise their performance of functions in accordance with available resources (s 23AA), and cannot assist in relation to community living areas unless requested to do so.

[5] Finance circular 2005/09 cl 4.