NORTHERN EDITION

LAND RIGHTS NEWS

"Our Land, our Sea, our Life"

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As we look to celebrate the 40th anniversary of the *Aboriginal Land Rights (Northern Territory) Act*, final settlement has been reached over the Kenbi land claim. In a battle that has been going on for nearly as long as the existence of the Land Rights Act itself, the Kenbi claim has been the focus of numerous court cases and claim hearings, and hostility from a succession of CLP governments.

Nearly four decades after it was lodged with the Aboriginal Land Commissioner, the Kenbi land claim has been settled.

The settlement was announced at a press conference at NT Parliament House in Darwin on Wednesday 6 April, fronted by NLC chairman Samuel Bush-Blanasi, Chief Executive Joe Morrison, Federal Indigenous Affairs Minister Nigel Scullion and NT Chief Minister Adam Giles.

A formal hand-back ceremony was expected to be arranged within the coming months.

Over its tortuous history the claim was the subject of two extensive hearings, three Federal Court reviews and two High Court appeals before the then Aboriginal Land Commissioner Peter Gray delivered his report in December 2000.

"This is a momentous day for the whole community," NLC Chairman Samuel Bush-Blanasi said. "This will open the door for the future economic development and the cultural protection of the Cox Peninsula area that has Aboriginal people at its heart."

Consent to the final settlement by Traditional Owners (known as the Tommy Lyons Group) followed extensive consultations conducted by the NLC with them, and with the Belyuen Group and Larrakia families.

Mr Bush-Blanasi said he acknowledged that not all Larrakia families have approved the settlement, and that some continue to disagree with the Land Commissioner's findings regarding traditional Aboriginal ownership.

"I accept that for some Larrakia this whole process has caused much distress. However, this claim has hung over us all for far too long. Now is the time to move forward–otherwise, there is a real prospect that it might never be settled," Mr Bush-Blanasi said.

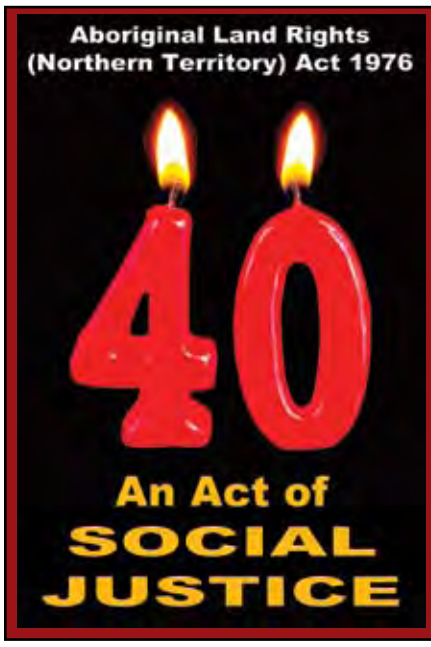
"The path is now clear to tidy up final legal details before a handback ceremony. It is most fitting that this will occur this year, the 40th anniversary of the enactment of the Land Rights Act."

Chief Minister Adam Giles said: "This is truly an historic day and secures the future of Darwin for generations to come. It also provides the family groups involved with real benefits. These benefits will open up new economic opportunities as well as preserving their cultural ties with the land.

"I think the settlement that has been accepted is extremely innovative as provides a combination of Territory freehold land as well as granting of claimed land under the Land Rights Act."

Mr Giles thanked the Traditional Owners and family groups and the negotiating teams from the Territory Government and the NLC for their diligence in crafting the settlement.

"While the settlement has obviously taken a long time, and had to factor in legal developments such as Native Title and the Blue Mud Bay High Court decision, I think it really does represent an excellent deal for all parties."



Would Aboriginal land rights be recognised today as robustly and securely as they were enshrined in the Aboriginal Land Rights (Northern Territory) Act 1976?

It's a question worth pondering 40 years after the Act was passed by the Commonwealth Parliament, and this issue of Land Rights News (Northern Edition) recalls its sinuous history.

The Act was shepherded through the Parliament by the then Minister for Aboriginal Affairs, Ian Viner QC, who writes on pages 6 & 7 that its enactment was the high point of its history. He laments the changes which various governments have made to the Act in the decades since.

On pages 8-11, we trace the long and relentless campaign of opposition to land rights in the Northern Territory from powerful political and bureaucratic forces.

Father Frank Brennan, professor of law at Australian Catholic University, on pages 12-15, charts the conduct of the Gove Land Rights case, first lodged in 1968, which set the scene for the introduction of the Land Rights Act.

A word from the Chair

I was very aware that history was in the making on Wednesday 6 April when I assembled in the Litchfield Room at Parliament House in Darwin with my CEO Joe Morrison, NT Chief Minister Adam Giles and Federal Affairs Minister Nigel Scullion.

We gathered before a big media crowd to announce that final settlement had been reached on the Kenbi claim, nearly 37 years after the NLC lodged the claim with the Aboriginal Land Commissioner. Four of the Kenbi traditional owners were there too.

We now look forward to the Commonwealth Government, especially the Department of Finance, tying up loose ends so that a date can be set for a formal handback ceremony. I want that to happen as soon as possible, because the Kenbi claim has dragged on for far, far too long.

Members of the Tommy Lyons group, the Belyuen group and Larrakia families deserve the right to start enjoying as soon as possible the benefits which the settlement will deliver. Real Aboriginal involvement in the long-term development of Darwin will also follow.

Then there's the handback of land at Yarralin to look forward to later this year. The Wickham River claim has been hanging around even longer than Kenbi.

It's fitting that all this is happening in 2016, the 40th anniversary of the *Aboriginal Land Rights (Northern Territory) Act 1976*. It's also, of course, the 50th anniversary of the Wave Hill walk-off.

The people of Yarralin are where they are today because they walked off Victoria River Downs Station in 1972, fed up with pay and conditions, and joined the Gurindji at Wattie Creek; they returned to what is now Yarralin after 18 months.

We devote several pages in this issue of Land Rights News to the history of the long struggle for land rights in the Northern Territory, in the face of determined opposition by politicians and bureaucrats. Reading that history leads me to wonder how different the social landscape of the Northern Territory might be if there had been a more enlightened rule over past decades.

In Katherine last month I attended a meeting of Aboriginal Housing NT (AHNT), a new body which provides a strong Aboriginal voice on housing issues through advocacy and representation to governments.

Government policies over the past decade have severely sidelined Aboriginal people when it comes to housing, and AHNT wants the NT Government to transfer management of public housing for Aboriginal people to Aboriginal community control.

The state of Aboriginal housing in the Northern Territory is beyond crisis point: overcrowding is severe, there's a huge shortfall of houses, and homelessness here is 17 times worse than anywhere else in the country.

Finally, the three-year term of the NLC's current Full Council expires this year. Again, I urge those eligible, especially women and young people, to consider putting your hands up for the election to a new Full Council.

Details of the election timetable can be found on the page 25 of this issue.

Finally, I thanks Chips Mackinolty for his contributions of artwork to this issue.

Regards to you all in this big year of anniversaries.

Samuel Bush-Blanasi, Chairman

2016 NT Ranger Awards

Nominations close Friday 27 May

The awards are open to any person working in protected areas conservation and management in the Northern Territory, including apprentices, trainees, school-based apprentices and those working on country.

The judging panel will comprise representatives from the Northern and Central Land Councils, Parks Australia, the NT Ranger Association and the NT Parks and Wildlife Commission. The panel will be looking for nominations that demonstrate environmental excellence, partnerships, leadership and outstanding team and individual performance.

Nominations are being called for the following five awards:

NT Ranger Award for Outstanding Environmental Achievement

This Award will recognise outstanding efforts of frontline staff in implementing programs to achieve environmental and conservation outcomes. The award will acknowledge significant commitment to protected areas management, and might include (but is not restricted to), weed, feral or fire management activities in which the individual has gone above and beyond to see a program effectively implemented or to ensure the program is delivered successfully. In particular, the award will recognise individuals who display exceptional commitment to delivery of environmental outcomes.

NT Ranger Award for Commitment to Partnerships and Diversiity

The award will acknowledge the efforts of individuals for their efforts to embrace partners (other Ranger groups/organisations, recreational stakeholders, environmental groups), including members of the community, to achieve environmental and protected areas management outcomes. This award is for individuals who recognise the need and importance of partnerships and collaboration, and are effective in engaging and working closely with a range of different groups to achieve significant outcomes.

NT Ranger Award for Outstanding Team Effort

This Award will recognise the exceptional efforts exhibited by frontline teams in protected areas management. The Award will include activities relating to planning, implementation and evaluation of projects and programs to achieve environmental and social goals in relation to protected areas management and conservation.

NT Ranger Award for Innovation in Protected Areas Management

This Award recognises outstanding efforts to protect the natural environment, and particularly relates to the development and implementation of original and innovative advancements in conservation and environmental protection for protected areas.

NT Ranger Award for Leadership in Protected Areas Management

This Award will recognise exceptional leadership of individuals working in protected areas management. The award will recognise individuals who demonstrate achievements against the strategic vision of the organisation, sound decision-making, exemplary communication and collaboration with others, accountability for actions, recognition and acceptance of cultural and social diversity, and fair and just treatment of others. The award will be awarded for comprehensive and recurrent achievement against these criteria, rather than for a specific situation in which this individual exemplified these characteristics.

Nominations can be made online at **www.parksandwildlife.nt.gov.au**

The awards will be announced at a ceremony in June.

IAS – "A price too high"

A Parliamentary committee has criticised the way the Federal Government's new Indigenous Advancement Strategy (IAS) was rolled out.

The Abbott Government's 2014-2015 Budget announced that all programs, grants and activities for Indigenous Australians would be "rationalised and streamlined" under the new IAS, which would be administered by the Department of the Prime Minister and Cabinet (PM&C).

From 1 July 2014, more than 150 programs previously delivered by a range of departments were consolidated into five funding streams: jobs, land and economy; children and schooling; safety and well-being; culture and capability; and remote Australia strategies. The Budget estimated the new arrangements would save $534.4 million by eliminating duplication and waste: "The strategy has been designed to reduce red tape and duplication for grant funding recipients, increase flexibility, and more efficiently provide evidence-based funding to make sure that resources hit the ground and deliver results for Indigenous people."

The implementation of the IAS caused chaos and confusion among hundreds of Indigenous organisations.

Having received 86 submissions, the Commonwealth Parliament's Finance and Public Administration References Committee conducted public hearings in Canberra and Darwin, and reported in March.

The committee acknowledged that those who wrote submissions and gave evidence saw the potential benefit that the new IAS process would deliver. However, it heard that the timetable to bed down the policy and administrative changes "in a shift of this magnitude" was too ambitious.

"There was little to no consultation or engagement with communities and organisations on this fundamental change to Aboriginal and Torres Strait Islander programs and no input sought at the start of this process," the committee concluded.

"In addition to implementing a completely new and untested way of doing business, the process was further complicated by machinery of government changes and budget cuts."

"Machinery of government changes" is official speak for the upheaval brought about by the Prime Minister's decision to move administration of Indigenous affairs, mostly from the old Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), into his own Department of the Prime Minister and Cabinet. That proved to be as much of a shambles as the implementation of the IAS.

The committee also noted that the same 2014-15 Budget also cut around a quarter in grants funding by the Department of Social Services (after this cut the Government was forced to introduce multiple rounds of emergency funding to address gaps in frontline services).

"There are overlapping concerns about the two (IAS and DSS) processes," the committee concluded.

In the view of the committee, both processes reflected fundamentally similar problems:

- A lack of consultation
- Rushed processes with poor transparency
- Cutting the number of funding areas created significant challenges as organisations had to refocus their applications
- Uncertainty for providers, and negative impacts on smaller organisations, and
- Resulting gaps in service deliveries.

The committee reported that it was "concerning that such fundamentally similar failures were replicated across multiple areas.

"In addition to the lack of consultation at the start of the process and the short timetable for transition, the committee is concerned about many elements of the program design. The committee questions the evidence base for the program design.

"While there was support for streamlining, the five streams do not appear to clearly or adequately cover the field of programs required to meet the objectives of this policy shift. In addition, the shift to a competitive tendering model appeared to disadvantage Indigenous organisations. While there was support for streamlining, the five streams do not appear to clearly or adequately cover the field of programs required to meet the objectives of this policy shift. In addition, the shift to a competitive tendering model appeared to disadvantage Indigenous organisations.

"Changes to the process as it was underway, including the funding extension and the 'gap filling' processes, made it appear as if the IAS was being adapted on the run, which to many stakeholders meant the new process lacked transparency and was not a level playing field.

"Communication throughout the process was poor, confused and confusing. It was clear to the committee that due to the lack of appropriate communication and information, the process was not well understood as evidenced by almost half the applications being non-compliant.

"The committee finds it profoundly disappointing that eight months after acknowledging shortcomings such as the lack of consultation and information provided to applicants, the situation does not appear to have improved. Many organisations are in the same position they were last year of having funding running out on 30 June 2016 and not knowing what the next steps are. This is despite the minister's (Indigenous Affairs Minister Nigel Scullion's) assurances that the new process would result in longer term funding contracts. In addition the committee notes that the release of the revised guidelines to apply for funding that will need to start from 1 July has been delayed which will result again in a compressed period of time to lodge applications.

"While the idea of IAS was welcomed, the committee believes the price paid by the Indigenous communities for implementing the unreasonable timetable was too high. This would appear to be a case of goodwill being hard to gain and easy to lose."

Kenbi Land Claim Settled Next pages

Parties to the Kenbi Land Claim settlement at Parliament House, Darwin, 6 April: From left, NLC Chairman Samuel Bush-Blanasi, NLC CEO Joe Morrison, NT Lands and Planning Minister Gary Higgins, Kenbi Traditonal Owner Jason Singh, NT Chief Minister Adam Giles, Federal Indigenous Affairs Minister Nigel Scullion, and Traditional Owners Raylene and Zoe Singh.

Kenbi Land Claim Settled

NLC CEO Joe Morrison spoke at a press conference at Parliament House, Darwin, where the Kenbi settlement was announced on 6 April. Here is the text of his address.

The first business I have here today is to acknowledge the Traditional Owners of the land we stand on, the Larrakia people.

Their ancestors must be thanked for their long-standing dedication and capacity to care for their country and kin.

I welcome the attendance here today of the Federal Minister for Indigenous Affairs, Senator Nigel Scullion, and the Northern Territory Chief Minister Adam Giles–both of whom have worked with the Northern Land Council to bring this occasion to fruition.

I want to extend a special welcome to the Traditional Owners–known as the Tommy Lyons Group–who have joined us in the front row on this momentous day.

It is in fact a momentous day because the Kenbi land claim has hovered over this landscape like a dark cloud for far too long.

Today, that cloud has begun to dissipate.

It was way back in 1979–May the 20th 1979–when the first Aboriginal Land Commissioner, the late and much respected Justice John Toohey, received the Kenbi land claim from the Northern Land Council. That was almost 37 years ago.

I was just a young boy back then, and Gloria Gaynor had just topped the Billboard Hot 100 with her song, *I Will Survive*.

Sadly, most of the original claimants to the said land claim have not survived.

The Kenbi land claim has gone down in our history as the most complex and hard-fought land claim in the history of the *Northern Territory Aboriginal Land Rights Act*, which was enacted by the Commonwealth Parliament in late 1976.

All in all, the Kenbi land claim was the subject of two extensive hearings, three Federal Court reviews and two High Court appeals.

Five Aboriginal Land Commissioners would deal with the claim over two decades, before Commissioner Peter Gray presented his recommendations in December 2000.

The history since then has been as complicated as the claim process itself, and, sadly, many more Aboriginal people who would have benefited from Commissioner Gray's recommendations have passed away over that time.

For the past decade, the NLC has led a protracted, but collaborative consultation process which has brought us all to this press conference this afternoon.

I'm happy to announce that traditional Aboriginal owners, as determined by Land Commissioner Gray, have consented to the terms of the final settlement proposal for the Kenbi land claim.

Although traditional owners had some years ago consented to many of the terms of settlement, two important issues did remain outstanding: a compensation package to allow public fishing access to the intertidal zone and some beaches of the Cox Peninsula, and the remediation of parcels of contaminated land over there.

Late last year and early this year, the NLC presented the final settlement proposal for consideration by traditional owners, the Larrakia people and the Belyuen people.

I do acknowledge that the settlement does not have the support of all Larrakia families.

Their misgivings have focused mainly on the Land Commissioner's findings as to who are the traditional owners, and that matter has been a source of great disputation among some of the Larrakia families, even to this day.

I can also tell you that the NLC has been called on to review the Land Commissioner's findings about traditional ownership.

But we don't have a statutory function, or statutory power, to review traditional Aboriginal ownership with respect to land which is not yet Aboriginal land. So it would not be appropriate to make a decision to review traditional ownership at this time.

> **"It's time for reflection, too, as we remember all those who are no longer with us – those who never got to see their rights realised."**

It is therefore appropriate that we follow the Land Commissioner's findings, and that's what we've done.

At this stage, let me remind you what the Land Commissioner said back in 2000 that his recommendation would benefit many more Aboriginal people, including the Larrakia, not just the traditional owners whom he identified.

I quote from his recommendation:

> "Under the Land Rights Act, a land trust holds land for a class of people much broader than those who fit within the definition of traditional Aboriginal Owners."

In his report, he said that all the claimants, some 1600 Aboriginal people, would be advantaged without question, and the total number might be as high as 2200.

I'm here today to report that earlier this week the NLC advised Minister Scullion and Chief Minister Giles of the traditional owners' acceptance of the final settlement.

And the Northern Territory Cabinet approved this settlement at its meeting yesterday in Alice Springs.

I wish to thank both Senator Scullion and Chief Minister Giles for their support of the settlement and for their presence here today.

Getting here has been an exhaustive and exhausting process for all parties – for the traditional owners themselves, for the Belyuen group, for the Larrakia families and for all the other affected parties.

We at the NLC have followed our legal obligations to the letter, and I thank the NLC staff and council members whose tireless efforts over many years have helped to bring us together this afternoon.

I know that the journey has been stressful and distressing for many.

But given the tortuous history of the Kenbi land claim, the NLC wants it now to be finalised, lest it lapses into limbo with the real prospect that it might never be settled.

I want this day to be an occasion for celebration, in spite of the reservations held by some of the Larrakia people.

It's time for reflection, too, as we remember all those who are no longer with us – those who never got to see their rights realised.

That final realisation will arrive when the Commonwealth hands over the title deeds to those lands just across the water from where we sit today.

I know that Senator Scullion and his officers will be doing their best to arrange a formal handback ceremony as soon as possible.

That will provide certainty to the whole community, and open the door for the future economic development and the cultural protection of the Cox Peninsula area that has Aboriginal people at its centre.

Kenbi Land Claim Chronology

19 May 1975 Before the enactment of the *Aboriginal Land Rights (Northern Territory) Act*, correspondence was forwarded to the Interim Land Commissioner, Justice Dick Ward, seeking advice about the lodgement of a land claim over land on Cox Peninsula.

22 December 1978 Town Planning Regulations, subsequently held to be invalid as made for an improper purpose, were promulgated under the *Town Planning Act* (TPA) These regulations stated that large areas of land (including submerged lands in Darwin Harbour) surrounding Darwin, Katherine, Tennant Creek, and Alice Springs were to be treated as if part of a town. The regulations were made notwithstanding earlier correspondence from the Northern Land Council (prior to Northern Territory self government) foreshadowing a land claim, and requesting that there be no alienation of land.

20 March 1979 A land claim to the Cox Peninsula and various islands to the west (the Kenbi land claim) was lodged.

2 November 1979 On the basis that the Planning Regulations (under the *Planning Act 1979* which replaced the Town Planning Regulations in 1979) were relevant to the issue of whether the Kenbi Land Claim could be considered, the Land Commissioner (Justice John Toohey) held that regulation 5 was prima facie valid, and that the regulation could not be attacked by impugning the motives of the Crown (ie, the Administrator). Justice Toohey had earlier reached the same conclusion regarding the Town Planning Regulations (in a hearing on 26 June 1979).

24 December 1981 Justice Toohey's conclusion was overruled by the High Court in *Re Toohey; ex parte Northern Land Council* 1981 151 CLR 170. The Court proceeded on the basis that the relevant legislation was the *Planning Act 1979*, in particular regulation 5. The matter was returned to the Land Commissioner for further consideration.

2 April 1982 Justice Toohey ordered that the Northern Territory provide discovery of documents relating to the promulgation of regulations made under both the TPA and the *Planning Act 1979*. The Territory claimed legal professional privilege of particular documents. These documents comprised legal advice from the then solicitor-general to the NT Government about methods by which the operation of the *Land Rights Act* could be defeated.

3 & 6 February 1984 Justice Toohey's successor, Justice William Kearney ordered that legal professional privilege did not apply because the documents had been created as part of a plan to defeat a potential land claim under the *Land Rights Act*.

14 September 1984 The Federal Court upheld Justice Kearney decision (*Attorney-General (NT) v. Kearney and Northern Land Council; Re Kenbi (Cox Peninsula) Land Claim 55* ALR 545; 1984 FCR 534).

25 September 1985 The High Court upheld the Federal Court's decision (*Attorney-General (NT) v. Kearney* 1985 158 CLR 500).

30 March 1987 Justice Kearney's successor, Justice Michael Maurice began hearings about the validity of the regulations made under the Planning Act 1979, but was required to stand down on the basis of perceived bias arising from comments,critical of the Northern Territory Government made in another claim. (*Re Maurice, Aboriginal Land Commissioner; ex parte Attorney-General for the Northern Territory 1987* 17 FCR 422; 73 ALR 123). The High Court refused leave to appeal on 12 June 1987.

8 December 1988 As a result of the decision of the High Court in *Re Kearney; Ex parte Northern Land Council 1984* 158 CLR 365, the validity of the regulation made under the *Planning Act 1979* was no longer an issue. The High Court held that the relevant issue was whether land was claimable at the time of lodgement of the application, and that a later change in the status of the land (through alienation or gazettal as a town) was irrelevant.

Consequently Justice Maurice's successor, Justice William Olney examined the regulations made under the TPA, holding that they were invalid as made for the improper purpose of preventing claims under the *Land Rights Act*. The regulations were held to be ultra vires the TPA, an argument of inconsistency with the *Land Rights Act* not being considered.

In his consideration of the validity of the regulation made under the *Town Planning Act 1964* Justice Olney stated: "The regulations were made in an attempt to ensure that the authority of the Northern Territory legislature and executive government over the Darwin regulation area would not be diminished or otherwise inhibited by the making of an Aboriginal land claim in respect of that land." (*Attorney-General for the Northern Territory v. Olney and the Northern Land Council* no. NG 1439/88; Fed. No. 325 - p. 11 of internet copy.)

He further stated that this "was the sole reason for making the regulations."

28 June 1989 The Federal Court upheld Justice Olney's decision (*Attorney-General for the Northern Territory v. Olney and the Northern Land Council* no. NG 1439/88; Fed. No. 325 – unreported, available on the internet). On 15 September 1989 the High Court refused leave to appeal.

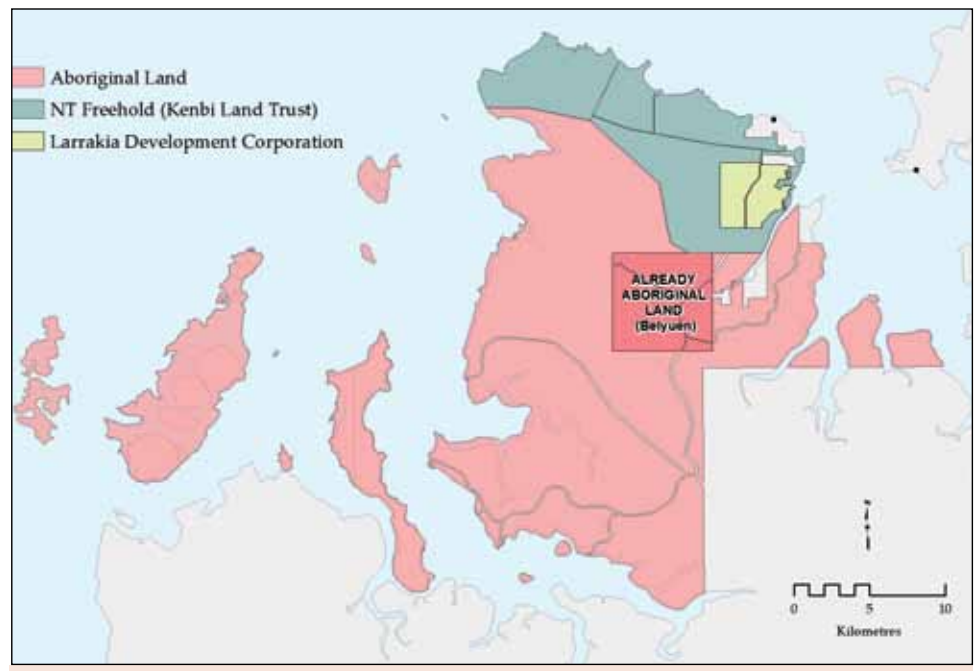
21 February 1991 Justice Olney, after conducting a hearing over 30 sitting days between 13 November 1989 and 8 December 1990, issued an interim report which found that there were no traditional Aboriginal owners of the land claimed because that term, as defined in the Act, required that there be at least two persons of patrilineal descent who had primary spiritual responsibility for sites on land. Justice Olney found that only one such person existed.

27 February 1992 The Full Bench of the Federal Court upheld an appeal against Justice Olney's decision, finding that persons of matrilineal descent can satisfy the term "traditional Aboriginal owners" as defined in the Act (NLC v Olney 1992 34 FCR 470).

11 June 1992 Justice Olney, whose appointment as Land Commissioner had expired, held that he consequently had no function to perform regarding the further hearing of the claim.

16 October 1995 The claim resumed before the new Land Commissioner, Justice Peter Gray, and continued over 57 sitting days to 4 June 1999.

14 December 2000 Justice Gray finds that six persons are traditional Aboriginal owners in relation to most of the land claimed, and recommends that it be granted as Aboriginal land. Justice Gray emphasised that the land would be for the benefit of all 1600 Larrakia people who have traditional interests in the land, not just the six traditional Aboriginal owners.



The Kenbi settlement provides for:

- 51,152 hectares to become Aboriginal land, to be granted to the Kenbi Aboriginal Land Trust. Communal title will be vested in the trust for the benefit of traditional Aboriginal owners, the Larrakia and Belyuen residents. Aboriginal land is inalienable–it cannot be bought or sold–but it can be leased with the informed consent of the traditional owners, who will also have a right of veto over mining and exploration.
- 10,766 hectares to be granted as NT freehold to the Kenbi Land Trust. It is designed to work similarly to Aboriginal land, and communal title will be vested in the trust for the benefit of the traditional owners, the Larrakia and Belyuen residents. The informed consent of traditional owners will be required for surrender or lease of the land. No permit system will apply, but the laws of trespass will apply because the land will be private freehold; and there will be no right of veto over exploration and mining.
- 1636 hectares to be granted to the Larrakia Development Corporation as NT freehold land. The LDC will be free to develop and sell this land as it sees fit, in accordance with planning and other laws.

In 2008 the High Court's Blue Mud Bay decision determined that Aboriginal land extends to the low tide mark. The Northern Land Council and the Northern Territory Government negotiated a compensation package that allows permit-free access for people to visit and fish in the Cox Peninsula waters and beaches. The compensation package includes:

- Grant of a 3.03 hectare industrial lot on the railway corridor at East Arm. A 2015 valuation values the block at $6.3 million.
- Leasehold title over Karu Park, the previous site of the Retta Dixon Home. It will be granted as a Crown Lease in Perpetuity, to be held by the Larrakia Development Corporation.
- Preference to proponents who propose to partner with Aboriginal organisations for the development of Crown land in the Darwin area.
- A proposal for an entity nominated by the Larrakia Development Corporation to partner in a residential land release at Farrar West–incorporating 220 lots.

The following rights will be recognised as part of the settlement:

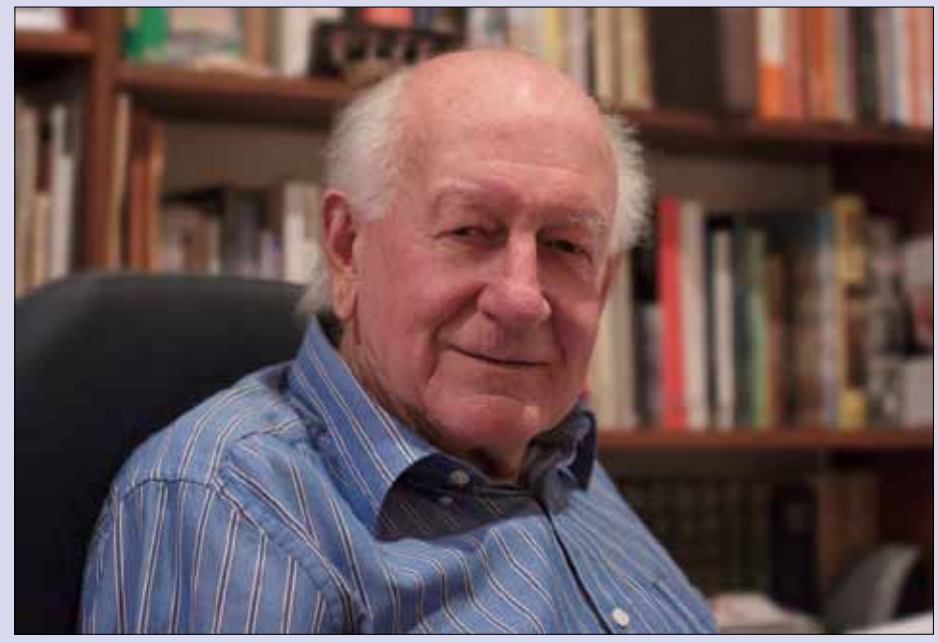
- Existing private uses on the Peninsula (squatters, mining tenements and others).
- Commonwealth Government uses (e.g., Charles Point lighthouse).

The 11 roads and tracks on the Peninsula will remain as Territory roads. The NT Government says there are 33 squatters shacks located in the road corridors; they will be offered a 5x5 year lease or occupancy agreement which will be managed by the NLC.

The Aboriginal Land Rights Act:

The past, present and future

The Land Rights Act is 40 years young. It has a long time to live for generations of Northern Territory Aboriginal people. The Act has proved to be a revolution in the Northern Territory and national relationships with Aboriginal people. In truth it was the foundation for reconciliation which later spread across Australia with the reconciliation movement after the Aboriginal Deaths in Custody Report. Land rights was that important 40 years ago writes Ian Viner QC.



Ian Viner QC was the Liberal member for the House of Representatives seat of Stirling (WA), 1972-1983, and Aboriginal Affairs Minister (1975-78) under Prime Minister Malcolm Fraser. Against sometimes fierce opposition, he shepherded the *Aboriginal Land Rights (Northern Territory) Act 1976* through the Commonwealth Parliament.

In this piece written for *Land Rights News*, Mr Viner recalls the tribulations he encountered from politicians, bureaucrats and special interest groups as he negotiated the passage of the Act, and he laments the efforts of many parties since to diminish its integrity.

Mr Viner, who was appointed an Officer of the Order of Australia in 1999, is still a practising barrister.

I saw the Act as the "simple justice" which drove the Woodward Commission to recommend recognition of traditional ownership of Aboriginal land and an example of the unity and harmony which was possible among the people of the Northern Territory.

White Northern Territorians and the Northern Territory Government of the day in 1976 did not all see the Act in that way. Many saw the Fraser Government's Land Rights Bill as a threat to their economic, social and political dominance of the Territory.

Regrettably, many non-Aboriginal Territorians and many Territory Governments since 1976 have continued to see the Act in that negative way.

Even more regrettably, policies and actions of Commonwealth Governments from Hawke to the Howard Intervention and its continuation by the misdirected Stronger Futures regime under the Rudd and Gillard Governments perpetuated that early fear and negativity by repeatedly tampering with the Act as if it was a threat to the Territory's future and an obstruction to Aboriginal aspirations.

The belief that the Land Rights Act was simple justice and an opportunity for harmony are not thoughts just for this 40th anniversary. They were things I said in Parliament at the time and in articles I wrote in 1978 for the *Northern Territory News*. In one of those articles I said, "In recent months I have read and heard many alarming rumours about the Aboriginals of the Northern Territory" after the passing of the Act. The rumours were indeed alarming and the politicians and interests opposed to land rights were ferocious in their opposition.

As Minister I had to meet face to face the powerful interests of miners, the oil industry, cattle industry, the fishing industry, big and small business and the politicians of the Territory. Not only the Darwin politicians. The Commonwealth Department for the Northern Territory was like an opposition within Government, not an opposition across the floor of Parliament. The Department was like an enemy within, arguing, objecting, frustrating at every turn the preparation and passage of the bill through Parliament.

The Northern Territory Government in 1976 was not made up of members of a Parliament like it is today. There was no Northern Territory Parliament. The Government was led by Goff Letts. He was one of those ferocious in opposition to the Act. On one occasion, Letts stormed down to Canberra to see Prime Minister Malcolm Fraser publicly calling in advance for the Prime Minister to sack me. Letts saw Fraser, demanded my resignation and said if Fraser did not sack me he would resign. As the Prime Minister told me afterwards, his reply was a simple one, "Goff, you had better resign, then". Letts did not resign. He slunk out of Canberra. The Act passed through the Commonwealth Parliament with the steadfast support of Prime Minister Malcom Fraser and Deputy Prime Minister Doug Anthony, guided through the Senate with the leadership of my friend and colleague, Queensland Aboriginal Senator Neville Bonner.

There was no slinking out of Canberra by Roy Marika and Silas Roberts from the Top End and Wenten Rubuntja from Central Australia after their meetings with the Prime Minister. I recall those ambassadors for the Aboriginal people with affection. They were received by Malcolm Fraser with great respect. I know their presence and their message had a significant and lasting impact upon him.

In Darwin, however, Northern Territory Governments since 1976 did not let up in their obstruction and frustration of the operation of the Act whenever they had the opportunity, as Aboriginal Land Commissioner Justice John Toohey pioneered the hearings of the first land rights applications. Northern Territory Governments fought election after election on racial grounds. Even today the Northern Territory Government regressively wants to take over the Act and bring land rights under its control. I hesitate to think what would happen to the Act under the flip flop governments of the Territory.

The Land Councils were always under relentless attack accused of being political for standing up for land rights and their responsibilities to traditional owners and Aboriginal communities.

The Land Councils were not without their political opponents when the Land Rights Bill was passing through Parliament, even in some Aboriginal quarters. They were too large; they were too powerful, they were not representative, it was argued. Like the Woodward Commission recommendation, I believed land rights had to be supported by strong, well-resourced Aboriginal bodies if the Act was to survive all the doubters and future political pressure. That view has proved to be right, although one of the most difficult and contentious decisions I had to make was whether to provide the opportunity for new Land Councils to evolve. I was conscious of the Tiwi Islands situation. Who would know what the future may require? I decided there had to be a mechanism in the Act for evolution, which is what has occurred in the special circumstances of the Tiwi Islands and Anindilyakwa Land Council for Groote Island.

Having strong Aboriginal bodies able to represent traditional owners and Aboriginal communities against powerful political and other forces has demonstrated the value of the views of the Woodward Commission and myself as Minister. Debate and discontent will always accompany any organisation, Aboriginal or non-Aboriginal, over representation, administration and particular decisions; but without the Land Councils as they were established by the Act, land rights today would be very different and much weaker.

I fear that Governments since 1976, Territory and Commonwealth, CLP, Liberal and Labor have never really come to terms with the Act, always wanting to amend it, restrict its operation, cut down freehold land ownership, diminish the traditional communal basis for recognition of Aboriginal land, restrict and reduce the role and responsibilities of the Land Councils, give miners, developers and Government easier access to Aboriginal land.

The Act has suffered review after review. It must be one of the most reviewed pieces of legislation ever: by Toohey (1983), Reeves (1998), House of Representatives Standing Committee (1999), Manning (1999), Gray (2006)

and most recently, Mansfield in 2013 - as well as the infamous 2007 Intervention by the Howard Government. Always the Act has been amended to increase access to Aboriginal land, change tenure, remove permits, weaken the veto power, reduce the roles of Land Councils and increase the power of the bureaucracy and the Minister.

Whilst the Northern Territory and Commonwealth Governments in the 2013 review supported the continuation of the veto of the grant of exploration licences and it was not proposed to be altered by the Mansfield Report, Mansfield sent danger signals in saying the merit of restricting the veto to mining leases "might be further considered". The 1976 Act recognised that mining starts with exploration and that is where Aboriginal consent must begin. The submissions by the Mining Council of Australia, AMEC and the Northern Territory Government, however, all indicated continuing efforts to further reduce the veto power in the self-interested name of expeditious and cheap mining procedures.

It is as if, since 1976, the interests of Governments, miners and others have never come to terms with the fact that Aboriginal land is held by the freehold title of traditional owners. Aboriginal land is not unalienated Crown land. As simple as that statement is, and needs constant repetition, unquestionably at the next review of the Act the veto power and the right of traditional owners and Aboriginal communities to say what happens on Aboriginal land will come under renewed pressure. As it was when the Woodward Commission said it was simple justice to recognise traditional ownership, so it is necessary to say today that it is simply right that Aboriginal people should have control over the land they own.

I am reminded of what I said to Parliament in my Second Reading Speech on 4 June 1976:

"Mineral exploration and development will be allowed in aboriginal land only with the consent of the Aboriginals. This important provision allows a level of protection hitherto unknown over land held by Aborigines and will allow them to consider mining plans carefully before they consent to exploration. Where consent is withheld, the Bill provides for an independent inquiry on the basis of which the Government may determine whether the national interest requires that exploration in mining can proceed."

The 1976 Act was the high point, the Mt Everest of land rights. Northern Territory and Commonwealth Governments and vested interests have successively set out to remove the peak that was achieved like reducing a landscape to ground level and bare earth.

No wonder I see that every amendment made to Part IV of the Act since 1976 as a grave retreat from that high vantage point on the Mt Everest of the Act given by the carefully structured veto power under the original s.40 and deadlock-breaking provisions of the Act.

Presentation of the Yirrkala bark petitions in old Parliament House, November 1977 From left: Gumatj leader Galarrwuy Yunupingu; Jeremy Long, Department of Aboriginal Affairs; Silas Roberts, NLC Chairman; Ian Viner, Minister for Aboriginal Affairs. Source National Archives of Australia

The powers of the Commonwealth Minister under the Act have never reduced. They have always increased. 40 years on it is time the powers of the Minister were removed down to the bare essentials. 40 years on the Land Councils and the Aboriginal people should be put in control of their own Act. If the 1976 objectives of self-management and self-determination are to be really achieved the Commonwealth should set itself the objective of giving ownership of the Act to the Aboriginal people through the Land Councils. Ministerial and bureaucratic powers and functions should be stripped away including control over the trusts and benefit accounts which should be placed under an independent statutory Aboriginal body.

The veto power over mining in the 1976 Act was deliberately powerful in the hands of the Traditional Owners. If ownership of Aboriginal land was to mean anything it had to be freehold and the Traditional Owners had to have a strong negotiating position and a powerful veto which only the overwhelming national interest could overturn. It is no coincidence that the veto power has been under constant attack and successively whittled away.

Freehold ownership of traditional land, not something less than the ownership enjoyed by all other Australians, had to be the foundation for title to Aboriginal land. At the same time legislating the communal basis for recognition of traditional ownership was critical; otherwise, there was no harmony between traditional ownership and Australian property rights which Justice Blackburn in the 1971 Gove Land Rights case had rejected.

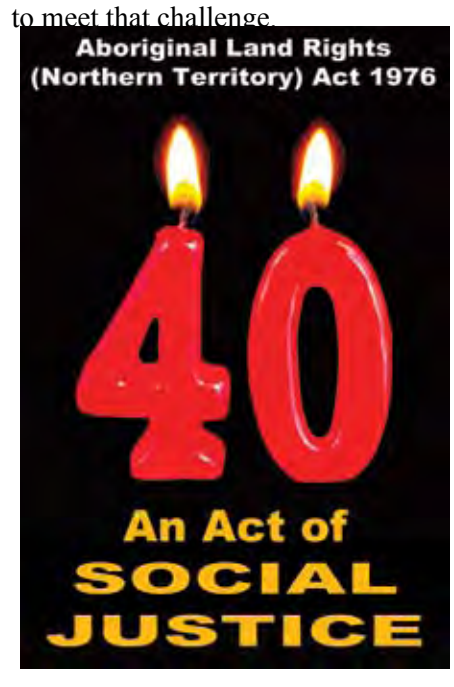
Because of the strength of inalienable freehold title, it is now under attack by ideologues, bureaucrats, people and Governments, both the Territory and Commonwealth, who covet Aboriginal land for private ownership and grand ideas for Northern Australian development.

Inalienable freehold title must not be given up. If it is, it is the beginning of the end, like traditional Maori land in New Zealand which was supposed to be protected by the 1840 Treaty of Waitangi. Maori traditional land was communal like Australian Aboriginal traditional ownership. New Zealand governments and land grabbers set about breaking up Maori land, by legislation in 1865, individualising "Native Title" and fragmenting Maori ownership. 150 years later Maori ownership had become a tragic mess. The New Zealand experience is an object lesson for Northern Territory traditional ownership and the pressure upon traditional owners and communities to agree to 99 year leases, and from the Forrest Report to make Aboriginal land freely saleable.

Today in Australia there is a familiar ring to the description of what happened in New Zealand 150 years ago when "the tribal infrastructure was devastated by Pakeha (New Zealanders of European descent) introduction of the concept of land as an individually owned, freely marketable entrepreneurial resource". It is only an accident of Australian history that the Commonwealth was little interested in Aboriginal land in the Northern Territory until the 1970s and did not go down the 19th century New Zealand path in the fragmentation of Maori land.

In New Zealand the ridiculous situation was reached by fragmentation to the point where an individual Maori could be regarded as owning a 6/1000th share of a parcel of Maori land. The result was the destruction of traditional communal Maori ownership and a long period of social degradation of Maori communities which only in recent years was being overcome with political acceptance of Maori language and culture and status within New Zealand society, the seriousness of Maori social issues and large scale financial compensation for the loss of land and traditional rights. Northern Territory land rights must not be allowed to be destroyed as Maori land ownership was destroyed by fragmentation of title in New Zealand.

I am sure land ownership under the Act can be used to the economic and social benefit of Northern Territory Aboriginal communities and Territorians as a whole, without the destruction of traditional ownership of existing freehold title. That is the challenge for the future. It is not beyond the capacity of the Land Councils, Aboriginal leadership and Governments, with goodwill towards Aboriginal people, the right sense of values, understanding and determination to meet that challenge.



Unholy alliances: The forces at play against land rights

The referendum of May 1967 was a turning point in the struggle for land rights, and a key factor in shifts in political attitudes towards legislative solutions to the issue of land rights. However there has been a long tradition of hostility to any idea of Aboriginal land rights from politicians—particularly the Country Party (now National Party), willingly aided and abetted by public servants from Commonwealth departments such as Interior. In fact, the first head of the Commonwealth Department of Aboriginal Affairs would complain: "… the Northern Territory has been established as a virtual Country Party State".

Through their various changes of names, the federal National Party and the Country Liberals in the Northern Territory have consistently opposed land rights; indeed, they've consistently disparaged the very notion of land rights.

Politicians have not been the only active opponents of land rights in the Northern Territory. Until the election of Gough Whitlam in 1972, the Department of the Interior and previously the Department of Territories, which for decades lorded over the Northern Territory as if it was their own fiefdom, had been the permanent preserve of Australian Country Party/National Country Party Ministers.

The Australian Country Party rebadged as the National Country Party in 1975; in 1982 it morphed into the National Party.

The culture of the Department of the Interior was such that it readily and loyally did the bidding of its ministers. Its bureaucrats and Ministers, especially when it came to any suggestion of progressive administration of Aboriginal affairs in the NT, remained wedded to old policies of assimilation even long after they had been officially repudiated.

The tensions between progressive and reactionary forces flared most brightly over the decade preceding the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976*. They were at play immediately after Prime Minister Harold Holt, only weeks before he drowned on 17 December 1967, announced in Parliament that he would establish the Council for Aboriginal Affairs (CAA) to advise him on new directions of Commonwealth policies (see story on opposite page).

One effect of the historic Referendum of May 1967 was to empower the Commonwealth to legislate for Aboriginal people across the country. In the spirit of the Referendum, Holt established the CAA and an Office of Aboriginal Affairs, headed by a career public servant Barrie Dexter, within his own department.

Hopes that Australia's polices affecting Aboriginal people would improve died with Holt; his successor, Prime Minister John Gorton, would demonstrate scant commitment to any advance of Aboriginal policies, for fear of alienating Country Party Coalition colleagues because of his own precarious hold on the prime ministership.

Duplicity at play

The Minister for Territories whom Gorton inherited from Holt was Charles Barnes (Country Party), a former horse trainer from Queensland who had held the portfolio since 1963; the permanent head of the Department of Territories (its responsibilities for the Northern Territory would mostly be transferred to the Department of the Interior in 1968) was a hardened warhorse, Warwick Smith, who went on to head up Interior.

The animus between the CAA and the Department of Territories, especially relating to land rights in the Northern Territory, was evident from the time the CAA was established.

From its earliest considerations, the CAA was concerned about the impact on Aboriginal people at Yirrkala of a lease of Reserve land to Nabalco, (North Australian Bauxite and Alumina Company), which was set up in 1964 to exploit the huge bauxite deposits on the Gove Peninsula.

Further, the CAA was apprehensive about amendments to the Crown Lands Ordinance before the Northern Territory Legislative Council, a partly-elected body which governed the Territory with limited powers before self-government on 1 July 1978.

The Crown Lands amendments would have enabled Aboriginal people to obtain leases of land on Reserves for pastoral, agricultural and miscellaneous purposes, and, after seven years, sell the leases to non-Aboriginal people.

The CAA viewed the legislation as "merely a device to break up the reserves and give non-Aboriginal interests access to their resources".

Writing to Minister Barnes on 12 February 1968, the Chairman of the CAA, Dr H C ('Nugget') Coombs, asked for the amending legislation to be deferred, because it would radically change the character of the Reserves.

Coombs' letter led to a meeting between the CAA and Minister Barnes on 22 February 1968. "The meeting was a curious one," CAA member Barrie Dexter recalls in his book, *Pandora's Box*.

"Mr Barnes seemed to consider that the Council was overstepping its responsibilities in wanting to consider matters that he saw as coming within the purview of his Department." At their meeting, Barnes warned about the dangers of an apartheid policy (a Country Party refrain), and his departmental officers "seemed to evince a hostility towards us that astonished us".

Only many months later did the three CAA members discover that on the very day they were meeting Minister Barnes and his officers, the Commonwealth had granted Nabalco a renewable 42-year mineral lease at Gove.

"We speculated among ourselves that the action had been taken in such secrecy and haste in order to pre-empt any consideration by the Council in the event that the composition of Mr Gorton's government, which he was then selecting and was sworn in six days later, might give us a base from which to play a useful role, including reconsideration of the terms of the draft Nabalco agreement," Dexter has written.

"… this affair was a foretaste of the difficulties and, we often believed, the duplicity we were to encounter in our efforts to deal with Northern Territory matters over the next five years".

Dexter and his fellow CAA members need not have bothered speculating that Prime Minister Gorton's new Cabinet might have been more sympathetic to their causes.

The unilateral Peter Nixon

Gorton moved responsibility for most Northern Territory matters to the Department of the Interior and re-appointed Peter Nixon its minister. Nixon was a grazier from Victoria, and, of course, a Country Party member. He would remain a relentless and ruthless enemy of the CAA.

Gorton also appointed a Minister-in-Charge of Aboriginal Affairs, Mr William Wentworth, putting the CAA and the Office for Aboriginal Affairs at arm's length from the Prime Minister himself–a clear abrogation of the relationship which Prime Minister Holt had established, but never lived to put into practice.

Wentworth may have been well-intentioned, and professedly sympathetic to Aboriginal needs, but he was a muddled administrator and no match for Nixon.

Evidence of Nixon's superiority litters the pages of *Pandora's Box*. One egregious example of his contempt for any advice from Wentworth's quarter was the award, without reference to the CAA, of extended mining leases to Nabalco in May 1969.

Many months later, belatedly aware of the extensions, Wentworth protested

Council for Aboriginal Affairs members Barrie Dexter (left) and Dr "Nugget" Coombs. Courtesy National Archives of Australia

to Nixon in February 1970, but was brushed off.

Nixon's high-handed dismissal led Dexter to write to Wentworth: "The council has concluded that there was a definite–and successful–attempt to conceal from it, and hence from you, the intention to grant the leases (to Nabalco) until it was too late to do anything about it."

Dexter writes: "The Minister for the Interior (Nixon) and his Department went on their merry way making unilateral decisions involving very important issues of policy without consulting or even informing us, confident that the Minister-in-Charge (Wentworth) was a paper tiger and the Council therefore impotent".

CAA member Professor Bill Stanner would write in July 1972: "Mr Wentworth frequently identified his worst opposition as coming from the Country Party … he accepted the risk to the Coalition as more important than his own ambitions."

Hostility in evidence

Dexter, in *Pandora's Box*, writes: "… we soon came to understand that what we were up against in the Northern Territory was, in effect, a Coalition between the Country Party and the administration, the latter comprising the Department of the Interior and its Northern Territory Administration, and that this Coalition was inherently hostile to our approach, even to our existence".

Commonwealth bureaucrats in Canberra and Darwin went out of their way to nobble the work of the CAA. In conversation with Barrie Dexter, Mr Harry Giese, who headed the Northern Territory Administration's Welfare Branch in Darwin, "condemned outright 'southern bludgers, stirrers and do-gooders' going to the Territory and complicating his task."

"… it was made plain to us by Interior that visits by ourselves or our minions to the Northern Territory were regarded as unnecessary and improper, although tolerable if made in company with Interior or NT Administration officers," Dexter writes.

"As time went by we found it increasingly difficult to obtain from Interior or the Welfare Branch information to which we believed we had a perfect right, and that was essential to us for the proper performance of our functions. More and more our enquiries and memoranda remained unanswered, or the answers were inadequate or greatly delayed.

But it was on the question of land rights in the Northern Territory that the CAA and Interior remained implacably at loggerheads.

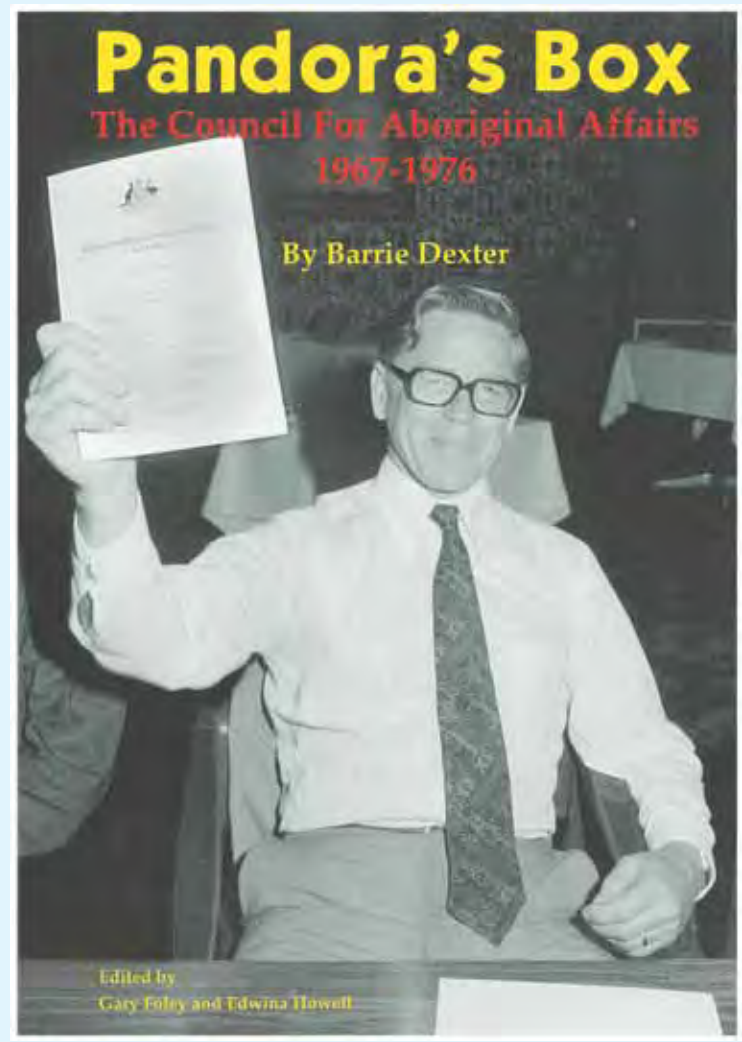
The rise of land rights

In its first draft Cabinet submission early in 1968, the CAA had recommended the establishment of a court or tribunal to determine land claims by Aboriginal communities "on the grounds of traditional occupancy".

"In our earliest days as a Council … we were greatly impressed by the attitudes of the tradition-oriented Aborigines we consulted. They clearly desired increased scope to retain and develop at least elements of their traditional social structure, way of life and beliefs. It was evident to us that this could be so only if they were assured continuing access to and rights over their traditional land–in effect land rights", Dexter recalls in his book.

"It was in large part this that made us determined to go on fighting for land rights. Our first fight was initially concentrated inevitably in the Northern Territory, for the majority of tradition-oriented Aborigines were located there; it was the Commonwealth's own back yard, and hence an area where the Commonwealth could – and should – set an example; there were numerous developments there that filled us with concern for the future of these Aborigines and their reserves; and we had been treated by the authorities to a display of dishonesty – over the signature of the Nabalco agreement on the very day we thought we were discussing it, which left us with no confidence in the probity of those responsible for administering of the Territory".

But the CAA was tenacious in the conduct of its cause. In its first year, it was able to head off successfully the attempt by the Northern Territory's Legislative Council to transfer leases on Reserve land to a non-Aboriginal person, after seven years. "We had exposed so much duplicity," Dexter recalls.



The referendum of 27 May 1976 raised hopes that the Commonwealth government would move to improve the lives of Aboriginal Australians; the possibility of land rights seemed a prospect.

The referendum had the effect of changing two sections of the Australian constitution: Aboriginal people, previously excluded from the census, would now be counted; and the Commonwealth Parliament was given the power to legislate for Aboriginal people, wherever they were.

Harold Holt, Liberal Party Prime Minister, was apparently taken aback by the overwhelming support (90.77%) for change, and it was not until 7 September that he announced in Parliament that he would establish an Office of Aboriginal Affairs within his own department. He later appointed a three-person Council for Aboriginal Affairs to advise the Government on policies affecting Aboriginal people. The Office would serve the Council.

The Council comprised Dr H C ("Nugget") Coombs as chairman, who would retire as the first Governor of the Reserve Bank to take up the appointment; Professor W E H (Bill) Stanner, a renowned anthropologist who had worked in the Daly/Wadeye region; and Barrie Dexter, an officer of the Department of External (now Foreign) Affairs.

Holt died in December 1967, without having settled a statutory framework for the Council for Aboriginal Affairs, which would operate without a charter until November 1973–"a sort of twilight existence", as Professor Stanner said in July 1969. Holt's progressive ideas of improving the lot of Aboriginal people were not matched by his Liberal Party successors, John Gorton and Bill McMahon.

The Council and the Office had a tumultuous history, but remained a force to be reckoned with. They were at constant loggerheads with successive ministers and bureaucrats (mostly from the Country Party-aligned Department of the Interior) as they challenged policies and practices.

As well as being a member of the CAA, Dexter also headed the Office of Aboriginal Affairs, which became the Department of Aboriginal Affairs (DAA) immediately after the election of the Whitlam Labor government in 1972. Dexter retired from DAA in 1976, having served under five Prime Ministers.

Barrie Dexter has written the history of the CAA in a voluminous book, *Pandora's Box*, published late last year. The title derives from a conversation when Prime Minister Holt recruited Dexter, which Dexter records in his book:

> I said: "But I don't know anything about Aborigines." Mr Holt replied: "That's why I asked you to take on the job. I'm frightened by people who think they do know something!" I said: "Mr Prime Minister, you asking me to open Pandora's Box!" "That," he replied, "is precisely what I am asking you to do, Barrie."

Dexter is now 94 years old. Much of the content of the accompanying article is drawn from his book. He wrote the original manuscript during a Visiting Fellowship in the Department of Political Science at the Australian National University from 1984-1987. It sat in the archives of the Australian Institute of Aboriginal and Torres Strait Islander Studies in Canberra, until it was retrieved and edited by Professor of History Gary Foley and Dr Edwina Howell.

The book is available from the publisher, Keeaira Press at www.kpress.com.au

Demonstration in Canberra in support of land rights, 1974 Courtesy National Archives of Australia

It was able also to temper the conduct by the Commonwealth of its defence of the Gove land rights case, which Professor Frank Brennan SJ writes about on pages 12-15.

Yirrkala rising

Off their own bat, and with the support of the local Methodist mission, in late 1968 the Aboriginal people of Yirrkala launched legal action by way of a writ against Nabalco and the Commonwealth government, seeking title to, possession of, and damages for use of, the land leased to Nabalco, and an injunction against Nabalco's proceeding with bauxite mining on the Gove Peninsula.

In spite of a Commonwealth commitment to contribute to the legal costs of the Yirrkala people, Dexter and his fellow CAA members concluded that, in the run-up to the hearing in the Supreme Court of the Northern Territory, the Commonwealth Departments of Attorney General and Interior "were acting in bad faith".

Finally, and at the behest of the CAA, Minister Nixon proclaimed that "in defending the action the Government was not acting in a spirit of opposition to the Aborigines, but was seeking a determination of the legal issues that had been raised. The Commonwealth case would be conducted on this basis."

The Commonwealth's first round of behaviour in chambers before Justice Richard Blackburn gave the lie to that pledge. Having attended the hearing in Darwin, CAA member Professor Bill Stanner wrote privately to Minister Wentworth on 1 April 1969: "I would judge, from the Aborigines' point of view, that it must have been very hard to avoid the conclusion that the Government was standing up for the company [Nabalco] against them."

The CAA's intervention had a positive result: Solicitor General Bob Ellicott (later to be Attorney General when the Land Rights Act was passed by the Fraser Government in 1976) himself took carriage of the case when the substantive hearing began in May 1970.

"There was a distinct improvement in the Crown's handling of the case, which was much less confrontational and adversarial than at the preliminary hearing", Dexter records.

Justice Blackburn handed down his decision on the Gove land rights case on 27 April 1971: the Aborigines at Yirrkala had no legal basis for their claim to land at Gove Peninsula.

THREE WISE MEN: The Council for Aboriginal Affairs–from left, Barrie Dexter, Dr "Nugget" Coombs and Professor Bill Stanner.

The McMahon Era

Seven weeks earlier, a new Prime Minister had been installed: after a tied vote of the Liberal Party caucus, Gorton had chosen to resign and William McMahon was elected.

CAA members took some heart from McMahon's statement to Parliament on 29 April about the outcome of the Gove case: "… the government has been particularly anxious to divorce the legal aspect from the moral problem and the problems associated with justice and reasonable treatment of Australian Aborigines".

Within hours, CAA Chairman Nugget Coombs had drafted a Cabinet submission, initialed by the Prime Minister, the Minister-in-Charge of Aboriginal Affairs, Bill Wentworth and the new Minister for the Interior, Ralph Hunt, which set a course "to give the protection of Commonwealth legislation to lands reserved for the use and benefit of Aborigines, and within such lands both to ensure to continuing groups of Aborigines the use of land for ceremonial, religious and recreational purposes, and to make available on appropriate tenure to individual Aborigines and groups of Aborigines land necessary for the conduct of commercial purposes; second, to set up an Aboriginal Land Fund … to acquire land coming on the market for Aboriginal groups …"

But, before it reached Cabinet that evening, Hunt, a Country Party grazier from New South Wales, had withdrawn his agreement.

And so began a renewed counter-offensive by Interior against any prospect of the government's establishing a form of Aboriginal land tenure based on traditional association.

By the end of May 1971, there was even less chance of that achievement. Prime Minister McMahon replaced Wentworth with Peter Howson, an English-born and educated Liberal Party MP from Victoria.

McMahon gave him the portfolio of Environment, Aborigines and the Arts, and as he left the Prime Minister's office, a colleague asked him what he had got. According to journalist Mungo MacCallum, Howson snarled back, "The little bastard gave me trees, boongs and poofters."

Howson would sideline the CAA and the Office of Aboriginal Affairs, accept cuts to their budgets, and yield to the Department of Interior on matters affecting the Northern Territory. Professor Stanner put it this way in a note on 19 July 1971: "The situation with which the Council will have to deal over the remaining life of the Government promises to be one in which policy towards the Aborigines … will virtually be Country Party Aboriginal policy".

The next day, Dexter lamented similarly in a note to Dr Coombs and Professor Stanner, his two colleagues on the CAA: "… the Northern Territory has been established as a virtual Country Party State and our own scope for effective activity there has been severely reduced. The problem is intractable ...there is little or no possibility of the situation improving this side of the elections, if then."

The McMahon government would finally turn its back on any prospect of real land rights in the Northern Territory in a statement by the Prime Minister on Australia Day 1972. He proposed a new form of lease on Aboriginal Reserves, for economic and social purposes, "rather than attempt simply to translate the Aboriginal affinity with the land into some form of legal right under the Australian system, such as that claimed before the (Blackburn) decision of the Supreme Court of the Northern Territory."

McMahon's statement immediately provoked Aboriginal protesters to establish the Tent Embassy on the lawns outside Parliament House in Canberra.

The promise of Whitlam

Promise of real land rights came with Labor leader Gough Whitlam's policy speech on 13 November 1972: "We will legislate to give Aborigines land rights – not just because their case is beyond argument, but because all of us as Australians are diminished while the Aborigines are denied their rightful place in this nation.

"We will establish once and for all

Aborigines' rights to land and insist that whatever the law of George III says, a tribe and a race with an identity of centuries–millennia–is as much entitled to our land as even a proprietary company."

Soon after winning government on 2 December 1972, Whitlam abolished the Department of the Interior and created a Department of the Northern Territory which seemingly inherited the old guard culture of Interior, and would remain intransigently opposed to land rights in its domain.

Whitlam also established the first stand-alone Department of Aboriginal Affairs, headed by Barrie Dexter, and appointed Justice Edward Woodward as a Commissioner to advise how land rights should be implemented in the Northern Territory.

One week after the legislation resulting from the lengthy Woodward inquiry had been introduced, the Whitlam government was dismissed by the Governor General on 11 November 1975.

Liberal Prime Minister Malcolm Fraser, elected on 13 December 1975, displayed an early hostility to the Department of Aboriginal Affairs, but stayed true to his party's pre-election commitment to introduce land rights.

Fraser's biographer, Margaret Simons, has written that negotiating new legislation faced "bitter opposition of the Country Liberal Party Territory government, the Minister for the Northern Territory Evan Adermann (Country Party, a dairy farmer from Kingaroy, Queensland) and the federal Department of the Northern Territory."

Fraser's first Minister for Aboriginal Affairs, Ian Viner, recalls on pages 6&7 the struggle to introduce the *Aboriginal Land Rights (Northern Territory) Act 1976*.

The CLP on attack

Barrie Dexter recalls that the Department of the Northern Territory wanted responsibility for the detailed legislation to rest with the Northern Territory. "This, of course, was totally unacceptable to the Council (for Aboriginal Affairs) and Department (of Aboriginal Affairs), for we knew there could be no effective legislation if the (NT) Legislative Assembly were responsible".

The Country Liberal Party, which in 1976 held all but two seats in the 20-member NT Legislative Assembly, "resorted at an early stage to what seemed to Mr Viner and me to be rough tactics".

CLP Leader Dr Goff Letts wrote to Mr Viner on 6 February 1976, "with regret and only after a great deal of consideration", that the pursuit of land rights legislation would cause: "loss of confidence in the move towards 'Statehood'; creation of deep internal divisions within our Party in the Territory; a serious rift between us and our Federal colleagues; difficulty in attracting and holding capable people to serve on the right side of politics here; and, wider problems in the Territory community in the future that our Government will have to answer for and I for one will not be prepared to live with."

Dr Letts was even more agitated when he telegrammed Prime Minister Fraser and Deputy Prime Minister Doug Anthony on 19 March: "The government appears to have failed to appreciate the depth of concern in the CLP and the whole NT community on this major policy matter … designed to satisfy a minority but very vocal view."

Gotts threatened to resign "from all associations with the Country and Liberal parties at all levels", unless his views on the legislation were heard and taken into account.

In reply, Prime Minister Fraser gave Letts short shrift.

The mining industry also maintained a strong campaign against the proposed land rights legislation, and Dexter records that in late 1976 "stories started to circulate that the Prime Minister's resolution to legislate on land rights was weakening in the face of substantial opposition from within the governing Coalition, the mining industry and other areas.

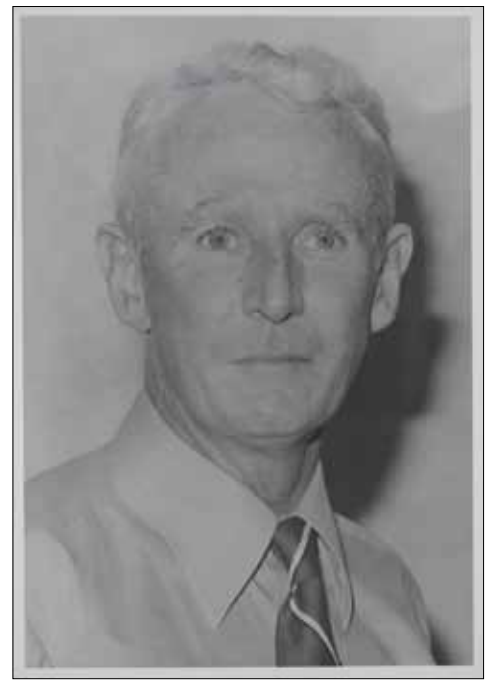
"According to whispers around Parliament House, succor came in the form of insistence by a group of backbenchers led by (Senator) Fred Chaney, that the legislation proceed, or they would cross the floor. The Prime Minister was said to have responded positively to this unexpected display of support for the course he had previously been pursuing."

Prime Minister Fraser held to his course, and the Land Rights Act finally passed through Parliament on 14 December 1976, and received Vice-Regal assent on 16 December.

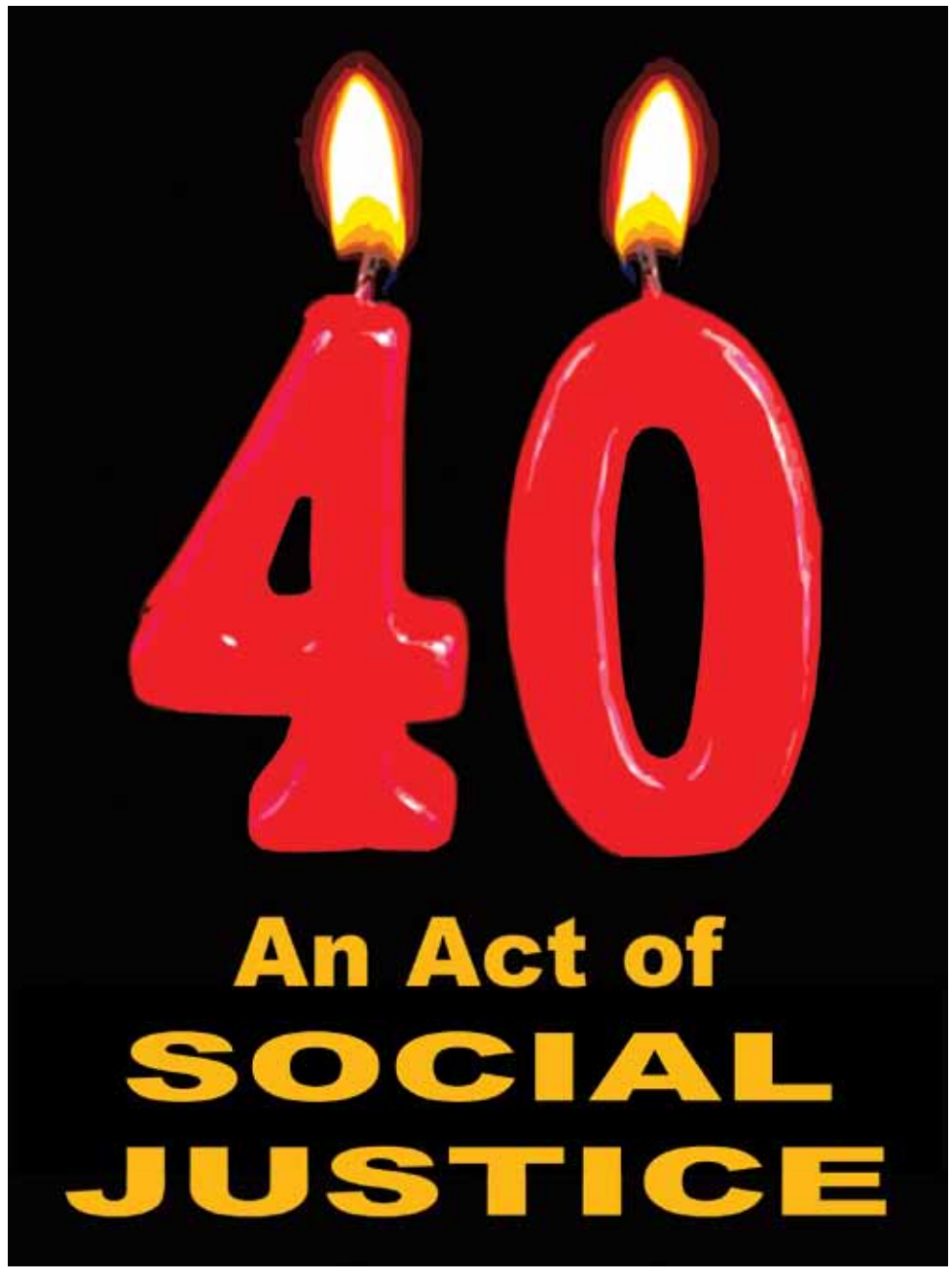
In the Northern Territory, the Country Liberal Party government would use every ruse within its power – and beyond – to thwart claims under the Act, and would spend tens of millions of dollars in legal fees to sustain its relentless opposition to every claim that it could challenge.

A search of Cabinet records reveals that only weeks after self-government in 1978, the CLP. Cabinet discussed vesting unalienated Crown lands in the Territory Development Corporation - a ploy to put the land beyond the reach of claim under the Land Rights Act.

Exploiting fears about land rights helped to keep the CLP in power for successive elections after self-government. The pollster Mark Textor admitted to the Sydney Morning Herald two years ago "things I deeply regret doing now" – particularly the way he advised the CLP to whip up fear about land rights. "At the end of the day, you just say, 'Well, I didn't need to do that to win.'"



CLP Leader Dr Goff Letts: Land Rights Act 'designed to satisfy a minority but very vocal view'.
©Northern Territory Library.



Forty years after its enactment, the CLP still wants to wrest control of the Land Rights Act from the Commonwealth. Only last year, the Northern Territory Attorney General John Elferink yet again made a pitch to have the act "repatriated"(as if it had ever been with the NT).

Land rights, he said, had become a "wall of imprisonment" blocking Aborigines from participating in northern development.

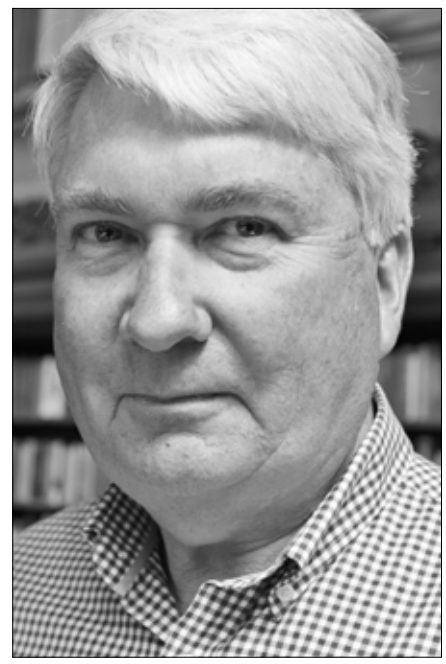
The last words are left to Federal Indigenous Affairs Minister Nigel Scullion. Elected in October 2001 as a CLP Senator for the Northern Territory, he said in his maiden speech that the "Aboriginal land act (sic) is an ill-considered piece of legislation that became law in the Northern Territory in 1976 because Territorians had no choice in the matter.

"Whilst I am sure that the social debris from the collision between a Stone Age culture and modern times is not going to be cleaned up through implementing just one or two ideas, I suspect that the special Aboriginal freehold title issued to indigenous Territorians under the current legislation is a sad comparison with the real freehold title enjoyed by other Australians. The nature of the tenure of this land is a principal impediment to development and the economic self-determination that will surely follow."

A transcript of his maiden speech continues to grace Senator Scullion's personal website.

The Gove Land Rights Case: Precursor to the Land Rights Act

The forty-year history of the *Aboriginal Land Rights (Northern Territory) Act 1976* has often been likened to a "lawyers' picnic". From the nature of land claim hearings themselves, through to countless appeals in the courts, Aboriginal land rights have been subject of litigation from the start. Many, many victories have strengthened the Land Rights Act. Yet it was the loss of a court case—the Gove Land Rights Case—that laid the foundations of the political actions that led to the passing of the Land Rights Act in 1976.



By Fr Frank Brennan SJ AO*

In 1963, the Commonwealth government set about issuing mining leases inside the Aboriginal reserve in Arnhem Land in the Northern Territory. Since 1935, the Methodist Church had been conducting a mission to Aborigines living around Yirrkala. The government had held regular discussions with the national mission board of the Methodist Church in Sydney. But the Yirrkala Indigenous community and the local Methodist missionaries were left out of any discussions about proposed mining leases.

The Aborigines trusted the Reverend Edgar Wells, who became superintendent of the Yirrkala mission in 1962. Wells was in the habit of sending telegrams to the press and to other key contacts in the south to inform them about Yirrkala developments. Though Wells was kept in the dark by his mission superiors, he had good links with the Labor Party. The Yirrkala Aborigines decided to contact Gordon Bryant, a Labor member of federal parliament and member of the Federal Council for Aboriginal Advancement (FCAA). Bryant asked his party elder Kim Beazley Snr to accompany him to Yirrkala. While there, Beazley went to the mission church to look at the magnificent bark paintings: "Suddenly I had an idea. We met again with the tribal council, and I urged them to petition parliament with a bark painting. I was sure this would catch the attention of the press. Then it could not be ignored in the way that most petitions are." Wells and the Aborigines liked the idea.

On 23 May 1963, Kim Beazley Snr proposed an opposition motion in the House of Representatives that "an Aboriginal title to the land of Aboriginal reserves should be created in the Northern Territory". This was the first time that any senior politician in the Commonwealth Parliament had suggested that Aborigines might be granted a legal title to their traditional lands.

The Yirrkala people presented their petitions to Parliament, mounted on bark paintings as Beazley had suggested. Expressing their fears that they were not being consulted about proposed mining developments on their traditional lands, they asked the Parliament to 'appoint a Committee, accompanied by competent interpreters, to hear the views of the Yirrkala people before permitting the excision of this land' and asking that 'no arrangements be entered into with any company which will destroy the livelihood and independence of the Yirrkala people'.

> **"The Yirrkala Indigenous community gave the Australian Parliament its first opportunity to focus on land rights."**

The Yirrkala Indigenous community gave the Australian Parliament its first opportunity to focus on land rights. Kim Beazley Snr moved the motion for the establishment of a parliamentary select committee to enquire into the grievances of the Yirrkala residents. He said, 'The moment the petition was presented to this Parliament, this parliament was put on trial. In fact, I think, the Australian nation is on trial. Morally, the nation is on trial in any event, even if this matter had no international implications. Internationally, in fact the nation is on trial.'

While not questioning the government policy of assimilation, Beazley suggested, 'If they are members of the community of the Australian Commonwealth they cannot be dispossessed of land that they occupy without consultation.' Beazley argued that some form of land title would be a precondition to avoiding constant crises developing whenever there was a demand for mining or pastoral activity to occur on Aboriginal lands.

In September 1963, following Beazley's parliamentary motion, the House of Representatives voted to set up the Select Committee on the Grievances of Yirrkala Aborigines. The committee held hearings in Yirrkala, Darwin and Canberra. Significantly, they heard three days of evidence in Yirrkala and thus were able to hear directly from the Aborigines, including Yolngu elder Milirrpum and the Methodist superintendent, Reverend Wells. The committee heard plenty of evidence about sacred sites and the Aboriginal relationship with the land. The chairman of the committee, asked Milirrpum, "Do you think it is a good idea for the mining people to come here and work on some part of the area? Do you think that this will bring advantages to your people?" Milirrpum replied:

> "If this country taken, we want something else from mining people. This Aboriginal people's place. We want to hold this country. We do not want to lose this country. That is how the people are worrying about this country. We want to get more room for our hunting and our fishing, because later on we got more people. Our children are to come. All my children at school in this country. They want to hold this country. We fought the law for our children for all this country. Please, we do not want to lose this country. We stand on this country.

YIRRKALA GOES TO CANBERRA: Outside the Law Courts in Canberra – from left, Djapu leader Daymbalipu Munungurr, Roy Marika (Rirratjingu clan) and Galarrwuy Yunupingu (Gumatj clan) attend a hearing of the Gove Land Rights case in September 1970. Mr Yunupingu acted as a translator.

Photo National Archives of Australia

The Aboriginal people were the first Australians here. Then you people come along."

The House of Representatives Select Committee reported to Parliament on 29 October 1963, finding that there had been no discussion between public servants and the Yirrkala people before the decision was made to excise land from the Aboriginal reserve to allow mining. The only discussion had been with the Methodist Mission authorities. The Sydney-based church leaders had unilaterally decided what they thought was best for the Yirrkala Aborigines.

The local residents and the local mission staff were strongly of the view that they had not given their consent to the mining development and they had not been adequately consulted. The all-party committee of politicians agreed. The committee learned that the government's chief welfare officer who covered Yirrkala was away on leave at the time. The committee felt "that the Welfare Branch's lack of proficient linguists also led to a failure in clear communication in May 1963, after excision and the granting of the lease, when officers met representatives of the people to explain the proposal." The committee found that there were "many sacred places within the whole of the excised area".

Yirrkala was the national test case of new policies, given that all members of the 1963 parliamentary committee had optimistically stated that the proposed Gove development, "gives the Commonwealth for the first time in history" the opportunity "to demonstrate that urban development by Europeans does not automatically reduce Aborigines to the status of fringe-dwellers, and that land development does not reduce them to the status of dispossessed people." This was part of the backdrop for the 1967 referend um campaign, which encouraged the Australian public to vote for a constitutional change that did the right thing by Aborigines, providing them with a fair go and the full benefits of citizenship. The protection of sacred sites, the protection of traditional country, appropriate consultation and compensation were now part of the mix when determining fair laws and policies.

Once the 1967 referendum was carried so overwhelmingly by the Australian public with the unqualified encouragement of both sides of parliament, it was inevitable that the 1963 recommendations for Yirrkala would become a test case for real change.

By this time, the views of Reverend Wells, the outspoken mission superintendent at Yirrkala, had carried the day in the Methodist Church. He had received strong backing from Victorian Methodists, upset with the national mission board members actions in Sydney. With assistance from the Methodist missionaries, the Yirrkala people decided to try the law. On 23 December 1968, Frank Purcell, a solicitor from Werribee in Victoria, wrote to Professor W E H Stanner informing him, "We have received instructions on behalf of Aboriginal clans of the Gove Peninsula in the Northern Territory to take legal action on their behalf regarding Aboriginal land rights." He said that his clients were being assisted by the Aboriginal affairs commission of the Methodist Church in Melbourne. They wanted Stanner to assist in supplying material and giving evidence at the hearing.

The Yirrkala Aborigines issued proceedings in the Supreme Court of the Northern Territory, claiming that their lands had been unlawfully invaded by both the Commonwealth and Nabalco Pty Ltd, the company to which the Commonwealth had purported to grant various mining leases in the Gove Peninsula. Milirrpum and Mungurrawuy were the leaders of the two clans which were the land-owning groups—the Rirratjingu and the Gumatj. These landowners were joined by Daymbalipu, the leader of the Djapu clan who, though not claiming to be owners, had access to the Rirratjingu and Gumatj lands for hunting and foraging.

The Commonwealth decided to ask the court to strike out the Aboriginal claim without a need for a full hearing of the evidence. Professor Stanner attended these preliminary proceedings in Darwin, made extensive notes, and then wrote to W C Wentworth, the Minister-in-Charge of Aboriginal Affairs. Stanner circulated his notes widely around Canberra, asserting that Bill Harris, the senior barrister appearing for the Commonwealth, had submitted:

> The Crown would make its primary attack on the whole substance of the case as plainly bad and misconceived. The action was an attack on the constitutional law, the law of real property, and Australian practice over a period of nearly 200 years. It was so obviously untenable that it cannot possibly succeed. No possibility of good cause of action. The statement of claims, even if proved, could not succeed. Frivolous and vexatious. Plainly hopeless. Would lead to a useless trial. Australian law did not recognise tribal rights to land.

Edward Woodward, the barrister appearing for the Aboriginal plaintiffs and being instructed by their solicitor Purcell, had replied, "Nothing is further from the truth than that the aborigines are making a misconceived and remarkable attack on the law of property." As Stanner summarised it, "On the contrary they were invoking the protection of the law. The aborigines sincerely believed they are the rightful owners." He would go farther "...they know they are the owners: the land was given them by their spirit ancestors and they had held it ever since." Having looked to the law developed in other civilised countries, Woodward concluded:

> It was not too much to hope that the same might be done here to give some protection

to the aborigines who established a claim to land. But they were being met at the door of the court by the Commonwealth and Nabalco with an allegation that the claim was frivolous, vexatious and an abuse of the privilege of the court.

Justice Blackburn decided not to strike out the action. The full hearing then commenced in Darwin on 25 May 1970. There was one major change to the line-up of barristers: the Commonwealth was now led by its new Solicitor-General, Bob Ellicott. Usually the Solicitor-General appears only in the High Court, leaving most matters in lower courts for the attention of other barristers briefed by the Commonwealth for the purpose. When Ellicott was apprised of the pending litigation, he thought he should become directly involved:

I come from a Methodist background. So this case is about an Aboriginal community at Yirrkala. Some of them are Methodists and some of them have been trained as Methodist local preachers. There's a fellow there called Galarrwuy Yunupingu, aged 19, who was to act as interpreter. He had learnt good English at bible college. This to me is an unusual case, so I'm not going to reject it. And I decide to take it on.

I don't think I had any confirmed views about Crown land or who owned the land. Except, I was a property lawyer and I knew the history of Australia and its land law. My initial reaction was: if the land has been claimed by the Crown then all interests have been subsumed to it. And there is no basis on which you can say any part of Australia hasn't therefore become free of any Aboriginal interests in the land. I obviously would have thought of the difficulties of proving what had taken place. The government of the day, in the context of the 1967 referendum, had a strong view that it wanted to be seen, and to be genuinely seen, to be concerned about the Aboriginal people and their future. There was no malevolence or adverse motive in its attitude.

There was an attitude I was aware of that probably found its main exposition in members of the Country Party who were very concerned about the Aboriginal people – wondering what we should do, what we can do to raise their status, and to look after their health and wellbeing. They did not, however, see land rights as being of significance in that pursuit.

On the first day of the hearing, Ellicott told the court, "The Commonwealth in its defence of this action is not wanting to prevent the Aborigines in any way putting their case factually".

The day after the Darwin hearings concluded, Ellicott wrote to the Attorney General, indicating that in past meetings with ministers, "the Minister for the Interior has emphasised the desire of the Commonwealth that this action should not, if at all possible, go off on some technical ground without the question of Aboriginal rights in relation to the land being determined." He indicated ways in which he thought the litigation could be run, ensuring that it did not run off the rails and giving the judge the opportunity to rule on the substantive questions of law. He highlighted a number of problems relating to the plaintiffs' evidence which, if not overcome, "could mean that a Court might decide the case without deciding the main issues". The main issues were whether the Yirrkala Aborigines had rights to land prior to 1788 that would be recognised by an Australian court applying the British law, whether those rights could survive the assertion of British sovereignty over the Aboriginal lands, and whether the Aboriginal plaintiffs in the case had the same rights over the same areas of land as their ancestors had prior to 1788.

Ellicott accurately forecast that the plaintiffs, "may have considerable difficulty in establishing that their clans were in fact on these lands in 1788 or that other Aboriginal clans regarded the Gove lands as their country in 1788." Ellicott was prepared to concede to the plaintiffs' barristers "that whatever land relationship is proved by admissible evidence to have existed immediately before the Mission came, also existed in 1788." He made it clear, however, that he "did not think the Commonwealth could, on the evidence, concede that the particular clans (ie. the Rirritjingu and Gumatj) were the Aboriginals who in fact had that relationship with the Gove land in 1788 or since."

The Yirrkala court proceedings recommenced in Canberra, where all the remaining evidence, including that of the anthropologists, was heard on and off between 7 September and 25 November 1970. Woodward tried to convince the judge that he could accept the evidence of the anthropologists about which Aboriginal groups were related to which areas of land. That would have avoided the painstaking task of calling evidence from Aborigines who would have needed to give their evidence with the use of translators, risking long cross-examination by the government barristers who might have confused the witnesses. Ellicott would not concede that there was any shortcut for the plaintiffs being able to provide the historical "hearsay" evidence of landholdings through the anthropologists. He was particularly stringent in his cross-examination of Professor Stanner, thinking him "like a lot of academics, not quite realistic in their thinking."

"The Commonwealth in its defence of this action is not wanting to prevent the Aborigines in any way putting their case factually."

After considerable delay, Blackburn handed down his decision while sitting in Alice Springs on 27 April 1971. He ruled against the Aboriginal claim. He found against the Aboriginal plaintiffs on the law and on the facts. On the law: Blackburn ruled that the common law did not recognise communal native title and that any pre-existing rights to land would have been extinguished by the assertion of sovereignty by the British crown. Blackburn could find no case of the principle of communal native title being put into practice other than "by statute or by executive policy". He did not consider that there was enough material before him to warrant a lower court, like a single judge of the Northern Territory Supreme Court, concluding that communal native title existed. That would be a matter for the High Court. Also he could not be convinced that the clans' relationship with land was a recognisable and proprietary interest. To be proprietary, it would need to carry "the right to use or enjoy, the right to exclude others, and the right to alienate"– being the right to sell, lease or give away one's interest in land.

The Aboriginal plaintiffs had expressly repudiated the right to alienate because under their law and culture they could not give away their land; they belonged to the land, rather than the land belonging to them. Blackburn was convinced that the clan's main right to use and occupy land was for the purposes of ritual and ceremonies. The clan had no right to exclude other groups from using the land for hunting purposes. So, "by this standard I do not think that I can

Conferring in the ACT courts building during the Gove Land Rights case, September 1970: From left, Jeremy Long from the Office of Aboriginal Affairs; Bill Priestly, counsel for Nabalco, who took silk in 1972 and later became a Justice of the NSW Supreme Court and Court of Appeal; Commonwealth Solicitor General Bob Ellicott; and Bill Harris QC, one of Mr Ellicott's junior counsel.

Photo National Archives of Australia

characterise the relationship of the clan to the land as proprietary."

Nonetheless Blackburn was very sympathetic to the Aboriginal view of their relationship with their traditional country. He observed, "The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me." However he felt compelled to rule that the British common law did not recognise communal interests in land as described in the evidence in court. Even if it did, he ruled that all such interests would have been extinguished by the assertion of sovereignty by the British crown.

The lawyers for the traditional owners had then to consider whether it would be worth appealing Blackburn's judgment to the High Court. Woodward saw little point in appealing the case. Admittedly the judge had made rulings of law about Aboriginal land title, which had never been tested in the courts before and which might be more favourably decided in favour of the Aboriginal plaintiffs by an appeal court. The problem was that the judge had not only ruled against the Aborigines on the law, he had also ruled against them on the facts. On the facts, he found, "I am not satisfied, on the balance of probabilities, that the plaintiffs' predecessors had in 1788 the same links to the same areas of land as those which the plaintiffs now claim." An appeal court was much less likely to interfere with the trial judge's interpretation of the facts than with his interpretation of the law.

There was little prospect that any appeal court would do anything other than show great deference to Blackburn's interpretation of the facts, given that he had been so respectful and considered of the Aboriginal evidence presented to him. Years later Woodward gave some indication of his thinking when, in 1989, he told a Darwin audience:

> I took the view that the finding of close identification between particular groups of people and particular land was sufficient to mount a claim for recognition of Aboriginal title at a political level. I had no confidence that the High Court, as it was then constituted, would produce any better result for the Aboriginal people than had already been achieved. Indeed, I was afraid that doubts might be cast on Blackburn J's findings about Aboriginal law. I therefore advised against an appeal.

Deciding then not to appeal to the High Court, Woodward "took the view that what we had achieved before Justice Blackburn was sufficient to provide a basis for land rights legislation." He feared not only that they might lose the appeal, "but might also have cold water poured on Blackburn's finding that there was a coherent system of Aboriginal law relating to land." He was confirmed in this view when he was told some months later that "Chief Justice Barwick had been heard to say that our native title claim was 'a lot of nonsense' or words to that effect."

With no further recourse in the courts, the Aborigines looked again to the politicians. The day after Justice Blackburn delivered his judgment, Commonwealth Solicitor-General Ellicott provided advice to the government focused on Blackburn's ruling about the lack of continuous occupation and use of the same areas of land by the plaintiffs and their ancestors: "This finding is of great significance in relation to any appeal. If the plaintiffs cannot upset it, it seems to me they cannot succeed and therefore the High Court could dismiss an appeal by accepting the Judge's finding of fact and without dealing with the significant questions of law." Ellicott was strongly of the view that the Aboriginal grievances were legitimate and that political action rather than further courtroom battles was the way to go.

"Woodward 'took the view that what we had achieved before Justice Blackburn was sufficient to provide a basis for land rights legislation.'"

There was building public sympathy for the Aborigines at Yirrkala. The unions said they would stop all mining operations in the area. That afternoon, Prime Minister McMahon was asked in parliament about the proposed work ban by unions on mining operations at Gove. McMahon said that his government had been "anxious to ensure that the Aboriginals had every conceivable opportunity to present their case in order to protect whatever legal rights they had" and that "if the Aboriginals want to pursue their rights in the High Court they have every right to do so". The Aborigines could appeal to the High Court if they wanted to, and the Commonwealth would fund their legal costs. McMahon, who had already discussed the matter with Coombs, wanted to emphasise, "that we should not confuse the legal approach, the moral approach and an approach based on justice for Australian Aboriginals."

Wentworth, who had only a month to run as Minister-in-Charge of Aboriginal Affairs, put a submission to Cabinet, informing the ministry, "The response of the press and other organs of public opinion to this judgment has practically without exception been to assert that since this is the law it should be changed by Parliamentary action to recognise or compensate for traditional rights of Aborigines to such land." He was in no doubt "that there is widespread and deeply emotional support among the community for the claims of the Aborigines to land". He wanted his colleagues to respond promptly lest the opposition, trade unions and militant protesters gain a political advantage. The government needed to act "promptly and boldly", consistent with what the Prime Minister had told Parliament, with "determination to act justly and morally towards the Aborigines."

Cabinet set-up a Ministerial Committee on Aboriginal Affairs to consider policies appropriate for Aboriginal reserve lands in the Northern Territory, ensuring that "continuing groups of Aborigines" would have use of these lands "for ceremonial, religious and recreational purposes" and providing appropriate tenure for groups and individuals wanting to operate commercial enterprises. The government was not leading on this issue; it was playing catch-up with community sentiment in favour of the Aborigines, a sentiment that was finding resonance with the Labor Opposition.

Both Justice Blackburn and Solicitor-General Ellicott were convinced that the court decision was not the end of the matter. Each of them wrote papers which were circulated within government arguing for different forms of Aboriginal land tenure and use. Ellicott wrote a 28-page advice seeking to provide a practical way in which "claims made by Aboriginal people to land situated within the Northern Territory should be recognised." He said, "The problem we ought to be facing is not should we recognise but, what is the method of recognition most likely to be in the interests of the Australian community." Reflecting back on all that happened at this time, Bob Ellicott wrote in 2014:

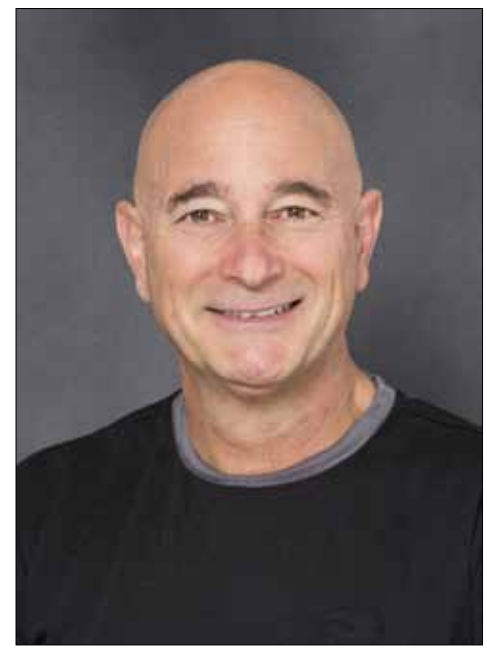
> I think it is important in telling the story of these early days to stress that in the *Milirrpum Case* although the court did not find for the plaintiffs there was clear recognition that there was a recognisable relationship of immense importance between Aboriginal people and their land. By 'recognisable' I mean it was so obvious and deeply rooted that it could be recognised by statute. It changed Commonwealth thinking on the subject so much that within 5 years the Northern Territory Land Rights Act was passed by a parliament which was controlled by so called 'conservatives'.

The Aboriginal loss in the courts was the precursor to their win in the Parliament with both sides of politics supporting the need for the *Aboriginal Land Rights (Northern Territory) Act 1976*, largely formulated by the Whitlam Labor Government and enacted with amendments by the Fraser Liberal-National Party Government forty years ago.

**Father Frank Brennan AO is a Jesuit priest and professor of law at Australain Catholic University. His latest book on Indigenous issues is* No Small Change, *University of Queensland Press, 2015.*

The financial underpinnings of land

When the Aboriginal Land Rights Act was passed in 1976 there was great optimism that the return of ancestral lands to their rightful owners might result in economic improvement, sometimes thought of just in mainstream ways, sometimes in accord with Aboriginal aspirations and wishes.



Jon Altman research professor, Alfred Deakin Institute for Citizenship and Globalisation, Deakin University, Melbourne.

By Jon Altman

At the stroke of a pen in 1976, lands that had been reserved for exclusive Aboriginal use under the Crown Lands Ordinance—about 20 per cent of the Northern Territory—was vested in land trusts and was the real estate property of traditional owners. Subsequently, Aboriginal 'land rights' ownership (as distinct from 'native title' determination) has expanded to just on 50 per cent after a protracted claims process.

But economic improvement could not come from land ownership alone, especially when that land is extremely remote and has low commercial value. And so the major architect of land rights law, Justice Edward Woodward, who was appointed by Prime Minister Gough Whitlam to head the Aboriginal Land Rights Commission, devised a scheme to assist in the generation of financial capital alongside the natural capital of land rights.

Woodward recommended that Aboriginal people in the Northern Territory be vested with a full royalty right—that is, that the royalties usually paid to governments as the asserted sovereign owners of subsurface minerals be instead paid to Aboriginal people.

This was a progressive masterstroke that was influenced by two logics.

The first was historical precedent. In 1952, in another progressive masterstroke from an earlier era, the Minister for Territories, Paul Hasluck, earmarked all statutory royalties raised on Aboriginal reserves to be held in trust for Aboriginal people.

This was an extraordinary decision for its time because it at once recognised that crown land was exclusively reserved for Aboriginal use and benefit. If mining was to occur on reserves then compensation was to be paid.

What is more, Hasluck directed that this compensation would constitute the royalties that would have been paid to the Commonwealth (then administering both the Northern Territory and reserves) and that the royalty rate would be double the standard rate stipulated in the Mining Ordinance.

Hasluck's policy intent was that such financial resources paid into the Aborigines (Benefits from Mining) Trust Fund (ABTF) could be deployed to assist the process of economic integration of Aboriginal people, in accord with the policy of assimilation formally espoused in 1951.

The second logic was a form of political compromise with Aboriginal interests.

Prime Minister Whitlam had instructed Woodward to vest title in land with the Aboriginal inhabitants of the Territory, as well as 'sovereign' rights in minerals and timber.

After intense lobbying by the peak mining industry association, Woodward decided that attaching mineral rights to land rights was a step too far. His compromise was the provision of a royalty right: all royalties raised on Aboriginal land would be foregone by the Commonwealth and paid to a new institution, the Aboriginals Benefit Trust Account (ABTA).

While the ABTF had been legally established in 1952, it became operational only in 1969, when royalties from mines established on Groote Eylandt and Gove started flowing to Commonwealth coffers. A key challenge that the ABTF faced was how to divide its income between those directly impacted by mining and Aboriginal people in the Northern Territory more generally. Eventually a decision was made to allocate 10 per cent to those in areas affected, with the remaining 90 per cent to be either allocated as grants or loans to Aboriginal individuals and groups, or held in trust.

Woodward proposed a radical change to this arrangement and recommended a legal formula whereby 40 per cent of royalties were earmarked to meet the cost of running land councils (one of their key roles being to mediate and represent traditional owners in negotiations with mining corporations); 30 per cent to be paid as compensation to land owners and others directly affected by mining; and 30 per cent to be retained by the ABTA to be applied to or for the benefit of Aboriginal people in the Northern Territory.

Woodward's recommendations were all incorporated in the Aboriginal Land Rights Act passed two years later.

I interpret Woodward's rationale for this three-way division as follows.

First, owners of the land, whether they approved of mining or not, should be compensated for loss of land and the social disruption associated with resource extraction. Arguably all royalties could have been paid to these people but this was sailing too close to a full mineral right and might result in excess wealth for some, with potentially negative transformative effects.

And so 30 per cent was arbitrarily chosen: better than the 10 per cent precedent, but far short of 100 per cent. However, this payment was only in relation to statutory royalties foregone by government; the right-of-consent provisions embedded in land rights law from 1976 also allowed for the negotiation of additional mining payments to be made to traditional owners.

Second, from 1973 Land Councils had been established to represent Aboriginal interests. Woodward experienced directly the value of these representative organisations—he referred to them as an unqualified success as institutions that reflect an Aboriginal viewpoint and recommended their establishment as statutory authorities.

Woodward also saw great merit in land councils having revenue independent of standard government budgetary appropriations, hence the recommendation that 40 per cent of royalties be used to fund their operations. Keen on checks and balances, he recommended ministerial approval of land council budgets.

Third, the balance was to be applied to or for the benefit of Aboriginal people in the Northern Territory to reflect in part that not all would be vested with land rights—freehold land, for example, was not available for claim—and in part to ensure some redistribution. This balance was to be held by the ABTA and granted to Aboriginal groups and corporations by the Minister of Aboriginal Affairs on the advice of an all-Aboriginal Advisory Committee nominated by land councils.

In 1982, when I was what is termed today an "early career academic", I embarked on a study sponsored by the Commonwealth Department of Aboriginal Affairs (DAA) to look at the institutional arrangements that had evolved to receive and manage mining royalties in the Northern Territory.

What I discovered and documented was that these new arrangements were not only complicated and incomprehensible to the people whom I worked with in Arnhem Land, but they were also poorly understood by a diversity of stakeholders, including DAA and the Minister.

And aspects of Woodward's schema had fundamentally changed—both in translations into law and by the granting of self-government to the Northern Territory. And so the law vested control of the new ABTA with the Canberra bureaucracy and the federal Minister.

Furthermore, self-government in 1978 saw primary royalty rights allocated to the Northern Territory Government (as was the case with the states), except in relation to uranium, a prescribed substance whose ownership remained with the Commonwealth.

From 1978, when these new financial arrangements were operationalised, the ABTA did not receive royalties from mining companies, but rather their near equivalence from the Commonwealth. This led me to invent the clumsy term, "mining royalty equivalents" or MREs, still in common use today.

Significantly, MREs were paid from consolidated revenue and this raised enduring ambiguity as to whether MREs are public moneys (which they are technically) or Aboriginal moneys (which they are in the spirit of Woodward's adjudications).

This in turn raises questions about who should control the financial resources raised from mining on Aboriginal owned land and who should be accountable for how they were used. This lack of clarity provided considerable structural opportunity for these new financial institutions to be dominated by politicians.

In 1984, as a not much older early career academic, I was honoured to be appointed by one of those politicians, Clyde Holding, to chair a wide-ranging review of the role, structure, functions

rights law: for whose benefit?

and operations of the ABTA. This review was conducted in a spirit of productive cooperation; a working party was drawn from land councils, the ABTA Aboriginal Advisory Committee and the DAA.

Some findings from that review, tabled in Parliament in early 1985, still have purchase today. It was highlighted that there was a lack of clarity between the clearing house and granting functions of the ABTA and that there was a need for a process to establish strategic financial (how much to spend, how much to save), expenditure (what to spend on) and investment (where to invest) policies. These issues, on which there was consensus, needed urgent attention.

There was some disagreement within the working party whether royalty equivalents are public or Aboriginal moneys and associated questions about the form of financial accountability required for their utilisation.

But there was unanimous recognition by all members of the working party that complete Aboriginal control of the ABTA was a desirable objective, and a comprehensive plan and timetable for the systematic and responsible shift to Aboriginal control over a five year period was proposed.

The review was conducted at a time when 'self-determination', if not quite the policy of the day, was perceived as at least desirable. A basic principle accepted by the working party was that control of the ABTA must be transferred to Aboriginal people.

Many of the 73 recommendations from this first and last independent and comprehensive review of the ABTA were implemented by government, in particular in relation to transparency and proper reporting, with a separate annual report being published and granting policy and practice being placed on a sounder and more strategic footing. For a time, advice provided to the Aboriginal Advisory Committee by federal bureaucrats was supplemented with independent advice from land council professionals operating as a Sub-Committee.

But the key issue whether MREs are public or Aboriginal moneys (or both) has never been properly addressed. And the key recommendation for complete Aboriginal control was never seriously countenanced.

This in turn has resulted in a lack of clarity about the proper purpose of grant expenditure, much of which has underwritten the functional responsibilities of governments. And it has left open possibility for political interference in the operations of the ABTA that has escalated rapidly in recent years, especially since the abolition of ATSIC, which managed the ABA from 1990 to 2004.

Looking back today to the optimism of the early days of the land rights movement, one has to ask what has the innovative ABTA institution, now renamed the Aboriginals Benefit Account (ABA)—with the word 'trust' of great symbolic value deleted - delivered? And where has it disappointed?

In terms of sheer numbers, a rare tallying of income and expenditure from 1978–79 to 2014–15 is impressive: over this period, more than $2 billion of MREs has been paid to the ABA (I use contemporary nomenclature) with expenditure roughly according with Woodward's intention, bearing in mind that the income of the ABA exceeds annual allocation of MREs owing to interest and other income.

To complicate this financial picture, payments of MREs out of the ABA have attracted an unnecessary and inequitable, arguably racist, mining withholding tax introduced by then Treasurer John Howard in 1978. And it is certainly difficult to make historic comparisons because over this 37-year period the consumer price index has seen a dollar in 1978–79 worth more than $4 today.

I estimate that $670 million or $18 million per annum has been allocated to the Northern Territory's four land councils. It is hard to say if this allocation represents good value for money. I suspect that from an Aboriginal standpoint, those who have benefitted from the more than doubling of the Aboriginal land base and the successful legal recognition of ownership rights over 85 per cent of the coastline, and the statutory mediating role played in literally hundreds of negotiations for land and resource use agreements, might say excellent value. Others, like the minister, might disagree.

In 2006 the Aboriginal Land Rights Act was amended by the Howard government to replace the 40 per cent of MREs guaranteed to land councils with a higher degree of ministerial discretion in calculating their budgets. This has provided a ready means for the minister to exert unconscionable political pressure on land councils to acquiesce to the agenda of the government of the day, rather than prioritise the views of their constituents, Aboriginal land owners.

I estimate that just over $600 million has been paid in 'areas affected' moneys with most going to just a few regions where there are major resource extraction projects—like at Gove, Groote Eylandt, Jabiru in the Top End and the Granites, Tanami, Palm Valley and Mereenie in the Centre.

These payments are similar to private compensation payments for surface and social disturbance paid to other Australians. Some payments have been used productively, others wasted. It is unclear what accountability metrics should be attached to these moneys although clearly it is tragic when expenditures exacerbate negative impacts they are supposed to ameliorate.

Finally, nearly $500 million has been expended in hundreds of grants to or for the benefit of Aboriginal people in the Northern Territory. To my knowledge the net benefit of these grants has never been rigorously assessed, even though concern was raised back in 1984 that too often grants were substituting for the citizenship entitlements of Aboriginal people.

There is no doubt that many grants have provided important contributions of community and environmental benefit, be it in underwriting funerals or caring for country activities or capital allocations for community stores and art centres.

But there has also been some scandalous ministerial interference from both sides of politics in pre-empting, overriding or reversing the considered views of the Advisory Committee—starting with the notorious decision of Mal Brough in 2006 to direct $100,000 to support the Woodford festival that just happened to be in his Queensland electorate, well outside the Northern Territory.

In other egregious examples it has been reported that ABA funds have been allocated to fund a number of initiative that have originated from the minister, thus reversing statutory intent that proposals originate with the Advisory Committee.

Perhaps most controversial has been the decision of current Minister Scullion in early 2014 to overturn an Advisory Committee decision to allocate $10 million to support the work of a foundation established to assist Aboriginal people suffering from the debilitating Machado Joseph Disease. This decision was successfully challenged in the Federal Court in late 2015 and is currently being appealed by the minister.

In the same round, a supportive decision by the Advisory Committee to allocate $1 million to the Karrkad-Kanjdji Trust (of which I am a director) to assist ranger groups 'caring for country' in Arnhem Land was similarly overturned at ministerial whim.

The ABA has increasingly become a highly-politicised stash fund with grant allocations made at ministerial discretion with timing of grant announcements aligned with electoral cycles rather than Aboriginal priorities.

Unfortunately this growing politicisation has occurred during the long mining boom; over the past decade the ABA has regularly averaged well over $100 million per annum in mining royalty equivalents. These are serious amounts that should have generated serious beneficial outcomes.

Instead, ABA funds have been deployed, after statutory amendment in 2006 and 2007, to promote ideologically-driven proposals for land tenure changes most evident in the underwriting of the activities of the Office of the Executive Director of Township Leasing and the push for 99-year leases of Aboriginal townships lubricated with upfront sweeteners from the ABA.

According to the latest financial statements and annual report of the ABA for the 2014–15 financial year, deeply concealed in the annual report of the Department of Prime Minister and Cabinet, there is equity of over $500 million held in reserve, a massive financial bucket of extraordinary developmental potential. But its use remains at ministerial discretion—one wonders what rabbit-out-of-the hat grants the minister might announce in the near future to maximise electoral prospects federally and in the Northern Territory, underwritten by the ABA?

The financial underpinnings of land rights law and the role of the ABA have slipped from public scrutiny in recent years; it has been a decade and a half since a parliamentary inquiry *Unlocking the Future* in 1999 examined their operations.

When I first worked in this area the ABA was regarded as a progressive institution for Aboriginal economic empowerment and development. Now it has been transformed into a ministerial slush fund, an institution for dependence to underwrite neoliberal experimentation for reforming land tenure to "develop the North" and to depoliticise and manipulate Aboriginal statutory authorities and community organisations.

The inability of well-intentioned reform to unshackle the ABA from increasingly politicised ministerial control and limited accountability has been very costly to Aboriginal interests in the Northern Territory.

One has to ask, why were we able to openly and productively inquire into such fraught issues in the past but not today? Who should control the financial resources generated from mineral resource extraction on Aboriginal land? Who is benefiting from the status quo? How can Aboriginal people wrest control of the ABA from the Commonwealth to ensure that it works in their best interests and according to their priorities?

If complete Aboriginal control of the key financial institution of land rights was accepted unanimously as a desirable objective in 1984, why is this not the case in 2016, 40 years after the passage of ALRA?

Ord Stage 3: been there

The Northern Territory Government has flip-flopped on its plans for the Ord Stage 3 irrigation scheme, which would extend the Ord River Irrigation Area from Western Australia into the Northern Territory.

NLC CEO Joe Morrison said he was "baffled" by the government's changing plans.

The Ord 3 extension into the Northern Territory is focused on 14,500ha of land on the Keep River Plain, within the Spirit Hills pastoral lease which adjoins the Western Australia border.

Plans to develop the Keep River Plain were first floated in the late 1990s by a consortium of Wesfarmers and Marubeni, Japanese commodity traders. The plans caused consternation among traditional Aboriginal owners, and in 2001 the NLC conducted the first detailed anthropological research into the Keep River Plain (balangarri) that established the entire area was a sacred site under the Aboriginal Sacred Sites Act.

Wesfarmers withdrew its proposal in late 2001, citing, among other reasons, the sacred nature of the Keep River Plain.

The plans were revived when a Chinese company, Kimberley Agricultural Investment, took over the project in 2012, and the next year traditional Aboriginal owners travelled to Darwin to inform CLP Government Ministers of their total opposition to the extension of the Ord scheme into the Northern Territory.

The government was undeterred by the opposition of Aboriginal people: in 2013 it progressed the proposal by applying to the Aboriginal Areas Protection Authority (AAPA) for an Authority Certificate. The Authority issues a Certificate when it is satisfied that work can proceed without risk of damage to sacred sites or if an applicant has reached agreement with Aboriginal custodians.

Further anthropological work in 2013 developed understanding of the nature of the Dreaming on the Keep River Plain. On the day in 2013 that the AAPA board met to register the Keep River Plain, the Northern Territory Government withdrew its application for a Certificate.

The Government then broke up the Ord 3 project into three blocks and proposed first developing a parcel to the south called Ord 3A. It would have required the extinguishment of native title over more than 4000ha, of which 1800ha were earmarked for irrigation farming —the rest was to be a buffer zone.

In May last year, the director of the NT's Ord Development Unit said: "By breaking up (Ord Stage 3) into smaller pieces, we can do a good deal, gain some momentum and build some trust (with native title holders) which will take us forward to talking about bigger areas …"

At the request of the Government, the Northern Land Council consulted Aboriginal Native Title holders and secured their consent to enter into an agreement for Ord3A.

Then, without notice, Government officials told the NLC in early March that it intended to develop Ord Stage 3 in toto, and publicly announced that intention on Sunday 3 April.

"We're quite baffled by the new approach to developing all of the Ord [Stage 3], as opposed to what we were heavily involved in – negotiating with native title holders the small parcel of land known as Ord Stage 3A," Joe Morrison told the ABC's *Country Hour*.

"We are quite disturbed about the sudden change of direction by the NT Government," he said.

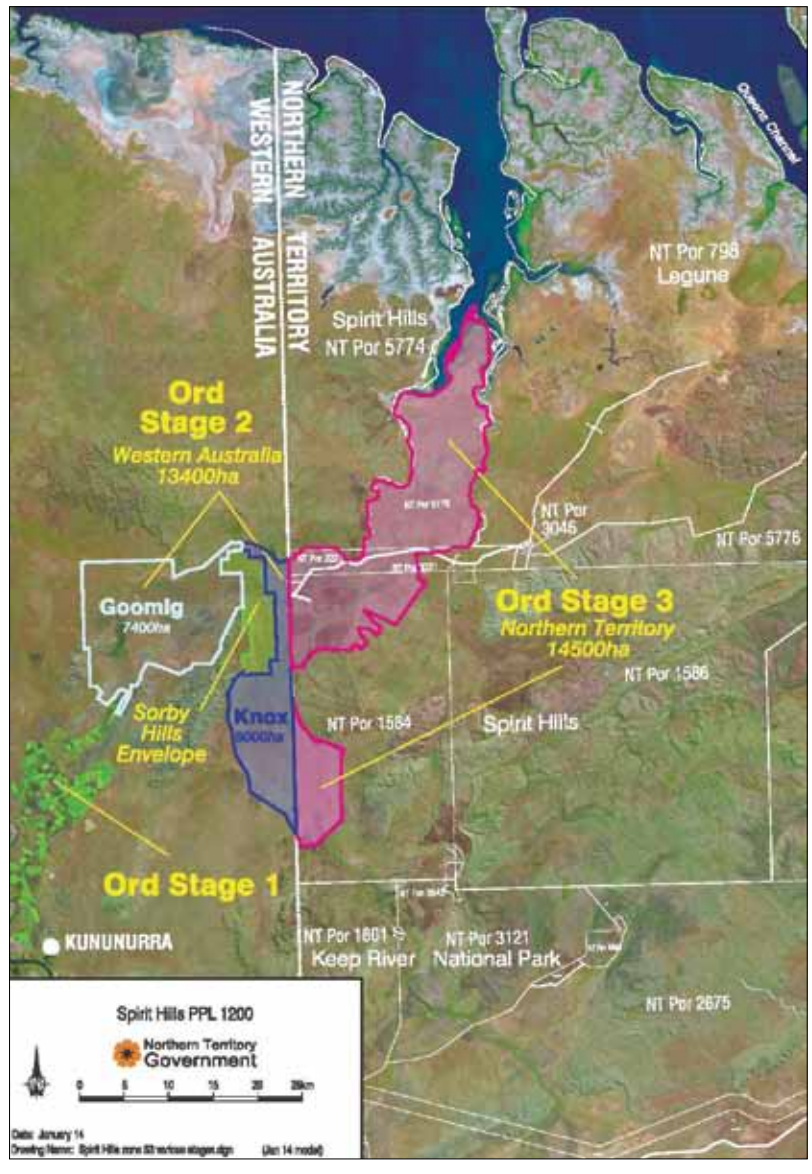
The Government is now seeking private sector proponents to develop the whole of Ord 3. A successful proponent would be expected to build irrigation channel infrastructure and gain all necessary approvals, including sacred site and environmental approvals.

A Government pamphlet says the proponent would have to conduct "sensitive negotiation" of native title and sacred site matters with the Miriuwung and Gajerrong people through an Indigenous Land Use Agreement and AAPA clearances.

The pamphlet says Ord Stage 3 "provides investors with the opportunity to develop premium crops for global markets, while providing economic and employment opportunities in the region, including for the Miriuwung and Gajerrong native title holders".

The Government has set a tight timetable: proposals must be lodged by the end of May, to be assessed by mid-June; negotiations with preferred proponents would occur in June-July, and an agreement would be executed by the end of July.

A successful proponent would also be required to provide a land corridor for a channel to supply water to the huge prawn farm planned on Legune Station to the north of Spirit Hills Station.



THE END OF THE LINE: The Commonwealth and Western Australian Governments have invested more than $500 million to bring the Ord Stage 2 irrigation channels within six kilometres of the Northern Territory border.

Native Title Compensation

The Federal Court sits at Timber Creek February 2016

Dwarfed by dramatic escarpments, the town of Timber Creek sits on the low land adjacent to its namesake, the Timber Creek—a stone's throw from where that creek joins the mighty Victoria River. On the other side of the river is the Australian Army's Bradshaw Field Training Area, and to the west, Judbarra (Gregory) National Park; everywhere else is pastoral country.

While the European origins of Timber Creek are as a depot camp for explorers, and when pastoral activity began, as a port for supplies, the Indigenous cultural heritage reveals a complex web of Dreaming paths and stories, ancient trading routes: a landscape offering not only physical but also spiritual, cultural and social sustenance.

The Federal Court came to this setting on 8 February 2016 to hear an application by the Ngaliwurru and Nungali peoples for compensation for the loss of their native title rights and interests over parts of the township of Timber Creek.

The case is the first in which a judge (Justice John Mansfield) will determine the principles of compensation for extinguishment and impairment of native title rights and interests. Whatever his decision, the matter will surely be decided by the High Court.

In a makeshift court set up on the town's covered basketball court, Sturt Glacken QC, counsel for the applicant, Alan Griffiths, opened with these words: "… a daunting task is now facing the court in involving the need to place a value on what some may say is the invaluable—that is, where an Aboriginal group is dispossessed of parts of their traditional country, in effect, where there is diminution in a religious, cultural and material sustenance that a country provides to its traditional owners. Above all, our word 'land' is too spare and meagre and we can now scarcely use it except without economic overtones, unless we happen to be poets ..."

A final judgment may resolve some of the last outstanding issues in native title jurisprudence, and provide a set of guiding principles to determine how compensation can be calculated where native title is extinguished.

The Timber Creek case is not the first compensation application under the Native Title Act. That case was *Jango*, which sought to deal with a native title determination and a native title compensation application at the same time. The *Jango* case established the principle that, without a determination that native title existed at the time of any extinguishment, a compensation application will not be successful. There have also been other compensation cases, such as De Rose and Gibson Desert, but none has, as yet, set out the principles for calculation of compensation.

The Ngaliwurru and Nungali peoples had already had their native title determined over Timber Creek. They first lodged a claim in 1999, after the Northern Territory Government gave notice of its intention to compulsorily acquire seven lots of vacant Crown land within the town.

The Government wanted to convert the lots into private land for lease or grant as freehold to tourism and agriculture businesses.

The Ngaliwurru and Nungali peoples lodged a further claim to land subject to a proposed acquisition in 2000, along with a claim in the same year covering the entire township. The filing of those claims secured future act rights under the Native Title Act, allowing the Ngaliwurru and Nungali to object to the proposed compulsory acquisitions. These three claims were heard together as the Timber Creek Matters.

The objections to the compulsory acquisitions were lodged in the NT's Lands and Mining Tribunal on behalf of the native title claimants, and were appealed ultimately to the High Court, which found in favour of the NT Government in 2008. Despite being successful in the High Court, the Government did not pursue the acquisitions.

In parallel, the Ngaliwurru and Nungali received a determination of non-exclusive native title over certain lots in the Timber Creek township in 2006. They then appealed successfully to the Full Court of the Federal Court, and the determination was amended to provide for exclusive native title in land declared to be a town site and occupied by the native title holders.

In 2011, Ngaliwurru and Nungali lodged a new and separate claim for compensation in the areas in which native title rights and interests were impaired and over areas where they were extinguished. The claim includes a variety of tenures, including freehold land and special purpose and Crown leases.

The liability of governments to pay compensation for extinguishing native title arises for acts done after 1975 when the *Racial Discrimination Act 1975* (Cth) was enacted. Under section 10 of that Act, persons of a particular race must enjoy the same rights to the same extent as other people. As a result, governments are liable to pay compensation for acts that impair or extinguish the native title rights of Aboriginal and Torres Strait Islander people.

The significance of this litigation as a test case will lie in the Court's decision about how to quantify the loss of native title rights and interests in monetary terms, a question that has not yet been settled.

The Attorney Generals of South Australia and Queensland have also joined the Timber Creek proceedings, recognising that they will have an interest in how the case is decided. The outcome will likely have an impact in all Australian jurisdictions, and may see an increase in the number of compensation applications filed on behalf of native title holders.

Before the Federal Court hearing in Timber Creek, Chris Griffiths, son of the applicant Alan Griffiths, told the ABC: "The compensation will never replace our land … Once you build a house, it's there forever but the country is still here, the spirit is still here, our heart is still here. But it's not going to be the way it should've been. But the compensation is going to help us in getting back what they damaged."

In Timber Creek, the Court was able to view the environs and hear directly from Ngaliwurru and Nungali witnesses about the impact of the acts that extinguished or impaired their native title rights and interests, and their relationship with country.

The Court then moved to Darwin, where evidence was heard from expert valuers, economists and anthropologists. The closing submissions of parties were heard in Darwin in late April 2016.

This story is drawn from a report by Rebecca Hughes, NLC lawyer, and Stacey Little, from the Native Title Research Unit of the Australian Institute for Aboriginal and Torres Strait Islander Studies.

Country Needs People

Campaign launches in Darwin

Dean Yibarbuk, Warddeken Ranger and Patrick O’Leary, PEW Foundation

Promoting cross cultural knowledge, passion and a beautiful country are the important reasons Indigenous ranger jobs should be doubled, according to Warddeken ranger and fire ecologist Dean Yibarbuk.

Yibarbuk, an NLC councilor from the West Arnhem region, joined Indigenous rangers from the Top End and across Australia at the launch of a national campaign in April to persuade the Federal Government to significantly increase the ranger and Indigenous Protected Area (IPA) programs.

“Ranger programs have started so much in our community – they gave people jobs and promoted culture, and they’ve given us the launching pad to open a school on country,” he said.

TV, billboard, newspaper and online advertising in Darwin focuses on the evidence that the work of Indigenous rangers is transforming lives and protecting the natural environment.

Warddeken Aboriginal Corporation is one of a growing alliance of ranger and Traditional Owner groups that have formed a campaign, *Country Needs People*, to urge the government to double funding and so double jobs for Indigenous rangers and IPAs by 2020 and secure funding into the long term.

The Pew Charitable Trusts is also a supporting partner of the Country Needs People alliance and spokesperson Patrick O’Leary said that the Northern Territory is a key focus for the campaign because it is a pioneering region for Indigenous land and sea management programs and has globally important environmental and cultural values.

“Indigenous ranger groups and Indigenous Protected Areas in the Territory have really led the way for the whole country to adopt these hugely successful programs,” Mr O’Leary said. “The work of Traditional Owners over the years to retain and live on country and develop Ranger and IPA groups is inspiring.

“The campaign is really saying there is an opportunity for politicians here to get behind the success and hard work that is delivering results for the environment, for local people and the wider community.”

Building on decades of work like the Northern Land Council’s Caring for Country efforts, Indigenous rangers and IPAs have evolved into a key foundation of Australia’s approach to land and sea management. The work by Traditional Owners through these programs is recognised as of global significance to environment, culture and community.

The campaign is calling for the government to:

- Double the funding for IPAs and Rangers;
- Secure longer term contracts in recognition of the value of the work and the need for stability for new and older Ranger and IPA groups; and
- Establish a longer term target of 5000 Indigenous ranger jobs nationwide, addressing the huge scale of management needed on fire, feral animals and weeds, protection of sea country amongst other needs across Australia and recognising the positive impact of these roles on Indigenous communities.

While Traditional Owners and their local and regional organisations were always the driving force for Indigenous Ranger and IPA work, the Federal Government in particular became a significant player in providing funding over the last decade.

The IPA and Working on Country programs were launched under the Howard coalition government, with ministers like Robert Hill and Greg Hunt taking a particular interest, and greatly expanded under the Labor ministers Peter Garret and Tony Burke. But while the federal government became a significant player in providing funding over the last decade, Traditional Owners and their local and regional organisations were always the driving force for Indigenous Ranger and IPA work.

NLC CEO Joe Morrison said Indigenous organisations like the NLC and the North Australian Indigenous Land and Sea Management Alliance (NAILSMA) have had continuing and critical roles in the development of ranger programs in the north and elsewhere around Australia.

“It’s important to remember that these are Indigenous programs and Indigenous people should be in full control of them including the design, implementation and on-going operations of Ranger programs to ensure that the original intent of these programs remains in the hands of Indigenous people. This has been the spirit in which the NLC and NAILSMA have always advocated for these programs as leading voices,” Mr Morrison said.

Federal support is now outstripped by the demand for Ranger jobs and IPA funding across Australia, and still represents much less than 0.01 % overall of Australia’s total $430 billion annual budget. “There is a real opportunity there for Canberra going forward to grow these programs and grow the jobs that bring such a great return for people and country,” Mr O’Leary said.

“The time now is to focus on the future and call for all political parties to have a strong vision and policy for a healthy and growing Indigenous Rangers and Indigenous Protected Areas network. With benefits for environment, culture, community, employment, health, education and more it’s a campaign all Australians, Indigenous and non-Indigenous can get behind.”

To find out more about the campaign and what’s happening, follow the Country Needs People Facebook page and website:

www.facebook.com/CountryNeedsPeople
www.CountryNeedsPeople.org.au

Public inquiry on marine fisheries and aquaculture

Late last year the Australian Government asked the Productivity Commission to undertake a public inquiry into the regulation of the Australian marine fisheries and aquaculture sectors.

The Commission has particular interest in impediments to increasing productivity and market competitiveness of Australian fishing and aquaculture industries. Its terms of reference to conduct the inquiry included considering "the extent to which fisheries management regimes support greater participation of Indigenous Australians, provide incentives to Indigenous communities to manage their fisheries, and incorporate their traditional management practices in the fishing industry".

In the NLC's submission to the Commission, Chairman Samuel Bush-Blanasi, highlighted NLC's account of Aboriginal participation in marine fisheries in the north following significant achievements in Indigenous land and sea country management. Most relevant to the Territory, is the High Court's decision on the Blue Mud Bay case, which was central to NLC's submission.

The Chairman stated, "the Northern Land Council would summarise our outcomes to date as falling well short of securing any of our interests and potential opportunities from this entitlement [control of intertidal access]. Aboriginal Territorians are no further toward participating in either fisheries management or fishery economic activities. Foremost, our rights are still not recognised in fisheries legislation and our responsibility to control access remains ellusive and vulnerable without proper regulation."

"Further, frameworks for community engagement toward consent and decision making processes remain strikingly absent. From this view point, the Northern Land Council is extremely disappointed by Governments' inability to formulate a program to support our interests in fisheries management that is premised on our recognised rights, protects our cultural practices and economies and is informed and led by our communities."

The NLC concluded that the overarching standard in all marine fishery and aquaculture regulatory frameworks must be the accountability of the significant property and customary rights of Aboriginal people and provided a set of recommendations. Interests included:

- Australian marine fisheries meet international standards (UNDRIP) for recognising Aboriginal values and interests.
- Review of Northern Territory fisheries legislation to recognise and account for fishing activity in relation to The Aboriginal Land Rights Act, Aboriginal Land Act, Native Title, Sacred Sites and Aboriginal Heritage acts.
- Review of marine fisheries management policies to recognise the Environment Protection and Biodiversity Conservation Act relevant to the recognition and protection of Aboriginal customary fishing rights.
- Raising awareness of all marine fishing sectors in recognising the rights and interests of Aboriginal people.
- Commonwealth and Northern Territory Governments work with the NLC and commit sufficient resources to resolve intertidal fishing access over Aboriginal land as a milestone to progress Aboriginal participation in marine fisheries by developing a comprehensive framework for Aboriginal people to control access, engage in fishery management decisions and participate in commercial fisheries.
- A moratorium on any fisheries legislative changes specific to fishing access and activity in intertidal areas over Aboriginal Land until fishing access has been resolved.
- Investment in research and development to recognise Aboriginal fishing rights, inform equitable resource sharing decisions, provide up to date stock assessments and to address multi-stakeholder interests.
- Independent expert body specific to the Northern Territory region is established to:
  - provide independent expert advice and regulatory oversight to the Northern Territory Government on delivery of national and other standards for sustainable marine fisheries.
  - regulate and measure Northern Territory Government administration of fisheries regulations and marine fishery sector compliance specific to Aboriginal land rights and interests.
- Develop and resource a community engagement framework to enable Aboriginal people to be actively involved in development, implementation, evaluation of policy and legislation or administrative measures that effect their land and marine estates.
- Fisheries Advisory Committees (or equivalent to Indigenous Protected Area construct) are established across the Northern Territory to inform Management Advisory Committees, managed independently of Government.
- Fisheries management is inclusive of impacts from development such as biosecurity threats; changes in land management practices through increased agricultural and offshore petroleum development and waste water discharge, water security and quality, and climate adaptation.
- Commonwealth regulates implementation of National Guidelines – Fishery Harvest Strategies in State and Territory equivalent regulatory frameworks so that Aboriginal fishing rights are recognised.
- Investment into research to qualify and quantify customary fishing values relevant to setting triggers and quotas in harvest strategies.
- Customary fishing rights are recognised and managed separately from environmental triggers for fishery allocation of resources.
- The role of Sea Country Indigenous Protected Areas is recognised and examined in fishery management and administration processes.
- Recognise and support the role of Rangers in providing services in marine fisheries management.

After considering all submissions, the Commission will to report to the Government in December 2016.

The Royal Commission into Aboriginal Deaths in Custody

Twenty five years ago, April 1991, the Royal Commission into Aboriginal Deaths in Custody handed down its report, with 339 recommendations.

The Royal Commission was established by the Hawke Government in 1987 to examine the deaths of 99 Aboriginal persons in police or prison custody between January 1980 and May 1989.

The Commission's report was put together by Elliot Johnston and a team of Commissioners that included Hal Wooten, Lou Wyvill, Dan O'Dea and Pat Dodson.

For the anniversary, Pat Dodson was invited to address the National Press Club in Canberra. Here's an edited transcript of his address.

Since the Royal Commission handed down its report, 750 people have died in custody. Indigenous people make up 20% of these deaths. Alarmingly, the rate at which Indigenous people are imprisoned has more than doubled over the past twenty-five years.

At the time of the Royal commission some 14% of those in custody were Indigenous. Today it is around 27%; this is despite the Commission's recommendation that prison be a measure of last resort.

This growth isn't tied to the crime rate – it well and truly exceeds it .

We are being imprisoned at a rate that is a staggering 13 times higher than that for non-indigenous people. And, unfortunately, that rate appears to be accelerating.

At 30 June 2015, ABS statistics showed we comprise 38% (2,113 prisoners) of the adult prisoner population, and get incarcerated at a rate that is 17 times higher than for non-Indigenous people.

There are some exceptions to this bleak outlook, notably the reduction in hanging deaths due to the removal of fixture points in cells.

But, by and large the problems the Royal Commission was set up to examine and advise governments on, have become worse.

This raises questions as to how effectively the Commission's recommendations have been implemented in the period since, and whether the issues identified by the Commission are understood or even considered important.

Certainly, one has to wonder what happened to the principle of imprisonment as last resort and the 29 recommendations relating to this issue.

In this regard, the role of criminal justice policies in driving the current upward trend in Indigenous custody rates cannot be overlooked.

Mandatory sentencing, imprisonment for fine defaults, paperless arrest laws, tough bail and parole conditions and punitive sentencing regimes certainly have not helped.

> **"At the time of the Royal commission some 14% of those in custody were Indigenous. Today it is around 27%; this is despite the Commission's recommendation that prison be a measure of last resort."**

Neither do funding cuts to frontline legal services and inadequate resourcing for much needed diversionary programs and re-entry programs to break the cycle of recidivism. "Paperless arrest" laws in the NT are particularly concerning. These laws provide a new set of powers for arrest and detention without a warrant and apply to trivial offences, which do not even carry imprisonment as a penalty.

Effectively, they enable police to arrest someone who they believe or think is going to commit an offence, regardless of whether an offence has actually been committed. Paperless arrests do not require police to bring the person before the court as soon as practicable, surely one of the most fundamental rights that we should have as citizens, regardless of who we are, where we live or how we live.

Paperless arrest laws, like mandatory sentencing, are typical of a "law and order", "tough on crime" mentality that frames a great deal of the political conversation about Indigenous incarceration and injustice.

This rhetoric, and the policy thinking behind it, has authored the criminalisation of many of our people. As the Commission noted decades ago:

> In many cases, in fact a great majority of cases, Aboriginal people come into custody as a result of relatively trivial and often victimless offences, typically street offences related to alcohol and language. Many of these 'offences' would not occur, or would not be noticed, were it not for the adoption of particular policing policies which concentrate police numbers in certain areas, and police effort on the scrutiny of Aboriginal people.

Those arrested are criminalised in several ways. They acquire criminal records, they are defined as deviant not only in the eyes of police but of the broader society, they are introduced to custody in circumstances where they feel resentment rather than guilt, and hence arrest and custody cease to be matters of shame.

It seems Indigenous people are still being taken into custody far too often. This suggests that legislators in some jurisdictions have not learnt from the past, and are still intent on arresting their way out Indigenous disadvantage.

For our communities, the storyline is all too familiar: The minor offence; the innocuous behaviour; the unnecessary detention; the failure to uphold the duty of care; the lack of respect for human dignity; the lonely death; the grief, loss and pain of the family.

A quarter of century after we handed down our findings the vicious cycle remains the same:

- Indigenous people are more likely to come to the attention of police.
- Indigenous people who come to the attention of police are more likely to be arrested and charged.
- Indigenous people who are charged are more likely to go to court.
- Indigenous people who appear in court are more likely to go to jail.

If Indigenous people are being taken into custody at an increasing rate, then it stands to reason that our chances of dying in custody also increases.

The statistics speak for themselves and the cold hard facts remain an indictment on all of us.

In the past decade alone, the incarceration rate for Indigenous men has more than doubled. Indigenous youths now comprise over 50 per cent of juveniles in detention.

As our Indigenous Social Justice Commissioner, Mick Gooda, observes, Australia is better at sending young Indigenous men back to jail than we are keeping them in school.

For Indigenous women, the rate of imprisonment is accelerating even faster–a 74 per cent increase in the past 15 years.

One in every three women in Australian jails is Indigenous. As the Law Council notes, a range of factors contribute to offending by Indigenous women, but poverty, homelessness and high rates of violence and sexual abuse against women, along with drug and alcohol abuse linked to the trauma they experience, tend to bring Indigenous women into contact with the criminal justice system at an increasingly higher rate, often for trivial or minor offences.

Sadly, what this suggests is that Indigenous women who end up in prison are more likely to have been a victim themselves.

Mental illness is also a growing concern. In the absence of appropriate community based services and support, these people end up in the criminal justice system where they are managed by default by the police, courts and prisons.

The impact of all this on Indigenous families and communities, particularly children, is heart wrenching.

We get an insight into the ripple effects when we look at the number of Indigenous children in out of home care, which now numbers around 15,000 nationally.

If we are to disrupt current trends, we must invest in re-building the capacity of families and communities to deal with the social problems that contribute to these appalling indicators.

We need to prioritise and ensure front line services are not only resourced to respond to crisis, but can develop preventative programs that engage the community in winding back the

ravages of drug and alcohol abuse, the scourge of family violence and welfare dependency.

“Paperless arrest laws, like mandatory sentencing, are typical of a ‘law and order’, ‘tough on crime’ mentality that frames a great deal of the political conversation about Indigenous incarceration and injustice.”

For the vast bulk of our people, the legal system is not a trusted instrument of justice–it is a feared and despised processing plant that propels the most vulnerable and disadvantaged of our people toward to a broken, bleak future.

Surely, as a nation we are better than this.

We need a smarter form of justice that takes us beyond a narrow eyed focus on punishment and penalties, to look more broadly at a vision of justice as a coherent, integrated whole. Not as a closed system, but as an integrated life process that allows some sense of healing and rehabilitation.

Such an approach should consider innovative approaches to justice that can offer effective solutions to offending behaviour.

Justice Reinvestment is one such approach. Such approaches suggest that unproductive expenditure on prisons should instead be invested in programs at the front end that both reduce crime and prevent people entering the criminal justice system.

Building more jails and enacting laws that ensure the incarceration of Indigenous peoples is not the solution, and certainly not a good use of taxpayers’ dollars.

As the recent Vulnerability Report from the Australian Red Cross suggests, there is a potential savings of almost $2.3 billion over five years if resources were devoted to reducing the rate of incarceration by 2% per annum.

Such savings could be invested in the social support and health services that would, over time, address the underlying causes of crime.

Addressing the issue of high incarceration rates is not the government’s job alone. It requires a whole of community response and will only be achieved by working together. This echoes the call from the Royal Commission all those years ago.

It is time for our own communities to drive the change on the ground that is necessary to build a better future for the next generation. This must include valuing education and creating opportunities for the next generation to flourish.

We will not be liberated from the tyranny of the criminal justice system unless we also acknowledge the problems in our own communities and take responsibility for the hurt we inflict and cause to each other.

Family violence, substance abuse and neglect of children should not be tolerated as the norm. And, those that perpetrate and benefit from the misery caused to our people need to be held to account.

If we are serious about addressing these issues we must work together and agree on a way forward.

But the process must engage Indigenous people in a genuine dialogue. And that dialogue must translate into real partnerships that enable local communities to devise solutions to the problems that confront them.

Benchmarks and the strategies to achieve them must be set with the agreement of communities, with sufficient flexibility to allow for regional variation. As we know, a one-size fits all approach simply has not been effective.

It also requires policies that invest in communities, not die on the vine polices that lead to community closures by stealth and place more of our people at risk of coming into contact with the criminal justice system.

The Australian Parliament needs to be more open to the idea of engaging in a formal way with Indigenous people on matters that affect our social, cultural and economic interests as well as our political status within the nation state.

What is clear to me, though, is that this discussion must be framed by the philosophy of empowerment–of self-determination.

As Commissioner Elliot Johnston noted 25 years ago: “The whole thrust of this report is directed towards the empowerment of Aboriginal society on the basis of their deeply held desire, their demonstrated capacity, their democratic right to exercise, according to circumstances, maximum control over their own lives and that of their communities.”

He went on to add: “Such empowerment requires that the broader society, on the one hand, makes material assistance available to make good past deprivations and on the other hand approaches the relationships with the Aboriginal society on the basis of the principles of self-determination.”

If we are to be authors of our own destinies, then governments must stop treating us as passive clients, or as targets of a policy for “mainstreaming”.

It is imperative that the policy context changes, so Indigenous people are viewed as part of the solution–not just as a problem to be solved.

For that to happen we must recognise the common humanity we share and ask why Indigenous people in this country are being disproportionately incarcerated?

On any measure, the current incarceration rates of Indigenous people are a complete and utter disgrace. Accepting the status quo permits the criminal justice system to continue to suck us up like a vacuum cleaner and deposit us like waste in custodial institutions.

Salvation for jail visitors

The Salvation Army is making plans to provide a bus service for visitors to the Darwin "superjail" at Holtze, 33 km south of Darwin.

The jail opened in September 2014, but the NT Government has steadfastly refused to provide a public transport service – in spite of undertakings by the previous government to do so.

The number of visits per head of prison population has declined around 35 per cent, compared with visits to the former Darwin jail at Berrimah.

Land Rights News, in its last issue, published an article by Darwin barrister John Lawrence SC which criticised the absence of a bus service for jail visitors. The article was picked up by several media outlets around the country, and led to a petition through change.org to the Minister for Correctional Services, John Elferink, and the Minister for Transport, Peter Chandler, to provide a service. The petition attracted more than 400 signatures.

Mr Elferink was unmoved by the gathering clamour for the government to provide a bus service to the new jail. He put the cost around $80,000 per year and told the ABC: "As far as I'm concerned, if it's not economic to do so then we won't be doing it."

Mr Elferink said that people were in prison because they were repaying their debt to society: "If a person wants to spend time with their family and they value their family time so much, don't commit the crimes that see you go into a jail in the first place.

Mr Elferink said he had not seen any evidence that visits from family members aided rehabilitation, or reduced recidivism. Further, he said the rate of recidivism remained unchanged from the old jail at Berrimah (which did have a bus service) to the new jail at Holtze.

As *Land Rights News* went to press, the Salvation Army was about to meet with the Department of Correctional Services about its plans for a bus service from Darwin to Holtze, via Palmerston.

The $40,000 bus stop at Holtz jail may soon be in use.

COMMUNITY CONTROL FOR ABORIGINAL HOUSING

Two Indigenous organisations, Aboriginal Housing Northern Territory (AHNT) and Aboriginal Peak Organisations NT (APONT) are urging radical reform of the NT's public housing system.

AHNT comprises Aboriginal organisations and individuals who want a new system that allows for community control of housing, local engagement and employment, more responsive repairs and maintenance and better tenancy management services. APONT comprises the Northern and Central Land councils, Aboriginal legal aid services and the Aboriginal Medical Services Alliance NT.

AHNT and APONT have jointly made a submission to the NT Housing Strategy Consultation Draft which the Government announced in June 2015. The Draft Strategy aims to review housing supply and assistance programs.

In March 2015 APONT hosted a Remote Aboriginal Housing Forum which brought together 150 people and identified many failures in the public housing system: inadequate supply, poor design and poor workmanship; poor maintenance, leading to unhealthy conditions; no employment opportunities for local people in construction or management; complex management arrangements which deliver poor service; and inappropriate and culturally insensitive tenancy process.

The AHNT/APONT submission to the Government's Draft Strategy says Aboriginal people have been greatly disempowered as a result of new housing policies following the Howard Government's "Intervention" in 2007, which abolished Indigenous Community Housing Organisations and transferred community housing to the NT

Government. In spite of a commitment in 2008 of $2 billion over 10 years for NT housing, severe overcrowding and homelessness remain.

The submission notes that the NT has by far the largest housing shortfall relative to the total number of households – a shortfall of about 10,600 dwellings; and homelessness in the NT is 17 times higher than anywhere else in Australia.

The submission says that while the housing sector elsewhere has shifted to a diverse, community-based sector, Aboriginal housing in the NT has gone in the opposite direction: "Aboriginal housing in the NT has been moved wholesale to government control. The success of a community housing approach will depend on the Department of Housing being prepared to transfer management of state-owned public housing for Aboriginal people to Aboriginal control.

"Special purpose Aboriginal housing organisations with skilled governance, sound financial planning and management and staffed by trained housing professionals can be part of the growing community housing sector across Australia. Aboriginal housing organisations are best placed to have strong partnerships with local communities and Traditional Owners and work across regions that are geographically and culturally connected.

"Government regulation of community housing is essential, but we want to see a commitment by the NT government to empower organisations to deliver a model of community housing management rather than the bureaucratic and culturally irrelevant public housing model that now exists."

AHNT/APONT wants the Government's Draft Strategy to address housing problems on homelands: "If homelands receive reduced services or close down, then people may move to the fringes of communities or towns where there are already housing shortages. Homelands have been excluded from the whole new housing framework and as a consequence are not receiving sufficient funding or adequate levels of service. Houses on homelands are up to 30 years old and in disrepair; there is no funding to build new houses."

After AHNT met in Katherine in March, Co-Chair Barb Shaw drew attention to the "appalling" state of Aboriginal housing in Elliott–"the forgotten town".

"A one-off payment of $3 million from the NT Government is going to Elliott, which is welcomed, but is unlikely to fix the systemic problems plaguing Aboriginal housing in Elliott and other Aboriginal communities, outstations and town camps.

"Housing is at a devastating point in the Northern Territory," Ms Shaw said. "Housing is the foundation of health and education. How can we achieve quality education when our children don't have a house, or somewhere safe to sleep?"

NORTHERN LAND COUNCIL

is calling for

NEW FULL COUNCIL MEMBERS

to nominate for the next 3 YEARS -

2016 - 2019

The Full Council is currently made up of 78 Council Members who represent 54 Communities and Outstation areas.

Nominate someone who will fairly represent your Community.

Women and Youth are encouraged to nominate.

WHO CAN APPLY? Traditional Aboriginal Owners or Aboriginal residents within the Northern Land Council (NLC) area.

WHAT DO COUNCIL MEMERS DO?

- Have good knowledge about their community and land rights matters.
- Represent the views of all groups in the community or outstation area.
- Attend all meetings – some will be held away from their community.
- Take back news from the council meetings.
- Abide by the Council Member's Code of Conduct.
- Member are paid at a rate (sitting fees & allowances) as determined by the Remuneration Tribunal.

When will nominations open? 1 June 2016

When will nominations close? 31 July 2016

HOW CAN I NOMINATE?

- NLC will advertise broadly about the process and make available *information kits.*
- *Nomination forms will be included in the information kits* and sent out to *registered entities* (Aboriginal organisations).

WHAT IS A VALID NOMINATION (THE RULES)?

- Nominations are to be on the approved form provided by NLC.
- Nominations must be seconded by a traditional Aboriginal owner or an officer of a registered entity.
- Nominees are not subject to a disqualifying event under subsection 29(5) of ALRA (details will be outlined in the *information kit)*.
- Nomination forms are correctly filled out and received by the close date.
- If there are more nominations than positions for a particular area then a community meeting or election will be conducted by the NLC.

WHEN IS THE FIRST NEW FULL COUNCIL MEETING? 14-17 NOVEMBER 2016

If you are successful, NLC will write and invite you to attend the first meeting and advise you of the meeting and travel details.

WHY IS THE FIRST MEETING SO IMPORTANT?

- The new Full Council Members will nominate and vote for the Chairperson and Deputy Chairperson - this process will be run by the Australian Electoral Commission.
- Each region (there are 7) will nominate an Executive Council Member.
- Members will also be nominated to sit on the Aboriginals Benefit Account Advisory Council.

FOR MORE INFORMATION CONTACT THE NLC COUNCIL LIAISON OFFICER ON 89 205 118

How the CLP exploited the Kenbi land claim

Relationships between journalists and politicians in the Northern Territory have often been confrontational, not least when it came to reporting Aboriginal land rights. One such confrontation in the early days of the long saga of the Kenbi land claim sparked an early Territory election. Land rights (the Kenbi claim in particular) were a winning issue for the then CLP government.

By Murray McLaughlin

My first visit to the Northern Territory helped to precipitate an early general election. But there was no gratitude from the incumbent Country Liberal Party government for my having delivered them an issue which ignited the premature election campaign and underpinned the CLP's victorious re-election. Rather, the government attacked my work and vigorously pursued a complaint to my employer, the ABC.

I was working in Brisbane where I had rejoined the ABC in early 1979 as a reporter on a new television current affairs program, *Nationwide*, which was launched that year to succeed *This Day Tonight*. *Nationwide* was a hybrid program which aired at 8.30pm, Monday-Thursday. Each state had its own presenter; the first half of the program's 40 minute duration was a national story, the second half had state-based content.

Before Cyclone Tracy in 1974, the ABC in Darwin broadcast a local television service. Tapes and film reels were flown in and put to air; there was a local news bulletin. After Tracy's destruction, the Darwin service emanated from Brisbane, wending its way via a chain of microwave transmitters, placed every 30 kilometres or so apart, on a path through Mt Isa into the Northern Territory.

So it was that ABC viewers in Darwin received the Queensland edition of *Nationwide*. That made the Northern Territory part of the big beat covered by the *Nationwide* office in Brisbane from where we made occasional forays over the border to gather stories.

The Kenbi land claim story brought me to Darwin in early 1980. The NT government led by Chief Minister Paul Everingham had reached beyond its powers (although a final court determination about that was still more than nine years off) by hugely extending the town boundaries of Darwin, Katherine, Tennant Creek and Alice Springs to put the extensions beyond claim under the Land Rights Act by their rightful Aboriginal owners.

Many land claims had been lodged by early 1980, but Kenbi was already shaping up to be the doozey of them all. The possibility that the Kenbi claim might succeed, as it ultimately would, rattled the Everingham government. Bad enough that vast areas of the outback were already under claim or earmarked for future claim; but the exercise of land rights so close to civilisation as the Kenbi claim, just across the harbor from Darwin, raised the spectre of backyards being under threat – even though the Land Rights Act specifically excluded land in towns from claim.

By regulations under the Town Planning Act, the NT government on 22 December 1978 proclaimed that the city of Darwin would be expanded from 142 square kilometres to 4350 square kilometres (about three times the size of greater London) to include Cox Peninsula. The government knew full well that the NLC was intending to lodge a claim to land on Cox Peninsula under the Aboriginal Land Rights Act – as indeed the NLC did on 20 March 1979.

The Town Planning regulations were an extraordinary administrative artifice. Never mind that back in the late 1970s it took hours over unsealed roads to get to Cox Peninsula; never mind that immediately adjacent to the then-existing boundaries of Darwin there was ample property available for urban expansion: the NT Government was thinking big. In 1978 the population of Darwin was about 50,000; the government envisioned that Darwin would spread to Cox Peninsula by the time the population reached about 500,000.

High Court Justice Lionel Murphy would later muse that the area prescribed by Everingham's government for Darwin's expansion was appropriate not to a town but to a megalopolis: "It is extravagantly beyond what could reasonably described as a town."

Around March 1980 I flew with a film crew by small plane from Darwin to Belyuen to record the agitation of traditional Aboriginal owners about the government's attempt to stymie their aspirations. Flying was more reliable because wet season rains persisted and the journey by road was problematic. I have one enduring memory of that trip: some filming happened on the beach and I stupidly got about in bare feet. I was savagely sunburnt and had to seek treatment at the Belyuen medical clinic. My feet were bound in bandages; I was hobbled for weeks, unable to wear shoes.

The other half of the story required comment from the NT Government. I don't remember the details of negotiations that preceded the interview, but I do remember that a bruising stoush developed during my on-camera interview with CLP Chief Minister Everingham, as he defended with goading hostility his government's decision to enlarge the boundaries of Darwin as an exemplar of prescient and prudent town planning. I have just reviewed a copy of the broadcast story, and there is a mutual disdain apparent between us.

The Kenbi land claim story, 18 minutes long, did not go to air on *Nationwide* until Monday 5 May 1980. I was then back in Brisbane, and unable to monitor directly the reaction in Darwin. According to newspaper accounts of the time, it was inflammatory. Radio talkback callers the next morning attacked the Labor Party because the program had disclosed a written undertaking to Aboriginal people at Belyuen by Opposition Leader Jon Isaacs that Labor, if it won government, would disallow the CLP's town planning regulations, to allow the land claim to proceed.

The government went on immediate attack after the story was broadcast: "Perron lashes out over ABC report" was a six-column-wide headline in the *NT News* on Wednesday 7 May (Marshall Perron

SYMBOL OF POWER: the NT Legislative Assembly receives a new mace, a gift of the Commonwealth Parliament, May 1979: From left, CLP Chief Minister Paul Everingham, Speaker Les MacFarlane (former chair of Katherine-based Rights For Whites Committee), and Labor Opposition Leader Jon Isaacs. © Northern Territory Library

was Treasurer and Lands Minister); "Anger over southern reporters" was the second deck of the headline. "Territory people are heartily sick of non-Territory ABC journalists making fleeting visits to the Territory, then retreating to their bases to prepare biased reports which reflect poorly on the Territory," Perron fulminated.

He sent a 30cm-long telex of complaint to John Norgard, who was then chairman of the (then titled) Australian Broadcasting Commission. I retain a copy. The telex opened: "A.B.C. Nationwide emanating from Brisbane carried a story on trying to make a case that the Northern Territory Government had deliberately impeded the intention of local Aboriginal people to make a land claim to the area. It was both implied and asserted that I as Minister for Lands and Housing had failed to consult with local people prior to the extension of town planning boundaries to cover Cox Peninsula."

Perron whined on for several paragraphs that he had not been given an opportunity to respond to that charge – ignoring the fact that it had been adequately put to Everingham, who claimed in the story which went to air that Aboriginal residents of Belyuen had been consulted about the regulations.

"Balance, fairness and impartiality were once the proud mottos of the Australian Broadcasting Commission. The Cox Peninsula incident, and others which precede it, indicate that so far as the Territory is concerned your visiting reporters have a confirmed bias towards sensationalism," Perron wrote.

I have no record of how Mr Norgard responded to Perron's request for a "remedy", but Perron's protests were a sham. The story was a godsend to Everingham because the local backlash was harshly and predictably against Labor because it backed the cause of the Kenbi claimants: Labor could not be trusted; it was accused of squandering a bold and farsighted vision of Darwin as a great sprawling capital city; title to land in towns was not secure; Labor was in league with the Northern Land Council.

The NT Parliament had risen just a week before the broadcast, and the government's performance had been lacklustre. All expectations were that Parliament would sit again in June and that the government would run its course – as Everingham had always said it would – with an election in August.

But the *Nationwide* Kenbi story delivered Everingham a ready-made issue and an excuse to attack the Opposition by portraying Labor as a champion of land rights, a party prepared to cede to Aboriginal interests at the expense of city voters. The unspoken subtext was that your backyard was not safe.

The resonance was irresistible for Everingham. On Wednesday 7 May, two days after the *Nationwide* program, he called a press conference, ostensibly to announce a spending spree to attract tourists to the Territory. What happened next was aptly described by the *Northern Territory News* as the most off-hand announcement in the history of Australian politics. Under the headline, "Before you all go …", the paper reported that after the tourism announcement, questions were asked about the Territory government's campaign to have the railway line extended from Alice Springs to Darwin. Everingham then talked about a federal election year being a good opportunity to pressure the Federal government.

A journalist asked: "Talking of elections, are Territory election dates foremost in your mind, Paul?"

Everingham replied: "Well, not foremost in my mind, actually. I was thinking of my trip to Bathurst Island this afternoon when you asked. But, yes, a Territory election will be held on June 7. That's a formal announcement."

Later, from a journalist: "If we hadn't asked you, would we have found out today when the election was on?"

"Yes, you would have," Everingham replied. "I would have told you when you were leaving. It's something that most people in the street want done and over with, rather than pages and pages of political punditry."

With writs to close only two days after the press conference, an election was called for 7 June 1980. Everingham brushed aside criticisms that his ambush would disenfranchise many voters, especially isolated Aboriginal voters who could not enrol in time. Everingham had had the perfect issue presented to him and he was not going to pass it up.

Until recently I have wondered if my memory was correct that the *Nationwide* story had brought on an early election, but research has confirmed that outcome. The *Darwin Star* reporter John Loizou reported at the time that the story was "the decisive factor" in Everingham's decision to go early to the polls, because it had made land rights the issue; and the late CLP historian and Northern Territory University academic Alistair Heatley, in an on-camera interview, confirmed Loizou's judgement.

In the midst of the post-program brouhaha, I was sent back to the Territory to report for *Nationwide* on the election campaign. It was a near-impossible assignment. My movements were flagged far and wide, and Everingham imposed a boycott: "PAUL GAGS NATIONWIDE – Top reporter vilified" was the front page headline of the *Darwin Star* of 22 May.

Again the telex machine would clatter between Darwin and southern ports, and I have kept a copy of the message. Everingham had got wind of my return and wrote to my Executive Producer, copied to Mr Norgard and to Talbot Duckmanton, the ABC boss, on 16 May: "I cannot see the need for *Nationwide* to come to the Territory in light of the fact that the ABC has expended considerable resources, money, equipment and personnel in upgrading its Territory situation to the extent that the half-hour national bulletin will be compiled and broadcast from Monday May 19 (although *Nationwide* would continue to emanate from Brisbane).

"The Territory community has unhappy memories of visits by Nationwide to this area. On two occasions the visits have introduced the sort of racial tension which obviously excites Queensland-based journalists and television producers, but is detrimental to the Territory community and foreign to the usual political process as practised by my government.

"The most recent contribution to racial tension in the Northern Territory was made by a Mr. Murray McLaughlin. An independent check of talkback programmes on Darwin commercial radio and the letters columns of the *Northern Territory News* in the last two weeks verify (sic) reading of the unfortunate legacy which that incursion caused.

"Furthermore, I believe the team Nationwide plans to send to the Territory to cover the election will again be led by Mr. McLaughlin. Because of his lack of professionalism as a journalist, I feel I would be wasting my time talking to him."

The *Darwin Star's* John Loizou tried at the time to extract the telex from Everingham's press secretary, Peter Murphy without success, because "it was likely that the message was libelous" – and so it was as it rambled on for 25cm.

Land rights was a sleeper issue in the 1980 campaign. The CLP knew that its reason for going early had filtered through to the electorate – it had only to leave the Kenbi issue hanging out there. Labor was not prepared to run it at all.

The CLP romped home, increasing its vote by 10 per cent.

As for the CLP's town planning regulations designed to defeat the Kenbi land claim, it would not be until June 1989 that the Federal Court found there was "no doubt that the relevant (NT) public servants thought that the purpose of the regulations was to frustrate Aboriginal land claims."

The Court accepted that "the subject regulations were not made for the purpose of carrying out or giving effect to the Town Planning Act." Therefore, the extensions of the boundaries of the city of Darwin into Cox Peninsula were not legal, because they had been made for an improper purpose. On 16 September 1989, the High Court refused leave for the Northern Territory to appeal.

So the Kenbi land claim survived. But it would face more challenges from CLP governments until a newly-elected Labor government decided in 2001 to call a halt to legal shenanigans and accept the December 2000 recommendations of Aboriginal Land Commissioner Peter Gray. Even then it would take until this year for the claim to be finally settled.

Who's with Roy?

In the last edition of Land Rights News we published this photograph of Roy Orbison at Kormilda College in 1972, and asked if any readers recognised the other parties.

The photograph, held by the National Library of Australia, was taken by Michael Jensen.

The man to Orbison's left has been identified as Jack William Riley (deceased) from the Ngukurr/Numbulwar area, who lived in Borroloola.

The man holding the microphone is thought to be Glen Taylor, a former ABC radio program maker.

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