



Northern Edition

# LAND RIGHTS NEWS

NORTHERN  
LAND COUNCIL

*Our Land, Our Sea, Our Life*

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Illustration © Nick Bland

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# A word from the Chair



Welcome to 2018, and the first issue of *Land Rights News* for the year. We've shifted publication dates back by a month, and LRN will now be published in February, May, August and November.

This will be another big year for the NLC; we've got a huge agenda and a huge workload ahead of us.

The NT Chief Minister, Michael Gunner, has proposed a Treaty between the NT Government and Aboriginal people, and I want the four NT Land Councils to take a leading role in developing processes to advance that idea. The NLC hosted an important workshop in Darwin in mid-February to prepare for a meeting in early

March where the Executives of the four Land Councils will work out what a Treaty could look like and how it should be achieved.

There is, of course, the big question about whether there should be just one treaty, separate treaties with different Aboriginal peoples, or an umbrella treaty sitting above separate treaties.

A big part of our job will be to manage community expectations, seek the best available advice, and have a real say about how we go about consulting with Aboriginal people across the Northern Territory.

The NLC has already sought preliminary legal advice from constitutional lawyers George Williams and Harry Hobbs, from the University of New South Wales. Mr Hobbs attended our workshop, and has written a piece for *Land Rights News* (pages 4 and 5) summarising the paper which he and Mr Williams have delivered.

It's a significant time to begin discussions about a Treaty, this year being the 30th anniversary of the Barunga Festival where then Prime Minister Bob Hawke promised a Treaty with the Indigenous peoples of Australia. At the 1988 Barunga Festival, Mr Hawke was presented with the Barunga Statement which now rests in Parliament House in Canberra.

I expect that significant announcements about the possibility of a Treaty with the NT Government will be made at this year's Barunga Festival, because the four NT Land

Councils will be meeting there in the week running up to the festival, and the Chief Minister is expected to attend.

As you will read below, I went down to Elliott in the New Year to discuss the shocking state of housing in the town. Elliott has fallen through the cracks for too long, and the Aboriginal residents there have not had a new house built for nearly 20 years.

I took the local MLA, Gerry McCarthy, along with me – he's also the Minister for Housing and Community Development. Lawrence Costa, Assistant Minister for Remote Health Delivery and Homelands, also attended. Mr McCarthy has since written to the NLC to confirm that the NT government is committed to resolving land tenure and housing issues in Gurungu, Wilyugu and Marlinja living areas in Elliott "as soon as possible".

He's undertaken to work with the NLC, Traditional Owners and local community representatives to agree on a form of tenure which would allow the government to invest funds to better support housing repairs and maintenance programs, construction of new houses and improved tenancy management, with the eventual handover of management to a local group.

The housing crisis at Elliott has worried me for a long time, and I can only hope that the situation there can be sorted out as soon as possible.

**Sam Bush-Blanasi**  
Chairman

## Minister assures no more roadblocks to Elliott housing

The North Territory Government has assured Traditional Owners and residents of Elliott they will receive new housing after almost 20 years of neglect.

Minister for Housing and Community Development Mr Gerry McCarthy and Assistant Minister for Remote Health Delivery and Homelands Mr Lawrence Costa met with community members in Elliott on 12 January at the invitation of Northern Land Council Chairman Samuel Bush-Blanasi.

Minister McCarthy informed the meeting that land tenure issues have prevented the Northern Territory Government from investment to date.

Elliott is made up of two camps at either end of the town. Gurungu (North Camp) is classified as an outstation and Wilyugu (South Camp) comes under a Special Purpose Lease.

Minister McCarthy said once the tenure is resolved, the Northern Territory Government can provide repairs and maintenance, better tenancy management, and build new houses.

"We know that housing underpins all the opportunities around closing the gap in terms of educational disadvantage, health disadvantage and social justice," he said. "Today was a really

good step forward in resolving land tenure issues so that the Northern Territory Government and importantly the Commonwealth Government can start to invest in housing infrastructure for the people of Elliott."

No new houses have been built and no major repairs completed in almost 20 years, leading to housing shortages, poor conditions and overcrowding.

Samuel Bush-Blanasi told residents today was an opportunity for the community to ask questions and have their voice heard. "I want you to find happiness again because you've been neglected for 17 years," he told the community.

Elliott resident and NLC council member Christopher Neade said he had tried to apply for funding in the past only to be knocked back because of land tenure. "The trucks went straight past Elliott," he said. "Federal Government were able to bypass Elliott because of the land tenure."

The NLC is now working with the Northern Territory Government to develop options for Traditional Owners to resolve the land tenure issues which have been part of the problem for government in allocating funds to housing in Elliott. NLC will consult Traditional Owners and

other affected Aboriginal people to protect their long-term control of the land at Elliott, and to give them flexibility to contract with government and other parties for safe, adequate and dignified housing urgently and into the future.

Minister McCarthy assured the community there will be no more roadblocks and noted the Gunner Government has committed \$1.1 billion to remote housing over 10 years.

"Michael Gunner's Labor Government has said we don't want blockers. We're leading the way with a \$1.1 billion investment and Elliott will certainly benefit from that. But we need the Commonwealth to do better, not just match it, but do better and that involves also the Chief Minister's commitment to land servicing."

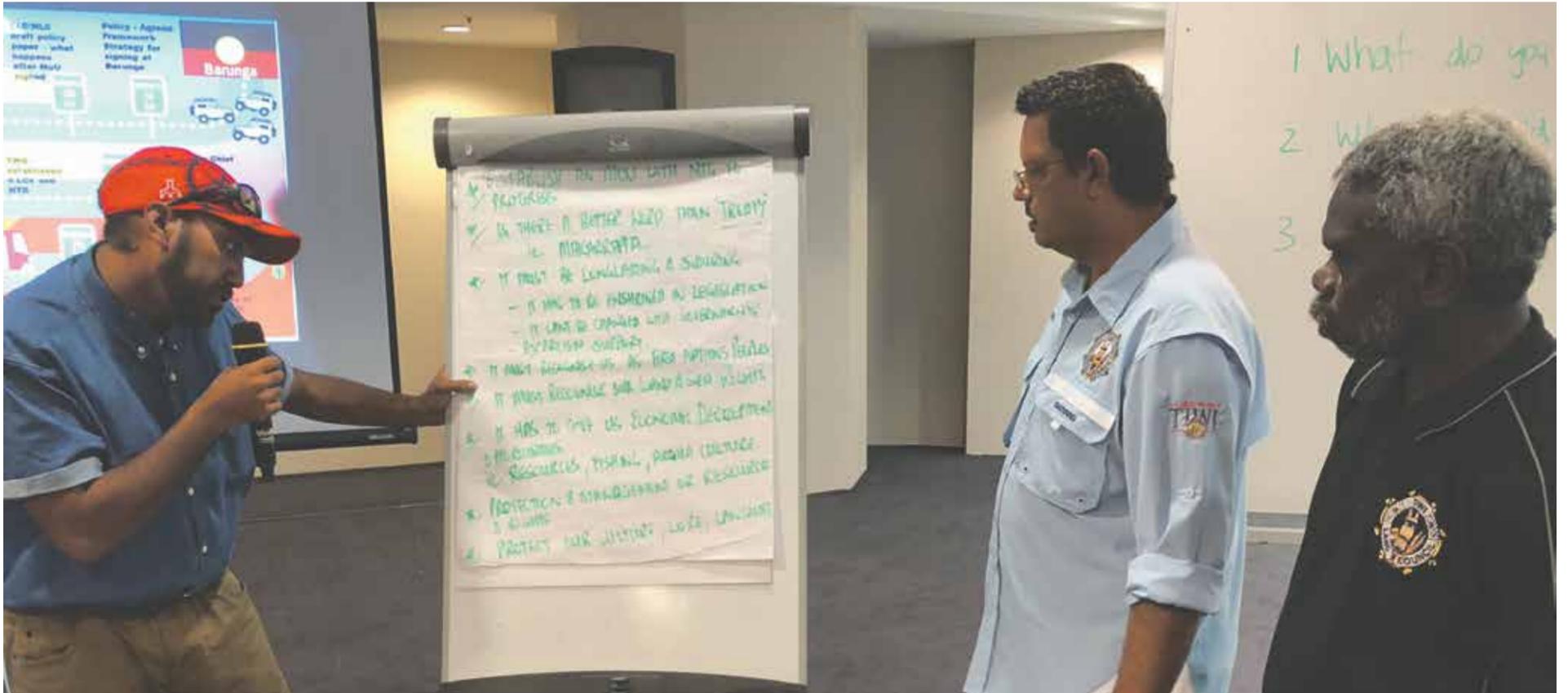
Mr Neade said he felt positive following the meeting.

"Today went very well. I feel a lot better because I've got direction and we can look forward and move onto new stuff."

He said the community was focused on the future.

"Let's leave the past in the past and move forward. We need all the support we can get. Let's work together."

# LAND COUNCILS SUPPORT TREATY



The meeting of the Executives of the four NT Land Councils broke into groups to consider what could be included in a treaty. James Durrilla (left, Anindilyakwa Council) presents a list of aspirations with Andrew Tipungwati (centre, acting CEO Tiwi Land Council) and David Guy (Tiwi Land Council).

In the wake of the despair of Indigenous Australians about the refusal of Prime Minister Malcolm Turnbull to accept the recommendation of the Referendum Council as espoused in the Uluru Statement from the Heart, the four Northern Territory Land Councils have embraced the decision of NT Chief Minister Michael Gunner to open a discussion about a treaty with the Territory's Aboriginal people.

The Executives of the Northern, Central, Tiwi and Anindilyakwa Land Councils gathered in Darwin to consider the implications of a treaty and how to progress consultations with their constituents and with the NT Government.

When he announced his new Ministerial line-up in September 2016, Mr Gunner appointed a sub-committee of Cabinet to "progress public discussion about a treaty with indigenous Territorians".

The Chief Minister subsequently wrote to the Northern and Central Land Councils: "I agree that the process of engagement around a treaty will be vital. It is important that Aboriginal voices are heard and consultations will need to be inclusive and accessible. The Northern Territory Government is committed to working with Aboriginal people and we will take time to get this right."

After their meeting in Darwin, the four Land Councils wrote to Mr Gunner, supporting his "historic" announcement.

The letter noted his statement that Land Councils would be an important part of

discussion about a treaty, and stated that Traditional Owners, who make up the Land Councils, "ought to be at the centre of negotiations of a treaty as the prior owners and occupiers of the Northern Territory".

"(Our) meeting resolved to proceed from here in a constructive and united way. In particular, we are wanting to reach a Memorandum of Understanding (MoU) with the Northern Territory about an engagement process with Aboriginal people that is led by Aboriginal people," the Land Councils wrote.

"We agreed that the MoU should also include a statement acknowledging certain realities, such as Aboriginal people being the prior owners and occupiers of the Northern Territory; that their land was taken without their consent and that deep injustices have occurred; that treaty-making involves the acceptance of obligations and responsibilities on both sides; and that non-Indigenous Australians are here to stay in the Territory."

The Land Councils have proposed the establishment of a Treaty Working Group (TWG) to develop the substance of the MoU; the TWG membership should comprise the Northern Territory Government, Land Councils and members of Aboriginal Peak Organisations Northern Territory (APO NT) which, with the Northern and Central Land Councils, comprises the Aboriginal Medical Services Alliance NT, and the North Australian Aboriginal Justice Agency.

The Land Councils are hoping that an MoU

with the NT Government can be negotiated in time for an announcement at the Barunga Festival in June – the 30th anniversary of the presentation to Prime Minister Bob Hawke of the "Barunga Statement", which is now on permanent display at Parliament House in Canberra. In reply, Mr Hawke affirmed that his government was "committed to work for a negotiated Treaty with Aboriginal people."



Indigenous Australians despaired when Prime Minister Malcolm Turnbull refused to accept the recommendations of the Referendum Council which evolved from the Uluru Statement from the Heart. Illustration: Nick Bland

# A TERRITORY TREATY

The NLC's Executive Council hosted a workshop in Darwin, 19-20 February, to discuss how a Treaty could be progressed between the Northern Territory Government and Aboriginal people. Staff of the Central Land Council also attended. The workshop preceded a meeting of the Executives of the four NT Land Councils in Darwin in early March.

Harry Hobbs, a PhD Candidate at the Faculty of Law, University of New South Wales presented a paper at the workshop, and his article below draws from that presentation.

Following his election in 2016, Chief Minister Michael Gunner indicated that his government was prepared to discuss the possibility of negotiating a treaty with the Territory's Aboriginal people. Although developments have been slow, treaty is still a priority, and the government is poised to announce plans to progress discussions with Aboriginal people. These moves are promising. They mark the first time in history that a Territory government has seriously considered a treaty. As Central Land Council Director David Ross and Northern Land Council CEO Joe Morrison have noted, however, the matter of a treaty and what it comprises is "sensitive and complex". It is crucial that Aboriginal people are well-prepared to drive the process—rather than have government lead.

In this article, I broadly set out possible outcomes under a treaty, note that legal complications suggest that it is prudent to involve the Commonwealth in a formal or informal capacity, and outline three potential approaches to negotiating a treaty. The aim is to ensure that all Aboriginal people are ready for what might happen next.

## What is a treaty, and what outcomes are possible?

There are many examples of agreements between Indigenous peoples and governments, both in Australia and around the world. In the Northern Territory, for instance, there are agreements relating to land rights, joint-management of national parks, and resource benefit-sharing agreements, among many others.

Simply calling an agreement a treaty does not make it so. A treaty is a special kind of agreement that must satisfy three conditions. First, it must recognise Aboriginal people as a distinct community as well as acknowledge the deep historic and contemporary injustices that invasion has caused. Second, a treaty is a political agreement that must be reached by way of a fair process of negotiation between equals. Third, a treaty must contain more than symbolic recognition, or service delivery provisions.

The specific outcomes that a treaty can entail vary widely, reflecting the different aspirations of negotiating parties across the globe. Based on the aspirations of Aboriginal people in the Northern Territory, as recorded in the Barunga, Kalaringi and Uluru Statements, as well as the United Nations Declaration on the Rights of Indigenous Peoples and the contemporary treaties negotiated in Canada, a treaty in the Territory might include terms relating to: transfer of land, and rights over resources and cultural heritage; financial compensation to satisfy outstanding claims and secure autonomous functioning of services within Aboriginal lands; and, some degree of self-government. This may amount to powers similar to local

government, or could potentially go further and include the administration of justice, family, and social services, education, and healthcare. Importantly, however, while this could recognise the inherent sovereignty of Aboriginal nations, a treaty will be subject to Australian law. Commonwealth laws will therefore apply where a conflict or inconsistency arises with a treaty or Aboriginal law.

Northern Territory First Nations will be best placed to know exactly what they want in any treaty, but this brief survey gives some indication of the types of things that may be agreed to. Nonetheless, Aboriginal-led consultations and discussions must take place across the Territory before any negotiations commence.

## Legal complications

A critical question that needs to be answered before Aboriginal people in the Territory determine what outcomes they desire under a treaty is a legal one. The Northern Territory is not a State, and therefore has limited powers in certain areas. Will these limitations complicate a potential treaty?

The Northern Territory's powers are delegated from the Commonwealth Parliament and are set out in two instruments: *The Northern Territory (Self-Government) Act 1978* (Cth) and the Northern Territory (Self-Government) Regulations 1978 (Cth). All of the Territory's authority flows from these two Acts. The Self-Government Act and the Self-Government Regulations provide broad law-making power over issues connected to Indigenous Affairs. Under these Acts, the Northern Territory could enter into a treaty with Aboriginal nations.

However, there are two complications which suggest that the Commonwealth should be involved in any treaty negotiation. First, the Northern Territory has limited powers over

Aboriginal Land, and any treaty must be consistent with the Australian Constitution and all current and future Commonwealth laws.

## Limited power over Aboriginal Land

The Northern Territory has no power over matters that relate to Aboriginal Land as defined under the *Aboriginal Land Rights (Northern Territory) Act 1975* (Cth). This means that certain terms could be excluded from the negotiation of any treaty signed solely with the Northern Territory. In relation to lands and resources, for example, a treaty could not: transfer rights to subsurface minerals under Aboriginal Land to Aboriginal control; overrule a declaration by the Governor-General to grant an exploration licence over the wishes of Traditional Owners; or entirely exclude the Crown from occupying Aboriginal Land. There may be more limitations.

It is also unclear whether a treaty could include provisions relating to self-government and sovereignty on Aboriginal Land. This is because some provisions of the *Land Rights Act* suggest that it recognises Aboriginal governance systems. For instance, section 69(2) of the Act permits Aboriginal peoples to determine who has the authority to enter and remain on sacred sites in accordance with their traditions. This is both a property right (the right to exclude) and a recognition of Aboriginal self-governance (as the source of the right to exclude lies in the traditional law of the Aboriginal nation). Indicative of the legal uncertainty surrounding recognition of self-governance rights however, the existence of the Northern Territory Local Government Act suggests that a treaty could include self-governance rights akin to local government.

Complications may exist in relation to provisions concerning land and resources

and self-government, but there is no restriction on the Northern Territory providing reparations, compensation, or other financial guarantees to Aboriginal nations. Compensation, a capital fund, and financial transfers, could be part of a treaty.

As noted, these limitations apply only to Aboriginal Land in the Territory. They do not apply to the approximately 50 per cent of land not covered by the *Land Rights Act*. Over this land, many other mechanisms to recognise Aboriginal sovereignty could be included in a treaty including, an elected Aboriginal body to advise government on proposed laws that affect Aboriginal peoples in the Territory, and/or greater Aboriginal representation on government boards. Rights to subsurface minerals could also be included in a treaty that covers non-Aboriginal Land.

## Limitations arising from the Australian Constitution

These limitations can be worked through, but the second legal complication is more significant. The Northern Territory's powers are subject to limitations imposed by the federal Constitution. A Northern Territory Act giving effect to a treaty must be consistent with all current and future Commonwealth laws. This means that even if a treaty negotiated with the Territory could include expansive self-government powers on Aboriginal Land, a future Commonwealth law could overrule it. This would remain the case even if the Northern Territory achieved statehood. The only way to prevent this from occurring would be by a referendum to insert a new protection against racial discrimination or a provision protecting "treaty rights" in the Constitution. Neither of these proposals was included in the Uluru Statement from the Heart.

In summary then, the Northern Territory can



Josie Douglas (Policy Manager Central Land Council), Jill Gallagher (Victorian Treaty Advancement Commissioner) and Taryn Lee (Victorian Department of Premier and Cabinet).



**Foreground:** Brian Stacey (former Commonwealth public servant), Samuel Bush-Blanasi (NLC Chairman), Raymond Hector (Executive Council member for Victoria River District) and Michael O'Donnell (NLC Principal Legal Officer). **Background:** Nigel Browne (CEO Larrakia Development Corporation), Elizabeth Sullivan (Executive Council member for Darwin-Daly-Waigait), Wayne Wauchope (NLC member), Lawrence Costa (MLA for Arafura), Steve Rossingh (Chief Minister's Indigenous Affairs Advisor) and Andy Cowan (Deputy Secretary, Department of Chief Minister).

negotiate a treaty with Aboriginal nations. The treaty cannot include terms that concern Aboriginal Land under the *Land Rights Act*. If First Nations wish to enter into a treaty that includes terms that do relate to Aboriginal Land, the Territory needs Commonwealth support. Even if a Treaty does not legally require Commonwealth action however, it would be prudent to involve the Commonwealth. Otherwise we may find that a treaty in the Territory is overruled by a future federal government.

## How should treaties be negotiated?

The second key question that Northern Territory First Nations need to determine before negotiations commence is a process one: How should treaties be negotiated? A choice can be made among three options. First, one overarching treaty for all Aboriginal peoples in the Territory is signed. Second, each nation negotiates separate treaties. Or, third, a middle ground, whereby one umbrella agreement with multiple separate side agreements is negotiated. First Nations across the globe have adopted different approaches.

### *A single overarching treaty*

The Treaty of Waitangi between Māori Chiefs and the British Crown is an example of a single overarching treaty. Under this approach, one treaty that encompasses all Northern Territory First Nations and the Territory (and potentially Commonwealth) government would be negotiated and signed. This approach is likely to be favoured by the Northern Territory and Commonwealth, as it avoids complications in negotiating and implementing a large number of agreements with diverse groups across the Territory.

This approach offers two clear strengths. First, it ensures that rights and obligations are consistent for all Aboriginal nations. Second, assuming agreement between Aboriginal nations is reached, a Territory-wide treaty could be negotiated relatively quickly, because government can focus on one forum, rather than many.

It also comes with several weaknesses however. Significantly, in the rush for a single-agreement, local needs and aspirations of distinct Aboriginal nations may be ignored or dismissed. Indeed, this fact suggests that a treaty negotiated this way may take many years because there will likely be difficulties in securing agreement

between all Territory First Nations. In any case, following that agreement, there is no guarantee that government will negotiate more quickly under this approach.

### *A series of separate treaties with each Aboriginal nation*

This approach has been adopted in British Columbia, Canada, and in the preliminary negotiations towards treaty in South Australia. Under this approach, separate treaties would be negotiated and signed between individual Northern Territory First Nations and the Territory and Commonwealth governments.

Once again, this approach has several strengths and weaknesses. First, separate treaties more accurately reflect the sovereignty of each nation and mean that agreements struck are more likely to closely track the specific aspirations and needs of Aboriginal nations across the Territory. Second, because some nations may already be in a position to negotiate, some treaties may be agreed to in a short period.

Conversely, capacity disparities between First Nations in the Territory might result in weaker rights and obligations for some nations. Larger nations with more resources may be in a position to demand more from government than others. This is a serious problem, but it could be rectified by including a term in all treaties allowing for renegotiation if stronger rights are agreed to in other agreements. However, such a term would not overcome all capacity disparities, and for smaller nations it may take many years before a treaty is finally agreed to. In the meantime, if the Northern Territory government later decides to stop negotiating, some nations will have treaties while others may not.

As I mentioned, this approach has been adopted in British Columbia, Canada. In order to mitigate capacity disparities among First Nations, the British Columbia Treaty Commission was established in 1993. The Treaty Commission is an independent and impartial body designed to facilitate treaty negotiations. It consists of five commissioners: two appointed by First Nations, one each by the Federal and Provincial governments, and one further commissioner agreed to by the three parties. Although the Commission and the treaty process face challenges, since 1993 eight treaties have been finalised, and a further seven are close to completion. This

Commission may be a useful example for Aboriginal nations in the Territory.

### *Combination of an overarching treaty and underlying separate treaties*

The third approach combines elements from both the first and second models. Here, one general agreement containing provisions consistent across the Territory would be agreed to, but with scope for separate side agreements to be reached by individual First Nations to reflect their specific aspirations and needs.

This approach also has its own strengths and weaknesses. Most significantly, it ensures that a minimum standard is agreed to across the Territory, while providing scope for specific agreements to reflect local needs and aspirations. This two-stage process also means that the broad contours of a treaty can be reached relatively quickly, while the harder, more specific terms can be negotiated later. Conversely, once again, capacity disparities may mean that some First Nations gain weaker rights than others. Additionally, while the two-stage process offers advantages, it does require government to sustain momentum and engagement after securing an umbrella agreement.

This approach has been adopted in the Yukon Territory in Northwest Canada. The Yukon Umbrella Agreement constitutes a general agreement over certain matters, specifying a broad single standard under which specific First Nations can negotiate separate treaties for additional or distinctive rights depending on their situation. The Umbrella Agreement identifies which provisions apply to all agreements, as well as areas where First Nations may negotiate provisions specific to their own needs. Under this process, 11 of the 14 Yukon First Nations have signed and ratified treaties. Three have chosen not to participate.

### Points to consider

Whether a treaty should be negotiated, what its terms may include, and how the process should be structured, are questions that must be determined by all Aboriginal people across the Northern Territory. This paper has simply raised several points that need to be considered before those negotiations take place in order to ensure Aboriginal nations are ready.

I end with three points. First, this discussion has revealed that it is important for the Commonwealth to be involved in any treaty negotiations. Legally, there are questions over the Territory's authority to negotiate certain terms, and politically, the federal Parliament could legislate to overrule the terms of any treaty. Unfortunately, an important safeguard in Canada is not present here – treaties will not be constitutionally protected.

Second, whatever approach is adopted must be consistent with Northern Territory First Nations needs and aspirations, but it is necessary to be aware of the strengths and weaknesses of each model. Nonetheless, regardless as to what process is adopted, agreement needs to be reached by Aboriginal people in the Territory over desired outcomes. This could take considerable time. In Victoria, for example, it has taken more than 18 months of discussion and consultation and an Aboriginal Representative Body has still not been established.

Finally, Territory First Nations should not have to choose between treaty or constitutional recognition. Indeed, as Megan Davis has argued, "treaty is recognition". The Uluru Statement from the Heart called for the creation of a Makarrata Commission to supervise a process of agreement-making between government and First Nations. In the face of Commonwealth government inaction, a Territory Treaty (or Treaties) offers hope for all Aboriginal and Torres Strait Islander people across the country.



\*Harry Hobbs is a PhD Candidate at the Faculty of Law, University of New South Wales. This paper draws from a presentation he made at the Northern Land Council's Treaty Workshop in Darwin, 19-20 February 2018.

# PASTORAL LAND BILL CHANGES WANTED

**The Northern Land Council is pressing the Northern Territory Government to amend its Pastoral Land Legislation Amendment Bill, which, in its present form, would give pastoralists the right to secure sub-leases on their properties to allow for land to be used for a range of non-pastoral purposes, but would severely curtail the rights of native title holders.**

When the Government announced the Bill in October last year, it said sub-leases would “help boost jobs and economic productivity in regional and remote areas by unlocking the development potential of the pastoral estate.”

“Specifically, sub-leases for non-pastoral uses will expand the range of existing uses ... and will be registered on the title to provide a security for investors,” the Minister for Environment and Natural Resources, Lauren Moss, said in a press release on 18 October last year.

The Government, while having “listened to” the NT Cattlemen’s Association’s advocacy of sub-leases, did not consult with Land Councils about the Bill. That led NLC CEO Joe Morrison to say, “It’s outrageous that there has been absolutely no discussion with the NLC or native title holders about these proposed changes. The Northern Territory Government needs to include Aboriginal people in the future development of the pastoral estate, as is their right as native title holders. This government should know better than to further marginalise us through discriminatory legislation. We want to be involved in economic development while protecting our culture and sacred sites.”

Chief Minister Michael Gunner conceded that Land Councils should have been consulted, and agreed to put the Bill on hold until after its consideration by the Parliament’s Economic Policy Scrutiny Committee.

Mr Morrison and the NLC’s Principal Legal Officer Michael O’Donnell subsequently met with Minister Moss and her advisers. “It was apparent at that meeting that neither the Minister nor her advisers were aware of the significant impact these proposed amendments would have on native title holders as they seem to be regarded as merely technical,” Mr Morrison and CLC Director David Ross wrote to the Chief Minister on 29 November.

Mr Morrison has also considered the pastoral land issue in the context of the government’s wish to negotiate a treaty with Aboriginal people. “If these legislative amendments are rushed through the Parliament, it will put into question the government’s bona fides, because a lot of what would be in a treaty needs to consider the pastoral estate that covers almost half of the Territory land mass,” he said.

“These amendments would undermine the treaty process and I ask, why would Aboriginal people then bother talking about a treaty?” If we could have a process such as that which drove Project Sea Dragon

on Legune Station (for a huge prawn farm), then we may have a future co-existing in the NT. But, if the NT Parliament persists in passing these amendments, then we are in for a hell of a ride.”

The NLC is the native title representative body recognised under the *Native Title Act 1993*, in relation to the top end of the NT including the Tiwi Islands, Groote Eylandt and the adjacent seas. There are currently 62 determinations of native title on 63 pastoral leases in the NLC region (there are 20 such determinations in the CLC region).

In their letter to the Chief Minister, Messrs Morrison and Ross said, “It’s important to note that pastoral lessees do not own the land and do not have a right of exclusive possession. Native title co-exists with a pastoral lease on the same area and the rights of native title holders require equal respect along with the pastoral lessee. This has been clear since 1996 from the High Court case in Wik and confirmed in the Northern Territory in a number of Federal cases since that time.”

The NT Government was able to back the NT Cattlemen’s Association’s push for sub-leases on pastoral properties because of the Howard Government’s amendments to the *Native Title Act* – the so-called 10-point plan which then Deputy Prime Minister Tim Fischer said provided “bucket loads of extinguishment” (of native title) to the disadvantage of native title holders. Mr Morrison and Mr Ross also recorded in their letter to the Chief Minister that their talks with Minister Moss and her advisers had revealed “an alarming lack of the awareness” that the power for the NT Government’s to legislate for sub-leases was sourced in the Howard 10-point plan.

That was the same power that enabled the previous CLP government to legislate for non-pastoral use permits, which can be approved for 30 years to allow

for pastoral lease land to be used for activities such as agriculture, horticulture, aquaculture, forestry and tourism (non-pastoral use permits were introduced before Mr Morrison was appointed NLC CEO, and he has said it was “a matter of personal regret that the NLC did not rise up to oppose the legislation” at the time).

The 10-point plan provided for a range of primary production activities on pastoral leases without the right-to-negotiate provisions of the *Native Title Act* applying. The native title is effectively suspended without upfront compensation for the term of the activities.

The NT Government’s latest Bill would mean that native title holders and claimants would have only minor procedural rights – to be notified of the proposal, an opportunity to comment, and to seek compensation through a court case for the effect on their native title. On current trends, that would take years to finalise. By contrast, the right-to-negotiate allows native title holders to be at the negotiating table and to be actively involved in the approvals for the development, and provides an opportunity to be involved in and benefit from the economic development proposed.

The 29 November letter from Messrs Morrison and Ross to the Chief Minister concluded:

“In summary, the effect of the previous introduction of the non-pastoral use permits and now potentially to provide for sub-leases for intensive uses of the land is of deep concern, as it clearly will (at a practical level) preclude the carrying out of native title rights and interests. The removal of the right-to-negotiate provisions of the *Native Title Act* to apply to the approval of these developments means there is no requirement and effective opportunity for native title holders to be involved in the economic activity that affects their interests and will occur on their traditional



Dancers on the shore of Lake Kununurra last year mark the agreement of native title holders to sign an Indigenous Land Use Agreement for the construction of a huge prawn farm (Project Sea Dragon) on Legune Station, in the far north-west of the Northern Territory. The project is able to proceed on the Legune pastoral lease by way of a Non Pastoral Use Permit (NPUP) which the CLP government of Adam Giles legislated in 2013. The proponent, Seafarms Group Ltd, has said the project could not have been undertaken in neighbouring jurisdictions (Queensland and Western Australia) because they do not have a regime of NPUPs.

lands without their consent. It would also significantly impact their ability to protect sacred sites as the mere notification and comment procedures are demonstrably inadequate where intensive land uses are proposed.

“The primary production activities that may now be facilitated through the grant of a non-pastoral use permit or proposed registrable sub-lease (such as forestry, agriculture and horticulture) are predominantly intensive land uses that preclude the carrying out of native title rights and interests in those areas, as the Explanatory Notes state in relation to the proposed amendments to bring in sub-leasing for non-pastoral purposes: ‘The intent of this provision is to support the non-pastoral use amendments made to the Act in 2014 and potential investment and diversification of the pastoral estate’.

“Whilst at one level there is no objection to diversification on pastoral leases everything else being equal in terms of environmental, social and cultural impacts it is the effective exclusion of native title holders from the proposed development because of the impact of the implementation of the 10 Point Plan amendments in the Northern Territory that is of concern.

‘It is appreciated that in communications with Mr. Morrison that you have decided to withdraw the proposed amendments in relation to sub-leasing at this time. If the Developing the North agenda is to be inclusive and equitable then it must also respectfully and meaningfully involve the many thousands of Aboriginal people in the NT that hold native title where pastoral leases also exist on their traditional country.

“To address this issue in a fair and equitable manner we are proposing that a legal right be recognised in the Pastoral Land Act that will enable the co-existing native title holders on pastoral leases a substantive say and involvement in the grant of any non-pastoral use permit or sub-lease. This is so they can also benefit from new economic activities on their traditional lands. This should be set in an agreed policy framework that also provides for an economic development package to facilitate this process and involvement in new developments by native title holders.”

The Economic Policy Scrutiny Committee is due to report back to Parliament by mid-March.

## COMMITTEE EVIDENCE

**NLC CEO Joe Morrison and Principal Legal Officer Michael O’Donnell gave evidence to the NT Legislative Assembly’s Economic Policy Scrutiny Committee on 2 February, and argued for changes to the Pastoral Land Legislation Amendment Bill. Here is an edited transcript of their evidence:**

**Mr Morrison:** I think the NLC’s position on the bill you are considering today is pretty plain and straightforward. I think our position is well known from various media events. We have stated on the record that the pastoralists do not have exclusive rights nor ownership of the land on which they are leasing. Native title where it has been determined over the pastoral leases provides for coexisting rights with native title holders.

The Northern Land Council and Central Land Council were rightly alarmed when we first became aware of the contents of this bill. Like the Central Land Council, we were not consulted about this bill which severely curtails the rights of native title holders. I recognise that Chief Minister Michael Gunner moved immediately to address our concerns and to refer the bill to this committee and I thank him for that.

Our position should not be taken as antagonistic towards the Northern Territory Cattlemen’s Association or Territory cattlemen in general, even though the government consulted with the Northern Territory Cattlemen’s Association and not the land councils as the native title representative bodies. Our fight is not with the NTCA; I want to make that very clear. In fact, there is a long history of the land councils working with the NTCA around the Indigenous Pastoral Program to create jobs on the pastoral estate.

Many people who have advocated for this bill have said this is a natural extension of the non-pastoral use permits and its administration, and that it is just an administrative process. I say the bill is a step too far, because it is a matter of personal regret that the Northern Land Council did not rise up to oppose the legislation in 2014 prior to my appointment. The rights enjoyed by native title holders are already fragile enough, especially because of the Howard government’s 1998 amendments to the *Native Title Act*, otherwise known as the “10 Point Plan”.

The bill entrenches the Howard amendments because native title holders will not have a right to negotiate or a say if a pastoralist wants to create a sublease that will have a lasting effect on native title holders’ rights, whose ancestors have lived on those lands for tens of thousands of years.

What we are seeking is for native title holders and pastoral leasers to have a say in the development at subsequent grant of any non-pastoral use permits or subleases. We are also seeking to ensure that Indigenous interests are taken into consideration in the deliberation of the Pastoral Land Board by suggesting that there be a specific position created on the Pastoral Land Board for Indigenous people.



Joe Morrison and Michael O’Donnell

We are hoping that this committee will concur with those two major recommendations and I conclude my opening statement.

**Mr Gerry Wood (Independent MLA, Nelson):** You raised a point that always worried me, Joe—not worried me, I was just confused about it. You said that there were changes in years gone by and I thought when those changes were going through, I was expecting the Land Council to say, ‘Well, we have some concerns’, but I did not hear anything. So my presumption was there was no issue with this particular change to the land tenure. Is it a case of now bringing forward your concerns? Is it that they are too late because some things have already been previously permitted? Can you turn back the clock in some ways, can the changes be retrospective that you think should happen?

**Mr Morrison:** I will just clarify. When these first amendments went through in 2014, I was not the Chief Executive of the Northern Land Council at the time, so I want to make that clear. Personally and professionally I do have some regret about the fact that the Land Council did not say anything about that, when in fact I thought that the Land Council should say a lot about it.

The amendments that took place in those negotiations under the Howard government in 1998 were in fact setting the groundworks for what we are discussing here today and the Principal Legal Officer next to me was part of those original negotiations with the governments and Indigenous leaders at the time and I will defer to Michael to say more about that.

**Mr O’Donnell:** With the right to negotiate provisions that used to apply, the National Native Title Tribunal acts as an independent arbitral body that can determine issues. This has become what you would suppose call a minor procedural right that you get notified that X pastoralist want a non-pastoral use permit to grow opium poppies on such and such, can be rather large areas of land that, by the very nature of their development, mean you cannot exercise native title rights and interests anymore because it needs

to be fenced off, there are security considerations, all sorts of things. Then, if the native title holders concerned want to be compensated for that, they have to run a court case, effectively after the event.

The current test case for native title compensation which has been run in this jurisdiction at Timber Creek has been going on for close to 10 years now and has cost more in legal fees than what the judge awarded at the first instance. We are up before the High Court on special leave applications on 16 February. But that is an Australia-wide problem, it is not only a Territory problem.

The fact is, the non-extinguishment principle applies. At the moment you get a non-pastoral use permit that is of a 30-year term. If this amendment was to go through, it would be a registrable sublease, which is proprietary interest, permanent for the period of the head pastoral lease. That effectively sterilises that area of land – which can be up to half of the pastoral lease legally under the *Native Title Act*—for many years if not decades. People then have to run an expensive court case to get compensation.

Now we are left with the situation for native title holders where they have a right to get a notice and opportunity to comment—and there it goes. You can catch up with the compensation case later. That is really, in broad terms, the primary concern. With the best of intentions, some people have moved these amendments forward and see them as merely a technical land tenure exercise.

It has been quite an historic view as to what is being implemented in Aboriginal rights. It is not something the Territory government has to do. The *Native Title Act* empowers a state or territory parliament to do it, it does not mandate that it does it. There is some discretion within this parliament to determine how these things can work. It cannot be inconsistent, obviously, with the *Native Title Act*. It is not without its legal complexity, but there are, I believe, ways forward to get Aboriginal people at the table with the pastoralists to be involved in these activities.

# CLOSING THE GAP

The 10th Closing the Gap report, released by Prime Minister Malcolm Turnbull on 12 February, shows the Northern Territory is the worst performing jurisdiction in the country in reducing Indigenous disadvantage. The Northern Territory is on track to achieve just one of the seven Closing the Gap targets (halving the gap in Year 12 attainment by 2020), and is the only state or territory not on track to having all Indigenous four year olds enrolled in early childhood education by 2025.

While we have seen a 21 per cent rise in Year 12 attainment over the past 10 years (from 18.3 per cent in 2006 to 39.1 per cent in 2016), this is significantly lower than the national average, where 65.3 per cent of Indigenous 20-24 year-olds have achieved Year 12 or equivalent.

The one target that was on track last year – to have 95 per cent of all Indigenous four year olds enrolled in early childhood education by 2025 – is now unlikely to be achieved. Other areas not on track include: halving the gap in child mortality by 2018; closing the gap in school attendance by 2018; halving the gap in reading and numeracy by 2018; halving the gap in employment by 2018; and closing the life expectancy gap by 2031.

The Closing the Gap targets were established in 2008 by the Council of Australian Governments (COAG) to improve Indigenous outcomes in health, education and employment. Six targets were established, and a seventh target on school attendance was added in 2014.

Nationally, three of the seven targets are on track to be met: halving the gap in child mortality by 2018; having 95 per cent of all Indigenous four-year-olds enrolled in early childhood education by 2025; and halving the gap in Year 12 attainment by 2020.

NT Chief Minister Michael Gunner described the Closing the Gap report as disappointing and demonstrating failure across the country.

Mr Gunner says that after 10 years, the gap is not closing on the majority of issues of importance to Aboriginal Territorians.

"Only one of the seven categories is on track in the Territory. That's not good enough," he said. "We have to completely overhaul this work, refresh it and then focus on delivering.

"I am backing calls from Aboriginal people across the Territory and the country for a stronger voice in establishing and then monitoring the next 10 years."

With four of the targets expiring this year, the Australian Government is now working to "refresh" the Closing the Gap agenda. A meeting in Canberra of prominent Aboriginal leaders from across Australia on 8-9 February considered the Commonwealth Government's "refresh" agenda.

The chairmen of the four NT land councils, Samuel Bush-Blanasi (Northern), Francis Jupurrurla Kelly (Central), Tony Wurrumarrba (Anindilyakwa) and Gibson Farmer Illortaminni (Tiwi) attended and published a short statement: "Governments had 10 years to get it right. Ten years ago, they did not talk to us. After 10 years of failure why are they rushing us now? Why don't they give us time to consult our people and elected members properly about these life-and-death issues?"

The meeting agreed that existing targets should be retained and critically reviewed, and that the following areas are of highest importance for setting additional future targets as part of this refresh: families, children and youth; housing; justice, including youth justice; health; economic development; culture and language; education; healing; and eliminating racism and systemic discrimination.

The Council of Australian Governments met the day after the meeting of Aboriginal leaders. A COAG communique said all governments would undertake community consultations on the "refresh". COAG would then agree to a new Closing the Gap framework, national and state targets, performance indicators and accountabilities by 31 October.

**"Governments had 10 years to get it right. Ten years ago, they did not talk to us. After 10 years of failure why are they rushing us now? Why don't they give us time to consult our people and elected members properly about these life-and-death issues?"**

**- Chairmen of the four NT land councils**

## CALL FOR JUSTICE TARGETS

The Law Council has redoubled its call for the Australian Government to create a series of justice targets to end the disproportionately high imprisonment rates of Aboriginal and Torres Strait Islander peoples.

Despite representing less than three per cent of the population, 27 per cent of all adult prisoners identify as Aboriginal and/or Torres Strait Islander.

In the past 10 years, imprisonment of Aboriginal and Torres Strait Islander peoples has increased by 88 per cent.

Law Council President, Morry Bailes, said the incarceration rates of Aboriginal and Torres Strait Islander people is nothing short of a national crisis, requiring a strong national response.

"Australia's Indigenous imprisonment rates continue to be among the worst in the developed world," Mr Bailes said.

"Justice targets must be put back on the national agenda. These targets will help drive change among all Australian governments by outlining clear markers for improvement and creating accountability for falling short.

"As set out in the Change the Record Coalition's Blueprint for Change, targets could include:

- to close the gap in the rates of imprisonment by 2040; and
- to cut the disproportionate rates of violence against Aboriginal and Torres Strait Islander peoples, to at least close the gap by 2040, with priority strategies for women and children.

The Law Council also expressed disappointment at the Australian Government's response to the Royal Commission into the Protection and Detention of Children in the Northern Territory.

"The Australian Government had a unique opportunity to demonstrate national leadership regarding the important findings of the Royal Commission," Mr Bailes said.

"Unfortunately, it missed the chance to deliver a national, comprehensive, intergovernmental response to the recommendations. This includes on the landmark recommendation to raise the age of criminal responsibility.

"It is clear, as with the Closing the Gap report, we need strong Australian Government leadership and intergovernmental cooperation among states and territories," Mr Bailes said.



Illustration: Nick Bland

## How helpful is the Closing the Gap rhetoric?

"How we talk about Closing the Gap matters because focus on the persisting gap can have detrimental impacts on the wellbeing of Aboriginal and Torres Strait Islander peoples. For example, negative reporting perpetuates negative stereotypes about Aboriginal and Torres Strait Islander peoples, and can fuel and galvanise discrimination and racism. It can also impact negatively on the self-esteem and the emotional health of Aboriginal and Torres Strait peoples, as they continue to hear negative stories about themselves, their families and communities. This can then influence health behaviours. For example,

because of discrimination, Aboriginal people may avoid using health services, or they might not receive best-practice medical care when they do. It can also affect the public appetite for programs, particularly if the impression is given that no progress is being made. This can create a cycle, where the constant focus on gaps can actually make the gaps bigger – and perpetuate inequality.

"This is why we also need to focus on improvements that are occurring within the Aboriginal and Torres Strait Islander population, as well as keeping an eye on the 'gap'. Examples of progress include

large declines in smoking prevalence, cardiovascular mortality, and infant mortality. Such achievements should be accessible as a source of pride to communities, and communicating these improvements may feed additional improvement."

*Excerpt from Closing the Gap in child mortality: Ten years on by Ray Lovett, Katherine Thurber, Roxanne Jones and Emily Banks from the Aboriginal and Torres Strait Islander Health Program at the National Centre for Epidemiology and Population Health, Australian National University.*

# NT REPORT CARD: HOW DO WE COMPARE?

## 1. Halve the gap in child mortality by 2018. **NOT ON TRACK**

Indigenous child mortality rates have fallen over the period 1998 to 2016. However, the NT has the highest Indigenous child mortality rate (332 per 100,000). Over the period 2012 to 2016, NSW had the lowest Indigenous child mortality rate (110 per 100,000 population).

## 2. Have 95 per cent of all Indigenous four-year-olds enrolled in early childhood education by 2025. **NOT ON TRACK**

All jurisdictions with the exception of the NT are on track, despite this target having been on track in the NT in 2017. Nationally, 65 per cent of all Indigenous children enrolled in an early childhood education program attended for 600 hours or more (compared with 77 per cent for non-

Indigenous children). Queensland had the highest proportion of children attending 600 hours or more (85 per cent), while the NT had the least (29 per cent).

## 3. Halve the gap in Year 12 attainment by 2020. **ON TRACK**

The NT has seen one of the greatest increases over the past decade, with Year 12 attainment rates rising by more than 20 percentage points (from 18.3 per cent in 2006 to 39.1 per cent in 2016). SA, WA and ACT are also on track, while NSW, Victoria, Queensland and Tasmania are not.

## 4. Close the gap in school attendance by 2018. **NOT ON TRACK**

In the NT the Indigenous attendance rate fell by 4 per cent from 2014 (70.2 per cent) to 2017 (66.2 per cent). There has been no meaningful improvement in any of the

states and territories. Indigenous and non-Indigenous attendance rates both fall in secondary grades, declining with increasing year level. However the decline for Indigenous students is more rapid, meaning the attendance gap increases throughout secondary school.

## 5. Halve the gap in reading and numeracy by 2018. **NOT ON TRACK**

The NT has consistently had the lowest proportion of Indigenous students at or above the national minimum standards from Year 7 to Year 12). The target covers eight areas (reading and numeracy for Years 3,5,7 and 9), and only Year 9 numeracy was on track in all the states and territories. The ACT was the only jurisdiction on track across all eight areas.

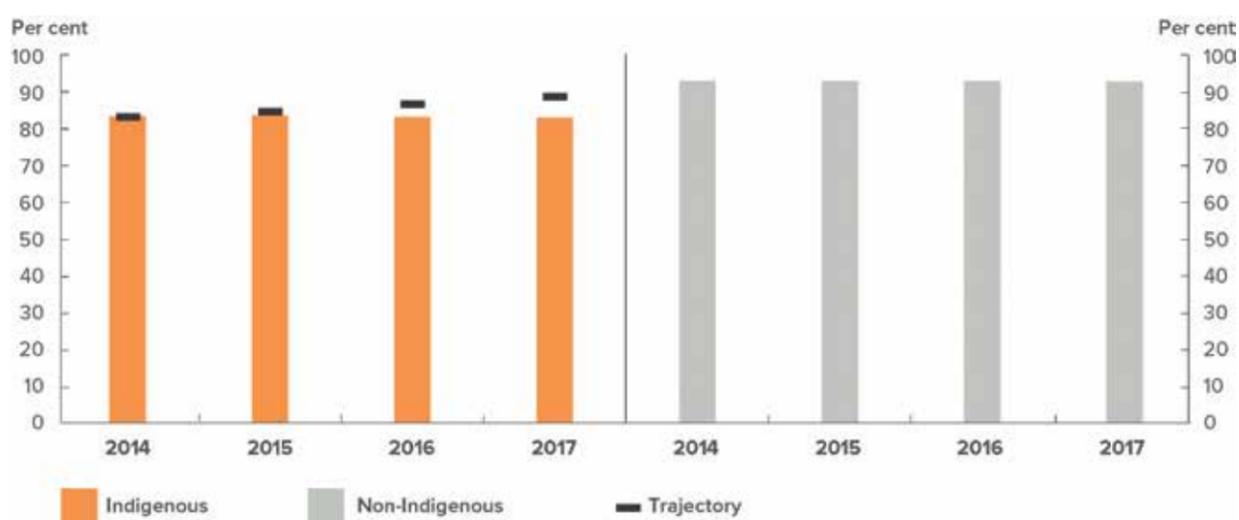
## 6. Halve the gap in employment by 2018. **NOT ON TRACK**

Census data show that the NT's Indigenous employment rate fell by 7.7 per cent points to 31.2 per cent in the ten years to 2016. NSW is the only jurisdiction currently on track to meet the employment target. The Indigenous employment rate fell in the prominent mining states of Queensland, WA and the NT between 2006 and 2016.

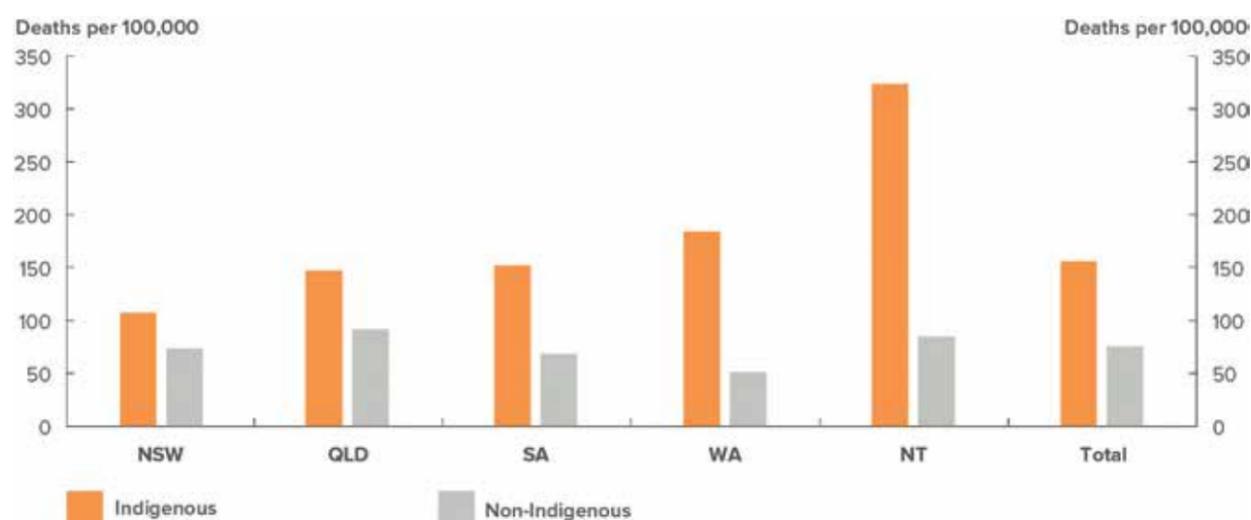
## 7. Close the gap in life expectancy by 2031. **NOT ON TRACK**

The NT had the highest Indigenous mortality rate (1,478 per 100,000 population) as well as the largest gap with non-Indigenous Australians, followed by WA (1,225 per 100,000). Only WA has seen a significant decline in Indigenous mortality rates since 2006 – a decline of 20.4 per cent, leading to a narrowing of the gap by 27.2 per cent.

### Student attendance rates



### Child (0-4 years) mortality rates by jurisdiction, 2012-2016



# The Close the Gap Committee

Australia's peak Aboriginal and Torres Strait Islander and non-Indigenous health bodies, health professional bodies and human rights organisations operate the Close the Gap Campaign.

The Closing the Gap Steering Committee, which includes the Human Rights Commission, produces an annual 'shadow' report representing its assessment of Australia's and the Federal Government's progress against the Council of Australian Government's (COAG's) Closing the Gap targets for health and life expectancy equality.

Here's what the committee said about its focus on 2017:

Over the decade since 2008, Aboriginal and Torres Strait Islander affairs have experienced discontinuity and uncertainty. Regular changes to the administration and quantum of funding, shifting policy approaches and arrangements within, between and from government, cuts to services, and a revolving door of Prime Ministers, Indigenous Affairs Minister and senior bureaucrats have all but halted the steady progress hoped for by First Peoples.

After the initial funding commitments made for the Closing the Gap Strategy, via the National Indigenous Reform Agreement and the supporting National Partnership Agreements – the strategy was effectively abandoned with the extensive cuts (over \$530 million) made to the Indigenous Affairs portfolio in the 2014 Federal Budget. A new competitive tendering process for services to apply for funding grants was introduced, creating enormous upheaval and led to uncertainty, lost continuity, and eroded engagement between Aboriginal and Torres Strait Islander organisations and government.

Government expenditure at all levels has not been commensurate with the substantially greater and more complex health needs of Aboriginal and Torres Strait Islander peoples. Of the investments made, in many cases it has been invested in the wrong areas, focussing more on tertiary than primary care, mainstream rather than Aboriginal Community Controlled Health Services, or been exhausted by the administrative costs of government departments.

It is unsurprising in this environment that governments have not been able to make real in-roads into closing the gap in health equality and life expectancy for Australia's First Peoples.

Despite this, Aboriginal and Torres Strait Islander community controlled health services continue to account for much of the gains made in health equality. Similarly, the small but growing Aboriginal and Torres Strait Islander health workforce continues to improve access and approaches to addressing First Peoples' health.

It is the duty of all Australian governments to build upon and support what is working. Closing the Gap is an agreed national priority, and hundreds of thousands of Australians have joined the Campaign, calling upon governments to work with First Peoples to ensure they can enjoy long and healthy lives. It is the particular responsibility of the Federal Government to ensure that the effort will be sustained, with effective, collaborative leadership and coordination with State and Territory governments to meet this national priority.

The recently released Productivity Commission 2017 Indigenous Expenditure Report noted that direct expenditure has actually dropped to 18 per cent from 22.5 per cent when the Statement of Intent was signed in 2008.

The Report also illustrated that expenditure on Aboriginal and Torres Strait Islander people is heavily skewed toward the costs of reacting to the outcomes of disadvantage rather than investments to reduce or overcome disadvantage.

Furthermore, the 2017 Indigenous Expenditure Report states that to 'know the direct impact of expenditure on the outcomes' requires a cost benefit analysis.

The Close the Gap Campaign agrees and believes that far greater effort should be spent on working with First Peoples on the approaches that can be shown to work, especially those that address the root causes of poor health, and direct investment to them. To date, the Close the Gap Campaign is not aware of any long-term cost benefit analysis, nor comprehensive evaluation of the last 10 years of closing the gap by government. This is a failure of accountability and good governance by the Federal Government.

We note the work of the National Health Leadership Forum and the Redfern Statement Alliance offers some hope to better collaboration with Government. These senior Aboriginal and Torres Strait Islander leaders provide considered, expert and collective advice to Government.

**The refresh process has lacked clarity and appears to be promoting an agenda based on views within government that have involved virtually no engagement with First Peoples in their development.**

In the 2017 Closing the Gap Report to Parliament, the Prime Minister announced that the Council of Australian Governments (COAG) would be looking to review and refresh the Closing the Gap Strategy and that the Productivity Commission would be expanded to include an Indigenous Commissioner 'to lead on the Commission's work of policy evaluation'.

One year later, there has been no announcement about the appointment of an Indigenous

Commissioner to the Productivity Commission. The Close the Gap Campaign expects the Federal Government to appoint the commissioner as a matter of urgency, and that the commissioner is an Aboriginal and/or Torres Strait Islander person.

The Government's 'refresh' process for the Closing the Gap Strategy has been maligned with rushed and poor engagement with Aboriginal and Torres Strait Islander leaders and communities. The refresh process has lacked clarity and appears to be promoting an agenda based on views within government that have involved virtually no engagement with First Peoples in their development.

The government preference for internalising policy development, where policy is produced in government bureaucracies with minimal input, will need to be a relic of the past if we are to start meeting closing the gap targets. This will mean prioritising approaches that deliver better health and wellbeing outcomes even if this means relaxing government operational and management control, especially if there is no compelling evidence that the continuation of such control will ensure improved outcomes.

Emblematic of the gap between the rhetoric of partnership and the reality, the Federal Government failed to grasp the opportunity presented by Aboriginal and Torres Strait Islander people with the proposal of the Uluru Statement from the Heart. The elements of the Uluru Statement go to the core of achieving a refreshed Closing the Gap Strategy that is genuinely co-designed. The Uluru Statement made three core proposals:

1. An Aboriginal and Torres Strait Islander Voice enshrined in the Constitution;
2. A Makarrata Commission to oversee agreement making between Governments and Aboriginal and Torres Strait Islander peoples; and
3. Truth-telling about our history, led by the Makarrata Commission.

The rejection of the Uluru Statement has been compounded by issues with the Refresh process, rumours of additional funding cuts to Indigenous remote housing programs and the devastating findings in the Royal Commission into the Protection and Detention of Children in the Northern Territory and the Royal Commission into Institutional Responses to Child Sexual Abuse.

Encouragingly, and despite government inertia, there are numerous positive examples of Aboriginal and Torres Strait Islander peoples and communities working effectively to deliver the solutions to the challenges posed.

Given the dreadful record of the trajectory towards closing the gap, 2018 is a critical year for Aboriginal and Torres Strait Islander affairs. We have quite simply reached a fork in the road for how Australia tackles the entrenched inequalities and disparities in health and wellbeing for First Peoples.

We are just two years off being halfway towards the generational deadline to close the gap that was called for in the seminal 2005 Social Justice Report. Aboriginal and Torres Strait Islander people and the nation cannot afford further missteps or apathy from governments if we are to meet the target that we have set as a national priority.

# REFRESHING CLOSING THE GAP IS ABOUT MUCH MORE THAN TARGETS

By Brian Stacey\*

Watching Kevin Rudd on TV in Tennant Creek offer an apology in Parliament on 13 February 2008 to Australia's Indigenous peoples for their mistreatment caused mixed feelings. On one hand, I was proud that Australia had finally reached this moment and moved by the humility of Indigenous Australians accepting the apology. On the other, I was very upset knowing that the Emergency Response which I was playing a major part in was commenced in the Northern Territory without any prior consultation with Aboriginal people and leaving them angry at the way their lives were being turned upside down. Those mixed feelings, however, were absent a year later when, on 26 February 2009, Kevin Rudd gave the first annual report to the Parliament on Closing the Gap. I was impressed and optimistic over this new national policy for Indigenous Affairs.

Led by the Prime Minister, Closing the Gap had been agreed to not just by the Commonwealth but by all First Ministers, Liberal and Labor, of all States and Territories. Moreover, they all signed a public agreement, for the first time, known as the National Indigenous Reform Agreement (NIRA), to implement the Closing the Gap policy at an historic meeting of the Council of Australian Governments (COAG) in November 2008. It wasn't just new policy. Governments, particularly the Commonwealth, put their money where the mouth is and came up with \$4.6 billion over ten years in new initiatives, to be spent through National Partnership Agreements on early childhood development, health, housing, economic development and remote service delivery. Importantly, Closing the Gap also appeared to have been developed around what Indigenous leaders were seeking. In his Social Justice report for 2005, Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma AO, urged Australian Governments to commit to achieving equality for Indigenous people in health and life expectancy within 25 years. Indigenous and non-Indigenous organisations joined forces to respond to this plea and launched a Close the Gap campaign in 2007. COAG's new Closing the Gap policy responded to this including making a headline national target of closing the gap in life expectancy within a generation.

For much of my career in Indigenous Affairs, I had confronted considerable division and confusion between Indigenous peoples and the Federal Government, the Coalition and Labor, and between the Commonwealth and State/Territory governments. In addition, I had been through three major upheavals in the Indigenous Affairs bureaucracy – from DAA to ATSIC, from ATSIC to the Office of Indigenous Policy (OIPC), and from OIPC to FaHCSIA. Good policy had been a loser but Closing the Gap including bipartisan and intergovernmental agreement to achieve equality between Indigenous and non-Indigenous Australians in health, education and employment, based on national targets, and a new commitment to engage with Indigenous people in designing and delivering services, and even new resources to measure and report on progress annually was the best policy I had seen for Indigenous Affairs.

Ten years have passed and recent events have given

me cause to reconsider whether I was right to be so positive about the Closing the Gap policy. Late in 2017, the Department of Prime Minister and Cabinet announced that the Commonwealth and State/Territory governments have agreed "to work together with Aboriginal and Torres Strait Islander leaders, organisations, communities and families on a refreshed agenda and renewed targets". Shortly after, the Minister for Indigenous Affairs put out a press release asking all Australians for their views "to help construct the next phase of the Closing the Gap agenda" and releasing "a COAG Discussion Paper to support ongoing consultations". Minister Scullion also said that:

The original Closing the Gap targets were developed without consultation from Indigenous Australians and without the direct involvement of state and territory governments – which meant targets were not as effective or as well directed as they should have been; and

New Closing the Gap targets will drive better outcomes for Indigenous communities because, for the first time, state and territory governments will establish targets in areas for which they are responsible and all targets will be designed to drive change with specific action plans to support targets.

Meanwhile, the COAG Discussion Paper told us that only one of the current targets is on track to be achieved. The Discussion Paper also pointed out that many areas relevant to the needs and aspirations of Aboriginal and Torres Strait Islander peoples are not measured and proposed moving to a strengths based approach that reflects a concept of prosperity and incorporating culture into the Closing the Gap framework.

The Prime Minister's Closing the Gap report for 2018, released only two months later, paints a somewhat more optimistic picture including that, in fact, three of the seven targets are on target to be achieved. Nonetheless, given what the Minister and his Department have said in relation to the Refresh, was I right to be so positive about the Closing the Gap policy? In fact, I believe I was. It is not the case that the original Closing the Gap targets were developed without any consultation with Indigenous interests and keeping in mind that the concept of targets was not new in Indigenous Affairs. The Indigenous led Council for Aboriginal Reconciliation recommended in 2000, for example, the establishment of benchmarks for measuring the performance of governments in delivering services to Aboriginal and Torres Strait Islander peoples and communities and an annual reporting system against these benchmarks. There is no doubt that the Closing the Gap policy expressed through the National Indigenous Reform Agreement was rushed to the extent that it was put in place a year after the Rudd Government was elected. But senior Indigenous leaders were consulted and welcomed COAG's decision to adopt health targets starting at its meeting in December 2007. I know that Northern Territory Aboriginal leaders were consulted by Mr Rudd and Jenny Macklin in meetings which I attended in 2008, not just about reinstating the Racial Discrimination Act in the Northern Territory Emergency Response but also the

Closing the Gap targets. Importantly, the Closing the Gap policy did not come out of nowhere. An important platform for it was the excellent decision of COAG in 2002, under the leadership of Prime Minister John Howard, to commission the Productivity Commission to produce a regular report against key indicators of Indigenous disadvantage and these reports, produced every two years, were supported by a working group with Indigenous representatives, now the National Congress of Australia's First Peoples. I know that there was considerable consultation with Indigenous people and their organisations across Australia as these reports were produced that built the structural framework for the Closing the Gap policy and the National Indigenous Reform Agreement.

The Closing the Gap policy was not negotiated with Indigenous interests to secure their formal agreement and they were not asked to be parties which has left them, in some cases, not having a sufficient sense of ownership or responsibility to also actively contribute to it. However, the National Indigenous Reform Agreement included a commitment to consulting Indigenous people about a national Indigenous representative body, which occurred with the establishment and funding of National Congress in 2010 (now the largest Aboriginal and Torres Strait Islander organisation in Australia). Closing the Gap also made engagement with Indigenous people central to the design and delivery of all programs and services and the best example of that was the 10 year package of measures called Stronger Futures in the Northern Territory, led by the then Minister for Indigenous Affairs, Jenny Macklin MP, which replaced the Northern Territory Emergency Response. I headed up the Stronger Futures Taskforce and there was 12 months of consultations with communities and their organisations so that the programs and legislation in the package reflected their priorities as much as possible. We discussed a formal consultation plan with Aboriginal peak organisations in the Northern Territory before starting and we published community consultation reports and also had independent experts review the consultation process and publish a report on its strengths and weaknesses. Aboriginal peaks in the Northern Territory including AMSANT and the Land Councils were engaged about the content of the National Partnership Agreement for Stronger Futures and the draft implementation plans and funding was provided in the package for Aboriginal Peak Organisations NT (APONT). While there was criticism of the Stronger Futures legislation, what occurred was a vast improvement compared to the initiation of the Emergency Response and it was because of the Closing the Gap policy.

State and Territory Governments were also directly involved in developing the original Closing the Gap targets. COAG established a Working Group on Indigenous Reform in December 2007 overseen by the Minister for Indigenous Affairs, with deputies nominated by the States and Territories at a senior departmental level. Senior officials from all jurisdictions were also included and it developed the National Indigenous Reform Agreement including the targets. The meetings were very long, complex

and often there were serious disagreements. However, they resulted in a national agreement signed off by the Prime Minister, Premiers and Chief Ministers. Moreover, States and Territories contributed funding to the National Partnership Agreements signed as a result of the National Indigenous Reform Agreement. Bilateral agreements between the Commonwealth and each jurisdiction about how Closing the Gap would be implemented in each State and Territory were also negotiated and I was part of the negotiations for the bilateral reached with the Northern Territory. State and Territory Governments were expected to produce their own annual reports on progress against targets set for their jurisdiction based on the national targets and for some years after Closing the Gap was agreed, this occurred. Annual reports produced by the Bligh Queensland Government are available online. It is not new to talk about States and Territories having targets and reporting against them and they already have their own trajectories to map progress and which are reported on in the publications of the Productivity Commission. To the best of my knowledge, the National Indigenous Reform Agreement remains intact as a national agreement reached under COAG's Intergovernmental Agreement on Federal Financial Relations and the parties including the State and Territory Governments are meant to be meeting their obligations under it.

In assessing the worth of a policy, of course whether it has achieved its objectives is paramount. To that extent, the data provided in the Prime Minister's Closing the Gap report, adding on what is provided on the Closing the Gap Refresh website (sourced from the Productivity Commission and the Census) tells us that there has been progress against most of the targets and in some cases more than marginal improvements since 2008. Some salient facts are;

- Three of the seven targets; Year 12 attainment, child mortality and participation in early education, are on track to be achieved;
- Another target for literacy and numeracy, is not on track but remain achievable;
- Over the five years from 2005-07 to 2010-12, the gap in life expectancy declined by 0.8 years for males and 0.1 years for females and a related indicator, the Indigenous mortality rate, has declined by 15 per cent between 1998 and 2015;
- The proportion of Indigenous Australians of working age who are employed in mainstream (non-CDEP) jobs has remained stable, at 48.2 per cent in 2008 compared to 48.4 per cent in 2014-15; and
- There has been negligible change in the national Indigenous school attendance rate from 2014 (83.5 per cent), when the target was introduced, to 2016 (83.4 per cent).

While hardly cause for celebration, I don't believe anyone could reasonably describe what has occurred over the past ten years as a policy failure. There have been significant gains particularly in areas such as Year 12 attainment, child and maternal health and access to early childhood services. The least progress has been made in remote Australia and this is reflected in the employment and school attendance data. Federal Labor and Coalition Governments made a mistake in replacing the original CDEP wages program with unemployment benefits and mainstream employment services. Instead they should have used the original CDEP as a springboard into regular employment and business development. That was poor policy development, inconsistent with the National Indigenous Reform Agreement, including a consistent refusal by the Coalition and Labor to respond to the feedback of remote communities and their representative organisations. Nor has Labor or the Coalition done sufficient policy work to understand and respond to the complex problem of school attendance in remote

communities and the programs they have put in place so far have been ineffective (although the Department of Prime Minister and Cabinet now appears to be doing more useful research in this space).

But it is the comments made in the COAG Discussion Paper released in December 2017 about the need for a strengths-based approach which I found so at odds with my understanding of Closing the Gap. I agree that it is important to highlight the many achievements of Aboriginal and Torres Strait Islander peoples and to celebrate their culture. Asking in the Discussion Paper if culture should be part of the Closing the Gap framework is almost a rhetorical question. The point though is that culture is already part of the Closing the Gap framework and a quick read of Schedule A to the National Indigenous Reform Agreement, titled the National Integrated Strategy for Closing the Gap in Indigenous Disadvantage, confirms this. It has a whole section devoted to the importance of culture which starts off by saying that "Connection to culture is critical for emotional, physical and spiritual wellbeing". Culture is also a critical part of the Productivity Commission's biennial Overcoming Indigenous Disadvantage report. That report contains many examples of achievements of Indigenous people including case studies about what works and their own progress. Obviously culture including language retention are not targets because they are focussed on responding to socio-economic inequality but it has always been part of the Closing the Gap framework. It was another reason why I was so positive about the Closing the Gap policy to begin with.

This goes to a key concern I have with the information COAG through the Department of Prime Minister and Cabinet has produced so far to support its consultations about refreshing Closing the Gap and assuming it will be updated following the outcomes of the COAG meeting on 9 February 2018. The information including the Discussion Paper only goes to the targets in the Closing the Gap framework and seeking feedback about them. The problem with this is that the targets are embedded in a comprehensive National Indigenous Reform Agreement which has 8 schedules to it including Schedule B, a National Urban and Regional Service Delivery Strategy for Indigenous Australians and Schedule E, National Investment Principles in Remote Locations. There are building blocks to focus investment such as early education and healthy homes and linked to those are national partnership agreements which had significant new investment attached to them. The National Indigenous Reform Agreement clarifies roles and responsibilities and includes robust and independent accountability arrangements. I don't think it is possible to provide feedback on the targets on their own without having regard to the National Indigenous Reform Agreement that has the strategy and resources to achieve them. Focussing on the targets only is a key reason for the criticism made by some Aboriginal organisations and scholars of the Closing the Gap policy that it is a "deficit based" approach that reduces Indigenous peoples to statistics. While the Closing the Gap policy may not be a strengths based approach or have targets relating to culture, I think that this criticism is not accurate if there is a focus on the National Indigenous Reform Agreement and the related initiatives including the Productivity Commission's Overcoming Indigenous Disadvantage Report.

When the COAG Discussion Paper and refresh website was launched, there was no mention of the National Indigenous Reform Agreement. I think there should be and I hope that this can be added later, as an additional resource, including asking what ought to happen to the National Indigenous Reform Agreement, its schedules and related National Partnership Agreements. In my view, even if the National Indigenous Reform should be simplified, I believe we still need it, national targets and a national integrated strategy for the next 10 years.

It is clear that to continue to make progress we need the Federal and State/Territory governments to be coordinated and focussed unlike the fragmentation which has appeared over the past 5 years. We also need to find a way for the representative bodies of Indigenous people, particularly national ones like NACCHO and NATSILS which have decades of experience, to be at the table inside COAG to reach agreement on a new National Indigenous Reform Agreement. It is clear that changes are going to be made as a result of the Refresh, including a greater focus on communities which sounds positive but this needs to be done through a National Indigenous Reform Agreement recommitted to by all jurisdictions. Changes were always anticipated by COAG and clause 6 of the Agreement states that "The National Indigenous Reform Agreement, like other National Agreements, is a living document subject to enhancement over time to reflect additions and changes to existing and new National Agreements and National Partnership agreements. As COAG agrees to additional reforms to Close the Gap in Indigenous disadvantage, these will be reflected in this Agreement". I sincerely hope that COAG honours this and other commitments originally made in 2008.

In the meantime, the Closing the Gap policy has been very important for the Northern Territory and has resulted in significant new investment. Accordingly, it is very important that Aboriginal people, communities and their organisations take the opportunity to provide feedback to COAG and it is great that the Department of Prime Minister and Cabinet's website on the Refresh ([closingthegaprefresh.pmc.gov.au](http://closingthegaprefresh.pmc.gov.au)) provides this opportunity for this to be done electronically.



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# 'REFRESH' THE POLICY APPROACH FOR REMOTE INDIGENOUS AUSTRALIA

By Jon Altman\*

I have been visiting Aboriginal communities in remote Australia for more than 40 years. In the past decade, particularly since the NT Intervention, I have observed both the destruction of lifeways and the entrenchment of deepening poverty. In many places people are making valiant and productive efforts to make a living, but against mounting odds. And in some sectors like in caring for country, caring for people and cultural industries there are glimpses of success and embryonic signs of what might be.

There is also a growing body of evidence, much based on official statistics gathered by the Australian Bureau of Statistics and other agencies and analysed by independent researchers, including myself, that indicate that my grounded pessimistic observations reflect a change that is widespread across the massive geographic regions, remote and very remote Australia, that encompass 86% of the continent but have an estimated Indigenous population of just 140,000.

In this article, I want to highlight the plight of Indigenous people in remote Australia juxtaposing this with the far more benign perspective on acknowledged failure provided in the Closing the Gap Prime Minister's Report 2018 just tabled in the Australian Parliament.

This is the tenth report in a row, five delivered by Labor Prime Ministers (2009–2013) and five delivered by Coalition Prime Ministers (2014–2018), that shows that at the national level the Australian government, in partnership with States and Territories, has failed to reduce disparities in socioeconomic outcomes between Indigenous and other Australians.

I then want to look more closely at the unfolding tragedy of what is happening in remote Australia focusing on the past decade, look to provide some explanation of why, at a time when governments frame their narrative on "closing the gap" in some geographic regions, disparities are clearly growing?

I want to further unsettle and challenge the dominant narrative by asking whether in the past decade government intervention, ideologically driven by the notion of delivering socio-economic equality, has actually made things worse for the subjects of its project of improvement, even according to the government's own ways of measuring.

Rather than concluding with a list of proposed solutions to what is a complex, politically-charged issue, I want to challenge politicians, officials and others to refresh their thinking and break out of a path dependency that is proving financially wasteful and truly destructive for

the very people that statistics represented in abstract and generalised form—perhaps seeking to conceal their suffering from the public gaze?

A feature of the Closing the Gap reports is how each year they have become glossier and thicker. This year represented a "day of reckoning" when four of the original five disparity targets were to be met.

The annual reports, originally conceived to hold Australian governments accountable for their performance, have been increasingly deployed to narrate stories of dramatic success, with the message that these are replicable, and to outline all that the Australian government is doing, a form of propaganda.

For the first time, right up front, there is a summary of performance not just at the national level, but also at State and Territory levels. While the National Indigenous Reform Agreement of November 2008 that formalised the Closing the Gap targets was a joined-up Council of Australian Governments initiative, one senses that the Australian government is now keen to share the blame for failure with other governments.

This is though it was Kevin Rudd's national government that unilaterally developed the

targets announced in February 2008 as an adjunct to the National Apology. An elixir of billions of dollars in National Partnership Agreements was used to entice State and Territory collaboration. But targets were set at the national not sub-national level.

Let's be clear that these disparity targets are modest: to halve the gap in child mortality by 2018, to halve the gap in reading and numeracy by 2018, to halve the gap in Year 12 attainment by 2020, and to halve the gap in employment outcomes by 2018.

The other three targets are to close the gap in life expectancy by 2031; a revised target to have 95% of Indigenous four-year olds in early childhood education by 2025; and an ambitious new target devised by Tony Abbott when "Prime Minister for Indigenous Affairs" to close the gap in school attendance between 2014 and 2018.

In this latest report the Australian government has made a valiant attempt to manipulate statistics to show that three targets are on track.

In fact, only one, year 12 attainment might be on track. I say might because recent research published by the Grattan Institute shows widening gaps, referred to as a gulf in learning outcomes, especially in remote and very remote areas.

**It is a sad indictment of a rich settler society like Australia that what are quite modest goals nationally have not been achieved.**



The information on child mortality provided refers to trends from 1998 with most progress already achieved by 2008. And the early childhood target is not a gap but information of enrolment in early childhood, "reset" in 2014 to extend its time frame for another decade after failure to meet the original target by 2013.

It is a sad indictment of a rich settler society like Australia that what are quite modest goals nationally have not been achieved.

But it also needs to be said that even in 2008 there were commentators and academics, myself included, that predicted this outcome.

Such prediction was based in part on earlier experience with the Aboriginal Employment Development Policy in 1987 that had set out to statistically eliminate disparities in employment, income and education

by 2000. And in part on historical statistical trends going back to 1971 when Indigenous people were first allowed to self-identify in the Australian census.

Two other factors, beyond the statistical, stand out as explaining the 10-year policy failure.

The first is conceptual or ideological: any notion of elimination of disparity must be based on a logic of sameness. To put it crudely, if Indigenous people are to have the same standard of living as other Australians they will have to live in similar locations, informed by similar norms and values, engage with the mainstream market capitalist economy and society in the same way. This approach resonates with the assimilation policy as defined in 1961.

Back in August 2007 when Prime Minister John Howard looked to justify the NT Intervention while visiting the remote township of Hermannsburg, he put it to Indigenous Australians in this brutal way:

What is more, most of this remote Indigenous population resides in about 1000 small communities spread across Indigenous-owned lands held under land rights and native title laws. Such titles have largely been legally bequeathed because their owners have demonstrated forms of “continuity of rights and interests under traditional laws acknowledged and traditional customs observed” and ongoing connection to their ancestral lands.

As more and more of remote Australia has come under various forms of Indigenous title varying from inalienable freehold title to exclusive possession to non-exclusive possession, land owners have looked to occupy their lands and utilise their resources for livelihood.

These are circumstances that enable the maintenance of diversity and difference, the high culture and “a history of 65,000 years” that the Closing the Gap

In *Land Rights News – Northern Edition* last October I documented the deepening poverty for Indigenous Australians in the NT using 2016 census data. To recap, 45% of households defined as Indigenous are below the poverty line compared with less than 10% of other households.

Recent research by Francis Markham and Nicholas Biddle from the ANU shows that for the first time more than half of the Indigenous population in very remote Australia is in income poverty. In some regions like Nhulunbuy and Jabiru Indigenous poverty rates are as high as 69.3% and 67.7%.

Indigenous income in very remote Australia averages just 44% of median non-Indigenous income. And Indigenous poverty rates have increased in very remote Australia between 2006 and 2016 by 7.6%

While income poverty is not one of the Closing the Gap targets, employment is, with data from the last three censuses showing that the Indigenous employment rate has declined in absolute terms in remote Australia.

**“Does every Aboriginal person necessarily want to be like you guys?”**

**- Former NLC Chairman John Daly to a Senate committee, August 2007.**

As the non-Indigenous employment rate has hovered about 80% between 2006 and 2016, the Indigenous rate has declined from nearly 50% to just over 30%. In remote Indigenous Australia the disparity between Indigenous and non-Indigenous employment is growing; and the absolute rate of Indigenous employment has declined to the extent that only three in 10 Indigenous adults are in paid work.

This trend in paid labour underutilisation, combined with inadequate social security payments, has caused the alarming escalation of Indigenous poverty in remote Australia. Coupled with the high price of basic foods in most remote communities, this explains the deep poverty that I observe when I visit.

While I focus here on poverty and employment rates, the disparities in all the Closing the Gap targets are greater in remote Australia than elsewhere.

This extraordinary socioeconomic decline that has seen the poorest Australians become even poorer has multiple explanations that are interlinked in complex ways.

Some are structural and outside Indigenous policy although they have disproportionately impacted on remote living Indigenous people.

For example, changes in the mainstream social security system have generated multiple jeopardies that excessively impact on remote living Indigenous people.

These include: the reduction in parenting payment introduced by the Gillard government; the growing gap that has developed between the more generous Aged Pension where Indigenous people are under-represented (owing to lower life expectancy) and Newstart Allowances where Indigenous people are over-represented; and the escalating difficulty that Indigenous people living remotely experience in accessing the Disability Support Pension as documented by the Commonwealth Ombudsman in detail in 2016.

These are all factors that have impoverished Indigenous people that the Australian government has chosen to ignore.

But of greater significance than such “mainstream”



The poverty of remote Australia is starkly manifest even in the streets of Darwin.

“Become part of mainstream society or face a bleak future”. This prediction too has proven correct as Indigenous people have resisted such incorporation.

This is especially so for those Indigenous Australians who do not want a future as part of the mainstream but prefer to live differently. As then Chairman of the NLC stated, also in August 2007 to members of a Senate Committee examining Intervention laws, “Does every Aboriginal person necessarily want to be like you guys?”

The second is the fundamental difference in the geographic distribution of the Indigenous and non-Indigenous populations: while 20% of Indigenous peoples live remotely only 1.5% of the non-Indigenous population do so.

report celebrates. Land owners with aspirations to live on their homelands should not be condemned to live in dire poverty by governments.

There is no engagement with this reality either in the framing of Indigenous policy or in the Closing the Gap annual reports. And there is no attempt to document the extent of the socioeconomic disparities for remote Indigenous Australia—even though an element of current government policy has distinct Remote Australia Strategies.

Let me turn now to expose just a few aspects of what has been papered over by the statistical focus on failed national performance and then explore briefly the role of government policies in intentionally and unintentionally impoverishing remote Indigenous Australia.

explanations is the extraordinary shift in Indigenous policy in remote Australia in the aftermath of the NT Intervention.

Neither the Intervention nor this policy shift to punitive neoliberalism rates a mention in the Closing the Gap report.

The dominant and bipartisan political view that has driven this new approach is that paternalistic measures need to be deployed to alter the norms and values and ways of behaving of remote living Indigenous people to align with those of neoliberal individualistic subjects.

I do not want to rail here against the illiberal, paternalistic, racist and, as we now see, unproductive and wasteful nature of these measures in any detail; I have done so on numerous other occasions.

What I do want to do is comment on how the draconian nature of these measures has ramped up over time by focusing on two instruments, income management and remote work-for-the-dole, to demonstrate how destructive and “gap widening” this approach has been.

When elected in late 2007, the Rudd government could have ended the folly of the “national emergency” but it chose not to, despite no evidence of any improvements and two important independent reviews – first of the

## A prerequisite for refreshing the policy thinking must be an acknowledgement of the crushing failure of the past decade and the deepened impoverishment in remote Indigenous Australia.

Intervention umbrella, and then on income management via the BasicsCard that eventually cost the Australian taxpayer more than \$1 billion to implement.

Indeed, by acquiescing to this “interventionist” approach, first the Rudd and then Gillard administrations gave it moral authority; and then having invested heavily in its escalating implementation over five years, renamed it Stronger Futures for the Northern Territory and locked it in for another decade.

When elected in 2013 the Abbott government appointed a mining magnate Andrew Forrest, to review Indigenous jobs and training. A government member, Alan Tudge, a fan of behavioural economics and with work experience at Noel Pearson’s Cape York Institute, and academic and public intellectual Marcia Langton joined the review team.

Implemented recommendations from this review have seen the further escalation of draconian measures with the piloting of the highly contested Cashless Debit Card and the introduction of the Community Development Programme (CDP) that requires people to work daily for up to 25 hours per week for their Newstart payments.

Two papers published by the ARC Centre of Excellence for Children and Families over the Life Course in December 2017 provide damning evidence on just how destructive income management might be.

The first examines the link between income management and child health. It provides very strong statistical evidence that income management did not improve child health outcomes but actually damaged

newborn health—causing a reduction in average birthweights.

The second examines the effect of quarantining welfare on school attendance. It found that the introduction of income management caused school attendance to fall in the short run. Furthermore, this paper argues that the way that income management was implemented may have resulted in income insecurity, barriers to day-to-day economic activity, and a loss of empowerment which may have led to increased family stress and had adverse consequences for parenting.

In terms of Closing the Gap targets in remote Australia, these studies illustrate negative impacts from intervention; neither is mentioned in the Closing the Gap report. And if quarantining 50% of income has negative impacts, one must ask how much more negative might impacts be from the Cashless Debit Card that quarantines 80% of income?

Numerous studies have highlighted the relative benefits of the community-managed Community Development Employment Projects (CDEP) scheme over the very inferior schemes that followed—Jenny Macklin’s Remote Jobs and Communities Program (RJCP) 2013–2015, and then Nigel Scullion’s CDP.

The Closing the Gap report has a lot to say about the achievements of CDP but forgets to mention the Australian government’s punitive willingness to apply 350,000 impoverishing financial penalties on 34,000 participants most of whom (84%) are Indigenous.

Nor does it mention that in the 60 CDP administrative regions the Indigenous employment rate is less than 30%, with many regions having a far lower rate, as low as 13% in CDP Region 23 ‘Alice Springs District’.

Nor does it mention how with CDEP (that operated 1977–2015) there was more employment, more income, more community enterprise and more empowerment of Indigenous people to utilise their vast lands and natural resources assets for livelihood improvement.

The government knows this and so is now looking to reform CDP while at the same time allowing it to continue to force people to work in modern slavery-like conditions for 25 hours per week for the dole and to be more and more impoverished with relentless penalties.

The complacent Turnbull government’s response to all this is to launch Closing the Gap Refresh. An unnamed official in Canberra has decided that a strengths-based approach is now needed, and the new framing buzz word is prosperity: “moving beyond wellbeing to flourishing and thriving”. I wonder what people in the bush struggling for a feed make of this discursive shift?

I am reminded of American political scientist Murray Edelman who wrote about “words that succeed and policies that fail”. With Closing the Gap both the policies and the words have failed, so rather than refreshing the overall policy approach the government is scrambling for new words.

There is a need to refresh the approach to clearly distinguish the circumstances of remote and non-remote Australia. We can learn from the Hawke government’s approach informed by a comprehensive review chaired by the late Mick Miller in 1985.

Alongside an aspirational but unachievable commitment to statistical equality there was clear commitment to accommodate difference with a community-based employment and enterprise strategy: “The purpose of the strategy is to support the aspirations of Aboriginal communities to undertake development in a way that is controlled and is determined by those communities”.

The ideological commitment to sameness for Indigenous

people who must legally prove difference through land rights and native title claim procedures lacks logic and must be reversed. And the expensive, racist, damaging and demeaning punitive measures currently deployed by the hegemonic and unsympathetic state must stop.

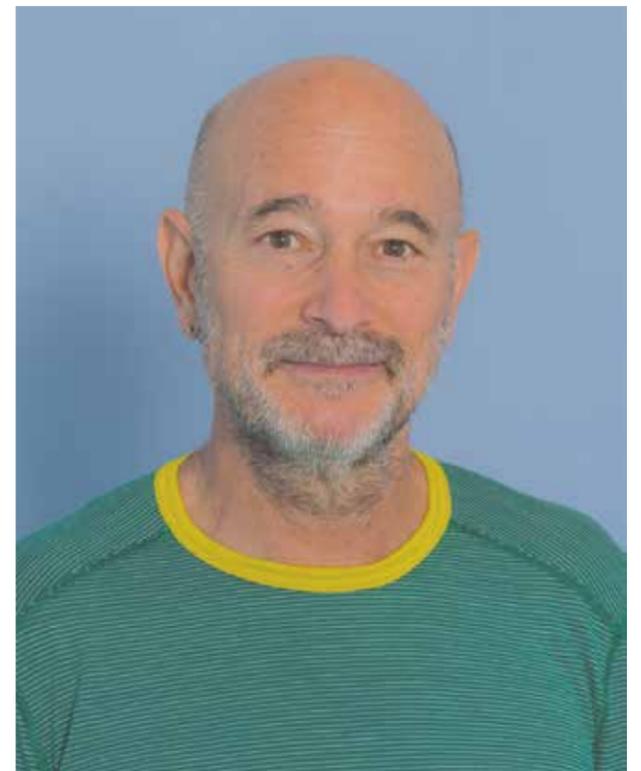
I am not a policy nihilist or anarchist: there are compelling reasons why the Australian government should be required to meet the needs of remote living Indigenous people as citizens. There are equally urgent social justice reasons why as a conquered and subjected people Indigenous people should be afforded special compensatory rights.

A prerequisite for refreshing the policy thinking must be an acknowledgement of the crushing failure of the past decade and the deepened impoverishment in remote Indigenous Australia.

An openness to a range of possible alternate approaches is needed that recognises development as a process that is not limited to market capitalism that can be totally absent in remote Australia.

A practical and empirically-informed framework is needed based on negotiated principles.

Some that come to my mind to stimulate overdue “refreshed” debate include: local control; responding to Indigenous aspirations and circumstances in all their diversity; adherence to international non-discriminatory human rights standards; a consideration of all production possibilities, inclusive of the customary and cognisant of the land titling explosion; new or enhanced existing institutions for empowerment; recognition of the intercultural mix of western and customary norms and values that remote Indigenous people live by; support for cross-cultural forms of hybrid governance arrangements; and creative engagement with global development thinking especially evident in those settler societies that have managed decolonisation and governance for sustainable Indigenous development far better than Australia.



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# GOVERNMENT MOVES TO EQUITABLE WATER REFORM



The Northern Territory Government has developed a policy framework for Strategic Aboriginal Water Reserves – keeping good its promise before the 2016 general election.

The previous Labor Government was moving to reserve water for Aboriginal economic benefit before the 2012 NT election, but was voted out of office.

Labor's policy grew out of the Council for Australian Government's National Water Initiative (NWI) which States and Territories signed in 2004, recognising Indigenous needs in relation to water access and management. The North Australian Indigenous Land and Sea Management Alliance (NAILSMA) and the Lingiari Foundation, back in the days of ATSIC, also did a lot of policy work to promote Indigenous water needs.

The CLP Government scrapped Labor's policy in its first year of government.

The CLP Government scrapped that policy in its first year of government. CLP Water Resources Minister Willem Westra van Holthe said in June 2013, "What we don't want to do is stymie current development for the sake of hanging on to water for some future use that may or may not happen."

A water allocation plan defines the non-consumptive pool needed to protect environmental and cultural assets. The remaining water is then available as the consumptive pool, which is allocated to a number of declared beneficial uses: public water supply, domestic, rural stock, cultural, agriculture, and industry (including mining and petroleum activities). Of the consumptive beneficial uses, public water supply, domestic, and rural stock uses are

allocated before others.

New and revised water allocation plans will specify a portion of the consumptive pool as a Strategic Aboriginal Water Reserve that will be managed exclusively for future economic development by and for the benefit of eligible Aboriginal people.

The Strategic Aboriginal Water Reserve will be a percentage of the available consumptive pool identified in each water allocation plan. Water for public supply, domestic use or rural stock will continue to be given priority.

The Reserve will be allocated according to a formula, depending on the area and title of the land owned by Aboriginal people:

Aboriginal land (under the *Land Rights Act*, or Northern Territory enhanced freehold), or exclusive native title to land under the *Native Title Act*.

Those owning less than 10% of eligible Aboriginal land with direct access to a water resource will have 10% of the available consumptive pool reserved; ownership between 10 and 30% will be entitled to a Reserve corresponding with the actual percentage of eligible land; beyond 30% ownership, the reserve will be capped at 30%

Eligible Aboriginal rights holders will give or withhold consent for access to a reserve by any party.



NLC members at Katherine, May 2014, protest against the CLP Government's decision to abandon Strategic Water Reserves.

# GAPU-MONUUK SALTWATER JOURNEY TO SEA COUNTRY

The story of Yolngu people of North-East Arnhem Land's fight for sea rights has reached new audiences with an exhibition at the Australian National Maritime Museum in Sydney.

Running from November 2017 until February 2018, Gapu-Monuk Saltwater: Journey to Sea Country presents 40 Yirrkala bark paintings from the Saltwater Collection. They reveal Yolngu sacred lore and connection to land and sea and tell the story of the Yolngu people's fight for recognition of Indigenous sea rights.

The works were used as legal evidence in the 2008 High Court case that confirmed that Traditional Owners of the Blue Mud Bay region, together with Traditional Owners of almost the entire Northern Territory coastline, have exclusive access rights to tidal waters overlying Aboriginal land.

The landmark Blue Mud Bay decision was described as the most significant ruling for Aboriginal landowners since the High Court's Mabo decision.

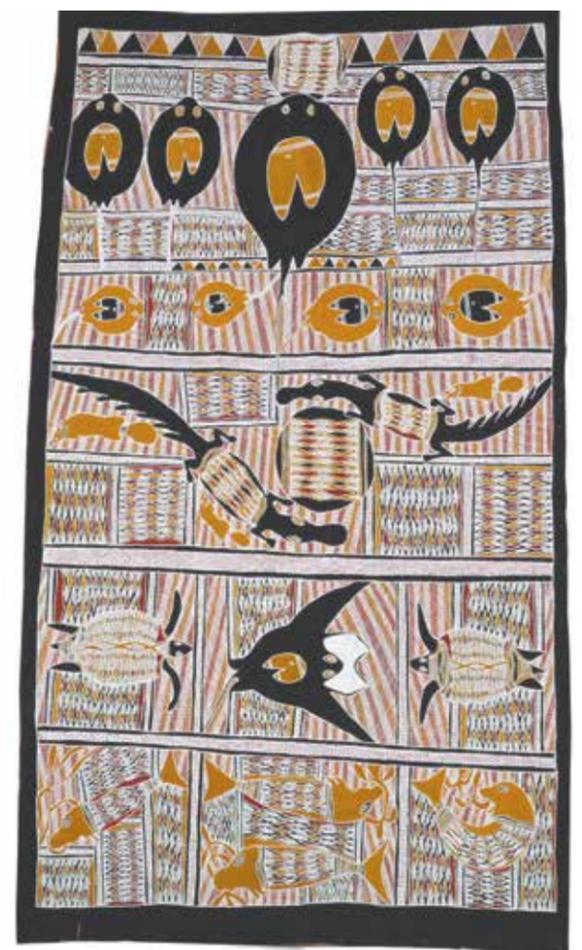
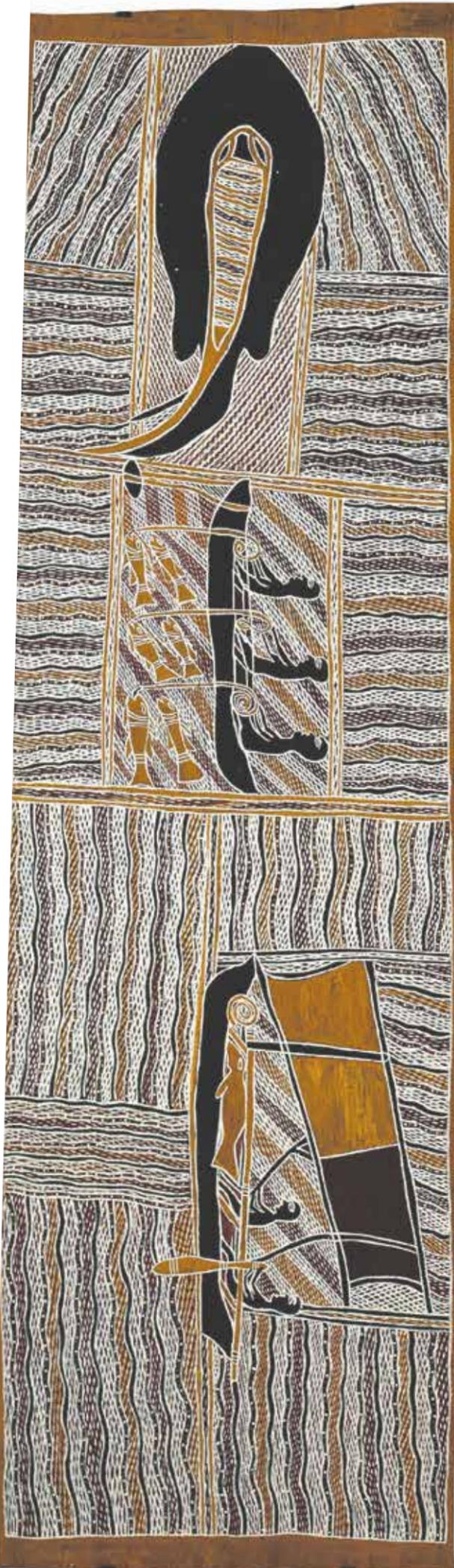
Some 47 Yolngu artists from 15 clans and 18 homeland petitioned for sea rights by painting their Saltwater Countries onto bark and revealing sacred patterns or designs known as Miny'tji.

The works were initiated by Madarrpa clan leader Djambawa Marawili AM, following his indignation at discovering an illegal poacher's camp on his sacred estate that included a decapitated crocodile.

"My clan name means Madarrpa. We are the Madarrpa people. Madarrpa means borrow. Those colours are not coming from the shop those colours are all coming from the land. The patterns and designs all connected back to a human being. Animals and human being all connected to the land," Mr Marawili says.

"This is my homeland, this is all in my blood and I cannot be changed into a whitefella world or a European world. I am still Blackfella. I know stories. I know the patterns and who I am. I am Madarrpa."

The exhibition also includes Mokuy (spirit) carvings, Larrakitj (mortuary pole paintings on hollowed trees) and other traditional and contemporary works.



**Above:** Contemporary Madarrpa, Djambawa Marawili AM. ANMM collection; **Right:** Two of the 36 carved wooden Mokuy (Spirits) by Nawurapu Wunungmurra, 2015. ANMM collection; **Far right:** From Biranybirany, Miniyawany Yunupingu 1947–2008. ANMM Collection

# GUNYANGARA SIGNS TOWNSHIP LEASE



Scenes from the signing of a 99-year township lease at Gunyangara, north-east Arnhem Land.

The community of Gunyangara in north east Arnhem Land celebrated the signing of a 99-year township lease to the Ngarrariyal Aboriginal Corporation on 18 November 2017, 10 years after the Gumatj people, led by Dr Galarrwuy Yunupingu, put forward a similar proposal to then Indigenous Affairs Minister Mal Brough.

NLC Chairman Sam Bush-Blanasi said the lease "marks a new direction under the Aboriginal Land Rights Act."

"At the Northern Land Council, we didn't like the way the Land Rights Act was first changed to allow for township leasing. That's because the lease was held by a Commonwealth officer, the Executive Director of Township Leasing," Mr Bush-Blanasi said.

"Under that law, it was the EDTL who held the head lease over a community, and in the end it was the EDTL who would get to have the say over who got to use the land within the community. At the NLC we opposed that model of leasing, because we didn't like the way it could take the power away from Traditional Owners.

"Our opposition to the EDTL put a fair bit of stress on our relationship with (Indigenous Affairs) Minister Nigel Scullion. But, he listened to us, and he was prepared to change his mind. He listened to us and he changed his policy. I want to pay a tribute to Nigel for doing that.

"And, might I say, the relationship between Nigel and the NLC is on a much better footing these

days. I'd go so far to say that the relationship is positive and constructive, and that's a good thing for Aboriginal people in the NLC region.

"What Nigel came up with was a new model for township leasing, which put the EDTL on the sideline. The new model allows the township lease to be held by an Indigenous controlled entity. So, Aboriginal people themselves will be in control of their own destiny.

"Aboriginal people at Gunyangara will be making the decisions about who gets to sub-lease land and how the community is developed," Mr Bush-Blanasi said.

Senator Scullion said the lease would enable the Gumatj people to leverage their land assets for economic and community benefit.

"This lease is the first of its kind to be handed over to an Aboriginal community organisation. The community entity model was developed at the request of traditional owners. The

Gunyangara lease provides the first example of how a local Aboriginal corporation can hold and administer a township lease," he said.

As a result of the township lease the Coalition Government has contributed \$2.5 million under the Economic Development Fund to support subdivision and employee housing in Gunyangara, in addition to a \$5.3 million employee housing project.



Galarwuy Yunupingu AM with Senator Nigel Scullion

# Native Title Act changes challenged

Senator Patrick Dodson, Shadow Assistant Minister for Indigenous Affairs and Aboriginal and Torres Strait Islanders, comments on the Australian Government Options Paper, Reforms to the *Native Title Act 1993*, launched at the end of November 2017.

Native title rights, founded in our common law, and recognised in legislation, should not be changed, extinguished or modified at the whim of Governments, as part of any business-as-usual approach. This might not be the accepted position of most lawyers or politicians. However, as both a native title holder and a Parliamentarian, this is the view I take.

Common law rights in native title do not exist as a gift of the Parliament, nor as an act of largesse by the Government of the day. They are held exclusively by First Nations Peoples. However, Parliament has the authority to do, more or less, what it wants through the legislative process.

The Parliament can legislate which aspects of common law native title rights one can enjoy. It does not require consent from the First Peoples. The courts can then interpret whether the Parliament has validly enacted that legislation into Australian law. There may be some moral and political consequences for Governments that legislate without consideration of the views of native title holders.

This is how creeping, continuing dispossession happens. When native title holders enter into negotiation processes as set down in the legislation, they become enmeshed in the process of accepting the terms set down by Parliament that puts limits on the extent of their native title rights. In this way Parliaments assert their sovereignty over First Nations.

These rights are common law rights of the First Nations peoples, not the rights of the common man in the British tradition. They require more than a business as usual approach in the legislative process. Amending such legislation should always require the “free, prior and informed consent” of native title holders and First Nations Peoples, who are entitled to enjoy and hold such rights.

These rights can be however changed or modified by Parliaments as we do not have any Treaty or Constitutional entrenchment protecting the native title rights of First Nations peoples. The Crown through the Parliament can do what it likes with them without consequences except from laws based on its own British traditions. When Government compulsorily acquires or restricts these rights it should be morally obliged to compensate for them.

The Government has released an Options Paper, *Reforms to the Native Title Act 1993*. It was launched at the end of November 2017 and submissions are due by the end of February 2018. This is a ridiculously short period and highly inconsiderate of those native title nations that live across northern Australia and elsewhere.

This Options Paper seeks to consider matters discussed in the:

- “Connection to Country” report by the Australian Law Reform Commission (2015);
- the report to COAG of late 2015; and
- the Office of the Registrar for Indigenous Corporations technical review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI) Act announced by the Minister in July 2017

A consultation process on these complex issues was promised by the Government at the time of the passage of the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 earlier this year, in response to the *McGlade* decision of the Federal Court (*McGlade v Native Title Registrar [2017] FCAFC 10*).

The consultation process is meant substantially to happen at the end of the year and over the Christmas break. In remote northern Australia, this period of time, at the peak

of the Wet, is less than ideal for consultation with native title holders.

Many of the issues raised in the Options paper go to significant issues of procedure, functioning and efficiency of the *Native Title Act*, with potential consequences known and unknown for native title holders. There is a need for ample time, resources and expertise to be devoted to such a project. I have urged the Government to ensure that its consultation and engagement processes on these issues are transparent and respectful; not rushed through as though they have the answers ready for delivery.

Since the days in 1998 of Howard and Fischer’s “10-point plan and bucket loads of extinguishment”, respect for native title rights has steadily diminished.

Since the original passage of the Act much has been done to restore the myth of terra nullius and to give it dominion over the existence of native title.

The purpose of the Act, “to recognise and protect native title”, has all but been set aside. I consider it necessary to shift the point of balance of honour in the *Native Title Act* more towards the rights, interests, needs and enjoyment of the First Nations peoples.

Pragmatism, efficiencies, and procedures under the Act should not be weighted in favour of third parties to the detriment of native title holders. The underpinning principles of cultural continuity, communally held interests, and country shared and cared for by native title holders should inform any changes. These foundations are the very essence of native title rights and indeed are what constitutes the uniqueness of people holding native title rights or asserting a claim for it against the Crown.

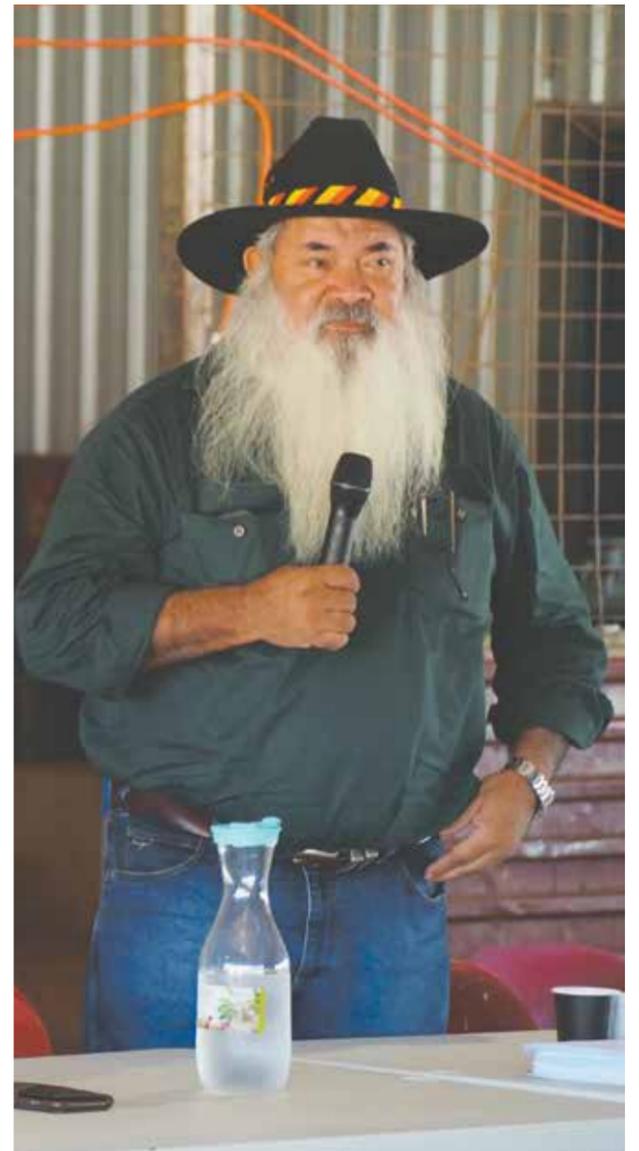
From my own perspective, as a native title holder, and now as a legislator in opposition, I have identified six key areas where the functioning of the Act requires some reworking to maintain, strengthen and to enable native title holders to truly enjoy them. Hopefully, to also better align the legislation to the vision of Eddie Koiki Mabo that was recognised by the High Court.

These matters will probably not be considered in these consultations by the Government. However, they should be matters for native title holders to consider and put forward if they wish.

These are the issues of:

1. Extinguishment, (the ruse to eliminate native title);
2. Consensus decision making (the drive towards individual rather than communal decision making);
3. Fungibility, (a commercial means to achieve economic development and prosperity without loss of native title);
4. Compensation, (for extinguishing native title and the loss of enjoyment);
5. Burden of Proof for native title (terra nullius is discredited so the crown needs to prove how it got good title to first nations people’s lands) ; and
6. Primary Production upgrades on pastoral leases to provide for diversification without requiring native title consent.

Dialogue around these issues with a view to recognising, honouring and protecting native title is surely overdue. A more honest debate around these areas would, in my view, restore the Act to something that the common law initially offered. Its fundamental purpose as stated in the objects of the Act is “to recognise and protect native title”. That fundamental purpose has been eroded.



Senator Pat Dodson

## Extinguishment

Extinguishment is a simple western legal concept but a weighty issue for native title holders. Deciding in an agreement to extinguish native title rights is a solemn and weighty burden for the native title holders. There is no treaty or constitutional entrenchment protecting native title rights.

Once it’s extinguished, native title is gone forever under western law, and terra nullius is reinstated. That is, the western land tenure system gets reinstated again over the lands and our unique native title rights are eliminated. If freehold is substituted (for native title) the land may have to be leveraged for the financial sustainability necessary to hold on to it; otherwise the land may be lost and we revert to requiring the largesse of the Crown.

Amending legislation that ignores this problem will only continue to entrench injustice and more native title will be lost.

There are some Noongar people, from the southwest of my state of Western Australia, who were intensely concerned about this fact. That is that the Indigenous Land Use Agreement over the region of Perth required them to consent to the extinguishment of what remained of their traditional lands and hence their native title. It was an unjust legal fact that extinguishment of native title had occurred without the right to compensation prior to the commencement of the Racial Discrimination Act in 1975 over much of their traditional lands and waters.

The Agreement provided a significant bundle of benefits, that could go some way to providing the opportunity for their community to better deal with its legacy of disempowerment, discrimination and subsequent disadvantage.

It is a high price to pay though for the current generation of Noongar peoples, to agree that forever and a day, any native title rights they may hold are, by virtue of this agreement, extinguished forever on registration of the agreement. To be asked to deny your essence for monetary gain was not fair in their view. *McGlade* was about decision making. The Noongar peoples in the *McGlade* case had a victory in court but when it was brought to the Parliament, the Government with limited consultation, amended the *Native Title Act* in a way that did not support the *McGlade* ruling of the Federal court.

In my view, the dispute may have been avoided. Under the terms of the *Native Title Act*, such an Indigenous Land Use Agreement should have been made without requiring the extinguishment of the Noongar native title rights.

Our colonial history in Western Australia was often bitter and violent, as it was elsewhere. We need to ensure agreement making and truth telling acknowledges this kind of history and that reconciliation can emerge from that history.

The “extinguishment as a first resort” mentality disrupts the process of agreement making. It becomes a challenge to align the needs and desires of powerful third parties, like miners, with the rightful position of First Nations peoples.

Agreements need to be made without the price tag of extinguishment of native title; without requiring signing off on the permanent and total loss of our cultural and spiritual entitlements; and without denying our survival as a People and our ongoing rights to our native title lands.

As First Nations peoples we are not on equal terms with the Government and those that lobby against us or our unique identity. We do not have parity on the playing field of law making.

This denies our rights as First Nations Peoples and works against us maintaining our status as the world’s longest living surviving culture on this Earth. It denies our rights as Indigenous people, as recognised by Australia under the United Nations Declaration on the Rights of Indigenous Peoples.

### Decision-making

The Government’s Options Paper considers changes to the way native title claim groups and native title holders make decisions under the Act. Traditional decision making is seen by some as problematic.

For corporations time is money and lengthy consultation processes are seen as costly and unnecessary.

However, the cultural and communal integrity of decision-making processes based on customary law and practice should not be sacrificed to business expediency and corporate demands. There are big stakes at play and time should not be used against us.

Individualism and the western mode of decision-making may have impacted on traditional ways of decision making for some First Nations peoples. Contemporary decision-making needs to respect our foundational fundamental traditions we hold or we risk becoming more western than cultural in our decision-making processes. Government decision-making processes tend towards that end.

The Government Options Paper raises significant questions on whether the Act and its associated Prescribed Body Corporate (PBC) requirements and regulations should be amended to allow native title claim groups and native title holders to determine their own decision-making processes, rather than mandating the use of traditional decision-making where such a traditional process exists.

Ideally the Government wants nominated native title holders that are on the PBC to control the decision-making process. In my view, it is a problematic proposition that there should be a move away from traditional decision-making processes in the context of native title decision making. While I see the argument for greater efficiency of decision-making and the autonomy of native title bodies and PBCs, it is necessary for these groups to ensure that such actions do not erode or undermine the authority, culture and power we hold as Peoples with unique cultures, protocols, practices and traditions.

### Fungibility

This is finding a way to do commercial things that lead to ongoing prosperity without losing the native title or having it extinguished and thereby losing communal title.

In economics, fungibility is the property of a good or a commodity whose individual units are essentially interchangeable; you can trade with it.

In May 2015, the Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda and the then Human Rights Commissioner Tim Wilson, now member for Goldstein, convened the Broome roundtable on Indigenous property rights. They began grappling with the communal, cultural, individual and corporate components that arise in this space.

This was no anti-development gathering; in fact there was much common ground found on what are more often than not conflicting positions.

The primary issue they identified was that of fungibility and communally held native title – enabling communities to build on their underlying communal title and create opportunities for sustainable economic development and prosperity. The grant of freehold automatically extinguishes native title and they were not supportive of this.

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First Nations Peoples’ interests in land come from our inherited connection to specific country, connection to family and community from the same country, traditions and cultural beliefs. This is something all Australians should rejoice in rather than have Government seek to extinguish this essence.

Our native title land doesn’t inherently have the character of fungibility in the western sense. It is not tradable for a like commodity. Native title is collective and inalienable; it cannot be sold or transferred under state and territory conveyancing legislation. Its existence is an affront to this western land tenure thinking – what has to happen is a change to the way western thinking deals with this truth rather than seek to extinguish it.

The fact that native title and other Indigenous land is communally held and inalienable should not prevent it being used for economic gain, or community development. But it does require innovative and careful consideration on ways in which title and tenure can be held while pursuing economic opportunities. In this way we also ensure the hard won rights we have inherited from our ancestors can be used for the benefit of future generations and not surrendered for the convenience of third parties.

### Compensation

Any reforms of the *Native Title Act* need to address the rights of compensation for the loss of enjoyment, access and use of native title lands and not just for its compulsory acquisition or extinguishment by the Crown.

While the constitutional just terms requirement will allow for this eventually, the requirement for extinguishment and the lack of fair compensation up front is unfair. There needs to be some administrative scheme that can provide compensation in a reasonably expeditious and inexpensive manner not the current requirement of endless court cases.

We need to get past the stumbling point in the conversation that crops up when the issue of compensation for lost land and opportunities arises.

It is an undeniable historical fact that First Nations Peoples in this continent had our lands taken from us without negotiation, without purchase, without consent; without any treaty, unlike other Commonwealth nations. We were also denied the opportunity to enjoy what was to be ours before it was taken without regard or justice to our unique human existence, cultures and enjoyments of our land, waters and environments.

The Timber Creek native title compensation case is an opportunity to go beyond just physical redress in defining compensation.

### Onus of proof

There is a need to change the onus of proof the burden of proving native title in the *Native Title Act* from native title applicants to that of the Crown. I look to the example of Canada, where the common law has recognised that the Crown has a fiduciary relationship to the Indigenous peoples of Canada.

In *Sparrow v. the Queen (R. v. Sparrow, [1990] 1 SCR 1075, 1990 CanLII 104 (SCC))*, it was found that the Crown is constitutionally charged with providing guarantees to the First nations, so that the “honour of the Crown” is at stake in dealings between it and First Nations Peoples. In Australia, our sorry experience has been that the Crown has too often acted dishonorably in its dealings with First Nations Peoples. This is in the land tenure domain but also in the justice and constitutional recognition space as well.

Reforming the *Native Title Act* can address that point and return honour to the Crown. Reforming the *Native Title Act* to give enhanced recognition to the inherent and ongoing rights of First Nations Peoples is a worthy endeavour for any Government. Should this Government seek to go down this path, I will certainly lend my weight to the effort.

I recall sitting through protracted court procedures in my own native title case and witnessing the cross examination of my people, most unfamiliar with courtroom tactics and proceedings. They were constantly challenged by lawyers about their credibility, but they adhered to their Laws and customs and their protocols and they established that they had withstood the processes of colonisation and the dominance of Government politics of assimilation. The history of assimilation, incarceration and domination since the occupation of their lands was thrown at my people to try and discredit their maintenance of their beliefs, practices and cultural lives. The Crown should be on trial for how they tried to eradicate and destabilise us.

### Pastoral Lease Upgrades

When the Wik Judgement came down in 1996, the pastoral lobby was up in arms. The High Court judgement talked of native title being coexistent and concurrent with those of the lease holder, but yielding if they conflicted with the purpose of the lease – usually grazing cattle or sheep.

What Howard gave to the lobby was a gratuity that they could upgrade up to 50% of their leases without requiring the consent of native title holders. This happened after all pastoral leases since 1975 were validated.

Now some state jurisdictions are talking about giving pastoral lease holders the right to sublease at commercial rates for a wide range of primary production activities. This includes irrigation, aquaculture, horticulture and forestry when pastoralists do not own the land and the co-existing title holder – the native title holders have no right to be involved in the proposed development on their traditional lands.

Native title holders are being dealt out of any such deal. Certainly, the right to negotiate over these upgrades has to be considered. This also has relevance to discussions on leveraging Native title held by First Nations people for economic growth and future prosperity.

No doubt these difficult and challenging topics will be put to one side in the current round of consultations by the Government. However, any of the current discussions should be mindful of just how much dispossession has already taken place through the processes of the *Native Title Act*.

# REMEMBERING LAND RIGHTS NEWS 1988

These days, the Northern and Central Land Councils each publishes its own editions of *Land Rights News*. Thirty years ago, the time of the Australia's Bicentenary, *Land Rights News* was a joint publication, and its production was not without tribulation.

The artist and writer Chips Mackinolty worked on *Land Rights News* for the NLC 30 years ago. In the following contribution, he recalls the difficulties that had to be overcome in the pre-digital age.

## By Chips Mackinolty

The Central and Northern land councils had been planning for the Bicentennial of 1988 for a very long time—indeed the NLC executive had rejected any participation in Bicentennial events as early as 1986. The CLC followed soon after, along with many Aboriginal organisations in the NT.

A key decision made by the two mainland land councils in 1987 was that there be a special anti-Bicentenary edition of *Land Rights News*, then and for many years afterwards, a co-production.

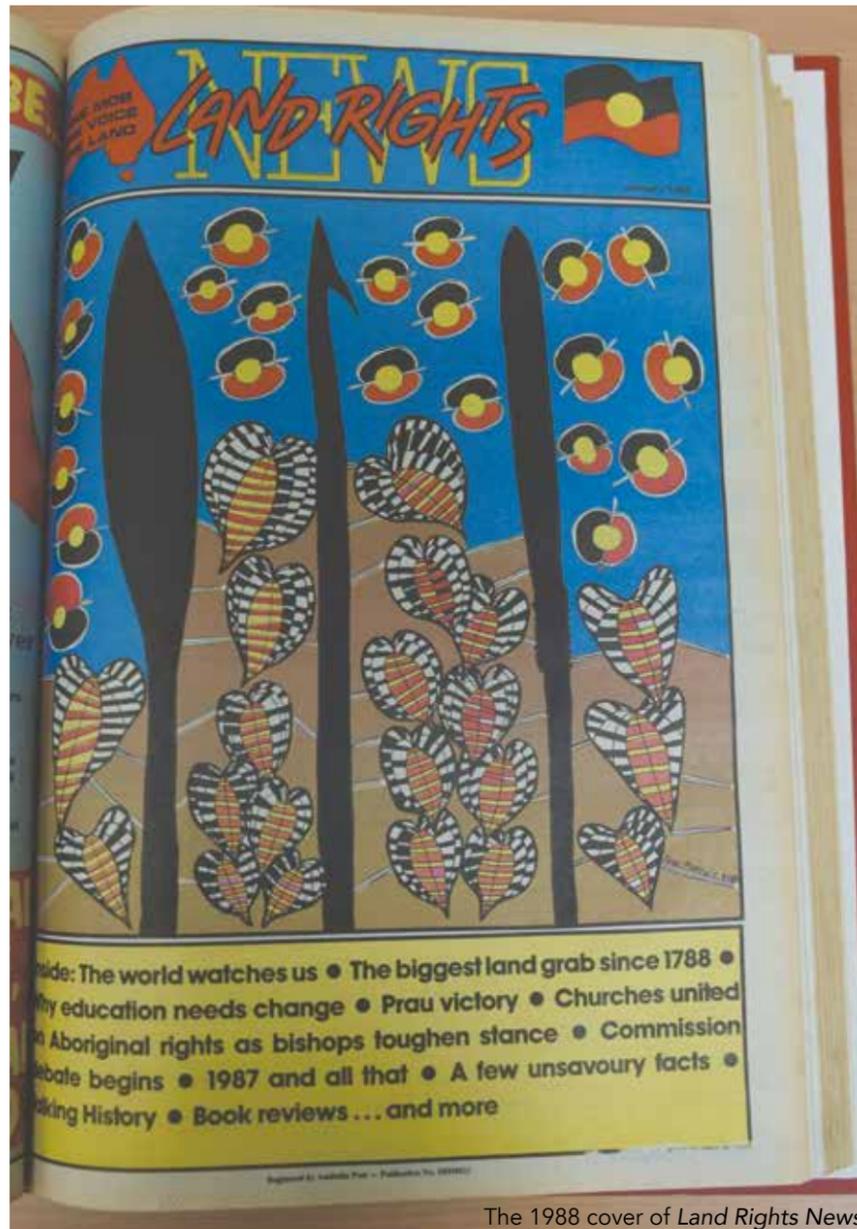
Running a newspaper from two places—Alice Springs and Darwin—was difficult enough in the days before emails: copy would be faxed, then re-typed, then typeset at the printers. Some poor bugger from the CLC would fly up in the last couple of days to help put the paper to bed.

But for the anti-Bicentenary? The decision was made to produce 100,000 copies, and create and print it in Sydney.

Madness.

Two of us were dispatched to Sydney from Darwin about three weeks out, after already covering stories such as Wally Fejo's role in the 1 January anti-Bicentenary protest in Darwin on behalf of the Larrakia—and gathering similar yarns from Darwin to La Perouse.

Back in those days, newspaper production was way different. Nothing was digital, and pretty much everything was done by hand: from written copy to type to proofreading; then sending the copy to the printers for typesetting—which would come back in long strips of paper called galleys. Corrections would be made to the galleys and sent back, and then the final strips of type would be cut out and then glued and laid out by hand. Headlines would be made from a plasticised transfer film called Letraset; and "rulings" with Letraline. Scanning didn't exist then. Physical photographs and graphics—all in black and



The 1988 cover of *Land Rights News*

white—would have to be correctly sized, then sent to a darkroom to be sent back to be laid out as bromides. Colour? Huh! Again spot colour placement would be done as layers, and then carefully laid out "spot colour" separations. Each page could take an hour to produce, with the layouts then sent to the printers to be photographed as a negative film, and then re-made as metal plates.

And only then could the printing start.

*Land Rights News* was lucky. Redback Grafix—with a long history of supporting Aboriginal organisations in the Territory—hosted the pre-production nightmare at their studio in Annandale, with help from Redback staff including Michael Callaghan and Marie McMahon, as well as others such as the journalist, Kaz Cooke. They all put up with the shouting matches between the two lads from Darwin who had been sent down to put the paper to bed. A kind soul lent us a house around the corner to stay in, as well as store the thousand T-shirts we had brought with us.

We printed at Media Press—then run by Eddie Obeid. They produced most of the student and ethnic newspapers at the time. Eddie got into a bit of trouble a couple of decades later with

ICAC, but there you go. There was also a dyslexic typesetter, who sent copy back with different mistakes each time, and the subsequent terror of laying out corrections line-by-line to cover those mistakes. There was what to do with 100,000 40-page newspapers weighing nine tonnes. People lent us trucks, and the Aboriginal and Islander Dance Theatre gave us storage space in an old church in Glebe. More trucks to get the papers to Hyde Park for the 40,000 marchers on the day. More trucks to get them back, and then back on the road interstate after it was all over.

And the edition of *Land Rights News* itself? It covered a huge range of articles and ideas—including news of the establishment of the Royal Commission into Deaths in Custody, and proposals to establish what would become ATSIC. The cover was by a founding member of Boomalli Aboriginal Artists, Fern Martins. It advertised the Barunga Festival which gave birth to the Barunga Statement, and Bob Hawke's stillborn promise of a Treaty.

Within weeks we were back in Darwin for the next issue of *Land Rights News* which, among other things, gave us a wonderful account by John Christophersen—then as now deputy chair of the NLC—about the 1000-strong convoy of Aboriginal people from the Kimberley, the Territory, South Australia and New

South Wales who drove by road to Sydney to attend the anti-Bicentenary march.

Later that year, *Land Rights News* went on to win the media prize in the annual national Human Rights Commission awards. The following year, the biggest and oldest Aboriginal newspaper in Australia started heading towards the digital world, winning Australian Macworld Expo Art Award for tabloid newspapers.



The 1988 story by NLC deputy chair John Christophersen on the 1000-strong convoy of Aboriginal people who drove to Sydney to attend the anti-Bicentenary march.

# The Wardaman: Looking after Country.



Wardaman TO-rangers (left to right) Mike Raymond, Damien Sing and Lincoln Raymond monitoring Gouldian finch using a bird calling technique.

Birds are closely connected to Wardaman culture. Many Wardaman dances have been adapted from bird movements and much Wardaman rock art depicts birds. Wardaman believe that birds “sing their country” and protecting them is important because they are so closely linked to culture and history.

One special case is the endangered Gouldian Finch (*Erythrura gouldiae*) whose populations have decreased with the advent of cattle industries and modern burning practices on the northern savannahs.

Following finch sightings in a general biodiversity survey in September 2015 on the Wardaman IPA, Wardaman rangers are developing a Gouldian Finch Recovery Program with support from Territory NRM.

The first aim of this program was to establish the size of the finch population and their locations on the IPA. In the late dry season of 2016, between September and October, Wardaman rangers conducted waterhole monitoring at five locations on the IPA and detected flocks at several locations.

The second aim of the program was to locate nesting areas of the finch. Between the April-June 2017 nesting season, Wardaman rangers surveyed several locations. To attract Gouldian Finches in their nesting habitat, rangers adopted a modern technique. They broadcast recorded Gouldian mating calls from special purpose software through portable high-powered wireless speakers.

Protection of finch habitat from frequent fire is one vital strategy in the Gouldian Finch recovery program. The information

gathered from these surveys helped identify and quarantine finch habitat for the first time in fire management plans in aerial and ground burning activities in April-May 2017.

This work has also allowed the Wardaman rangers to further develop their skills in biodiversity field surveys since their September 2015 survey. Recently, the Wardaman rangers attended the Barrapunta birds forum to demonstrate their new found skills and exchange information with their peers.



Waterhole monitoring of Gouldian finch by Wardaman TO-rangers Jimmy Nelson (left) and Basil Murrimal (right). Inset: Gouldian Finch (*Erythrura gouldiae*) having their early morning drink in Menngen community.

# Kenbi and Wudicupilidiyerr Ranger exchange



Kenbi and Wudicupilidiyerr rangers came together over three days in December to share knowledge, skills and expertise.

Kenbi Traditional Owners, rangers Raylene and Zoe Singh, took guests to Kenbi land which covers the Cox Peninsula and the various Islands to the west.

Raylene Singh said it was a great opportunity to share knowledge with other NLC rangers. "It's good to teach other Rangers. I love for that knowledge to be passed on to other rangers."

Kenbi Traditional Owners Raylene and Zoe Singh took guests on quad bikes and all-terrain vehicles along the coastal areas, including Waigait beach, Two Fella Creek, One Fella Creek, Point Charles Lighthouse and Rankin Point. Wudicupilidiyerr rangers were also taken out on Sea Ranger boat, used to monitor sealife such as dolphins, turtles, dugongs and mantarays, and check for ghost nets, illegal fishing nets and unnamed crab traps.

"We'd like to do some more work with the Kenbi rangers and hopefully they can come down at Wudi and do a bit of work," said Wudicupilidiyerr ranger Kenny Ahfat.



Photos clockwise from top: Kenbi and Wudi Rangers Jeremy Ahfat, Rex Edmunds, David Hewitt, Steve Brown, Zoe Singh and Raylene Singh on Kenbi land; rangers inspect a flat tyre in the quad bike; Kenbi and Wudi Rangers on board the Sea Ranger; TO-Rangers Raylene and Zoe Singh.



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