NORTHERN LAND COUNCIL

Northern Edition

LAND RIGHTS NEWS

Our Land, Our Sea, Our Life

January 2017 Issue 1

www.nlc.org.au

The gaps are not closing: NT WORST

A word from the Chair

The NLC's newly-elected Full Council met for the first time at Timber Creek mid-November last year, and I was honoured to have been re-elected as Chairman. John Christophersen was elected deputy Chairman.

The NLC exists by virtue of the Aboriginal Land Rights (Northern Territory) Act 1976, which commenced 40 years ago, on 26 January (Australia Day) 1977.

This year, 2017, we will mark several other anniversaries: Firstly, it's the 50th anniversary of the referendum which famously brought about two important changes for Australia's Indigenous peoples. The referendum, held on 27 May 1967, enabled the Commonwealth Government to (a) make laws for all of the Australian people by amending s51 of the Constitution, (previously people of "the Aboriginal race in any State" were excluded); and, (b) take account of Aboriginal people in determining the population of Australia by repealing s127 of the Constitution (formerly, Indigenous people had been haphazardly included in the census but not counted for the purposes of Commonwealth funding grants to the states or territories).

It's also the 25th anniversary of the passing of the Native Title Act by the Labor government led by Paul Keating, following the High Court's historic Mabo decision the year previously.

And, let's not forget that 10 years ago the Commonwealth Government (on 21 June 2007) announced the notorious Northern Territory Emergency Response – the "Intervention". The lives of Aboriginal people in the Northern Territory were most adversely affected, and we continue to feel its effect.

A big agenda item for the new Full Council last November was a decision to signal an end to the "interim" inter-tidal fishing access arrangement with the Northern Territory government. The decision will not affect the seven agreements with the Government which allow permit-free access for commercial and recreational fishers in "high value" fishing areas.

The NLC has since begun negotiations with the Government, the Amateur Fishermen's Association of the Northern Territory, the Northern Territory Seafood Council, the Northern Territory Guided Fishing Industry Association and the Environmental Defender's Office.

A communique issued after all the parties met on 16 February noted that it was the first meeting for many years of user groups with interests in the NT's intertidal zone. All parties agreed that a new, cooperative and productive approach is needed to implement matters outstanding from the High Court's 2008 Blue Mud Bay decision - in particular, access to and management of the Aboriginal-owned intertidal zone.

Discussion focused on the need to find solutions and develop plans to achieve an understanding of the concerns of Traditional Owners and their aspirations for the intertidal zone; resolution of immediate uncertainties about access; long term certainty for all user groups; prioritising consultations with affected Aboriginal communities; a five-year strategy to implement marine ranger fisheries compliance powers; and ecological sustainability of fisheries across the NT.

The negotiations were open and constructive, and I look forward to further talks towards resolving this long outstanding issue.

SAMUEL BUSH-BLANASI

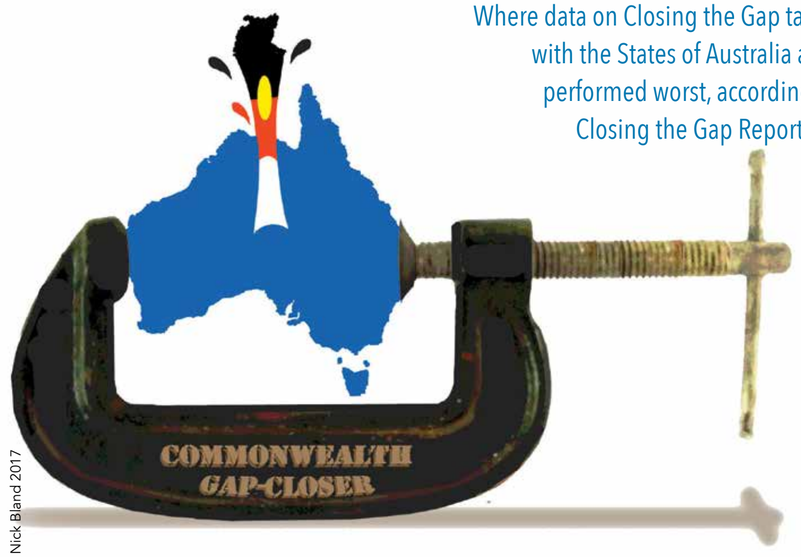
Chairman

The NLC's New Executive Council

Following the triennial election of the Full Council, the NLC has a new Executive Council, comprising the Chairman and Deputy Chairman, plus one member chosen from each of the NLC's seven regions. They are pictured with CEO Joe Morrison (left). Back row, L-R: Raymond Hector (VRD), Peter Lansen (Ngukurr), Richard Dixon (Borroloola-Barkly), Bobby Wunungmurra (East Arnhem), Ronald Lami Lami (West Arnhem). Seated, L-R: Helen Lee (Katherine), John Christophersen (West Arnhem, Deputy Chairman), Samuel Bush-Blanasi (Katherine, Chairman), Elizabeth Sullivan (Darwin-Daly-Wagait).

The gaps are gaping

Where data on Closing the Gap targets can be measured in comparison with the States of Australia and the ACT, the Northern Territory has performed worst, according to the Prime Minister's ninth annual Closing the Gap Report which was presented on 15 February.



Nick Bland 2017

The Council for Australian Government (COAG) has set seven targets (see "What are the Targets" on this page). But only one of the seven – to have 95 per cent of all Indigenous four-year-olds enrolled in early childhood education by 2025 – is "on track". As with other targets, the Northern Territory falls far behind other jurisdictions. Of Indigenous children enrolled in early childhood education in the year before full-time school in 2015, 92 nationally had attended early childhood education in 2015; in the Northern Territory the attendance was only 73 per cent.

Closing the Gap in life expectancy between Indigenous and non-Indigenous Australians by 2031 is an ever-elusive target. The Prime Minister's report says it remains challenging because, among other things, non-Indigenous life expectancy is expected to rise over coming years. In the period 2011 to 2015, the Northern Territory had the highest Indigenous mortality rate (1520 per 100,000 of population), as well as the largest gap with the non-Indigenous population. See the table below.

The target to halve the gap in child mortality by 2018 is unachievable. The Prime Minister's report on this target covers only four states to compare with the Northern Territory because the data elsewhere is not good enough. But the comparison shows the NT's child mortality rate is off the scale – three times the best-performing jurisdiction (NSW).

The target to improve reading, writing and numeracy also shows the NT far behind the rest of Australia. The target covers eight areas (reading and numeracy for Years 3,5,7 and 9), and the NT alone was not on track for all eight (the ACT, by comparison, was on track for all eight). The NT had the lowest proportion of Indigenous students at or above the National Minimum Standards for each area measured.

The Northern Territory also had, by far, the lowest proportion of Indigenous 20-24 year olds with Year 12 or equivalent attainment: only 29.7 per cent, compared with 61 per cent nationally.

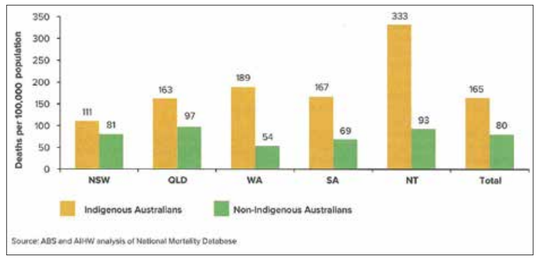
What are the targets?

Closing the Gap aims to reduce Indigenous disadvantage. All Australian governments have committed to achieve Indigenous health equality within a generation.

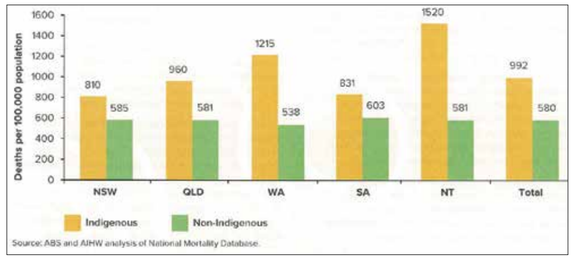
In 2008, the Council of Australian Governments (COAG) set targets in health, education and employment to measure improvements in the health and wellbeing of Aboriginal and Torres Strait Islander people. The first Closing the Gap report was presented in 2009.

To monitor change, COAG has set measurable targets to monitor improvements in the health and wellbeing of the Aboriginal and Torres Strait Islander population. The targets are:

- Close the life expectancy gap within a generation (by 2031).
- Halve the gap in mortality rates for Indigenous children under five within a decade (by 2018).
- Ensure access to early childhood education for all Indigenous four year olds in remote communities within five years (by 2013).
- Halve the gap in reading, writing and numeracy achievements for children within a decade (by 2018).
- Halve the gap for Indigenous students in year 12 attainment rates (by 2020).
- Halve the gap in employment outcomes between Indigenous and non-Indigenous Australians within a decade (by 2018).
- Close the gap between Indigenous and non-Indigenous school attendance within five years (by 2018).



Overall mortality rates by Indigenous status: NSW, Qld, WA, SA and the NT 2011-2015 (age standardised)



Child mortality rates (0-4 years) by Indigenous status: NSW, Qld, WA, SA and the NT 2011-2015

ROYAL COMMISSION:

Fair Go, not Fair Game

John B Lawrence SC*

The *Four Corners* program on Don Dale screened on 25 July 2016. It showed Aboriginal boys being beaten, held down, stripped, shackled, hooded and tear-gassed by NT Corrections officers. It included vision of what has become a contemporary symbol of Australian justice: Dylan Voller placed in a cell, bound to a chair, hooded and catatonic. It was called, *Australia's Shame*.

It created a massive reaction locally, nationally and internationally. Australians were shocked, appalled and angered. This was much bigger than any previous crises which Chief Minister Adam Giles had managed to successfully navigate.

Not only had the images from the program created a tidal wave of outrage and anger, but most of the incidents broadcast were known to Giles and his CLP colleagues. The gassing of the six boys in August 2014 had been widely reported and was the subject of two investigations and public reports.

Four of the six children gassed were suing the NT Government in the Supreme Court for assault, and the Government was pleading that the actions of its officers were, in the circumstances, "reasonable". The film of 13-year-old Dylan Voller being grabbed, held down stripped naked and then left in his cell crying had been shown on TV during the subsequent unsuccessful prosecution of one of the Youth Justice officers. Again, the same film was played on TV news when the Director of Public Prosecutions unsuccessfully appealed that acquittal to the Supreme Court.

The Chief Minister reacted like all politicians when caught out – he immediately went into damage control. At 1:08am the next morning, he issued a media release: "Like all Australians, I was shocked and disgusted by tonight's *Four Corners* program"; and further, "Tonight questions were raised about what is going on in our juvenile detention system that date back to 2010. I also will seek advice on the establishment of a Royal Commission to investigate the matters raised in the *Four Corners* story. I intend to consult the Leader of the Opposition on the Terms of Reference of this Inquiry".

Later that day at a press conference, his defence developed. He sacked his Minister for Corrections, John Elferink, and presented a cover up allegation: "I think there's been a culture of cover up going on for many a long year. The footage we saw last night went back to 2010 – and I predict this has gone on for a long time."

Clearly his initial aim was to keep the inevitable inquiry "in house" – i.e., within the Territory. However, Prime Minister Malcolm Turnbull had seen the program and was moved. He understood the shock and outrage it had engendered in the Australian community, and the next day he announced a Royal Commission of Inquiry. It would work with the NT Government as regards its administration and costs.

Within days, the Prime Minister announced the Terms of Reference and the proposed Commissioner, former NT Chief Justice Brian Martin. That appointment was met with more anger and opposition, especially from the Aboriginal community. Within a week, Brian Martin withdrew and was replaced by Commissioners White and Gooda.

The Royal Commission commenced in Darwin on 6 September 2016, and sat in October and December, hearing evidence including from two of the juveniles featured in the 2014 gassing incident and the *Four Corners* program, Dylan Voller and "AD". Following those sittings in December the Royal Commission was adjourned, to recommence in March 2017. The original date for completion in March was extended to early August.

At first, the Royal Commission was welcomed unequivocally by most Australians who had witnessed the existence of a savage regime within the NT juvenile justice system. The country was distressed that this had descended into manhandling, shackling and handcuffing kids, as well as placing them in the infamous Behaviour Management Unit (BMU) isolation cells without air conditioning or fans for up to 16 days at a stretch.

The image of Dylan Voller in that restraint chair appalled most Australians. This was torture, and most agreed with the Prime Minister's decision to establish a Royal Commission so as to find out not only what practices had been going on, but, more importantly, how had an Australian legal system descended into such medieval barbarism in the 21st century? Further, who was responsible and to what degree? These were the questions required of such an Inquiry to ensure that recommendations would guarantee no such catastrophe would ever recur. The Prime Minister said this when asked about the swiftness of his decision: "This Royal Commission is a very appropriate response to what appears to be a systemic failure in the justice system in the NT." (*ABC News*, 9.09.2016).

Having a Royal Commission with such Terms of Reference means the whole legal system – its bureaucratic components, relevant members of the legal profession, including the judiciary – are now in the spotlight and subject to scrutiny. This Royal Commission cannot and will not be just about unqualified and inexperienced prison officers, their supervisors and their political masters who oversaw the practices which existed in the Don Dale and Alice Springs youth detention facilities.

As Prime Minister Turnbull correctly called it, this was "systemic failure". Royal Commissions are the best mechanism to investigate and expose not just incidents and events, but systemic problems which have emerged. That is what this Royal Commission can and will do.

The Media and Criticism: "The lady doth protest too much, methinks" – Hamlet (III.2.240)

From the beginning, the Royal Commission has had its nay-sayers and critics. Political commentators and certain sections of the media have written and reported consistently in a negative and critical way about the very need for a Royal Commission and the way it's conducting its business.

Tony Abbott (of "there will be no undermining and no sniping" fame) criticised PM Turnbull for his "knee-jerk reaction" in establishing the Royal Commission. His political ally, Warren Mundine who claims to represent Aboriginal people, joined in. Warren Mundine regularly appears on *Sky News*, often with the virulent, right-wing commentator Andrew Bolt, tearing into the Royal Commission.

Within a week of the *Four Corners* program, Mr Mundine had made this contribution via *The Australian*: "A Royal Commission is a costly exercise that has been shown to achieve little, while making a whole lot of lawyers rich". Of course, hanging it on lawyers is an easy way to criticise the Royal Commission. That same line of attack came from *Bushranger* in the *Sunday Territorian*: "in any case, the real winners of the Royal Commission will inevitably be the PORSCHE DEALERS of Sydney."

Sky News is a Murdoch concern, as is *The Australian* and *The NT News*. All have been consistently hostile to the Royal Commission – consider, for example, their stories after the live public screening of Dylan Voller's evidence to the Royal Commission on 12 December 2016.

Unsurprisingly, his evidence reignited shock and anger. The political editor of *The Age*, Michael Gordon, reported Mr Voller's evidence on 13 December: "The first hour of dripping testimony alone by Dylan Voller vindicated Malcolm Turnbull's snap decision to call the child detention Royal Commission and put a human face to a national scandal. In clear, succinct and mostly detached responses, the 19-year-old has painted a horrid picture of institutionalised cruelty in a system hopelessly ill-equipped to deal with those supposedly in its care". And, "There is no doubt that many things Voller described will be contested by those in positions of responsibility, but it is difficult to consider him as anything but a credible witness".

Warriors of the Aboriginal Resistance (WAR), Australian flag spit mask, Don Dale 2016, synthetic polymer paint on canvas, adhesive tape, 157.0 x 175.0 cm, courtesy Australia Centre for Contemporary Art, Melbourne. Photo: Andrew Curtis

Contrast that with *The Australian*'s Amos Aikman, who wrote a clearly negative story on 14 December, headlined, "Dylan Voller social media posts contrast with scripted Court appearance". His report of Voller's evidence consisted of Facebook entries from 2014 – according Mr Aikman, "seemingly by Voller, although that cannot be confirmed" – which were aimed solely at trying to sully Voller's character. Brave journalism that.

The *NT News*, through regular stories and opinion pieces by Sky's Darwin-based journalist, Matt Cunningham, has consistently criticised and undermined the Royal Commission on various fronts. Mr Cunningham wrote an opinion piece in *The Sunday Territorian* on 4 December 2016 which took the well-worn line of portraying staff of the Royal Commission as southerners from the café societies of Fitzroy and Double Bay with preconceptions that we Territorians are just "wannabe Ku Klux Klansmen". He went on to comment: "It's little wonder many Indigenous leaders [unnamed of course] have said the Royal Commission risks becoming another gab fest that will deliver very few real outcomes". The next week, his opinion piece (11 December) was headlined: "The Royal Commission has become a farce, and we're footing the bill". He called it a "dysfunctional Inquiry".

His hostility was again apparent in the *NT News* on 26 December 2016, when he brought out a Mr Ken Parish, a law lecturer at Charles Darwin University. The article described Mr Parish as "a prominent legal academic". Mr Parish's view was: "The Royal Commission is a silly idea from the beginning. It will boost the cash flow of the legal profession"; he was then quoted by Mr Cunningham as stating: "The Royal Commission should be abandoned now to prevent $100 million being urinated down a legal gutter". I must say, in more than 30 years in the law, I have never before come across such language from any "prominent academic", but that's Mr Parish's unedifying contribution. His language not only sullies the reputation of CDU, it reflects the calibre and standard of his view.

The *NT News*' latest contribution came from its senior journalist Ben Smee, who on 4 February 2017 concluded that the Royal Commission was "a disaster" and "just about the most outrageous waste of public money in Territory history". His judgement backed that of the independent MLA and former CLP Chief Minister Mr Terry Mills, who in the same week had called for the Royal Commission to be abandoned forthwith.

All this hostility towards the Royal Commission is clearly aimed at undermining its progress and diluting its potential effect on the subject matter of its Inquiry, namely previous governments and the legal establishment.

The Royal Commission ended 2016 with evidence on 15 December. It was first adjourned until the end of January 2017; however, in the interim, an extension of time was granted, and so the resumption date is now 13 March 2017. That delay was criticised by the same sections of the media.

Further, in the interim, the *NT News* and Darwin's *Channel 9 News* have delivered a carpet bombing of media hyperbole on the issue of rising youth crime in the Northern Territory, which was claimed to be linked to Territory judges' reluctance to detain juvenile offenders because of the opprobrium associated with the Don Dale Detention Centre. The *NT News* and *Channel 9* campaigns have been relentless, and even led to the Chief Justice of the Supreme Court on 20 January issuing an 11-page statement explaining there was no link in this period between any perceived drop in detention numbers and reports of rising crime.

This extreme and obsessive coverage attacking and demonising children goes on unabated. The description of children as "Dirtbags" in front page headlines reflects the basis of this approach. A society which so labels any of its children is going nowhere, but the media do not care. Of course, the media assert that they are reflecting the concerns and views of the community; but the truth is, they are creating and encouraging such views. The effect is obvious and deliberate: community hostility towards child offenders, thereby lessening interest and support in the Royal Commission's work.

All of this raises several questions: Why?; and what are the real reasons and motives behind the attacks, and by whom? To answer these questions, a couple of points can be made.

Compare this media hostility towards the Royal Commission with the McLellan Royal Commission into Institutional Responses to Child Sexual Abuse. That Royal Commission is a five-year concern which has cost more than $430 million to date. It enjoys extensive reportage. How does the media coverage of that compare?

Another question to ask now is this: Looking back to what was discovered and what we objectively now know about the inhumane juvenile justice regime that had been in existence for years, why wouldn't the Australian community want this Royal Commission to get to the bottom of it, discover exactly what was happening to these children, why and who was responsible? What level of savagery is necessary for this nation to hold a proper, thorough (á la McLellan) Royal Commission into such infamy? Are restraint chairs, solitary confinement, shackles and spit hoods not enough?

I represent the juvenile now described as "AD". I represent him, and his direct family in Darwin, Borroloola and Tennant Creek. That boy told his story to *Four Corners* and he gave evidence to the Royal Commission on 9 December 2016. Unlike Voller's evidence, his evidence wasn't published at the time, as a consequence of objections made by the NT Government about some of his evidence. AD's evidence, with minor redactions, was eventually placed on the Royal Commission website on 19 January 2017, and was basically not reported by any news agency, other than *ABC Darwin Online*.

AD is an Aboriginal boy from Tennant Creek. He was 14 when he was locked in an isolation cell in the BMU in August 2014. That cell and its dimensions were shown on *Four Corners*. The cell was approximately 2 by 3 metres, with a toilet bowl and nothing else therein. No fan, no air conditioning. It was hot. He was kept in there alone for 23 ½ out of 24 hours every day. He received his meals in that cell. He was kept in there for 16 days in a row. This was the same boy who, on the sixteenth day, went off and found that his cell door was in fact unlocked. He got out and, in a clear outburst of anger, went off in the confined holding area adjacent to his and the other cells. The Four *Corners* program begins with this very incident. You see and hear him screaming, "How long have I been in here brus?" These actions led to the prison guards gassing him and the other five boys confined in their locked cells. They were all overwhelmed, cuffed, hosed down, spit-hooded, and placed in the adult prison. AD told the Royal Commission, just as he explained in his *Four Corners* interview, that he was telling his story in order to prevent this kind of thing happening again to other children.

AD and his Nanna whom he lives with, as well as other family members, have all been watching this Royal Commission with great interest. They discuss it regularly with me. Several of his family members came up on the bus from Tennant Creek to attend some of it. They have also been watching the negative reporting and criticism of the Royal Commission. This reporting has made them angry and unimpressed. But, make no mistake, they see right through it for what it is. They want this Royal Commission to work, to make a difference. They want it to do its job, just like the McLellan Royal Commission. Is that too much to expect in Australia in 2017?

The day after the *Four Corners* program, Aboriginal journalist Stan Grant wrote a moving column for *The Guardian*. He talked about his tearful anger and rage watching "those images". Like many Australians, he said he couldn't watch all of it. He called for "this Royal Commission to do its job. That it look at systemic failure and responsibility and retribution."

He also wrote: "Things once seen, cannot be unseen; the images of those boys, teargassed, beaten, held down, locked up, hooded. Those boys that look like my boys."

"Cannot be unseen"? – I only wish he was right, but I fear not. In Australia 2017, things once seen can be unseen. Australian society lives in a 24/7 news cycle. The sad and dangerous reality is that most Australians can't remember what was in the news, including what was seen, two weeks ago. The critics of the Royal Commission are relying on that very fact as they continue to bombard the community with stories which demonise children.

Nevertheless, Stan Grant and the rest of Australia can rest assured on this: AD does remember. All of it. And AD's Nanna, his other family and his Aboriginal community all remember it. What's more, they are resolute that they will not allow the media and the interests they represent to prevent Australia having the proper Royal Commission it so badly needs. They believe that this Royal Commission will be the breakthrough moment in Indigenous relations that this country desperately requires.

**John B Lawrence SC is a Darwin-based barrister. He is a former president of the NT Bar Association.*

Aboriginal Peak Organisations NT (APO NT) is concerned that attacks on the Royal Commission into the Protection and Detention of Children in the Northern Territory are undermining public confidence in the Commission's work.

APO NT spokeswoman Priscilla Collins has dismissed a call by the Independent Member for Blain, Mr Terry Mills, to scrap the Commission, and says negative commentary by the *Northern Territory News* is unwarranted and needlessly destructive.

"APO NT understands the community's frustrations with wayward youth in the Territory but tough on crime policies are not working", Ms Collins said.

"Diverting young people away from the justice system makes financial sense and it also helps prevent reoffending. We need to do what we can to keep young people out of detention. Rehabilitation of young people makes communities safer than locking them up; intensive supervision works and is cheaper than detention. Young people in the criminal justice system are more likely to offend as adults.

"Aboriginal people have invested a lot of trust in this Royal Commission. APO NT has confidence that it will identify where systems have failed and make recommendations on how to improve laws, policies and practices in the Northern Territory to provide a safer future for our children.

"Calls for the Royal Commission to be abandoned in favour of 'quick fix' solutions are just a shallow catchcry.

"We utterly reject the notion that the Commission has been a 'disaster' or 'an outrageous waste of money', as the *NT News* has commented. It still has a lot of important work ahead, and Aboriginal people of the Northern Territory want that to continue."

CLASS ACTION ON STOLEN WAGES

Shine Lawyers is investigating a class action on behalf of Aboriginal people in the Northern Territory whose labour was exploited because of wage control laws in effect from the late 1800s until the 1970s.

Shine Lawyers says the action would be on grounds similar to the class action *Hans Pearson v State of Queensland*, being for equitable compensation for breach of trust and/or fiduciary duties.

The firm says historians estimate that Queensland may owe Indigenous workers $500 million – "and it is likely that similar amounts may be owed to Indigenous workers by other states and territories".

It says it is examining allegations that tens of thousands of Indigenous workers across Australia never received their wages which were held in government-controlled trust accounts. They were stockmen, farm hands, laundry assistants, kitchen hands, labourers and domestic workers. "In many cases, these workers never received part or any of their wages," Shine says.

The Senate's Standing Committee on Legal and Constitutional Affairs inquired into the matter of "stolen wages" in 2006. Its report, Unfinished Business: Indigenous stolen wages, recommended that governments take a more proactive approach to settling grievances of Indigenous people – otherwise there was "a risk that past injustices will be compounded with further inaction".

The Committee did not accept the view that governments should "wait and see" whether Indigenous people pursue similar claims to those raised in Queensland and NSW against them: "Such an approach may amount to governments relying on the age, infirmity and social disadvantage of the claimant group to escape or reduce liability."

The Committee received evidence that suggested many Indigenous people remain unaware they have been denied wages and welfare entitlements; it said governments should fund an education and awareness campaign, but that has not happened.

The Commonwealth Government, in relation to the Northern Territory (which it governed from 1911 to 1978), has not taken up a recommendation by the Committee to "urgently consult" with Indigenous people about the stolen wages issue and to conduct preliminary research of archival material. The Committee recommended that if consultation and research revealed practices of withholding, underpayment or non-payment or Indigenous wages and welfare entitlements, a compensation scheme should be established.

The Committee's recommendations have come to nought.

Shine Lawyers would like to speak to anyone who believes either they or their relatives may have been subjected to wages control legislation.

Molly Dodd at Wave Hill c. 1950

The Senate's Standing Committee on Legal and Constitutional Affairs was well informed about the issue of "stolen wages" in the Northern Territory during an inquiry in 2006.

The Committee's report, "Unfinished business: Indigenous stolen wages", recommended that the Commonwealth Government, in relation to the Northern Territory, "urgently consult with Indigenous people in relation to the stolen wages issue"; it also recommended that the Commonwealth conduct preliminary research of its archival material.

If the consultation and research revealed practices of withholding, underpayment or non-payment of wages and welfare entitlements, the Committee recommended that the Commonwealth establish a compensation scheme. The recommendation was never acted on.

The Committee also recommended that the Commonwealth provide funding to the Australian Institute of Aboriginal and Torres Strait Islander Studies to conduct a national oral history and archival project "in relation to Indigenous stolen wages". That recommendation, too, was never acted on.

In its consideration of how Aboriginal labour had been exploited in the Northern Territory, the Committee drew extensively on a submission by Stephen Gray, a lecturer at Monash University Faculty of Law, and an Associate to the Castan Centre for Human Rights Law.

In a covering note to his submission, Dr Gray argued that debate about stolen wages should not be limited to the consequences of mandatory controls over paid Indigenous labour. "Indeed, arguably the most significant corollary of mandatory control over Indigenous labour in the Northern Territory is that much of it was unpaid".

Dr Gray noted that from the beginning of the 20th century, legislation in the Northern Territory authorised or condoned the widespread practice of not paying Indigenous workers in the pastoral industry and elsewhere.

"It expressly authorised this by allowing workers to be classified as 'temporary' rather than permanent, and by allowing employers to pay wages 'in kind' (in the form of rations) to an employee or his/her dependants. Later it authorised non-payment by allowing employees to be classified en masse as 'slow, aged or infirm' and therefore not eligible even for the wage prescribed under the Wards' Employment Ordinance. Alternatively, it implicitly condoned non-payment of wages by allowing employers to classify workers as 'dependants' rather than employees."

Dr Gray's submission addressed the issue of unpaid Indigenous labour by considering whether such unpaid labour should be regarded as slavery.

"This is not an attempt to be provocative. Rather it is an argument that the term should play a legitimate part in any national debate on the issue. Indeed, it has played a prominent role in such debate in the past. The submission notes that 'slavery' did not merely become a criminal offence when the Commonwealth enacted new laws on the issue in 1999. It has been an offence in British, and Australian, law since at least 1824, and at international law since at least 1926. It is legally arguable that some Northern Territory employment practices would have infringed anti-slavery laws, even where they were legislatively authorised or condoned." Dr Gray wrote.

But he was doubtful about the chances of success in a court action to recover stolen wages, noting that both native title and 'stolen generation' cases have "generally disappointed" Indigenous litigants: "In the light of these decisions, the idea that litigation will meet the expectations of litigants in the 'stolen wages' cases should be treated with some care."

"Even if successful," Dr Gray told the Senate Committee, "litigation based on breach of trust or fiduciary duty addresses only a relatively small part of the broader 'stolen wages' issue. For many Indigenous people, the injustice is not so much that a portion of their wages or entitlements have disappeared into government 'trust', but the fact that for decades they were paid at grossly unequal rates, or not paid at all.

"An argument based on the legal concept of 'slavery' is not subject to these limitations. The matters required to prove a charge of 'slavery' are precisely the broader matters of injustice in this area: the fact that Indigenous people were paid at minimal rates, or not paid at all, and the fact that many had no real choice but to work under the conditions they did. The question of whether their treatment was legally sanctioned at the time or not is not crucial to a charge of slavery. Clearly laws such as the Aboriginals Ordinance did not ordain, or even expressly authorise, conditions of slavery. On the other hand they facilitated and condoned the existence of such conditions. Many of the legislative restrictions on Aboriginal human rights they contained, such as the restrictions on freedom of movement, would be matters tending to prove the legal condition of 'slavery'.

"Australia was not a 'slave state' in the manner of the American South. Nor did all Aboriginal people during the relevant period live in a condition of 'slavery'. Nevertheless there is a strong argument that at least some Aboriginal people – particularly those in the pastoral industry – lived and worked in conditions which would satisfy the definitions of 'slavery' contained in the 1926 Slavery Convention, and in the applicable law under the Slave Trade Act (UK) 1824.

"This is not to say that prosecutions should be brought. Lapse of time is a greater problem here even than in the 'stolen generation' cases, or in potential litigation based on breach of trust. It is, rather, an argument for recognition of the concept within the terms of reference for any possible reparations tribunal formed as a result of the Inquiry into Stolen Wages. Without recognition of its existence, meaningful debate on this issue cannot occur."

Dr Rosalind Kidd was a key instigator of the 2006 Senate Legal and Constitutional Affairs Committee of Inquiry into stolen wages. Her submission revealed how governments around Australia intercepted and controlled the private wages, savings, child endowment, pensions, and inheritances of thousands of Indigenous people for most of the last century.

Dr Kidd works as a freelance researcher investigating official records and providing reports for various claimants in Native Title applications and, since 1995, has worked with Indigenous lobby groups to win justice and reparations for stolen wages and trust monies lost over decades of government maladministration.

Since 2015 Dr Kidd has worked as a consultant to Cairns firm BE Law, in support of a class action to recover Indigenous stolen wages in Queensland, which was lodged with the Federal Court in September 2016. She is also an adviser to Shine Lawyers who are pursuing similar redress in other jurisdictions, including the Northern Territory.

The following account of the history of exploitation in the Northern Territory is extracted from Dr Kidd's submission to the Senate inquiry in 2006. Currency conversions from £.s.d. to dollars (at 2016 value) have been done via the Reserve Bank's Pre-Decimal Inflation Calculator.

Dr Rosalind Kidd

Legislation in the Northern Territory in 1910 and 1911 implemented employment licences, revocable if wages or conditions were unsatisfactory, and directed wages owing to deceased workers be paid to the Chief Protector, who also had the right to demand any wage be paid direct to himself. Since no minimum wage was mandated, most employers in the pastoral industry paid no cash component.

Although a minimum wage of 25 shillings weekly was set for government employees (in Darwin), 10 per cent went straight into a trust account controlled by the government and the remainder could be paid in kind, rather than in cash. Any general wages received by Protectors were also lodged in a trust account to be spent 'solely on behalf of' the employee, a record to be kept of receipts and payments.

From 1918, any Aboriginal female could be controlled for life and sent out to work. Minimum wages for town workers were five shillings weekly plus clothing and food, of which two shillings was paid direct to the trust account. The government required rural employers to buy licences, but these allowed for unlimited workers who had to be provided only with food and clothing; wages and housing were optional if workers' dependants were also supported.

In the Northern Territory lack of intervention by the Commonwealth Government allowed exploitation to continue. Stations commonly undercounted worker numbers and inflated the quantity and quality of rations supplied; in 1927 pastoralists estimated they spent half as much on an Aboriginal employee as they did on a white worker.

A 1929 report found the pastoral industry was 'absolutely dependent on the blacks for the labour' and 'most of the holdings … would have to be abandoned' without them. Yet the 2500 Aboriginal workers and 1500 'camp dependants' on the stations were forced to suffer in shelter cobbled together from waste materials, 'mere kennels and most unsanitary'. The report revealed managers withheld rations to enforce discipline and some stations refused to supply rations to non-workers, leaving families to survive on the offal of beasts killed for station supplies and forcing many women into prostitution to feed their children.

Regulations in 1930 set a minimum wage for half-caste youths 'apprenticed' to pastoral work from the government's institutions, much of it paid direct to the department's trust account. Wages of up to 30 shillings ($119.58) weekly were set for drovers but many pastoralists refused to pay and none were prosecuted. The Chief Protector said contracted employment in central Australia was 'analogous to slavery' because the regulations were not enforced. In 1933 he described many station managers in the Northern Territory as 'unscrupulous' in their exploitation of Aboriginal workers, and police as 'unreliable' in setting wages.

Records shows the Commonwealth Government failed to intervene, despite knowledge of starvation and deaths among workers and their families. In 1934 the government was notified that on one station ex-workers were starving to death, but it refused to supply rations arguing this was the responsibility of station management.

L-R: Camerine, Alice Kuwalang, Polly Lajay, unknown, Old Ship Miliyari at the Wave Hill Bakery 1954-58

In 1938, the anthropologist W E H Stanner again reported workers and dependants on several stations were at high risk of diseases caused by deficient diets; he said on one station only 10 children survived from 51 births between 1925 and 1929. In 1942 a patrol officer reported at one station workers 'finished in a state of exhaustion due to the hard labour on the diet of flour only', there was 'not a vestige of food' in the camp of 12 women in 'wretched' emaciated condition who fell upon a piece of unleavened damper 'like starving dogs'. He cancelled the employer's licence, but was overruled by his Canberra superiors who laid no charges against the owner.

In the mid-1940s a survey reported all ration recipients were forced to labour, including the aged, women and children; and many stations in the central-west ruled their workers through violence and fear. The survey confirmed endemic malnutrition was endemic and excessive maternal and infant deaths were 'destroying the race'; of four births at Wave Hill during a two-month period three of the babies and two of the mothers died.

In 1947, Aboriginal workers in Darwin went on strike, demanding full wages and full access to their wages and savings. Despite further strikes in 1948, 1950 and 1951, the Minister for the Interior refused to intercede in the operations of the Aboriginals Ordinance.

Although the Welfare Ordinance (1953) exempted all half-castes from employment and financial controls, the government could declare anyone a ward in need of assistance, a category automatically including around 15,700 'full blood' people on the grounds they had no voting rights. Under the Wards Employment Ordinance (1953) male wages doubled to £2 ($68.16) weekly plus rations and clothing; but as the major employers of half-caste wards, neither the missions nor the Welfare Branch were bound to comply with the new provisions.

Wages for wards rose to three pounds ten shillings in 1957, part-paid direct to the trust fund.

It was not until 1953 that minimum wages and conditions were specified for Northern Territory pastoral workers, but the wage was one-fifth the white rate, annual leave was half, and the range of rations less than 35 per cent the minimum requirements for white workers. There were 6000 Aboriginal people reliant on pastoral work for their survival, yet between 1959 and 1964 not one cattle station was prosecuted for failing to comply with mandatory wages, shelter, rations and work conditions.

Skilled Aboriginal stockmen of many years experience were still getting only £1 ($27.87) plus keep in 1961, compared with £14 for their white counterparts. In 1965, when 51 per cent of general station hands were paid around one-quarter the white rate and 34 per cent around one-third, the director admitted only 20 stations had even attempted to meet their legal employment requirements.

Aboriginal drovers were similarly underpaid. Mass walk-offs at Newcastle Waters and Wave Hill were the culmination of protests during the previous 20 years. When equal wages were finally implemented the 'slow worker' clause legitimised continuing under payment. Minimum wages in the early 1970s, including clothing, were less than half the unemployment benefit.

Child labour

From Darwin the Government Resident recommended in 1907 that all mixed-descent children be institutionalised for indenture to white families, and the Kahlin compound was started in 1912 to supply servants to Darwin families. The Bungalow began in 1914 in Alice Springs with the aim of taking children from the camps and training them for work.

From 1931, it was government policy to institutionalise all 'illegitimate' mixed-descent children under 16 years, as well as unmarried women, increasing removals 70 per cent during that decade. Girls were frequently contracted from the Bungalow to work around Adelaide. After the Second World War patrol officers were told to remove all mixed-descent children to institutions and by the early 1950s almost all had been sent

to missions or government institutions.

It is clear that child removals reflected labour market demands. In the 20 years from 1932, 60 per cent of children institutionalised in Alice Springs were boys trained for pastoral work, whereas 70 per cent of children institutionalised in Darwin were girls trained for domestic service. Girls from both Darwin and Alice Springs were sent interstate, particularly to meet demand in Adelaide. Between 1943 and 1972, 350 girls were processed through Colebrook Home in South Australia to domestic service.

Aboriginal stockmen at Wave Hill Station

Trust funds

It appears that in the Northern Territory the first Aboriginal trust account was started in 1913 to take 10 per cent of wages paid to Aboriginal employees of the government; if a servant absconded the employer was refunded all paid wages. By the time Treasury legitimised this procedure in 1915, improper usage of the trust accounts was already apparent.

From 1916, children were sent as servants to Adelaide at wages substantially lower than South Australian child servants. Employers were required to supply food, clothing, accommodation and medical attention; children were paid five shillings weekly which went direct to the Alice Springs Protector for lodging in a savings account and withdrawals could only be made with the Chief Protector's permission. By 1917 there were 481 accounts worth £1448 ($133,908.16).

The Ordinance (1918) directed a portion of rural wages be paid direct to protectors or police. In the same year, unclaimed wages in 500 accounts, with a total value of £1202 ($104,211.16), were simply transferred to Treasury.

The administration admitted stockpiles of unclaimed money showed workers did not know of their wage entitlement, nor how to claim it; it admitted other monies earned by workers were not banked in the trust account. Men over 21 years did not necessarily gain control of their earnings; in 1921 a 22-year-old man who had worked since he was 14 and had savings of over £220 ($16,954.30) was denied permission to have a passbook on the grounds he was a "spendthrift".

Evidence to the 1919/20 Royal Commission on Northern Territory Administration revealed it was easy to access trust monies corruptly, especially since many workers were illiterate and endorsed withdrawals with a cross; at times cash was released simply on the word of someone in authority. Immediately after the Royal Commission, £1184 ($91,244.97) in "unclaimed money" was transferred into consolidated revenue.

Recovery of wages remained a low priority, as did administration of the Trust account. Despite attempts by the Chief Protector to have unclaimed money made available for general Aboriginal benefit it was decided sums unclaimed after six years would revert to Treasury. The government reaped the interest on controlled savings, and, the Aboriginal trust fund was one of the few government schemes which made a profit.

Contracted employment and controlled savings could be lifetime sentences for Northern Territory girls and women. In breach of regulations requiring trust monies be lodged in a single account, the Alice Springs Protector opened individual accounts for Adelaide servants. By 1925, one girl's account held £83 ($6,541.77), and total savings under the Protector's control was £1516 ($119,485.80). By 1926, 24 girls and four boys had been sent from the Bungalow as servants in Adelaide, and the Protector suggested wages be increased to eight shillings weekly after two years' service with three shillings paid directly to the Protector's control – although for girls over the age of 16 this now was banked with the South Australian Chief Protector in Adelaide for easier access.

A sum of £15.12.0 ($1,462.15) was found missing from one worker's account between 1930/32 and only partially repaid, her claim weakened by the absence of any employment contract. The Ordinance (1927) empowered the Chief Protector to retain control of the savings of adult men; half-caste girls over 18 years who applied could be released from state controls if deemed capable of managing their own affairs. From 1928, the savings of half-caste workers with more than £20 ($1,558.62) could be transferred to interest bearing bank accounts.

From 1929, a medical benefit fund required half-castes to contribute sixpence weekly for single workers or one shilling for those with dependants, plus one shilling weekly from employers; contributions were optional for white workers who, in any case, received free medical treatment. This deduction was in addition to an employer-financed Aboriginal Medical Benefit Fund which accumulated large balances in Treasury. The Chief Protector argued this fund should be used to build Aboriginal hospitals rather than subsidise free medical care for half-castes already covered by the general benefit fund. He was overruled.

Much of the wage of youths contracted from institutions under the Apprentice (Half-Castes) Regulations (1930) went direct to the trust account, although by 1932 pastoralists succeeded in slashing the wage to only 10 shillings "or such sum as the local Protector may consider", of which six shillings went direct to the apprenticeship fund. Youths over 18 years who joined the Australian Workers Union were legally due the same wage as white apprentices. Rowley mentions a housing scheme operated in 1932 for employed half-castes "on the basis of subscriptions from the Trust Accounts". The Aborigines Ordinance (1933) increased wages of female town workers to six shillings weekly, all of which was paid into the trust account, and mandated employer contributions to the Medical Benefit Fund.

From 1933, the Superintendent at Jay Creek settlement (Central Australia) was charged with control of every half-caste male under 21 years south of the 20th parallel, whether in the institution or in employment. Boys were to be contracted to work including – until 1936 – children under 14 years, with the Superintendent as authorising officer to withdraw money from the trust accounts, ensuring the boys were not defrauded or wasting their money. It was his responsibility to make deductions from wages in the trust accounts for the Medical Benefit Fund and to check employers of half-caste workers insured them under the Workman's Compensation Ordinance. The Superintendent was "directly responsible" to the Chief Protector in the execution of these duties. In the 1930s the trust account held over £3000 ($281,183); 160 official complaints about branch accounts and trust account books continued.

Under the Wards Employment Ordinance (1953) male wages were doubled to £2 ($68.16) weekly plus rations and clothing. Controls of half-caste wages ceased but trust fund provisions continued for the 15,700 full blood people defined as wards. Although wages for wards increased in 1957 to £3.10.0 ($106.39) weekly plus keep, the Director retained the power to direct part-payment to the trust fund, and retained controls on access. Controls of wages and savings continued until the Social Welfare Act (1964).

Pensions

In the Northern Territory, missions and pastoral stations received bulk pension payments. There were no competent procedures to ensure these were passed on to the beneficiaries. In 1965 it was said managers at Wave Hill were withholding pensions of £9000 ($235,077.84).

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PRAISE FOR NLC and CLC CONSULTATIONS FOR GAS PIPELINE NEGOTIATIONS

Jemena, the company selected by the Northern Territory Government to build, own and operate the Northern Gas Pipeline (NGP), has praised the role of the Northern and Central Land Councils in their conduct of consultations with traditional Aboriginal owners and native title claimants.

Jemena, 60 per cent -owned by the State Grid Corporation of China and 40 per cent -owned by Singapore Power International Pty Ltd, says that the Land Councils have made "an invaluable contribution" to the project.

"Their expertise, advice, and understanding of the local community, coupled with their commitment to working with Jemena have been key in helping ensure the smooth delivery of the project so far" said Jonathan Spink, the NGP Project Director.

The 622km pipeline (12 inches in diameter and made of steel) will be buried, and will transport gas from Phillip Creek near Tennant Creek, to Mt Isa. Associated infrastructure includes compressor stations at Phillip Creek and Mr Isa, access tracks, main and portable camps, mainline valves, scraper stations and cathodic protection stations.

The NLC's Full Council, meeting at Timber Creek in November, decided to enter into a Benefits and Impacts Agreement and Indigenous Land Use Agreements (ILUAs), clearing the way for the project to proceed.

About 163km (42 per cent) of the proposed NGP is located in the NLC's region and about 221km (58 per cent) is in the CLC's region. Lawyers for both land councils conducted negotiations with Jemena between March and October 2016.

In the NLC's region, the project is proposed over land subject to three registered claims for non-exclusive native title rights. In the CLC's region, it will traverse land subject to one claim for non-exclusive native title, land held by the Wakaya and Warumungu Aboriginal Land Trusts, and other unallocated Crown land and pastoral land that may be subject to native title claims in the future.

Jemena expects the majority of jobs during planning, construction and commissioning phases will be filled by residents of the Northern Territory and the Mount Isa region. The company is obliged to seek to employ appropriately qualified local Aboriginal people, assist in training, and give preference to appropriately qualified local Aboriginal businesses.

Photos clockwise from top:
Joe Morrison, CEO, NLC and Paul Adams, Managing Director, Jemena

Left to right: Welcome to Country function on Sunday night with Gerry Kelly, Paul Adams, Chairman Du, Annie Morrison and Patricia Franks

Left to right: Joe Morrison, NLC CEO; Jeff Collins Assistant Minister for Primary Industry and Resources; Jonathan Spink, Project Director, Northern Gas Pipeline Project; Paul Adams, Jemena Managing Director; Greg Marlow, chair Tennant Creek Regional Economic Development Committee.

Opportunities and challenges discussed at recent NLC Indigenous Women Ranger Conference

The NLC Indigenous Women Ranger Conference held in Katherine in October was an opportunity for women from some of the ranger groups across the Top End to meet and exchange knowledge and support. It gave women a forum in which to discuss the opportunities and challenges facing them, and inform the NLC of where they think ranger programs should head in the future.

The conference was attended by 19 rangers from ten ranger groups, including NLC, the Indigenous Land Corporation (ILC) and independent groups, from Croker Island to Robinson River, Numbulwar to Timber Creek.

The NLC Chairman, Samuel Bush Banasi, gave a welcome speech affirming his support for employing women in caring for country programs. He spoke of the importance of the contribution of women rangers to caring for country work and noted that women are "the backbone of the organisation." Samuel acknowledged the work women rangers do looking after country, and assured the group he supports them 100 per cent.

Supporting women has always been a NLC priority, but as of 2015/16 less than a quarter of permanent rangers employed in NLC ranger groups were women. As some ranger groups have no women at all, more effort is needed to reach equality.

Rangers from each group gave presentations outlining the activities and aims of their ranger programs. This was followed by an open forum where the rangers participated in identifying barriers and developing priorities for the future.

The priorities they identified were to increase the number of women rangers, women coordinators, and women in leadership roles. The need for more culture camps was also important, as was the need for more ranger exchanges between groups. This reflects the importance of providing opportunities for women from different communities, who undertake the same job and face similar challenges, to interact with and support each other.

Following the conference, rangers participated in land management training. Fifteen rangers undertook and passed a certified three-day course to apply chemicals and treat weeds delivered by Charles Darwin University at their Katherine campus. This provided women with the knowledge and skills to safely undertake weed management work on their country alongside male rangers.

The final group training was prescribed burning delivered by Brett Stephens. Wagiman Ranger Group Coordinator Veronica Birrell and the Wagiman rangers hosted women from the Waanyi Garawa, Garawa, and Timber Creek ranger groups at the Wagiman ranger base at Lewin Springs. This training taught rangers to plan and undertake prescribed burning to protect assets and culturally significant sites, and to work safely with fire.

Another Indigenous Women Rangers Conference is proposed for 2017 which will focus on developing policies and targets for employment in NLC groups, and leadership development. Invitations will be extended to independent ranger groups in the Top End.

Other work over the next six months will focus on working with the ranger groups without women rangers to discuss ways to increase engagement and employment of women. On-going support for women currently employed as rangers will be maintained, and ranger exchanges will be held to provide opportunities to share knowledge and experience, and gain new skills.

NLC Indigenous Women Rangers Conference, October 2016, Katherine (Photo: Katherine Van Wezel)

Veronica Burrell (Wagiman Ranger Coordinator) giving an inspiring talk at the conference about the ability of women to move into more senior roles.

Nakira Davey, Waanyi Garawa Rangers, Lewin Springs October 2016

Rosemary Bunonjoa, Mimal Rangers, Katherine October 2016

Weed Training, Katherine October 2016 (Photo Katherine Van Wezel)

For further information about the Women's ranger Program, please contact Penny Mules at the NLC on (08) 8920 5214.

APO NT calls for CDP reforms

The Aboriginal Peak Organisation NT (APO NT) has called for fundamental reforms of the Commonwealth Government's Community Development Program (CDP).

APO NT's membership comprises the Northern and Central Land Councils, Aboriginal Medical Services Alliance Northern Territory (AMSANT, itself the peak body representing Aboriginal medical services, with the aim of improving the health of Aboriginal people through promoting and extending the principle of local Aboriginal community control over primary health care services to Aboriginal people) and the Territory's two Aboriginal legal services, the North Australian Aboriginal Justice Agency (NAAJA) and the Central Australian Aboriginal Legal Aid Service (CAALAS).

APO NT convened a forum in Darwin in December 2016 to discuss concerns about the effect that the CDP is having on its participants, their families and communities. Attended by more than 20 organisations, predominantly Aboriginal organisations and CDP providers, the forum concluded that the CDP is doing substantial harm to individuals and communities without generating sufficient opportunity.

Combining both CDP provider expertise and strong Aboriginal community relationships and perspectives, the forum identified fundamental flaws with the program:

- The lack of Aboriginal community control or input into the program design, or delivery;
- The lack of employment outcomes, and inability to provide career pathways and long-term "on the job'" support;
- The program does not do enough to encourage enterprise development or stimulate job creation;
- The lack of flexibility in CDP implementation resulting in a complete inability to tailor arrangements to maximise positive outcomes in different regions and communities;
- The program is punitive and fundamentally fails to understand what drives change in remote Aboriginal communities;
- The program is focused on individuals at the expense of community development and engagement;
- The program is focused on short-term outcomes with no measurement of net gain to communities;
- Under CDP, most participants are required to do many more work-for-the-dole hours than others in order to receive income support – meaning that participants are being set up to fail;
- The penalty regime is disproportionately impacting on remote Aboriginal people leading to food insecurity, greater poverty, and increased disengagement from the system entirely; and
- Thousands of CDP participants are locked into work at a rate well below award rates, with no work entitlements or protections and with little or no prospect of earning additional income or leaving income support.

In addition, some critical program delivery and implementations challenges were identified including:

- Expensive and complex administrative and IT systems resulting in more time spent on compliance and reporting than on delivering outcomes, and preventing the employment of local people;
- Appropriate assessment processes are simply not available in remote locations; and
- Department of Human Services systems, particularly participant access to Centrelink, are inadequate.

Based on the substantial evidence that CDP is failing, and drawing on extensive experience delivering successful programs in remote Aboriginal communities, forum participants agreed to work together to develop an alternative model that could form the basis of negotiations with the Commonwealth.

The alternative model would be underpinned by the following principles:

- the program must be driven by community level decision making, not centrally imposed rules;
- it should include greater access to waged employment and emphasise incentives over punishment;
- it should foster long term economic, social and cultural development and be measured on its success in supporting these over an extended period;
- it should include a much greater emphasis on job creation;
- it must include much greater support for job retention and career advancement; and
- it should be much less bureaucratic, so that program resources go into individual and community impact, not into red tape.

While maintaining a focus on the need for comprehensive reform, the forum also identified short–term improvements which could be implemented without legislative reform. Forum participants are calling on the Australian Government to immediately:

- reduce the current work-for-the-dole requirements applied to CDP participants to a level more closely aligned to requirements elsewhere;
- provide local flexibility in the arrangement of days and hours of participation and associated supervision and administrative arrangements;
- revise CDP contractual arrangements to allow providers to determine when to recommend breaches based on community and individual circumstances without penalty; and
- make adjustments within existing social security laws to improve the fairness of the system.

Achieving both immediate and long-term reform of CDP is a priority issue for many CDP providers, Aboriginal organisations and other supporters. APO NT has committed to building a strong alliance of organisations to progress this work in 2017, and has asked the Government to commit to an inclusive collaborative process to redesign the program with a view to improving better outcomes for Aboriginal people living in remote areas.

For further information, please contact:
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APONT Aboriginal Governance & Management Program

Innovating to Succeed Forum

CEOs, managers, chairs and board members of NT Aboriginal organisations will attend the Aboriginal Peak Organisations NT (APO NT) "Innovating to Succeed Forum" on 3 March in Alice Springs. This is a full day event run by and for NT Aboriginal organisations, with a focus on sharing knowledge about ways to achieve success in this unique industry.

Central Australia is set to host Aboriginal organisations from across the NT at the 3 March "**Innovating to Succeed: How NT Aboriginal Organisations are Affecting Change**" Forum at the Alice Springs Convention Centre. Like the hugely successful 2015 CEOs Forum in Darwin, this event is organised through APO NT's Aboriginal Governance & Management Program.

Forum participants will represent a variety of fields, from health, education, environment, and justice, to arts and culture, and many more. This diverse group will come together to share their stories about new approaches to grow and strengthen business and service delivery, be more sustainable, and self-determine success.

The forum's program will include and opening by the Chief Minister opening, a keynote address from the 2016 National Indigenous Governance Award winner, Western Desert Dialysis (aka The Purple Truck), as well as presentations from the Warlpiri Youth Development Aboriginal Corporation, Central Australian Aboriginal Congress and the Palngun Wurnangat Aboriginal Corporation, among others. There will also be updates from government representatives and Q&A discussion. Topics will include governance, succession planning, commercial venture and a transition to independence.

Aboriginal organisations face unique challenges and make a significant contribution to the economy and the community. In 2014/15 NT Aboriginal organisations generated more than $800 million, the greatest overall share of the country's top 500 Aboriginal organisations' combined income. This demonstrates the enormous contribution made by this industry to the Territory and how important it is to ensure these organisations have the skills and resilience to manage change in a dynamic environment.

The event is free and fully catered. Register now at www.aboriginalgovernance.org.au. For further information call 8959 4623 or email info@agmp.org.au

The NLC's newly-elected Full Council meeting at Timber Creek mid-November 2016

L-R back row: David Warraya (Ramingining EA), John Daly (Daly River South DDW), Shadrack Retchford (Bulla VRD), Larry Johns (Timber Creek VRD), Phillip Goodman (Darwin South DDW), David Rumba Rumba (Ramingining EA), George Milaypuma (Milingimbi EA), John Wilson (Peppimenarti DDW), Wesley Bandi Bandi (Gapuwiyak EA), Graham Kenyon (Darwin East DDW), George King (Yingawunari VRD), Matthew Shields (Daly River North DDW), Raymond Hector (Pigeon Hole VRD), Jason Guyula (Galiwin'ku EA), Paul Henwood (Darwin South West DDW), Brian Limerick (Alexandria BB), John Finlay (Wombaya BB), Jason Bill (Muckaty BB), Chris Neade (Elliot BB), Timothy Lansen (Nicholson BB) Linda Fletcher (Katherine Kath), Helen Lee (Barunga Kath)Lisa Mumbin (Katherine Kath)Samantha Lindsay (Bulman Kath).

L-R 2nd row seated on stairs: Otto Dann (Gunbalanya WA), Bunug Galaminda (Warruwi WA), Jenny Inmulugulu (Warruwi WA),

L-R 2nd row after stairs: Yananymul Mununguri (Yirrkala EA), Faye Manggurra (Numbulwar Ngukurr) Shannon Dixon, kneeling (Murranji BB), Jabani Lalara, standing (Blue Mud Bay EA), Gordon Noonan, kneeling (Rockhampton Downs BB), Jonathon Nunggumajbarr, standing (Blue Mud Bay EA), Samuel Bush-Blanasi, seated front (Beswick Kath), Kenny Djekurr Guyula, seated back (Galiwin'ku EA) Clint Julius Kernan, kneeling (Maningrida WA), Johnny Burrawanga, seated back (Galiwin'ku EA), Michael Ali, standing (Milingimbi EA), Bobby Wunungmurra (Gapuwiyak EA)George Campbell, seated front (Yarralin VRD), Elizabeth Sullivan, standing (Pine Creek DDW), Djawa Yunupingu, standing (Ski Beach EA), John Christophersen, seated front (Kakadu WA), Ronald Lami Lami, standing (Cobourg WA), (list continues next page)

Gabby Gumurdul, standing (Gunbalanya WA), Peter Lansen, standing behind (Nutwood/Cox River Ngukurr), David Djalangi, standing front (Galiwin'ku EA), Keith Farrell (Hodgson Downs Ngukurr), Audrey Tilmouth (Darwin DDW), John Sullivan (Daly River West DDW), Virginia Nundhirribala, seated front (Numbulwar Ngukurr), Jody Evans, standing (Borroloola BB), Maxine Wallace, seated back (Brunette Downs BB), Jason Mullholland, standing (Borroloola BB), Wayne Wauchope, standing front (Gunbalanya WA), Tobias Nganbe, seated on steps (Port Keats DDW), Martin (observer), seated on steps (Port Keats North DDW), Walter Rogers, seated on steps (Ngukurr)

Absent from photo:

Keith Rory (Borroloola BB), Joy Priest (North Barkly BB), Richard Dixon (Robinson River BB), Kevin Quall (Darwin DDW), James Sing (Darwin West DDW), Mark Tunmuck Smith (Port Keats North DDW), Adrian Ariuu (Palumpa DDW), Sharon Daly (Daly River DDW), Dhuwarrwarr Marika (Yirrkala EA), Caroline Dhamarrandji (Yirrkala EA), Jocelyn James (Mataranka/Djimbra Kath), John Dalywater (Weemol Kath), Grace Daniels (Ngukurr), Gregory Daniels (Ngukurr), Timothy Wurramara (Numbulwar Ngukurr), Clifford Duncan (Urapunga Ngukurr), Kenovan Anthony (Amanbidji VRD), Matthew Ryan (Maningrida WA), Victor Rostron (Maningrida WA), Helen Williams (Maningrida WA), Matthew Ngarlbin (Croker WA)

Regions: BB - Borroloola Barkley; DDW - Darwin Daly Wagait; EA - East Arnhem; Kath - Katherine; Ngukurr; VRD - Victoria River District; WA - West Arnhem

ANAO Audit of the Indigenous Advancement Strategy (IAS)

Michael Dillon

'Though this be madness, yet there is method in it'

Hamlet Act II, Scene ii

The Australian National Audit Office (ANAO) released its effectiveness audit of the Indigenous Advancement Strategy (IAS) on 3 February 2017. The IAS is the Commonwealth Government's major grants program in Indigenous Affairs, allocating in excess of $1bn per annum for activities designed to deliver services to Indigenous citizens and communities.

The Australian newspaper described the audit as "scathing", and noted:

> *However the audit found that a seven-week planning and design period had "limited the department's ability to fully implement key processes and frameworks, such as consultation, risk management and advice to Ministers".*
>
> *The program's short implementation time had then "affected the department's ability to establish transitional arrangements and structures that focused on prioritising the needs of indigenous communities".*
>
> *Further, the department's grants administration process "fell short of the standard required to effectively manage a billion dollars of Commonwealth resources".*

An ABC story led with the following paragraph:

> *The Abbott government bungled its overhaul of billions of dollars worth of Indigenous funding, a major report has found.*

The Department of Prime Minister and Cabinet website published a summary of the Department's response to the audit which tries valiantly to shift the focus to the future and away from the findings, and, as a result in my opinion, fails to adequately acknowledge the seriousness of the findings.

The Minister for Indigenous Affairs published a media release in response to the audit, titled, *Government a step ahead of the ANAO audit recommendations*, which stated in the first paragraph that the audit findings related to the 2014 grant round, and "should be viewed as a historical observation on a process carried out two-and-a-half years ago".

The implication that the ANAO and the Auditor General is a step behind the Government in releasing this report, and that its assessment is not "fair and reasonable", is on its face extraordinary. So too is the Minister's quite direct criticism of the ANAO for failing to focus on the Government's alleged successes as stated in the Minister's media release:

> *Assessing the success of the IAS based on the introductory period is premature. Any fair and reasonable assessment of the IAS needs to consider a timeframe well beyond the introductory period to give the strategy time to deliver the intended benefits.*
>
> *By focusing its audit on the grants round, the ANAO has paid insufficient regard to the state Indigenous Affairs was in when the Coalition Government came to office in 2013 – and hence the need for the Government to implement its reforms.*
>
> *Before the Coalition introduced the IAS, it was not possible to say where and how much taxpayer money was being spent or what outcomes were expected for the outlay. I know this to be true, because they were questions I repeatedly asked in Senate Estimates as an Opposition Senator.*

These criticisms ought to be seen for what they are: attempts to divert attention from the shortcomings identified by the ANAO. In relation to the claim about assessments, in the 'introductory period' the Minister himself decided that the previous Government's Remote Jobs and Communities Program was a failure and should be abolished while it was still less than 12 months old, and the replacement Community Development Program is in diabolical trouble, with soaring breach rates and substantial community concern. The comments about not being able to say where the money was being spent and what outcomes were expected under the previous Government are issues identified by the ANAO in relation to IAS. The degree of transparency in relation to the IAS is virtually non-existent, as a cursory trawl through the PM&C website will reveal.

To take just one example: the level of detail available in relation to expenditure on the Minister's signature program, the Remote School Attendance Strategy is woeful, with no accessible detail on the allocation of funding, no detail on the numbers of students impacted, only one internal quantitative evaluation which suggests that the program's impact, while positive, is far from making a meaningful difference to overall remote school attendance. Yet the media releases, magazine articles and good news stories keep rolling out.

In an interview with the ABC in relation to the ANAO Report, the Minister was reported as stating that he did not think errors were made:

> *"I don't accept that this was some sort of disaster at all," Senator Scullion told the ABC.*
>
> *"All of these criticisms are about departments and processes. What my job is to do is focus on what people who receive the services think.*
>
> *"The fact is Aboriginal and Torres Strait Islanders, as a consequence of these remarkable changes, are far better off."*

In essence the Government's response has been to argue that the IAS involved "remarkable changes", that any issues identified by the ANAO are "historical observations" of no relevance today, and that "these criticisms" are "unreasonable and unfair" and all about bureaucratic processes for which the Minister is not responsible.

Before assessing the merits of these arguments, it is worth noting some of the ANAO's detailed findings. Of necessity, they are extracts and the report needs to be read in its entirety. Nevertheless, a number of the findings are extremely concerning and suggest deep-seated problems existed (and presumably continue to exist) in the way Indigenous public policy is being implemented.

In terms of understanding what has gone on here, it is important to understand that the ANAO is precluded from examining the actions of Ministers; its focus is entirely on the actions of agencies, notwithstanding that the Minister is the decision-maker and he and his office would have been integrally involved in the roll out of this program (as was confirmed in Secretary Parkinson's letter, discussed below).

Here are some of the more worrying quotes from the ANAO report (emphasis added):

> *7. While the Department of the Prime Minister and Cabinet's design work was focused on achieving the Indigenous Advancement Strategy's policy objectives,* ***the department did not effectively implement the Strategy****.*

Indigenous Affairs Minister, Nigel Scullion addressing the NLC Full Council meeting at Timber Creek, November 2016

> *10.* ***The department's grants administration process fell short of the standard required to effectively manage a billion dollars of Commonwealth resources****. The basis by which projects were recommended to the Minister was not clear and, as a result, limited assurance is available that the projects funded support the department's desired outcomes. Further, the department did not:*
>
> - *assess applications in a manner that was consistent with the guidelines and the department's public statements;*
> - *meet some of its obligations under the Commonwealth Grants Rules and Guidelines;*
> - *keep records of key decisions; or*
> - *establish performance targets for all funded projects.*
>
> *11. The department has commenced some evaluations of individual projects delivered under the Strategy but has not planned its evaluation approach after 2016-17.*
>
> *16. The department did not meet its commitments with respect to providing advice on all the elements identified as necessary for the implementation of the Strategy.* ***The department also did not advise the Minister of the risks associated with establishing the Strategy within a short timeframe.***
>
> *24.* ***The department did not maintain sufficient records*** *throughout the assessment and decision-making process. In particular, the basis for the committee's recommendations is not documented and so it is not possible to determine how the committee arrived at its funding recommendations. The department did not record compliance with probity requirements. Further, the department did not maintain adequate records of Ministerial approval of grant funding.*
>
> *1. 15.* ***The ANAO does not have assurance that the department has produced complete records of the design and implementation of the Strategy****.*
>
> *2.9. The department advised the ANAO that it met with Indigenous leaders and national peak bodies outside of the council but* ***did not keep records of the meetings****. As such, it is not clear who the department met with, what feedback the department received and how this was considered in developing the Strategy.*
>
> *3.21. There is limited evidence that regional profiles were considered in the grant assessment process. As at August 2016, two years after the commencement of the regional network, the department has drafted but not finalised regional strategies.*
>
> *3.23. The department advised that it has provided the Minister with dashboard reports since August 2015. The reports include a short local issues section that, until January 2016, focused on the Community Development Program and Remote School Attendance Strategy. The dashboard reports provide a reflection of activity within the regions, but do not meaningfully report on the performance of the regional network.*
>
> *4.17. This meant that the* ***information from the application assessments was so aggregated that it did not provide meaningful information to the committee against the selection criteria, and subsequently the Minister.***
>
> *4.20. ANAO analysis shows that* ***some projects that were awarded a high score against the selection criteria and need score were not recommended for funding, and some low-scoring applicants were recommended.*** *For example, 59 projects that were awarded assessment scores of 20 or below and a need score of 3 or less were recommended for funding. Further, 222 projects that were awarded assessment scores of 26 or above, and a need score of six or above were not recommended for funding.*
>
> *4.25. The department provided the ANAO with a list of 415 demand-driven applications it assessed, but could not confirm that it was a complete list of the applications received. The ANAO identified 11 applications that were under assessment for more than one year, with the longest time between application and notification of outcome being 592 days.*
>
> *4.34. The review of applications identified* ***300 missing applications*** *that the department had*

received but not registered for assessment.

4.36. The requirement that all projects were assessed by two staff was not applied to all projects. Analysis by the ANAO identified that 815 out of approximately 5000 project assessments did not receive two assessment scores ...

4.37. As a consequence of being assigned an automated score, ***the 815 projects were not appropriately considered against each of the individual selection criteria*** *at the assessment panel stage.*

4.40. The probity plan required that committee meetings be recorded, with minutes signed by the Chair of the committee, and that the Chair ensure that the grant assessment process be comprehensively documented and tied explicitly to the selection criteria. The committee did not record minutes of its meetings, keep a record of the actions taken by the committee to address conflicts of interest recorded by committee members, ***or keep records of key decisions****.*

4.41. The ANAO was provided with two different spreadsheets that, according to the department, recorded the funding recommendations made by the committee. ***Neither spreadsheet matched with the value of funding recommendations recorded on the brief that the committee Chair signed to approve the recommendations to the Minister****, and one of the spreadsheets recorded recommendations that the department later advised the Minister were not an accurate representation of the committee's recommendations.*

4.46. ***The department provided descriptive information (such as project locations and electorates), but did not provide the Minister with assessments of the extent to which projects met each of the five Strategy selection criteria****. The department advised the ANAO that it provided the assessment score and need score to the Minister in its initial $917 million recommendation brief, but was unable to provide evidence of this.*

4.48. Similarly, ***the department did not maintain adequate records of the grants approved by the Minister.***

4.61. As such, ***the department has limited assurance that the process of negotiating funding agreements and amounts was conducted fairly,*** *and that applicants received similar treatment across the regional network.*

5.26. The department drafted an evaluation strategy in June 2014 ... A constraint on evaluation activity was that the evaluation strategy was not formalised and no funding was set aside to implement the evaluation strategy.

The ANAO has also published a copy of the letter responding to the audit from the Secretary of PM&C, Dr Martin Parkinson. It is a only a slightly more balanced response than that provided by the Minister, but is nevertheless a letter which no Secretary, let alone the Secretary of PM&C, would ever wish to have to sign.

Parkinson acknowledges what he terms shortfalls in "some" of the Department's processes, including record keeping. He notes, inter alia:

> *The department worked closely with the Minister for Indigenous Affairs and his Office to ensure that they were apprised of the progress being made and implementation challenges ...The department considers the shortfalls in its processes outlined in the Report and the potential implications arising from them are overstated when seen in the full light of the transition ...*

The substantive issues raised by the ANAO are extremely serious in their own right, but it seems to me that there are two broader issues which deserve attention.

The first goes to the quality of the advice provided by the Department to the Minister. The ANAO makes clear that the advice was substantively faulty in relation to a substantial proportion of the grants being considered. This raises broader issues relating to the capacity of the Australian Public Service (APS) to provide quality advice to Ministers. It needs to be remembered that while Indigenous affairs is a complex area of public administration, managing grants programs is core business for the bureaucracy and it seems almost unbelievable to me that a central agency such as PM&C could get it so wrong. One must wonder where the Department's Audit Committee was during this process. Where was the Executive Leadership Group which, according to the Annual Report for 2013-14, "considers strategic issues impacting on the Department, including any ongoing or emerging risks, and monitors performance in delivering outcomes"?

It was less than 10 years ago that Peter Shergold (the then Secretary of PM&C) identified policy and program implementation as key areas of focus for the APS and established an implementation unit in PM&C to drive a stronger focus on the issue across the APS.

More importantly, and more worryingly, is the implication which can be drawn from reading between the lines of Parkinson's letter, (and from paragraph 16 of the ANAO summary) that PM&C failed to properly advise the Minister of the risks of attempting to implement major change to Indigenous funding programs "within very ambitious timelines" presumably set by the Minister – either because it didn't recognise the full nature of the risks (but see paragraphs 2.18 and 2.19), or it decided to ignore or discount them. The inevitable conclusion drawn by the ANAO was that the bureaucracy did not provide appropriate (i.e., frank, fearless and quality) advice, and we might surmise that the Department was perhaps afraid to tell the Minister and Government that the reform agenda in the timeframe demanded was not possible.

This is an issue of much broader import than program administration in the Indigenous Affairs portfolio, and goes to the increasing politicisation of senior levels of the APS – not in a partisan sense, but in the sense that it is career suicide for a senior public servant to say, "No, Minister, that is not possible". This increased politicisation of the bureaucracy strengthens the arguments for stronger independent checks and balances elsewhere in the systems of public policy and administration.

The second issue goes to the notion of ministerial responsibility. It is appalling that no-one appears prepared to take responsibility for what is an extraordinary litany of incompetence and ineffective program implementation. Of course, the ANAO can only assess what is recorded and it may well be that the Department was verbally warning the Minister of the risks and the need to take corrective action. And, of course, once the course is set by the Minister, it is often impossible to turn the clock back. Given the inevitability that the bureaucracy's advice and relationship with the minister is a "black box", even to auditors, and that the levels of resourcing for agencies are set by governments, there is an extremely strong public interest in the Minister being held accountable for the performance of his Department. This is the normal Westminster theory, a notion which appears to be increasingly ignored in practice.

What is particularly concerning in the present case, and unprecedented in my memory, is the Minister's preparedness to denigrate the ANAO and attack the ANAO's conclusions (replicated more diplomatically by the PM&C Secretary). This has the effect of eroding the authority and independence of the ANAO and deserves public censure.

The overall outcome of all this is just too cute. The Department did not advise the Minister of the risks, so he takes no responsibility. The Secretary claims the program was integral to "a very ambitious reform agenda but one that was long overdue in the delivery of Indigenous programs" and any "shortfalls in its processes outlined in the Report and the potential implications arising from the are overstated when seen in the full light of the transition…", so there is no case for the Department to be held responsible. The Minister claims that as a result of "these remarkable changes" Indigenous people are "far better off", and the problems identified by the ANAO are merely of historical significance and in effect have either been fixed or are being fixed. No one takes responsibility.

The information disclosed in the ANAO Report may just be an account of teething problems in the reform of a complex grant program under tight deadlines. But those reforms, driven by the Minister, also created a system which created the potential for substantial subversion of normal grant management principles and normal principles of governance, where the Minister could, if he so wished, take funding decisions in accordance with whatever whim came to him, could reward favorites, punish enemies, without reasons being recorded, details kept, and all hidden from view and scrutiny. There is no evidence in the ANAO report that this occurred in relation to this program, but the question is: where is the assurance that it didn't occur, and where is the assurance that it is not occurring today? That is the purpose of good process, record keeping, timely transparency and equal and fair grant management processes.

We might believe that virtually all politicians and ministers are akin to saints and will never seek to pursue personal or political agendas; but the realist within tells me there will always be a minority who are prepared to opportunistically pursue self-interest and political agendas under the guise of operating in the public interest. And that is why all those with an interest in good governance ought to be concerned with what has been shown to have gone on here.

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Inside The Kenbi Land Claim

Negotiations: Watersheds and Waterlogs

Kirsty Howey*

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I felt a familiar mixture of elation and deflation as I read the headlines announcing the settlement of the Kenbi land claim in April 2016. While the stories covered the basics, they could never capture the complexity of a land claim which bookends the Northern Territory's own political history, which was publicly fought out in the High Court three times and the Federal Court four times, which brutally adjudicated the legal identities of the Aboriginal people who sought to be recognised by it, and which had taken over 15 years to settle since the Aboriginal Land Commissioner's 'final' report recommending the grant of Aboriginal land.

While the media outlets suggested that this was *the* apical moment in the history of the claim, for me it was but one of many watershed events in the 10 years in which I had been involved, raising the questions: how many decisive moments had there been over the 37-year history of the claim? And how often were the players, be they Aboriginal claimants, lawyers, anthropologists or bureaucrats, utterly convinced that the fate of the Kenbi land claim had been finally determined?

In this article, I explore this concept of stops and starts by describing the most recent phase of the Kenbi land claim, the negotiation of its settlement, and briefly reflecting upon the multiplicity of turning points during this phase (the watersheds), and the times the whole thing seemed to grind to a halt (the waterlogs).

I write from the perspective of a land council lawyer. The spheres of activity I have operated within limit what I can say. In particular, I cannot hope to understand the complexity and depth of meanings of the land claim to the Aboriginal groups who were involved, although I have some understanding of their perspectives as mediated through the NLC consultation process. What I do offer is the perspective of someone who has both observed and participated in the discursive relationships underpinning the Kenbi land claim settlement, a perspective beyond the brief media incursions into land council 'business' normally accessible to the reader.

Les Kundjil, Prince of Wales (playing didj), Johnny Bianimu, Tommy Barrtjap, Rusty Moreen, Bobby Lane 1979

Kenbi—a brief and inadequate legal history

Formally lodged in 1979, the Kenbi land claim was the key battleground in the fight for jurisdiction over land between the newly formed Northern Territory Government, and the NLC (established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) [*ALRA*]). The claim was particularly controversial because it covered prime real estate immediately adjacent to Darwin, encompassing the wealth of the Cox Peninsula's natural bushland, bountiful estuaries, calm harbours and sandy beaches. It was ripe for urban development and desired for hunting and fishing.

In 1978, just five months after the Northern Territory gained self-government, the new NT government tried to head off the Kenbi land claim by passing regulations which declared the Cox Peninsula part of the town of Darwin, expanding the city from 142.4 square kilometres to 4,350 square kilometres. Three months later, the land claim was formally lodged by the NLC. For the next decade, the parties were entangled in a series of complex court challenges related to the validity of these regulations. While this wrangling has provided fertile ground for generations of administrative law professors, in the end the NT's machinations were fruitless, with Justice Olney (the fourth Commissioner) holding in 1988 that the regulations had been made for the "improper purpose of preventing claims under the *Land Rights Act*" – (*Attorney General for the Northern Territory v Olney and the Northern Land Council* FCA [1439/88 Fed No 325] 11).

With these technical battles out of the way, the hearing of the traditional evidence could finally commence. But yet another barrier confronted the claimants, with Justice Olney finding that there were no "traditional Aboriginal owners" as required by the *ALRA* (although there was one person who satisfied the definition), and hence that the claim must fail. However, in a successful appeal, the Federal Court of Australia overruled Justice Olney's decision in 1992, finding that the descent criteria adopted by the Commissioner to fulfil the definition of traditional Aboriginal ownership were too restrictive (and that persons of matrilineal, not just patrilineal, descent could also satisfy the definition).

The consequence was that the whole claim had to be reheard, this time by a new Commissioner, Justice Gray. This meant that the claimants had to once again endure the arduous process of proving that they fitted within the definition of "traditional Aboriginal owners" as required to win a land claim.

There was a further complication, with the NLC on counsel's advice deciding to divide the Larrakia claimant groups into the Tommy Lyons group (a subgroup of the Larrakia comprising six people), and the 'wider' Larrakia (comprising approximately 2000 people). The Belyuen families long resident on the Cox Peninsula also decided to make a separate claim, as did a further subgroup of the Larrakia, the Dangalaba clan. The NLC funded separate legal and anthropological representation for all four claimants groups.

The decision to split the claim can be seen as either inspired or devastating, depending

Former Land Commissioner Peter Gray with Principal Legal Officer Michael O'Donnell at the Kenbi handback ceremony 21 July 2016

on one's perspective. In December 2000, Justice Gray found that the six members of the Tommy Lyons group were "traditional Aboriginal owners" of most of the land claim, and recommended that this land be granted as freehold to an Aboriginal land trust for their benefit, as well as for the benefit of the other claimants who were found to have traditional rights and interests in the land. While it initially looked like the findings might again run the gamut of the court process, challenges by the NT and members of the Dangalaba clan were discontinued. It was a victory—at least for some.

From a legal process to a political one—why did Kenbi need to be 'settled'?

Most claimants consider they have "won" a land claim after the Commissioner's report is published, and there is usually only a short period between the report and the handover ceremony where the deed of grant of Aboriginal land is delivered. In Kenbi, there was a delay of over 15 years.

Legally, under the *Aboriginal Land Rights (Northern Territory) Act 1976*, there are two steps that must be taken between the Commissioner's report and the grant. First, the Minister for Indigenous Affairs, once satisfied that the land claimed should be granted to a land trust, must establish the land trust and recommend to the Governor-General that the grant be made. Second, the Governor-General, upon receiving the recommendation, may execute the deed of grant and deliver it to the land trust (usually at a handover ceremony).

Kenbi Land Claim Hearing at Belyuen 1989-1990

Accordingly, the decision whether to recommend the grant of land after a Commissioner's report lies firmly within the discretion of the relevant minister, requiring a shift from the legal and anthropological domain to a realm 'pregnant with political controversy' (Brennan J in *Re Toohey; ex parte Meneling Station Pty Ltd* 1983 44 ALR 63 at 91) While the weight to be given to various matters is for the minister to decide, there are constraints. In reaching their decision, the minister must have regard to the Commissioner's report, in particular to the matters commented upon in accordance with s 50(3) of the Act (that is, 'the detriment' to persons or communities that might result if the land was granted).

It was alleged detriment to others that made the grant of land in Kenbi such an elusive goal. There were over 100 stakeholders claiming interests in the Cox Peninsula, from squatters with illegal beach shacks, to lighthouses, to recreational and commercial fishers, to gravel extraction tenement-holders. To that may be added the general public of Darwin, represented by the NT Government, which claimed it would suffer detriment if the land were granted to a land trust due to its inability to expand Darwin. While the Commissioner gave the NT's expansionary plans for Darwin short shrift (including the optimistic planned growth of Darwin from a town of 100,000 to a city of 1 million), he did find that it would suffer detriment from the grant. There were other stakeholders whom the Commissioner found would not suffer detriment (including the squatters, because they had no legal rights to begin with, and the holders of mining tenements, because their interests would be preserved).

The political reality for the claimants was that, in order to get the land granted, they would need to make arrangements with all people claiming to possess interests on the Cox Peninsula (whether legally recognised or not). The word "settlement" could thus be substituted with "compromise", for this is what was required. Having fought so hard during the land claim process, the claimants now needed to find some way to accommodate those who had opposed their claim in order to "satisfy" the minister that the land should be granted.

The negotiation phase—key turning points

If the hallmark of the claim process was disputation and retreat to the courts, the hallmark of the negotiation process was pragmatic cooperation. The desired goal was accommodation between development and Aboriginal property interests. This change in approach was attributed by some to the new NT Labor Government which, voted in after 23 years of conservative rule in 2001, immediately discontinued a Federal Court challenge to the Commissioner's findings. However, the preceding years under the conservative NT Government had been marked by several landmark native title settlements for the Larrakia in the Darwin region, and subsequent Kenbi negotiations built on this success. The negotiation commenced in earnest in early 2006 (just after I joined the NLC), and through accident rather than design there was a constellation of very capable NT, NLC and Commonwealth senior staff assigned to the matter who had worked together before and could see a way through. My impression was that all stakeholders knew that agreement was the only way through the political process now being faced—otherwise there was a risk that the land under claim could conceivably be "locked up" forever. (It is not possible to "deal" with land under a traditional land claim, including the grant of leases or other developments, except in limited circumstances: see s67A of the *ALRA*.)

What did the negotiation look like? It took different forms at different times, but physically it looked like a large rectangular conference table in Darwin with senior bureaucrats seated around it, slowly working through a schedule of "detriment issues" one by one, allocating tasks, and returning to the same table every fortnight to report on their progress. This is the mundane reality of a complex negotiation, and it was during this productive period that the key tenets of today's settlement were thrashed out.

Urban development—the Gordian Knot

Although I don't recall the exact date, I remember the day the NLC conveyed the news that the Larrakia and Belyuen people did not agree that the whole northern coastline of the Cox Peninsula should be freed up for immediate urban development. The NT bureaucrats' shoulders visibly sank, the despair in the room palpable. The process seemed to screech to a halt.

The issue that needed resolution was the NT's desire to pursue the planning of Darwin for an expanded population by making land along the northern coastline available for urban development as NT freehold.

On the other side of the table, the Larrakia and Belyuen people had made it clear to the NLC in consultations that there was one non-negotiable: all the land subject to claim had to be returned to Aboriginal ownership, as had occurred in every successful land claim. They were willing to countenance that some of the land along the northern coastline be granted as NT freehold to the recently established Larrakia Development Corporation for immediate development, but not all of the land flagged for development by the NT.

But, just as quickly as the roadblock emerged, it seemed to magically disappear. The solution, suggested by a NT lawyer, was to create an Aboriginal land trust under NT legislation to which the "developable" land would be transferred. A similar form of tenure had recently been created to underpin various national parks under the NT "parks deal"—and many of the people seated at the table had been part of those negotiations.

The land would operate in the same way as Aboriginal land granted under the *ALRA*, but would come under the NT's jurisdiction and hence be subject to NT law rather than Commonwealth law if dispute arose regarding future development.

Thus, uniquely for the settlement of a land claim, there would be three forms of tenure underpinning the settlement: the vast majority would be granted as inalienable freehold title to an Aboriginal land trust under the *ALRA*, a portion on the north-eastern side of the claim area would be granted as NT freehold to the Larrakia Development Corporation or a similar commercial entity representing Larrakia interests for immediate development, and some land along the northern coastline would be granted as NT freehold to a land trust established under NT legislation with future development expected over the longer term. Native title issues (which were significantly curtailed when the Larrakia lost their native title claim in 2006) would be resolved by an Indigenous land use agreement which would extinguish any native title over the land granted to the Larrakia Development Corporation so the land could be developed and sold as unencumbered freehold, but also provided that the grant of land to the NT land trust would be subject to the non-extinguishment principle.

Once this issue was resolved, the proposed resolution of the other detriment issues seemed to follow quickly—the Gordian knot had been cut. The Gordian knot metaphor was Ron Levy's (former principal legal officer at the NLC), not mine.

The settlement of Kenbi—the false start and the power of documents

From reading the news headlines about Kenbi in early 2009, and then again in mid-2011, it would appear that Kenbi had been settled before. In March 2009, the NT and the NLC jointly announced the signing of an "In-Principle Settlement" (IPA) proposing the resolution of all stakeholder issues. Then in June 2011, the Commonwealth jumped on board, with former PM Julia Gillard signing a Heads of Agreement (HOA) that formally adopted the IPA.

The elevated status that these documents assumed in the years following their signing baffled me. To my lawyerly brain, they were more political documents than anything else, with the IPA in particular designed to place pressure on the Commonwealth to agree to the proposed settlement. They were quickly drafted and not legally binding, in the amorphous category of a memorandum of understanding. A lot more work was needed by all parties to flesh out the detail of the settlement. For example, a vague reference in the IPA to a lease needed to be bolstered with details of the term, rent payable, lease area and other conditions, most of which required further negotiation with external parties.

However, despite their lack of legal clout, the IPA and HOA exerted a coercive force throughout the negotiation. Time and time again when things got tense, or a party would suggest a creative resolution of an issue, the other parties would retreat into the clauses of the IPA and HOA as evidence of what had "been agreed". As

suggested by sociologist Dorothy Smith, in her book *Conceptual Practices of Power: A Feminist Sociology of Knowledge,* these texts stabilised institutional memory of the settlement, and coordinated and structured the action that came after them (also D Smith, *Writing the Social: Critique, Theory and Investigations*). They became historical artifacts with present-day impacts, ossifying the key components of the settlement as at 2009 and 2011 and making renegotiation of resolved issues difficult. Through this force, they also gave some much needed stability and structure to the negotiation and impacted subsequent texts, metamorphosing into the over 100 legal documents which now underpin the settlement.

The Kenbi settlement was announced 6 April 2016 at Parliament House Darwin: From left, Traditional Owners Zoe and Raylene Singh, NLC Chairman Samuel Bush-Blanasi, and Traditional Owner Jason Singh.

Surprise, chaos and the policy context

It is impossible to do justice in this article to all the other quirks that characterised different components of the Kenbi settlement, and contributed to its final form. While the basic structure of the settlement as set out in the IPA has remained consistent for nearly a decade, it has been battered about by the chaotic reality of a multilateral negotiation. No one foresaw the extent of asbestos and polychlorinated biphenyls (PCB) contamination on certain areas of Commonwealth land, which required a lengthy bureaucratic and parliamentary process to ensure the allocation of $31.5 million to clean up the mess. Nor did anyone realise just how difficult it would be to reach agreement about the compensation package to be paid in exchange for giving the public the right to access and fish the intertidal zone and beaches of the Cox Peninsula, a necessary consequence of the High Court's *Blue Mud Bay* decision in 2008. Evolving Commonwealth and NT policies to obtain and pay market rent for leases on Aboriginal land also impacted the negotiations. This package included a $6 million parcel of land on the railway corridor at East Arm Wharf, leasehold title to the old Retta Dixon home in Darwin where many Larrakia members of the Stolen Generation grew up, and a right of first refusal to a residential development in the satellite city of Palmerston, with the Larrakia Development Corporation to receive all these benefits.

The revolving door of politicians and bureaucrats had a big impact, sometimes bringing renewed vigour which spurred things along, but more often than not slowing the whole thing down while a cast of new characters "got their head around" Kenbi. The settlement is very much a product of its time—if negotiations started today the final package may look very different.

The Aboriginal groups—consent and consultation

What is starkly missing from the foregoing discussion is the space for the Aboriginal claimants in the negotiation process. While I am cautious about trying to speak for them in any way, for many Larrakia and Belyuen people the negotiation of the settlement has perpetuated the deep distress and devastation felt from the Commissioner's findings that only six people met the legal definition of "traditional Aboriginal owners". The Federal Court's ruling in *Risk v Northern Territory* in 2006 that the Larrakia did not possess native title rights and interests over Darwin, notwithstanding the Commissioner's finding in 2000 that every Larrakia and Belyuen person had at least a traditional right to hunt and fish on the adjacent Cox Peninsula, compounded this anguish.

There are tangible legal and social effects flowing from the Commissioner's findings. While the Larrakia and Belyuen people have the right to be consulted about the land under claim, the members of the Tommy Lyons group who were identified as traditional Aboriginal owners are catapulted to decision-makers whose consent (as a group) is required for all development under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), ss 19(5) and 23(3). While I consider the Larrakia and Belyuen people were integral to the settlement process, many do not share the Commissioner's view as to traditional ownership, and feel keenly disappointed at their status as people to be "consulted", rather than people who "consent".

It was and is the NLC's function to facilitate consultations with respect to the settlement, and it held over 100 meetings with members of the Tommy Lyons group, and Larrakia and Belyuen people over the course of a decade about the settlement. The process has been hard and deeply affecting for NLC staff and the groups involved. While many Larrakia and Belyuen people supported the settlement, I got the sense from others that approving the settlement was seen as forever enshrining the findings of the Commissioner. In fact, once the land is granted, the NLC can appropriately review traditional Aboriginal ownership, effectively deferring this issue for another day and perhaps setting the stage for a future Kenbi battleground.

For the Aboriginal claimants, one can only speculate about what the decisive moment was in the Kenbi land claim. It is likely that there have been many. One may have been the NLC's decision to split the claim by elevating a subgroup of the Larrakia to a higher status, with many Larrakia believing that it sounded the death knell for their claim to the Cox Peninsula. Scambary writes about how divisive this decision was at the time, fuelling "intense contestation" about Larrakia identity and authenticity. A converse view is that it ensured the success of the land claim for all Aboriginal claimants, and should be celebrated. Other turning points might be the way the genealogies were compiled by the NLC, which particular lawyers or anthropologists were appointed to run the claim, or which piece of crucial historical evidence was accepted or ignored. Or perhaps the announcement of the settlement on 6 April 2016 was the defining moment in the claim.

No land claim or native title claim can ever parallel the Kenbi land claim for the fierceness of its contestation, nor the complexity of its issues. There have been many times over the last 37 years when all appeared to be lost, either through government maneuvering, the court process, or the political realities of the negotiation. The claim has such deep meaning, for Aboriginal groups as well as the armies of lawyers, anthropologists, politicians and bureaucrats whose careers, and perhaps identities, have been defined by their involvement and whose efforts I wish to acknowledge here. Whether or not all support the settlement, most would acknowledge that the return of this land to Aboriginal ownership is nothing short of remarkable.

*Kirsty Howey worked at the NLC for 10 years as a lawyer, including on the Kenbi land claim settlement. She is currently undertaking a legal and ethnographic study of the Northern Land Council as a PhD candidate at the University of Sydney.

Land Rights Act: 40 years on

Australia Day, 26 January 2017, was the 40th anniversary of the commencement of the *Aboriginal Land Rights (Northern Territory) Act*. On the occasion of the anniversary, Ross Howie draws on his experience as a lawyer who worked on land claims for more than two decades.

Ross Howie*

When in November 1972 Gough Whitlam declared his intention to give Aboriginal people in the Northern Territory land rights "not just because their case is beyond argument, but because all of us as Australians are diminished while the aborigines are denied their rightful place in this nation", he overcame the opposition to land rights of years of conservative governments since the Bark Petition in 1963 and the Gurindji walk-off in 1966. The appointment of Justice Woodward as the Aboriginal Land Rights Commissioner a few months later in February 1973 and his two reports in July 1973 and April 1974 led to the tabling of the Aboriginal Land Rights Bill in the House of Representatives in October 1975. There it lay when the Whitlam Government was dismissed the following month on 11 November 1975.

During the following election campaign Bob Ellicott, shadow Minister for Aboriginal Affairs, promised in a telex message to pass the land rights legislation if elected to government. Powerful forces opposing land rights were mobilised – the Northern Territory Administration, the mining industry, the pastoral industry, the Finke River Mission. The opposition continued with the election of the Fraser government in December 1975. The Central Land Council (CLC) and the Northern Land Council (NLC), which had come into existence to make submissions to the Woodward Inquiry, campaigned vigorously to have the legislation passed. Geoff Eames, the lawyer working for the CLC, played the critical role in that campaign.

Eventually, in December 1976, the *Aboriginal Land Rights (Northern Territory) Act 1976* was passed. It came into operation on Australia Day of the following year, 26 January 1977, 40 years ago. Twenty areas of land, former reserves and missions, were included in Schedule 1 of the Act, to become Aboriginal land on the establishment of relevant Land Trusts. Land claims on the basis of need, which had been part of the original Bill, were not included in the Act as passed. Land claims to unalienated Crown land, and land held by or on behalf of Aboriginals, required proof of traditional ownership according to the complex definition provided in the Act.

What an extraordinary 40 years it has been. More than half of the land in the Northern Territory is now freehold Aboriginal land held by Land Trusts for the benefit of Aboriginal people entitled by Aboriginal tradition to the use or occupation of the land. Much of that land, the land not included in Schedule 1, has been won in more than sixty traditional land claims heard and determined by Aboriginal Land Commissioners – Justices Toohey, Kearney, Maurice, Olney and Gray. Early Ministers for Aboriginal Affairs, particularly Ian Viner, Fred Chaney and Peter Baume, were of critical importance in their staunch defense of the Act against the continuing attacks of the miners, the pastoralists and the Northern Territory Government.

What must be acknowledged is that the achievements of the Land Rights Act have been due most of all to the successful work of the land councils – the CLC and the NLC. They have made the Land Rights Act work. There would be no land rights without these two land councils. Those who attack them attack land rights. They are an essential part of the Woodward proposal and the key element in the structure of the Land Rights Act. Their role in identifying traditional owners, acting on their instructions, lodging and preparing land claims, providing expert advice and professional skills for proposed use of land, are essential for the Act to work. And it has worked, despite the attacks on the land councils, which, at times, have seemed relentless.

> **"The Central Land Council and the Northern Land Council … have made the Land Rights Act work. There would be no land rights without these two land councils."**

For those involved in land claim work, as I was for 24 years from 1978 to 2002, there have been many memorable moments. One was to give effect to the promise made by Prime Minister Whitlam to Vincent Lingiari at Wattie Creek on 16 August 1975 when, handing to him a title and pouring a handful of dirt into his hand, he said to him: *Vincent Lingiari, I solemnly hand to you this deed as proof in Australian law that these lands belong to the Gurindji people, and I place in your hands part of the earth itself as a token that these lands will be in the possession of you and your children forever.* The title he handed to him was, in fact, a pastoral lease which ran until 30 June 2004, a period of 23 years. For anything better it was necessary to bring a claim to the land under the Land Rights Act. The land claim to Daguragu Station was heard by Justice Toohey in 1981. It was not until his report in November 1981, and judgment in March 1984 following an appeal to the High Court, that a freehold grant of the Gurindji land was made.

Geoff Eames has a lovely story about the handover, which he emailed to me on the day of Gough's passing (Tuesday 21 October 2014, aged 98). "I watched the film of the handover of title at Wattie Creek, and it is all so memorable. Gough had handed me the title document (a lease, at that stage) for safe keeping, after the famous earth in Vincent's hand photo, and people kept borrowing it for photos, until when he asked me to hand it back (presumably, for his own photo op) I said I had no idea where it was. 'Christ', he said, 'it took them two hundred years to get title back and you lost it again in one day'. Fortunately, I did track it down – safe but with red earth finger marks all over it."

There would not have been a successful claim to the Gurindji land if the claim to Utopia Station had not been successful. The Utopia claim was the first cattle station claim and the first claim under the Land Rights Act to be considered by the High Court. It began before Justice Toohey in September 1979. Self government had been given to the Northern Territory on 1 July 1978. There was no shortage of political testosterone. The newly empowered government was incensed by anything that questioned its sense of its power, particularly the Land Rights Act. It was bitterly opposed to Aboriginal owned cattle stations becoming Aboriginal land. The Attorney-General and Chief Minister Paul Everingham attacked the land claim to Utopia Station and the Land Council alleging that the claim had been lodged without instructions and that the station would become "a running sore" and "a harbor of disease". A complaint about such language to the Solicitor General Ian Barker QC was rejected by him as "a mere impertinence". Mr Everingham, as Attorney-General, brought proceedings in the High Court to stop Justice Toohey hearing the claim.

The High Court dismissed the proceedings. The Court, Barwick CJ dissenting, agreed with the Land Council submission that the lease held by the Aboriginal Land Fund was held "on behalf of Aboriginals" and as such could be subject to a traditional land claim under the Act. Since then, in addition to Utopia, seven other cattle stations, including Daguragu Station (Wattie Creek), have been successfully claimed and become inalienable freehold land.

The negotiations over the Mereenie oil field, 225 kilometres south-west of Alice Springs, were an interesting example of the ongoing resistance to the Land Rights Act by the Northern Territory Government and the mining industry. The Magellan companies had permits to explore for oil, but under the Land Rights Act had to make an agreement with the Land Council before a mining interest could be granted. They complained loud and long about this requirement, issuing statements on the Stock Exchange, and bombarding the Commonwealth Government with letters and submissions claiming that the Act was not working and calling for it to be changed. They were supported by the Minister for Mines Ian Tuxworth, the local member Roger Vale, the CLP senator Bernie Kilgariff and MHR Sam Calder. Each of them attacked the Land Council.

These attacks were firmly resisted by Commonwealth Ministers for Aboriginal Affairs Ian Viner and Fred Chaney. It was only after a meeting in June 1979 when Mr Chaney spelt out to Magellan and to Mr Tuxworth that "the Act will not be amended, start talking to the land council, make an agreement", that genuine negotiations commenced. An agreement was reached by the following February.

Since those early days there have been numerous agreements with mining companies, and the efficacy of the Act and ability of the land councils to make agreements have been demonstrated again and again.

Each year since September 1977 when the hearing of the first land claim, the Borroloola land claim, began, there have been land claim hearings. Each of these claims involved a massive amount of work for the Land Councils in researching, preparing and presenting the claims. The burden of this work has been borne by the field staff, the researchers, the solicitors and the counsel they engaged. The field staff have been magnificent. Toly Sawenko, Barbara Cox, Gavin O'Brien and Maria Loveson come to mind, but there have been many others. The anthropologists and linguists are too numerous to mention, but without doubt one of the pleasures for the lawyers involved has been to work with colleagues of such ability and skill. I want to mention the land council solicitors – Geoff Eames, Mark Hird, John Coldrey, Bruce Donald, Neil Andrews, Tom Keely, David Avery,

> **"Land claims are … invariably substantial, lengthy, and complex litigation, and often enough, vigorously contested."**

James Nugent, Paul Burke, Jonathon Rodd, Phil Teitzel, Brett Midena, Robert Blowes, Ray Plibersek, Ione Rummery, Sean McLaughlin, Tony Young, Susan Gilmour, Jessica Klingender, Mick Dodson, Ian Gray, Ron Levy … with apologies to those I have overlooked.

Land claims are legal proceedings. They are invariably substantial, lengthy, and complex litigation, and often enough, vigorously contested. There would have been no land claims without these lawyers who lodged them, prepared them and dealt with the manifold issues involved.

Each land claim is memorable for the experience it brings of working with Aboriginal people, many of them remarkable men and women, and representing them in matters of such importance to them.

Two land claims, Warumungu and Kenbi, were particularly memorable, for the time they took, the opposition to them, and the number of times they went to the High Court. Each was a claim to land adjacent to a town, Tennant Creek in the case of Warumungu, and Darwin in the case of Kenbi.

The hearing of the Warumungu claim, lodged in November 1978, commenced before Justice Kearney in November 1982. It had difficulties due to the anthropologists' report (the "R Report") which was ideological and verbose in style, significantly irrelevant in content, and failed to address issues required by the Land Rights Act. Fortunately, during the first week of the hearing it was revealed that the Northern Territory Government had alienated areas of land under claim to its Development Land Corporation. Justice Kearney ruled that those areas were no longer "unalienated Crown land" and could not be claimed. The hearing was adjourned and the Land Council appealed to the High Court. In March 1984 the Court upheld the appeal and held that the land, save for one area, was able to be claimed and the Commissioner had jurisdiction to hear the claim.

The hearing then recommenced before Justice Maurice in Tennant Creek in March 1985. In the meantime the unhelpful R Report had been abandoned and a new report prepared by competent researchers. It was a keenly fought case with many parties, including the Northern Territory Government, contesting the claim. In the fifth week of the hearing, as he heard the evidence of the Aboriginal claimants and of the opposing parties, the judge expressed his "developing sense of powerlessness and frustration" at the limits of what might be achievable under the Land Rights Act. He made the following plea.

> *we are into our fifth week and we have heard a lot of evidence from Aboriginal people who have got quite clearly traditional claims to ownership of country around Tennant Creek. We have heard quite a lot of evidence from non-Aboriginal people who have got legitimate expectations in respect of the same country. The claims that have been made by the Aboriginal people have quite understandably been made to the areas they have because they are the only areas left. They are not necessarily the areas of choice, but because they are the only areas left and because they affect non-Aboriginal interests, they create tremendous divisiveness and put people in confrontation with one another. Is there no way that all the parties could get together and work out alternative areas which could become Aboriginal land in lieu of some of the more contentious areas under claim*

Despite this plea the hearing continued during 1985. It became even more contentious. The R Report had suggested that descent was not a factor in responsibility for land. Although the claimants did not rely on this report, the Northern Territory was hopeful of finding information in the field notes of the researchers damaging to the claim. Summonses were served on each of the researchers requiring them to prepare affidavits and produce all documents relating to their research for the land claim, including their field notes. As they had been engaged by the Land Council, and some had carried out work for the Sacred Sites Authority, both the Land Council and the Authority became involved. Issues of public interest immunity, and of legal professional privilege and waiver were raised. The researchers made their affidavits, produced their documents,

Ross Howie, Central Land Council lawyer, delivers opening address to the Aboriginal Land Commissioner, Justice John Toohey, at Dagaragu during the land claim by Gurindji to Dagaragu Station, July1981.

were called by the claimants and gave their evidence. R was not called by the claimants and was separately represented.

On 1 October 1985 Maurice J gave a comprehensive ruling on the issues relating to the production of documents. He held that as the R Report had not been tendered in evidence by the claimants, and was not relied upon by them or deployed on their behalf, they had not waived their privilege in information gathered by him. He also held that there was an insufficient basis for a claim by the Sacred Sites Authority of public interest immunity in the information gathered by it.

The Attorney General for the Northern Territory challenged the decision of Maurice J. The Federal Court upheld his decision. The Attorney General appealed to the High Court. This was the second occasion that the Warumungu claim had gone to the High Court. The Court dismissed the appeal. The Sacred Sites Authority also challenged the ruling of Maurice J. That application was dismissed by the Full Federal Court (Bowen CJ, Woodward and Toohey JJ).

Kenbi Land Claim Hearing at Belyuen 1989-1990

In the meantime two other contentious issues had arisen. In March 1986 Maurice J had ruled that, although there was an error in the application in the description of the claimed land, the intention of the claim was clear. The Attorney-General (NT) challenged this ruling in the Federal Court. Beaumont J upheld the ruling in November 1986, and the appeal by the Attorney to the Full Court was dismissed in July 1987. The judge had also ruled that a stock route was a road and could not be claimed. The Full Court disagreed and held that stock routes could be claimed.

After these diversions the hearing of the Warumungu land claim recommenced on 23 February 1987 in order to complete the evidence and submissions in the case. It was the 52nd day of the hearing. Maurice J expressed his frustration.

> *My concern about these matters will have been obvious from the pleas I have made to the participants to try and reach some compromise …. The Northern Territory has offered no alternative, at least none that I am aware of. Still, that is typical of its approach to all of the claims under the Land Rights Act in which I have been involved … its actions consistently betray an underlying hostility to the basic principle of land rights for a dispossessed people. It does nothing to acknowledge the moral strength of any of their claims.*

On day 54 a senior pastoral inspector gave evidence that when he went from Darwin to inspect Singleton Station, after once being refused entry and turned back, he had been met by the pastoralist's solicitor who remained present during the inspection, and was later asked by a superior to tone down his report. The judge's observations concerning this evidence, which included *I must say that the evidence which you have given seriously disturbs me and it raises questions about some form of patronage going on in this Territory* attracted the interest of the press, and led to ongoing fiery exchanges between the judge in court and the Chief Minister Mr. Hatton in the media. It was complicated by the fact that an election was taking place, that counsel assisting, John Reeves, was a Labor candidate in the election and he also made public statements.

On 23 March 1987, day 61 of the hearing, the Attorney-General, now represented by David Bennett QC, applied to the judge to disqualify himself. An affidavit in support of the application by Peter Conran, Deputy Secretary of the Department of Law, revealed the astonishing information that on 4 March 1987 counsel for the Northern Territory, including Ian Barker QC, who was in Darwin for the Morling Inquiry into the Chamberlain case, had met with the judge and counsel assisting. It was news to counsel for the claimants, who were not at the meeting and had no notice of it.

Maurice J refused to disqualify himself. The Attorney General brought an application in the Federal Court to prevent him from proceeding further with the hearing of the Warumungu claim. On 13 April 1987, the Full Court, who began the judgment with the words "This is a most regrettable case", dismissed the application. The Court held that although the judge had been severely critical of the competence of the Northern Territory Government and had cast aspersions upon its integrity, it could not be reasonably apprehended that he might not resolve the issues before him in the Warumungu claim in a fair and unbiased way.

The hearing resumed on 21 April 1987. There was further evidence in April and June and submissions in August. It concluded on 19 August 1987, day 69. Justice Maurice delivered his report on 8 July 1988. At 280 pages it is the longest Land Commissioner's report. The Warumungu claim was really the equivalent of many claims. There were fifteen areas under claim and eleven claimant groups. The judge found claimant groups to be traditional owners of twelve of the areas and recommended those areas for grant. He dealt comprehensively with the large number of people and bodies with interests in the land claimed and the manner in which they may be affected. It is an impressive document. Most impressive of all is the way in which he acknowledged the Warumungu people.

> *One has only to read the accounts and view the photographs and drawings of Spencer and Gillen to realise that in 1901 the Warumungu were a flourishing nation in the ordinary sense: a large number of people of mainly common descent, language and history, inhabiting a territory bounded by defined limits and forming a society under one government. They were reputed to be the most numerous, most intelligent and physically the best tribe in Central Australia.*
>
> *Within a matter of years, the Warumungu had been almost completely dispossessed. They had fought vigorously to defend their inland state from the white invasion, but their spears and boomerangs were no match for men on horseback carrying firearms. …Astonishingly, perhaps, much of the Warumungu identity remains, and even today the sense of belonging to land is a powerful influence in the lives of these people in the Barkly Region. In a sense, white Australia has been caught in delicto with the Warumungu. We have taken all their good land; no watercourse remains which does not have some European claim to it. We have comforted ourselves with myths about what Aboriginal people wanted, what was important to them, what was good for them – all the while taking more and more of their land, shifting them here, shunting them there; until all that was left was desert wasteland and what the Northern Territory Government would describe as public purpose lands. …*
>
> *We nearly got away with it: perhaps another generation or two and the Warumungu would have become so detached from their traditional land base that their spiritual affiliations and much of their oral traditions would have been lost. …Sadly, the Northern Territory has not recognised the moral strength of Aboriginal land claims or, indeed, the fundamental place that belonging to land has in shaping Aboriginal self-identity. Encouragingly, the general population of Tennant Creek has: their support for the claimants' proposals to compromise important parts of their claim – proposals not treated seriously by the Government – marks the town apart from many others where black and white Australians live.*

In the report he wrote of people's landedness, that their identities "have been shaped by the distinctive Aboriginal society in which they have grown up and live and the traditional culture which has been such a part of their lives. Though their lifestyles may be vastly different from what they would have been had they lived one hundred years ago, the superficial trappings of white civilisation belie the fact that, in my judgment, they remain deeply Aboriginal. Everything about them finally attests to this. The way they talk, the way they think, their mannerisms, the things they talk about, how and where they live, what they eat, how they dress and groom themselves, how they relate to one another and to other Aboriginal folk – the whole atmosphere of their presentation." This is such a splendid insight.

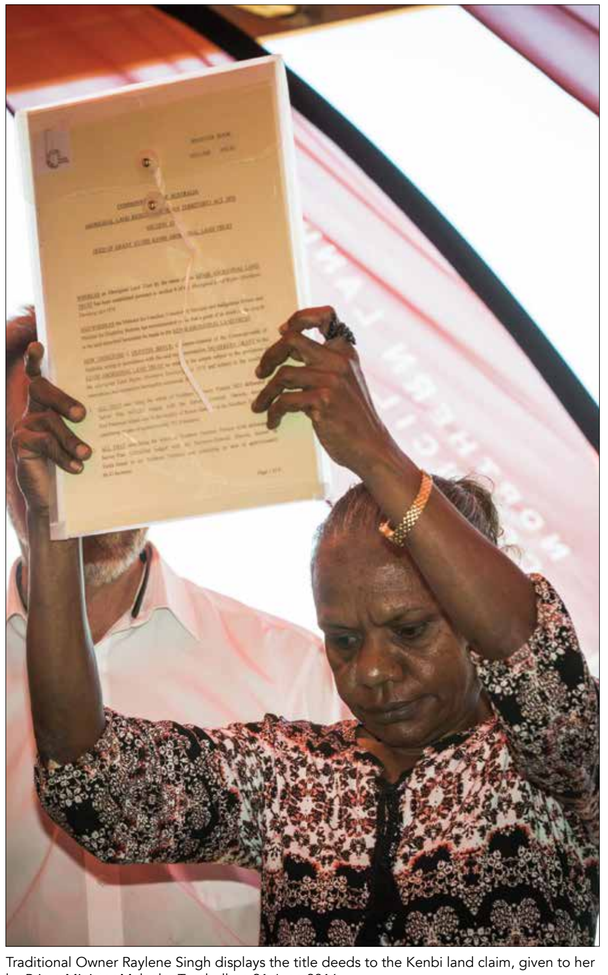
The other epic land claim, of course, was Kenbi. The application for Dum-In-Mirrie Island lodged on 29 June 1978 was consolidated with the application for the Cox Peninsula on 20 March 1979. Thirty-seven years later, on 21 June 2016, the Prime Minister handed deeds of grant to the land to the traditional owners. It was an extraordinary legal achievement to overcome the massive obstacles erected to defeat the land claim. On 22 December 1978 the Northern Territory Administrator, acting on the advice of the Executive Council, passed regulations making the Cox Peninsula part of the town of Darwin.

The purpose seemed to be to block the land claim, as land in a town could not be claimed under the Land Rights Act. The Land Council challenged the validity of the regulations as not being a proper exercise of the power under the Town Planning Act and made for the ulterior purpose of defeating the land claim. Justice Toohey ruled that the motives of the Administrator could not be examined, that the regulations were valid, and the land could not be claimed. The Land Council challenged this ruling in the High Court. On 24 December 1981 the Court held that the claimants were entitled to challenge the validity of the regulations on the ground that they were made for the ulterior purpose of defeating the land claim.

The Northern Territory then objected to producing the documents relating to the making of the regulations, claiming they were subject to legal professional privilege. Justice Kearney dismissed that objection and ordered that the documents be produced for inspection by the Land Council. The Attorney General's appeal to the Federal Court was dismissed and his appeal to the High Court was also dismissed.

When the opportunity came to examine the memos of senior officers of the Northern Territory there were some real gems. One from the Department of Law to the Solicitor General (Ian Barker QC) dated 28 November 1978 began: "I refer to your request that I examine further the methods by which certain lands in the Northern Territory may be taken out of the definition of 'unalienated Crown land' within the meaning of Section 3 of the *Aboriginal Land Rights (Northern Territory) Act*." The proposal to use the regulatory powers under the Town Planning Ordinance to treat the land as a town led the solicitor general and others to "agree that the proposal is the neatest solution to the problem." Mr Barker's memo of 1 December 1978 headed "Aboriginal Land Rights and Town Lands" noted: "Our decision on Wednesday was to make regulations under the Town Planning Ordinance so that the unalienated land east of Darwin and on the Cox Peninsula becomes a 'town' within the meaning of the *Aboriginal Land Rights (Northern Territory) Act*."

Having seen the documents the Land Council proceeded with the application to have the regulation declared invalid. It came before Justice Maurice in March and April 1987, the same time period in which the last aspects of the Warumungu claim were being heard. Because of remarks made by the Judge in the closing stages of the Warumungu claim, the Northern Territory applied to the Federal Court for him to be disqualified in the Kenbi claim. The Full Court prohibited him from proceeding with the Kenbi claim. Justice Olney then heard the case concerning the validity of the 1978 regulations. It ran for seven days from 18 to 26 October 1988. He gave his decision on 8 December 1988.



Traditional Owner Raylene Singh displays the title deeds to the Kenbi land claim, given to her by Prime Minister Malcolm Turnbull on 21 June 2016.

> *I have not the slightest hesitation in concluding from the evidence … that [the relevant Minister] embarked on a course of conduct designed for the purpose of ensuring that the land could not be made the subject of a land claim. … On the evidence I find as a fact that the regulations were planned and implemented, from start to finish, to ensure that no Aboriginal land claim could be made … That was the sole reason for making the regulations … [They] were not a valid exercise of the regulation making power … It follows that the land described as Cox Peninsula … was not at the time the claim was lodged … land within a town*

The Attorney General's challenge to this decision was dismissed by the Full Court on 28 June 1989. Special leave to appeal was refused by the High Court on 15 September 1989.

At last, roughly ten years after it commenced, the Kenbi land claim could be heard. Justice Olney commenced hearing it in November 1989 and concluded in December 1990. He presented his report on 21 February 1991. What an irony, after all these battles, he found that there were no traditional owners of the land. The Land Council applied to the Federal Court to review this decision. On 27 February 1992 the Full Court held that Justice Olney had made errors of law, in particular holding that the expression "local descent group" in the definition of traditional Aboriginal owner in the Act should be construed to mean "patrilineal clan", and set aside his decision.

Justice Gray commenced the second inquiry on 16 October 1995. Despite the fact that the transcript of evidence and exhibits in the earlier inquiry were evidence in the second inquiry, it still occupied fifty-seven sitting days, concluding on 4 June 1999. In this inquiry the Land Council provided separate representation for three groups of claimants, the larger group of Larrakia claimants, the Belyuen community, and a smaller group of Larrakia claimants known as the Tommy Lyons group. Justice Gray presented his report on 12 December 2000. He found that the only claimants who fell within the definition of traditional Aboriginal owners were the members of the Tommy Lyons group, and that the strength of traditional attachment justified him in recommending the grant of the whole of the land claimed with the exception of an area in the south-east. It took another fifteen years of representation and negotiation by the Land Council before the deeds of grant were handed over on 21 June 2016.

These are accounts of the twists and turns of just some land claims. There have been more than 60 in the 40 years since the Act was passed. I have been involved in about 25 of them. They would not have happened without the land councils and the work of the land council lawyers, field staff and researchers. Each of the land claims has required Aboriginal women and men to disclose extensive information concerning their knowledge of country, their personal lives and their spiritual beliefs and practices. It has often been at considerable personal cost. There have been many pleasures for a lawyer in land claim work, especially the collegiate nature of it, but the greatest pleasure and privilege has been the time spent with so many impressive Aboriginal people in dealing with matters most dear to them.

Ross Howie was a partner in a firm of solicitors in Melbourne before going to Alice Springs with his wife Janet and three children in November 1975 to be senior lawyer with the Central Australian Aboriginal Legal Aid Service.

In January 1978 he moved to the Central Land Council as principal legal officer until December 1981. He went to the Victorian bar in March 1982, was appointed Senior Counsel in 2000 and was appointed a judge of the County Court of Victoria in October 2002.

Since retiring in December 2012 he has continued as alternate chairperson of the Youth Parole Board, works as a volunteer at the Asylum Seeker Resource Centre in Footscray, and enjoys more time with his nine grandchildren.

Dr Gumana: a great man who won the respect of all

Jonathan McLeod was the Northern Land Council's acting CEO when the memorial service was held at Gangan for Dr Gumana, and he delivered the following eulogy:

Today, along with the many others gathered here, the Northern Land Council – its members and staff – honour a great man who, through his long life, won the respect of all who knew him.

His contributions to our society as a senior cultural, community and religious leader, artist and learned scholar, were properly recognised through the high honours that were awarded to him during his lifetime.

In 2002 he was awarded the overall Telstra National Aboriginal and Torres Strait Islander Art Award.

The following year he received an Order of Australia. The citation stated he was a cultural ambassador and religious leader who promoted understanding, leadership and mutual respect to the reconciliation process and to the arts as a significant contributor to Australia's Indigenous artistic heritage. And in 2007 he was awarded an Honorary Doctorate by Charles Darwin University.

But those honours are only one measure that reflects his contributions to the Northern Territory and to Australian life.

His contributions to his Yolngu people are also indicated in other roles which he discharged as a young man.

In 1962, then in his 20s, he contributed to painting the Yirrkala Church panels, which were a forerunner a year later to the Bark Petition, which now rests in our Commonwealth Parliament House in Canberra.

He was a senior clan leader in the Milirrpum land rights case where he acted as an interpreter. And then there was his continuing support for the Homelands movement which began in the early 1970s.

His involvement in Yolngu land rights was continuous and in 2005 he was the lead plaintiff in the Blue Mud Bay land rights case which has returned to Aboriginal ownership more than 85 per cent of the Northern Territory coastline.

With the works of other plaintiffs, his art was admitted as evidence before the Federal Court which first heard the Blue Mud Bay case in 2004.

With the others, he was described by the judge as an impressive witness. The judge must have been particularly impressed by Dr Gumana's evidence, because he published long extracts in an appendix to his judgement.

Of him and other Yolngu witnesses, the judge said they were honest and truthful, and had a detailed understanding of the laws, traditions and customs of the clans about which they gave evidence.

Dr Gumana will be especially remembered for his unrelenting support for the homelands movement, and revered for the strength of his leadership in maintaining his Dhalwangu clan land and its centre here at Gangan.

This place has been one of the few clan centres that has remained continuously a living homeland from its sacred origin, through the period of development of the homelands movement in the 1970s, to the present time.

It will surely remain a living tribute to the wisdom and leadership of Dr Gumana.

We at the Northern Land Council salute his legacy. We remember today a man of high standing and intellect, and we convey our heartfelt condolences to the family of this great man.

Jonathan McLeod, Acting CEO, NLC delivering the eulogy at Dr Gumana' Memorial Service

In May 2007, Dr Gumana was awarded an Honorary Doctorate by Charles Darwin University.

The then Chancellor of CDU, Richard Ryan, presented Dr Gumana with the degree of Doctor of Arts, Honoris Causa, in recognition for his outstanding contribution to the whole of Australia and the Northern Territory in particular – especially in recognition of his part in creating a contemporary world where people can live together with mutual respect and understanding; and in acknowledgement of his notable work as an artist.

The following text is drawn from Mr Ryan's address at the award ceremony.

Dr Gumana was born in north-east Arnhem Land in about 1930. He grew up around Gangan, near powerful sources of traditional lore and culture and alongside the continuing presence of the creative ancestors. His early life was steeped in tradition and the learning of skills such as the making of canoe voyages across the open sea to Groote Eylandt.

When he was a young man he was diagnosed with leprosy. It was then a fearful disease and he was brought into the Channel Island leprosarium for confinement and treatment. Later, he was moved to the new East Arm facility and he underwent treatment for more than a decade. During that time he learned English, got married and became a Christian. He also began painting, drawing on his memory to depict scenes of his country and its stories. That way he kept strong his links with his land.

Dr Gumana said later that during his time around Darwin he learned three ways to look at the world – the Yolngu Aboriginal way, the western way, and God's way. His importance as a mediator in many complex situations flows from that ability to see and understand things from these different points of view.

Eventually he returned to Arnhem Land, settled at Yirrkala and was given an important place in local life as the eldest son of the clan leader Birrikitji. By then, issues were arising about the future ownership and management of the land which the Yolngu people had thought was theirs alone.

In 1962 Dr Gumana joined with other Yolngu artists to paint the panels which were installed on either side of the altar in the Yirrkala church. The panels depicted the creation stories that gave the Yolngu their claim to the surrounding lands. The panels inspired the bark petition of 1963 which put all Australians on notice that there were people whose claims to land long predated European arrival in 1788.

It was a turning point in Australian history. In 1968 Yirrkala people took action in the Northern Territory Supreme Court to protect their interests in their land. They claimed that they had occupied the land since time immemorial and that the government had no right to negotiate arrangements for mining the land without their consent. Dr Gumana acted as an interpreter and cross-cultural bridge during the proceedings.

The Yolngu lost their Supreme Court action, but the loss was a direct catalyst for the enactment of laws which protected Aboriginal land rights in the Northern Territory.

The homelands movement, the return of Aboriginal people to live on their traditional country, was one of the outcomes of the new land rights system. Dr Gumana led his clan back to its traditional country at Gangan, about 150 kilometres south-west of Nhulunbuy. There, he led his people in the creation of a homeland centre for about 80 people. Gangan has been acknowledged as one of the notable success stories of the homelands movement.

In 1992 he was ordained a Minister of the Uniting Church, following study through Nungalinya College in Darwin. He regarded his course of theological study as part of the lifelong process of acquiring knowledge; while being ordained was a logical step in the discharge of his responsibilities toward his people. He says that he is a warrior on behalf of his people and that while a generation ago his weapons would have been spears, now his weapon is his tongue. Dr Gumana has said that his continuing study of the lore and life is essential so that his tongue can speak well.

Over the last two decades his stature as an artist and ambassador for Yolngu culture has been recognised. He has been painting for almost 60 years and his work has been included in major local and international collections since 1966. He has travelled to London, Paris, Singapore and other places with art and dance troupes and he has featured in many documentary productions which describe Yolngu art and aspirations.

In 2002, Dr Gumana won the Telstra National Aboriginal Art Award, for a painting on a hollowed-out stringybark log of the kind which was once used to store the remains of the dead.

His status among his people was further demonstrated when he was selected to be the lead plaintiff in the 2005 Federal Court case which resulted in the affirmation of Yolngu native title rights over inland and coastal waters.

Dr Gumana is now continuing his life mission to bring knowledge of the western world to his Yolngu people, and to help outside people to learn about the Yolngu. He accepts that before he can teach about these things he must first learn as much as he can about life, culture and lore. For him, that is an essential part of the process of people learning how to be closer to each another in an undivided Australia. He can be well satisfied with his own role in helping to create a better Australia, a place where people can indeed live closer together.

Land Rights News Northern Edition
is published by Samuel Bush-Blanasi for the Northern Land Council.

Publication dates
January, April, July, October

Circulation
7,000

Contributions
Land Rights News welcomes stories and photos about Aboriginal people and organisations.

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