

# KERINAIUA V TIWI LAND COUNCIL

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Northern Territory Supreme Court (Southwood J)  
13 August 2007  
[2007] NTSC 40

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## **LAND RIGHTS - grant of head leases – Aboriginal Land Council and Land Trust – consultation – misinformation - permit system – amendments - Tiwi Islands.**

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### **Facts:**

The plaintiff, Adam Kerinaia, is a member of the Mantiyupwi group, who are the traditional landowners of the township of Nguuu on Bathurst Island. The Tiwi Aboriginal Land Trust holds inalienable freehold title over the Tiwi Islands under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('ALRA'). Under ALRA the Tiwi Land Council is established as a Commonwealth authority.

Since August 2004 discussions have been held between the Mantiyupwi group, members of Nguuu community and Government representatives about the grant of a 99-year lease over the township of Nguuu. In 2005, the Minister for Families, Communities and Indigenous Affairs announced changes to ALRA which allowed the grant of 99 year leases of the area of a township on Aboriginal land to an entity approved under ALRA.

In 2006 the Tiwi Land Council and the Commonwealth Government established the Nguuu Negotiation Team, which had the responsibility of consulting with and explaining to the Mantiyupwi traditional landowners the nature, purpose and effect of the proposed 99-year head lease over Nguuu.

Under section 19A(1) of ALRA, a Land Trust may only grant a head lease to an approved entity. Further, it cannot do so unless the Minister consents in writing and the Land Council for that area directs the Aboriginal Land Trust in writing to grant the lease. Section 19A(2) provides that the Land Council must not give the direction unless it is satisfied that:

- (a) the traditional Aboriginal owners (if any) of the land understand the nature and purpose of the proposed lease and, as a group, consent to it; and
- (b) any Aboriginal community or group that may be affected by the proposed lease has been consulted and has had adequate opportunity to express its view to the Land Council; and
- (c) the terms and conditions of the proposed lease (except those relating to matters covered by this section) are reasonable.

Under section 19A(3), the failure of a Land Council to comply with subsection (2) does not invalidate the grant of a lease, unless the approved entity procured the direction of the Land Council by fraud.

Section 27(3) provides that a Land Council must not enter into an agreement or permit a Land Trust to do so without the approval of the Minister. Under section 27(4) the Minister cannot give approval to the Land Council to enter an agreement for an amount exceeding \$1,000 000 unless he or she is satisfied that the Land Council has had regard to the interests of, and consulted with, the traditional Aboriginal owners of the land and any other Aboriginals interested in the land. The section states that the Land Council shall not take any action unless it is satisfied that:

- (a) the traditional Aboriginal owners (if any) of that land understand the nature and purpose of the proposed action and, as a group, consent to it; and
- (b) any Aboriginal community or group that may be affected by the proposed action has been consulted and has

had adequate opportunity to express its views to the Council.

The plaintiff submitted that the resolutions procured in meetings with the Land Council held in May and July 2007 could not and did not constitute the consent of the traditional landowners for the purposes of section 19A(2) of *ALRA*.

The plaintiff submitted that there were serious irregularities following the meeting in May, including: that the plaintiff was recorded as being present by his signature when in fact he did not attend the meeting; that persons who were not members of the Mantiyupwi group signed the resolution; and that persons were paid \$50 each to sign their names on the resolution.

The plaintiff also submitted that the traditional owners were misled by the Commonwealth Government and the Tiwi Land Council about the nature and purpose of the lease and that the resulting resolutions were not made in accordance with the traditional decision making process of the Mantiyupwi group.

**Held, dismissing the application for an interlocutory injunction:**

1. There is no evidence that the signature of the plaintiff was falsely added, or added at all, to the endorsement of the resolution: [76].
2. The evidence of attendees being offered \$50 to sign the resolution is not accepted, as it is contradicted by a number of other witnesses. It is not uncommon for Aboriginal people to be paid money to attend meetings, but it is highly unbelievable that traditional Aboriginal landowners would agree to sign a resolution for \$50 if they did not agree with a 99-year lease being granted over Nguuu: [77].
3. It may be that nine or 10 of the signatures on the resolution were not members of the Mantiyupwi group. However, the vast majority of people who attended the meeting were members of the group and supported the lease: [77].
4. The terms of the draft 99-year Head Lease make it clear that even after the lease is granted entry into the township would remain subject to the provisions of *ALRA*. Clause 7.2 of the draft lease provides for an alternative permit system in the event that the *Aboriginal Land Act 1992* (NT) ceases to regulate the land covered by the lease: [78].
5. While some of the documents originally distributed did not adequately explain the impact of the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill (Cth) on the permit system, the Government position was clarified at the meeting which took place on 26 July 2007: [79].
6. There was no evidence from any person stating that they were misled by the negotiations: [80].
7. The decision-making processes and manner in which traditional Aboriginal landowners group may give consent are not limited by the provisions in section 77A of *ALRA*: [81].
8. The *ALRA* does not require a unanimous decision of all the members of a traditional landowners group: [81]; *Alderson and Others v Northern Land Council* (1983) 20 NTR applied.
9. The plaintiff does not have a sufficient likelihood of success to justify the injunction: [82]; *Australian Broadcasting Committee v O'Neill* (2006) 226 ALR 457 applied.
10. There is a strong argument that the Mantiyupwi group has already consented to the granting of a lease over Nguuu: [82]; *Noble v Murgha* [2005] FCAFC 211 referred to.