INSIDE THE KENBI LAND CLAIM NEGOTIATIONS: WATERSHEDS AND WATERLOGS

by Kirsty Howey

Kenbi land claim settled after 37 years[1]

Historic land rights settlement 'too late' for many traditional owners[2]

Kenbi land claim divides residents amid suggestions some shut out of deal[3]

Kenbi land claim: fishing, camping rights for public remain after settlement[4]

INTRODUCTION

I felt a familiar mixture of elation and deflation as I read the headlines announcing the settlement of the Kenbi land claim. 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 and which was publicly fought out in the High Court three times and the Federal Court four times. Brutally adjudicating the legal identities of the Aboriginal people who sought to be recognised by it, the claim 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.

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.[5] 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.[6] 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*'.[7]

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 Olney J finding that there

were no 'traditional Aboriginal owners'[8] 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 Olney J'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).[9]

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.

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 on one's perspective. In December 2000, Gray J 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.[10] 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, 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.[11] 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).[12]

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'.[13] 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[14] (that is 'the detriment' to persons or communities that might result if the land was granted).[15]

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.[16]

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'[17]—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*,[18] 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.

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).

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.[19] Native title issues (which were significantly curtailed when the Larrakia lost their native title claim in 2006)[20] 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.[21]

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.

THE SETTLEMENT OF KENBI—THE FALSE START AND THE POWER OF DOCUMENTS

From reading the news headlines about Kenbi in early 2009,[22] and then again in mid-2011,[23] 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, these texts stabilised institutional memory of the settlement,[24] and coordinated and structured the action that came after them.[25] 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.

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 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.[26] 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,[27] 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. And 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 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.[28]

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.[29] 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,[30] 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.[31] 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.

1 Zach Hope and Christopher Walsh, 'Kenbi Land Claim Settled after 37 Years', NT News (online), 6 April 2016 <http://www.ntnews.com.au/news/northern-territory/kenbi-land-claim-settled-after-37-years/news-story/aaa1a07e63ee0cf13b42c1e1a164637a>.

2 Michael Gordon, 'Historic Land Rights Settlement 'Too Late' for Many Traditional Owners', *Sydney Morning Herald* (online), 6 April 2016 <http://www.smh.com.au/federal-politics/political-news/historic-land-rights-settlement-too-late-for-many-traditional-owners-20160406-gnzss0.html>.

3 Avani Dias and Elliana Lawford, 'Kenbi Land Claim Divides Residents Amid Suggestions Some Shut Out of Deal', *ABC News* (online), 7 April 2016 <http://www.abc.net.au/news/2016–04–07/kenbi-land-claim-divides-residents/7309066>.

4 'Kenbi Land Claim: Fishing, Camping Rights for Public Remain after Settlement', *ABC News* (online), 7 April 2016 <http://www.abc.net.au/news/2016–04–07/kenbi-claim-mean-fishing-and-camping-rights-for-public-remain/7307984.

5 David Parsons, 'Kenbi Land Claim: 25 Years On' (1998) 4 *Indigenous Law Bulletin* 15, 15.

6 See *R v Toohey; Ex parte Northern Land Council* [1984] HCA 15; *R v Kearney; Ex parte Northern Land Council* [1984] HCA 15; *Re Kearney; Ex parte Northern Land Council* [1984] HCA 15; *Attorney-General (NT) v Kearney* [1985] HCA 60; *Re Maurice, Aboriginal Land Commissioner; Ex Parte Attorney General for the Northern Territory* (1987) 17 FCR 422; *Attorney General for the Northern Territory v Olney and the Northern Land Council* [1989] FCA 233 (28 June 1989). For a more fulsome explanation of this legal history see Ron Levy, 'The Kenbi Land Claim' (2002) 5 *Indigenous Law Bulletin* 19; and D Parsons, above n 5.

7 *Attorney General for the Northern Territory v Olney and the Northern Land Council* FCA [1989] FCA 233 (28 June 1989).

8 The concept of 'traditional Aboriginal owners' underpins the *Aboriginal Land Rights (Northern Territory) Act 1976*. Section 3 defines traditional Aboriginal owners as 'a local descent group of Aboriginals who:
   (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for the site and for the land; and
   (b) are entitled by Aboriginal tradition to forage as of right over that land.'

   There must be a finding that there are traditional Aboriginal owners in order to succeed in a traditional land claim (s 50(1)).

9 *Northern Land Council v Olney* (1992) 34 FCR 470.

10 Office of the Aboriginal Land Commissioner 'Kenbi (Cox Peninsula) Land Claim No 37' (Report and Recommendation of the Former Aboriginal Land Commissioner Justice Gray to the Minister for Aboriginal and Torres Strait Islander Affairs and the Administrator of the Northern Territory, 2000).

11 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 11(1).

12 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 12.

13 *Re Toohey; ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 362 (Brennan J).

14 *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24.

15 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 50(3).

16 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 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 67A.

17 Following *Western Australia v Ward* [2002] 191 ALR 1, the Territory received advice that 50 of the parks and reserves in the Territory may have been invalidly declared, and negotiated a framework to deal with the outstanding and potential claims affecting these areas which included the creation, in some parks, of Territory freehold owned by land trusts. See *Parks and Reserves (Framework for the Future) Act 2003* (NT). The earliest precedent was establishment of the Garig Gunak Barlu National Park at Cobourg Peninsula in 1981, which provided the legal precedent for the subsequent Kakadu and Uluru settlements.

18 Pursuant to the *Kenbi Land Trust Act 2011* (NT), Territory freehold title will be vested in the Kenbi Land Trust for the benefit of the traditional Aboriginal owners, the Larrakia and Belyuen people. The informed consent of traditional Aboriginal owners will be required for the surrender of land, or the grant of any estate or interest in land owned by it, such as a lease or licence (see *Kenbi Land Trust Act 2011* (NT) s 13). The direction of the NLC is also required for any dealing in land (similar to the *Aboriginal Land Rights (Northern Territory) Act 1976*). Traditional rights of use and occupation of the land are also preserved (see *Kenbi Land Trust Act 2011* (NT) s 14).

19 *Kenbi Land Trust Act 2011* (NT).

20 *Risk v Northern Territory* [2006] FCA 404.

21 The Gordian knot metaphor was Ron Levy's (former principal legal officer at the NLC), not mine.

22 Tara Ravens, 'Agreement Reached on Oldest Land Claim', *Sydney Morning Herald* (online), 30 January 2009 < http://www.smh.com.au//breaking-news-national/agreement-reached-on-oldest-land-claim-20090130-7tll.html>.

23 Rick Hind, 'Pact Marks End of Longest Land Rights Claim', *ABC News* (online), 30 June 2011 <http://www.abc.net.au/news/2011–06–30/pact-marks-end-of-longest-land-rights-claim/2777704>.

24 Dorothy E. Smith, *Conceptual Practices of Power: A Feminist Sociology of Knowledge* (University of Toronto Press, 1990) 79.

25 Dorothy E. Smith, *Writing the Social: Critique, Theory, and Investigations* (University of Toronto Press, 1999) 7.

26 'Government funds clean up', *Land Rights News*, Northern Land Council, July 2015, 6.

27 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.

28 *Risk v Northern Territory* [2006] FCA 404.

29 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), ss 19(5) and 23(3).

30 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 24.

31 Benedict Scambary, ''No Vacancies at the Starlight Motel': Larrakia Identity and the Native Title Claims Process' in Benjamin R. Smith and Frances Morphy (eds), *The Social Effects of Native Title: Recognition, Translation, Coexistence* (ANU E Press, 2007) 151, 155.

Argula
Biddy Dale
Acrylic on canvas
605mm x 695mm