

## Setting the Context

### Introduction

- 2.1 The Land Rights Act and the *Northern Territory (Self-Government) Act 1978* are, arguably, the two most significant statutes affecting people living in the Northern Territory. This chapter places the Land Rights Act in the lives of people in the Territory. It begins by explaining the major provisions of the Land Rights Act and then outlines the structure of the Reeves Report. As the Land Rights Act does not operate in isolation, a snapshot is provided of the other Commonwealth and Territory legislation considered by the Committee when examining the Act. Finally, the chapter describes the social and economic context in which Aboriginal people live in the Northern Territory.

### The Land Rights Act

#### Origins

- 2.2 The Land Rights Act, which grants land in the Northern Territory to its traditional Aboriginal owners and provides for the management of that land, was enacted by the Commonwealth Parliament in 1976.<sup>1</sup>

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1 For the purposes of this report, the phrase 'Aboriginal land' is taken to mean land granted under the *Aboriginal Land Rights (Northern Territory) Act 1976*. The phrase does not refer to other land in the Northern Territory granted to Aboriginal people under other legislation or otherwise owned or leased by Aboriginal people.

- 2.3 One of the factors that had led to the Land Rights Act was the findings of the 1970 Gove Land Rights case in the Northern Territory.<sup>2</sup> In that well publicised case, Justice Blackburn found that the established spiritual links of the Aboriginal plaintiffs to their land did not amount to a proprietary interest in that land.
- 2.4 Several years after the Gove Land Rights case, a new Commonwealth Government established a Commission of Inquiry into Aboriginal Land Rights in the Northern Territory to be undertaken by Justice Woodward.<sup>3</sup> The Letters Patent for the Commission required Woodward, among other things, to inquire into an appropriate means to recognise and establish the traditional rights and interests of Aborigines in relation to land. The Commission was conducted in 1973 and 1974 and its recommendations form the backbone of the Land Rights Act.
- 2.5 An historical overview of the origins of land rights in the Territory and a summary of the Gove Land Rights case and the Land Rights Commission are detailed in chapter two of the Reeves Report. Accordingly, further details are not provided here. However, as the Land Rights Act is largely the product of Justice Woodward's recommendations, reference is made to his findings throughout the report.<sup>4</sup>

## Granting Land

- 2.6 The main purpose of the Land Rights Act is to grant land in the Northern Territory to its traditional Aboriginal owners. Secondary purposes are to:
- recognise traditional Aboriginal interests in and relationships to land; and
  - provide Aboriginal people with effective control over activities on the land granted.
- 2.7 Land is granted to Aboriginal people via schedules to the Act or through a claims process. Claims are heard by the Aboriginal Land Commissioner, an office established under Part V of the Land Rights Act, to determine who are the traditional owners of the land claimed.<sup>5</sup> Title to the land is communal fee simple, held by a Land Trust on behalf of those Aboriginal people determined by the Land Commissioner to have a traditional

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2 *Milirrpum and others v Nabalco Pty Ltd and the Commonwealth* (1970) 17 FLR 141.

3 Aboriginal Land Rights Commission 1973, *First Report* and 1974, *Second Report* (Justice Woodward, Commissioner), AGPS, Canberra.

4 The Committee also took evidence from Sir Edward Woodward. See Transcripts, Canberra, pp. 550-65; Submissions, pp. S746-70.

5 s. 11, Land Rights Act.

entitlement to use or occupy the land.<sup>6</sup> The application of section 50(2A) of the Act ('the sunset clause') has meant that no new land claims could be lodged after June 1997.

- 2.8 As of December 1998, 42.1% (566 600 km<sup>2</sup>) of the Territory had been granted to its traditional Aboriginal owners under the Land Rights Act with claims for a further 11.35% (152 400 km<sup>2</sup>) still being processed.<sup>7</sup>

## Land Councils

- 2.9 Land councils are established under Part III of the Land Rights Act to administer the Land Rights Act. The major functions of the land councils are to:

- represent the views and interests of traditional Aboriginal owners and their communities;
- protect the interests of traditional Aboriginal owners and other Aboriginals interested in Aboriginal land;
- assist Aboriginal owners to protect sacred sites on their land;
- negotiate with people wishing to obtain an estate or interest in land owned by land trusts; and
- assist Aboriginal people to claim land.<sup>8</sup>

- 2.10 There are currently four land councils with defined geographic areas of responsibility. They are the:

- Northern Land Council (covering approximately the top half of the Northern Territory mainland);
- Central Land Council (covering approximately the bottom half of the Northern Territory mainland);
- Tiwi Land Council (Bathurst and Melville Islands); and
- Anindilyakwa Land Council (Groote Eylandt and Bickerton Island).

- 2.11 While Land Trusts hold the legal title to the land, they are not decision making bodies. They can only act in accordance with directions given by land councils.<sup>9</sup> Land councils, in turn, act subject to the directions of the traditional Aboriginal owners and after consulting and having regard to

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6 s. 4(1), Land Rights Act.

7 Northern Territory Government, Transcripts, Darwin, p. 8.

8 ss. 23(1), (2), Land Rights Act.

9 s. 5(2), Land Rights Act.

the interest of any other Aboriginal people with interests in the land.<sup>10</sup> In carrying out its functions, a land council is required to obtain the informed consent of traditional Aboriginal owners before taking any action. A land council is also required to allow other Aboriginal people with interests in the land, ‘adequate opportunity’ to express their views to the land council.<sup>11</sup>

- 2.12 It is clear that traditional owners, land councils and Land Trusts are trustees for traditional owners and Aboriginal communities or groups. The trustees must ensure the traditional Aboriginal owners understand the nature and purpose of the proposals and consent to them. The trustees must also consult Aboriginal communities or groups and ensure that they have an adequate opportunity to express their views to the land council. The potential beneficiaries of the trust are both the traditional owners and Aboriginal communities or groups. It is clear that none of their interests can be disregarded.
- 2.13 New land councils can be established under s. 21 of the Act.

## **Mining and Royalties from Mining**

- 2.14 Part IV of the Act establishes processes for the grant of exploration and mining rights to land granted under the Act. A significant feature of the Act is that it gives traditional Aboriginal owners the right to withhold consent (‘veto’) to exploration (consequently mining activities) on Aboriginal land in all but cases of national interest.<sup>12</sup> Part VI of the Act establishes a financial regime whereby the land councils, Aboriginal people affected by mining and the broader Aboriginal population in the Territory receive a share of the equivalent of royalties raised by mining activity on Aboriginal land.

## **The Reeves Report**

- 2.15 In October 1997, the Minister for Aboriginal and Torres Strait Islander Affairs, Senator the Hon John Herron (‘the Minister’), appointed Mr Reeves QC to conduct a review of the Land Rights Act. A copy of the terms of reference for the Review of the Land Rights Act are at Appendix D. Mr Reeves took oral and written evidence between

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10 s. 23, Land Rights Act.

11 s. 23(3), Land Rights Act.

12 s. 40(a), Land Rights Act.

November 1997 and July 1998. The Reeves Report was presented to the Minister in August 1998 and then tabled in the Commonwealth Parliament.

- 2.16 After a historical review of land rights in the Territory in Part A, the Reeves Report:
- in Part B examines the structure and performance of the land councils, the anthropological basis for the definition of traditional Aboriginal owners and calls for the establishment of new land councils ;
  - in Part C focuses on some specific processes under the Act including the land claims process, sacred site protection, permits and access;
  - in Part D covers the operations of the Aboriginals Benefit Reserve and ‘royalty associations’;
  - in Part E deals with the relationship between the Northern Territory Government and Aboriginal landowners by addressing issues such as the compulsory acquisition of Aboriginal land for public purposes and the application of Territory laws;
  - in Part F looks at other matters relevant to the Act including the role of the Minister;
  - in Part G examines the exploration and mining provisions of the Act and the social, cultural and economic costs and benefits arising from the Act; and
  - in Part H proposes that the Act be amended to establish new institutions including Regional Land Councils and the Northern Territory Aboriginal Council.
- 2.17 The majority of these issues are discussed in this report.

## **Other Legislation Relevant to the Land Rights Act**

- 2.18 The Land Rights Act does not operate in legislative isolation and there are a number of Commonwealth and Territory statutes that affect its operations. In fact, chapter eighteen of the Reeves Report and chapter eight of this report deal with the general interaction between the Land Rights Act and Northern Territory laws. Listed below, however, is an outline of three of the major pieces of legislation that affect and give effect to the intent of the Land Rights Act.

## **Mining Act 1980 (NT)**

- 2.19 The law governing mining in the Northern Territory includes the Land Rights Act, the Mining Act 1980 (NT) and common law. Part XI of the Mining Act requires corporations or individuals to gain the permission of the Northern Territory Mining Minister before they enter into negotiations with land councils to explore Aboriginal land for mining purposes. The Northern Territory Mining Minister must also approve the granting of exploration licences before exploration can commence.
- 2.20 The mining provisions of the Land Rights Act are examined in chapter twenty-four of the Reeves Report and in chapter six of this report.

## **Aboriginal Land Act 1978 (NT)**

- 2.21 Sections 70 and 71 of the Land Rights Act make it an offence for people to be on Aboriginal land, unless they are entitled to be there by Aboriginal tradition or because they are undertaking an activity in relation to the Act or a law of the Territory. Section 73(1)(b) of the Land Rights Act allows the Territory to make laws regulating or authorising the entry of people onto Aboriginal land who do not have traditional rights to be there.
- 2.22 Section 4 of the Territory's Aboriginal Land Act 1978 (NT), accordingly, makes it an offence for people, other than those entitled by Aboriginal tradition, to be on Aboriginal land without a permit. Access permits can be granted by the appropriate land council, the traditional Aboriginal owners of the land, the Administrator of the Northern Territory in particular circumstances and the relevant Territory Minister for certain government employees. Land councils and traditional owners can revoke permits issued by each other.
- 2.23 The issue of permits is discussed in greater detail in chapter fourteen of the Reeves Report and in chapter seven of this report.

## **Northern Territory Aboriginal Sacred Sites Act 1989 (NT)**

- 2.24 Section 69 of the Land Rights Act makes it an offence for a person to enter or remain on land in the Northern Territory that is a sacred site. Section 73(1)(a) of the Land Rights Act allows the Territory to make laws to protect or prevent the desecration of sacred sites in the Northern Territory.
- 2.25 Accordingly, the Northern Territory Aboriginal Sacred Sites Act 1989 (NT) established the Aboriginal Areas Protection Authority (AAPA). The AAPA maintains a register of sacred sites and facilitates discussions between the custodians of sacred sites and people performing, or

proposing to perform, work in the vicinity of a sacred site. In addition, the Commonwealth's *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* applies to protect those areas and objects in the Northern Territory that are subject to a declaration under that Act.

- 2.26 The role of the AAPA is discussed in chapter thirteen of the Reeves Report and in chapter nine of this report.

## The Social and Economic Context

- 2.27 The Committee believes that any discussion of the Land Rights Act should be undertaken with an understanding of the social and economic conditions of Aboriginal people living in the Territory. As was acknowledged by the Territory Government at the Committee's first public hearing:

There is no doubt that, in comparison with the balance of the Territory community they [Aboriginal people] experience significant social and economic disadvantages.<sup>13</sup>

## Population and Employment

- 2.28 There are approximately 52 000 Aboriginal people living in the Northern Territory, making up almost 30% of its population.<sup>14</sup> Of these, approximately 60% live in rural areas – in contrast to 17% of other residents in the Territory.<sup>15</sup>
- 2.29 The unemployment rate for Aboriginal people in the Northern Territory is just over three times that of non Aboriginal people. The median income of Aboriginal people in urban areas is approximately 50% of that of other Territory residents and the median income of Aboriginal people in rural areas is just under 40% of that of other Territory residents. The median weekly income for Aboriginal families is also less than half that of other families.<sup>16</sup>

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13 Northern Territory Government (NTG), Transcripts, Darwin, p. 7.

14 As of 30 June 1996. Australian Bureau of Statistics (ABS), 1996, *Census of Population and Housing: Aboriginal and Torres Strait Islander People, Northern Territory, 1996*, Cat. no. 2034.7, ABS, Canberra, p. 2.

15 ABS, *Census 1996*, p. 4.

16 ABS, *Census 1996*, pp. 40, 29.

## Education and Language

- 2.30 Aboriginal people have a significantly lower level of educational qualification than do other Territory residents. Only 6% of Aboriginal people aged over 15 years have a post secondary school qualification compared to 40% of other Territory residents. In rural areas of the Territory, only 3% of Aboriginal people have a qualification compared to 37% of other rural residents. It should be noted, however, that school retention rates and levels of education for Aboriginal people are increasing.<sup>17</sup>
- 2.31 Just over 60% of Aboriginal people in the Territory speak an Aboriginal language as their main language at home, while only 32% spoke English as their main language. Three quarters of Aboriginal people in rural areas speak an Aboriginal language.

## Health Outcomes

- 2.32 In 1997, the median age at death was 43 years for Aboriginal males living in the Territory and 52 years for Aboriginal females. The median age at death was 62 years for non Aboriginal males living in the Territory and 66 years for non Aboriginal females.<sup>18</sup> Additionally, in 1995 the age adjusted death rates for Aboriginal males and females in the Northern Territory were 2.3 and 2.9 times higher than those for non Aboriginal males and female residents respectively.<sup>19</sup>

## Multiplicity of Agencies Providing Services

- 2.33 During the course of the inquiry, Committee Members became very conscious of the social and economic disadvantages faced by Aboriginal residents of the Territory. While not directly related to the terms of reference for its inquiry, the Committee wishes to comment on the multiplicity of agencies - at the Commonwealth, Territory and local government level - that deliver services to Aboriginal people in the Northern Territory. Committee Members despaired at times at the mish-mash of programs and agencies providing varying degrees of support and services to Aboriginal people with the waste and inefficiencies that accompany them.

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17 ABS, *Census 1996*, pp. 49, 50.

18 ABS, 1998, *Demography: Northern Territory, 1998*, Cat. no. 3311.7, ABS, Canberra, p. 69.

19 M Measey, E d'Espaignet, J Cunningham, 1998, *Adult Morbidity and Mortality due to Tobacco Smoking in the Northern Territory 1986-1995*, Territory Health Services, Darwin, p. 9. Note that the House of Representatives Standing Committee on Family and Community Affairs is currently conducting an inquiry into Indigenous health.



## Service Delivery and the Land Rights Act

- 2.34 The Reeves Report too acknowledges the poor social and economic indicators for Aboriginal residents in the Territory. The Reeves Report argues that the Land Rights Act should be given a new purpose of providing opportunities for the social and economic advancement of Aboriginal people in the Northern Territory.<sup>20</sup> The Report proposes a single new organisation, the Northern Territory Aboriginal Council, to administer a number of separate Commonwealth and Territory programs.<sup>21</sup>
- 2.35 For cultural, historical and symbolic reasons, land is important to Aboriginal people but land is not a panacea to the social and economic challenges facing their communities. The Committee has every sympathy with this desire to ameliorate the disadvantages facing Aboriginal people living in the Territory. However, the Committee hesitates to recommend using the Land Rights Act as a mechanism for achieving this goal. The Land Rights Act currently deals with land ownership and management, and that focus should remain undiluted.
- 2.36 In the Committee's view, cooperative programs between Aboriginal, Territory and Commonwealth agencies in the form of regional agreements and 'whole of government' strategies are a more effective and efficient way to improve social and economic outcomes for Aboriginal people. Such agreements are already being negotiated in the Territory and are supported by the Committee. In so far as the Land Rights Act can be used to facilitate these cooperative arrangements, the Committee encourages the use of agreements struck under s. 19 of the Act.
- 2.37 These comments aside, there are a number of ways that the Land Rights Act can be constructively amended to give Aboriginal people greater control over their lives and the first of these is discussed in more detail in the next chapter.

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20 John Reeves QC, 1998, *Building on Land Rights for the Next Generation: The Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, AGPS, Canberra, p. 76.

21 *Reeves Report*, pp. 613-14.