

## Aboriginal interests and statehood

- 5.1 The Aboriginal population in the Northern Territory tends to be younger, and resides in more remote locations, than the non-Aboriginal population. The Aboriginal population also has a higher fertility rate than the non-Aboriginal population and it has been estimated that by 2031 Aboriginal Territorians will comprise 34.5 per cent of the total Territory population.<sup>1</sup>
- 5.2 It is estimated that 40 per cent of the non-Aboriginal population in the Territory arrived in the past ten years.<sup>2</sup> The Aboriginal population makes up the majority of what may be described as 'long term stakeholders' in statehood.<sup>3</sup> Aboriginal freehold makes up about 42 per cent of the Territory land mass with most of the remainder subject to native title under the Commonwealth *Native Title Act* 1993.<sup>4</sup>

### Aboriginal land rights

- 5.3 The Commonwealth has expressly reserved executive authority over rights in respect of Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act* 1976 by means of subregulation 4(2)(b) of the Northern Territory (Self-Government) Regulations 1978. The future status of the *Aboriginal Land Rights (Northern Territory) Act* 1976

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1 T. Wilson & J. R. Condon, 'Indigenous population change in the Northern Territory 1966 to 2031', *People and Place*, Vol. 14, No. 4, 2007, p. 73.

2 Northern Territory News, 'NT born, NT bred, not likely: study said' 9 February 2007.

3 Central Australian Aboriginal Congress, *Submission No. 5*, p. 7.

4 Mr Bree, *Transcript of Evidence*, 16 November 2006, p. 32.

remains unresolved. The Act only applies in the Northern Territory. Aboriginal land rights is a particularly sensitive issue in the Northern Territory.

- 5.4 The *Aboriginal Land Rights (Northern Territory) Act 1976* vested title in Crown Land to Land Trusts on behalf of the traditional owners. Title granted under the Act is the equivalent to freehold title but the land is held communally. The Act established Land Councils to represent the interests of traditional owners concerning Aboriginal land management issues including negotiating on mineral exploration and development. The Act also established the Aboriginals Benefit Account (ABA) into which the Commonwealth makes royalty payments in respect to mining activities. Payments into ABA are then distributed to Land Councils and traditional owners.
- 5.5 In 2006, the *Aboriginal Land Rights (Northern Territory) Act 1976* was amended to 'provide for individual property rights in Aboriginal townships, streamline processes for development of Aboriginal land and improve efficiency and enhance accountability of organisations under the act'.<sup>5</sup>
- 5.6 The amendment did not provide any greater certainty for the Northern Territory in terms of resolving the issue of controlling land rights following statehood:
- The SSC notes recent amendments introduced in the House of Representatives on 31 May 2006 do not provide the Northern Territory equal status with the existing States. The Territory will exercise delegated powers. It is also clear the Commonwealth could potentially retain the ALRA upon Northern Territory Statehood using other heads of power apart from the terms and conditions power in s.121.<sup>6</sup>
- 5.7 The Northern Territory Government has indicated its view in the past (1986, 1996) that the Act should be patriated to the new State upon statehood. It was argued that patriation of the Act would bring the new State to a position of parity with the existing states.<sup>7</sup>

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5 The Hon Mr Brough, Second Reading Speech, *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006*, *House of Representatives Hansard*, 31 May 2006, p. 5.

6 Statehood Steering Committee, *Submission No. 1*, p. 23.

7 Northern Territory Statehood Working Group, *Final Report*, May 1996, p. 44; Northern Territory Statehood Executive Group, *Towards Statehood: Land Matters Upon Statehood*, 1986, p. 1. This view was supported by the Northern Territory Minerals Council, see Ms Purick, *Transcript of Evidence*, 16 November 2006, p. 51.

5.8 At the time of the statehood referendum the Central and Northern Land Councils opposed the patriation of the Act. In its presentations to the seminar, both Land Councils expressed a number of concerns with the prospect of patriating the Act to the Northern Territory. For the Central Land Council, these concerns include:

... the generally adversarial and hostile approach taken to the act and land councils by successive Territory governments; the unicameral nature of the Territory parliament; the difficulty of sustaining majority support for Indigenous rights within the wider electorate in the face of sustained campaigns to the contrary; the risk of comparatively little national and international attention on proposed amendments, compared with the current situation with the federal parliament; the nonapplication to state laws of some key guarantees entrenched in the Commonwealth Constitution, such as just terms and freedom of religion; and ... the question mark over the capacity for effective entrenchment of state constitutional provisions.<sup>8</sup>

5.9 The Committee was interested to note that the Land Councils appear to hold greater trust in the constitutionally guaranteed accountability mechanisms of the Commonwealth Parliament,<sup>9</sup> regardless of which party was in power, rather than the accountability mechanisms of the Legislative Assembly of the Northern Territory, while having a greater representation of the Aboriginal population.

5.10 Both Land Councils expressed their continued support for the Kalkaringi and Batchelor statements in reference to their position on the future status of the *Aboriginal Land Rights (Northern Territory) Act 1976*.<sup>10</sup> These statements are further discussed below.

5.11 The Statehood Steering Committee sees its role as an 'agent for discussion' on the question over the future treatment of the Act.

Detailed negotiation should be undertaken at a Government to Government level involving the relevant interest groups

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8 Ms Weepers, *Transcript of Evidence*, 14 November 2006, p. 26.

9 Ms Weepers, *Transcript of Evidence*, 14 November 2006, p. 26; Mr Daly, *Transcript of Evidence*, 16 November 2006, p. 37.

10 Ms Weepers, *Transcript of Evidence*, 14 November 2006, p. 26; Mr Daly, *Transcript of Evidence*, 16 November 2006, p. 29. The Kalkaringi and Batchelor statements were also supported by Mr Tilmouth, *Transcript of Evidence*, 16 November 2006, p. 71.

either after the SSC education and consultation process has concluded or at the same time.<sup>11</sup>

- 5.12 As with other issues, the Steering Committee is interested in hearing the intentions of the Commonwealth with regard to the *Aboriginal Land Rights (Northern Territory) Act 1976*.
- 5.13 It was also suggested at the seminar that the *Aboriginal Land Rights (Northern Territory) Act 1976* should be patriated to the Northern Territory to provide future state governments greater control of land issues and minimise delays caused by negotiations over land. Indeed, the issue of land rights could be removed from the statehood agenda by patriating the Act to the Territory Government as soon as possible.<sup>12</sup>
- 5.14 Another issue raised with the Committee is that of defining traditional owners of land under schedule 1 of the *Aboriginal Land Rights (Northern Territory) Act 1976*.<sup>13</sup>

## **The Native Title Act 1993**

- 5.15 It is important to differentiate land rights and native title in the Northern Territory. The *Native Title Act 1993* seeks to recognise pre-existing rights to land for Aboriginal and Torres Strait Islander people in accordance with their traditional laws and customs. The Act applies across Australia with no different application to the Northern Territory, however holders of Aboriginal freehold title under the *Aboriginal Land Rights (Northern Territory) Act 1976* have no incentive to make a native title claim.<sup>14</sup> Further, the *Native Title Act 1993* can apply to areas in the Territory not covered by the *Aboriginal Land Rights (Northern Territory) Act 1976*.<sup>15</sup>
- 5.16 The *Native Title Act 1993* provides a framework for the negotiation and resolution of issues concerning exploration and mining grants. The Committee heard that in November 2006, there were around 185 native title claims in the Northern Territory that were yet to be

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11 Statehood Steering Committee, *Submission No. 1*, p. 23.

12 Mr Tollner MP, *Transcript of Evidence*, 15 November 2006, pp. 61, 80.

13 Mr Tilmouth, *Transcript of Evidence*, 16 November 2006, p. 67.

14 Mr Neate, *Transcript of Evidence*, 16 November 2006, p. 44.

15 National Native Title Tribunal, *Submission No. 8*, p. 5.

resolved, about half of which were made to secure the right to negotiate over exploration and mining grants.<sup>16</sup>

- 5.17 The Committee heard that while the *Native Title Act 1993* added an additional layer of bureaucracy to mining related activity, it is now considered an established part of the legal framework and encouraged the practice of cooperation and relationship building through Indigenous Land Use Agreements.<sup>17</sup>

## Broader Aboriginal interests

- 5.18 The Committee heard that the issue of Aboriginal land rights and statehood is broader than the *Aboriginal Land Rights (Northern Territory) Act 1976* itself, and it is linked to Aboriginal interests in improving service provision and addressing socio-economic disadvantage.
- 5.19 Aboriginal disadvantage is well documented. The Productivity Commission has identified the following 'headline indicators' which outline the main areas where Aboriginal and Torres Strait Islanders have disproportionately poorer outcomes than other Australians:
- Life expectancy at birth;
  - Rates of disability and/or core activity restriction;
  - Years 10 and 12 retention and attainment;
  - Post secondary education – participation and attainment;
  - Labour force participation and unemployment;
  - Household and individual income;
  - Home ownership;
  - Suicide and self-harm;
  - Substantiated child protection notifications;
  - Deaths from homicide and hospitalisations for assault;
  - Victim rates for crime; and

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16 Mr Neate, *Transcript of Evidence*, 16 November 2006, p. 53.

17 Mr Neate, *Transcript of Evidence*, 16 November 2006, p. 55.

- Imprisonment and juvenile detention rates.<sup>18</sup>
- 5.20 The Coordinator of the Larrakia Nation Aboriginal Corporation (the only Aboriginal representative at the seminar to make a strong statement in favour of statehood) saw a new state constitution as a means to protect the rights of Aboriginal people:
- Creation of such a crucial legal instrument would generate an opportunity to include better recognition of Indigenous rights of justice, our cultural values and our right to self-determination. It should also enshrine a particular and key role of Indigenous peoples in land management and environmental protection of our traditional lands.<sup>19</sup>
- 5.21 The Northern Land Council indicated to the Committee that the path to statehood provides an opportunity to ‘challenge the way in which governments allocate resources to Aboriginal people’.<sup>20</sup> An example of poor allocation of resources put before the Committee was the lower level of funding per school age child in the Aboriginal community in Wadeye, compared with the average funding per student across the Territory.<sup>21</sup>
- 5.22 The Northern Territory Government informed the Committee of its new ‘whole of government’ framework to improve the well-being of Aboriginal Territorians that focuses on childhood education, economic development, governance, community infrastructure, and community safety.<sup>22</sup>
- 5.23 The Committee was interested to hear the views of seminar participants on whether inalienable freehold title prevents Aboriginal people from maximising employment and business opportunities from land and acts as an impediment to development. Aboriginal representatives considered that inalienable freehold title can make a

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18 Productivity Commission, *Overcoming Indigenous Disadvantage, Key Indicators 2005*, Steering Committee for the Review of Government Service Provision, p. xxii.

19 Mr Costello, *Transcript of Evidence*, 16 November 2006, p. 74.

20 Mr Daly, *Transcript of Evidence*, 16 November 2006, p. 30. A similar sentiment was expressed by most Aboriginal representatives appearing before the Committee.

21 Mr Daly, *Transcript of Evidence*, 16 November 2006, p. 30; see also J. Taylor & O. Stanley, *The Opportunity Costs of the Status Quo in the Thamarrurr Region*, Centre for Aboriginal Economic Policy Research Working paper No. 28, 2005, p. 63.

22 *Exhibit No. 11*, Northern Territory Government, *Agenda for Action*, 2005, p. 2.

positive economic contribution to Aboriginal communities through the use of 99-year leases.<sup>23</sup>

- 5.24 The Committee also heard about the recent collaboration and partnership activities between the Indigenous Land Corporation and the Northern Territory Government that provide training opportunities and generate employment outcomes for Aboriginal people.<sup>24</sup>

## The Kalkaringi and Batchelor statements

- 5.25 The Northern and Central Land Councils boycotted the 1998 Northern Territory Constitutional Convention due to what they considered to be the 'undemocratic' process for selecting delegates. In the lead up to the referendum, the Combined Aboriginal Nations of Central Australia met in Kalkaringi and agreed on a statement to express their collective concerns about the implications of statehood for Aboriginal people.
- 5.26 The Kalkaringi statement set out a number of Aboriginal rights covering self-determination, land rights, rights to sacred sites, human rights and rights to political participation, services and infrastructure, education and justice, under the following general principles:
- That we do not consent to the establishment of a new State of the Northern Territory on the terms set out in the Draft Constitution adopted by the Legislative Assembly on 13 August 1998.
  - That we will withhold our consent until there are good faith negotiations between the Northern Territory Government and the freely chosen representatives of the Aboriginal peoples of the Northern Territory leading to a Constitution based upon equality, co-existence and mutual respect.
  - That the Northern Territory Government must provide adequate resources and negotiate in good faith a realistic timetable for such negotiations.<sup>25</sup>

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23 Mr Procter, *Transcript of Evidence*, 16 November 2006, p. 40; Mr Daly, *Transcript of Evidence*, 16 November 2006, p. 47; Mr Costello, *Transcript of Evidence*, 16 November 2006, p. 76.

24 Ms McPherson, *Transcript of Evidence*, 14 November 2006, p. 24.

25 Constitutional Convention of the Combined Aboriginal Nations of Central Australia, Kalkaringi, 17-20 August 1998, *Exhibit No. 5*.

- 5.27 Shortly following the referendum a further Aboriginal Constitutional Convention was held at Batchelor College that endorsed the Kalkaringi resolutions, and released its own statement called *Standards for Constitutional Development*.<sup>26</sup>
- 5.28 At a meeting with the Northern Territory Legal and Constitutional Affairs Committee (LCAC), the Convention Committee advised that '[n]egotiation over statehood can only proceed when the NT Government makes a commitment to the negotiation of a framework agreement'.<sup>27</sup> Such a framework would include a government commitment not to patriate the *Aboriginal Land Rights (Northern Territory) Act 1976*, to gain Aboriginal consent for policy reform that affects them, and recognition of Aboriginal law and traditional land ownership.<sup>28</sup>
- 5.29 It appears that the Land Councils have the power to derail the statehood process if they are not satisfied with the government response to the Kalkaringi and Batchelor statements. As one submission to the inquiry observed:
- If any senior government were to leave out or pay inadequate attention the full participation of Indigenous peoples in design at every level of the new NT – that is, were they denied a sufficient positive role – they would later play another role, by negative sanction as it were, by resistance and making things unworkable, as is the age-old 'power' of minorities or second-class citizens from Ireland to Quebec in the past, to northern territories abroad in more recent years.<sup>29</sup>
- 5.30 In 1999, LCAC recommended that the Territory make a serious attempt at engaging Aboriginal parties on the content of a framework agreement. In 2003, the Northern Territory Government placed Aboriginal people at the centre of their approach to statehood:

A central principle for the Northern Territory to achieve Statehood is the respect for and proper recognition of the

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26 Northern Territory Indigenous Constitutional Convention, *Standards for Constitutional Development*, Batchelor College, 30 November – 4 December 1998.

27 Northern Territory Standing Committee on Legal and Constitutional Affairs, *Report into appropriate measures to facilitate statehood*, 1999, p. 29.

28 Northern Territory Standing Committee on Legal and Constitutional Affairs, *An Examination of Structural Relationships in Indigenous Affairs and Indigenous Governance in the Northern Territory*, Discussion Paper No. 1, 2002, p. 15.

29 Australian Centre for Peace and Conflict Studies, *Submission No. 9*, p. 12.



Indigenous people of the Territory and that the Indigenous people are to be involved in all stages of the process.<sup>30</sup>

- 5.31 It was put to the Committee that progress needed to be made on the framework agreement, regardless of statehood:

I ask now has anything been done to deal with developing a framework agreement between the Northern Territory government, the indigenous constitutional convention committee and the Indigenous communities on future developments, addressing issues of self-determination and self-governance within their communities, and recognition of Aboriginal customary law? These do not need statehood to happen, they need government to get off their backsides and go and do the job.<sup>31</sup>

- 5.32 During the course of the seminar the Committee noted that the Kalkaringi statement sought negotiation between the Northern Territory Government and the **freely chosen** representatives of the Aboriginal Territorians,<sup>32</sup> rather than their democratically elected representatives. The Committee raised the question of how matters could be negotiated with representatives that may not have the democratic authority to speak on behalf of Aboriginal people.<sup>33</sup> It also appears that some Aboriginal people will be excluded from the decision making process.

- 5.33 Aboriginal representatives at the seminar put forward the view that democratic and the traditional decision making processes are two different systems.<sup>34</sup> These systems are based on the cultural context of a group and imposing one system onto another group would not assist the process of negotiation:

How they make their decisions on who represents them is done through a cultural and social process that people who are not expert in understanding it will have difficulty with, and we will head off looking for the new Fallujah to impose a democratic process that no-one understands.<sup>35</sup>

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30 Statehood Steering Committee, Terms of Reference, p. i.

31 The Hon Mr Hatton, *Transcript of Evidence*, 15 November 2006, p. 14.

32 *Exhibit No. 5*, Constitutional Convention of the Combined Aboriginal Nations of Central Australia, Kalkaringi, 17-20 August 1998. Emphasis added.

33 Mr Tollner MP, *Transcript of Evidence*, 16 November 2006, p. 71.

34 Ms Weepers, *Transcript of Evidence*, 14 November 2006, p. 33.

35 Mr Tilmouth, *Transcript of Evidence*, 16 November 2006, p. 73.

- 5.34 The Statehood Steering Committee expressed enthusiasm for engaging with Aboriginal people on constitutional development. According to the Steering Committee Chairperson, Ms Barbara McCarthy MLA (herself indigenous):

A new Northern Territory Constitution must provide for the continuance of Aboriginal cultures and societies within a contemporary nation state of Australia. It must provide the constitutional protections that have until now been provided by federal legislation and oversight of the Northern Territory.<sup>36</sup>

- 5.35 It is not clear if the Commonwealth Parliament would have enthusiastically legislated for statehood if the referendum had narrowly passed but with only about a quarter of the Aboriginal population voting in favour of the change. As one speaker remarked at the seminar:

If [the rights of Indigenous Australians] are overridden or undermined, we will not become a state – at least in my view – because I doubt if the Commonwealth parliament would agree to imposing terms and conditions on the people of the Northern Territory which a large proportion of them would not support.<sup>37</sup>

### Strategies to include Aboriginal Territorians

- 5.36 The Committee heard that the Aboriginal Interpreter Service caters for about 100 languages for the legal, health and education systems in the Territory.<sup>38</sup> Literacy rates are also low. Communicating the more complex concepts of governance will also be a challenge.<sup>39</sup>
- 5.37 The Aboriginal population tend not to participate in elections to the extent of the non-Aboriginal population.<sup>40</sup> Table 5.1 below shows a much lower voter turnout rate for the federal division of Lingiari, which encompasses the remote areas of the Northern Territory, compared with the rate for the federal division of Solomon and the national average. The lower voter turnout in remote areas occurs despite the provision of mobile polling services and the high level of

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36 Ms McCarthy MLA, *Transcript of Evidence*, 15 November 2006, p. 7.

37 The Hon Mr Snowdon MP, *Transcript of Evidence*, 14 November 2006, p. 8.

38 Ms McCarthy MLA, *Transcript of Evidence*, 14 November 2006, p. 36.

39 The Hon Mr Snowdon MP, *Transcript of Evidence*, 14 November 2006, p. 49.

40 Mr Connop, *Transcript of Evidence*, 15 November 2006, p. 72.

assisted voting in many remote Aboriginal communities. The Northern Territory Electoral Commission has observed that a 'lack of electoral awareness' in remote areas contributes to low voter turnout rates.<sup>41</sup>

Table 5.1 Voter Turnout - 2004 Federal Election

Division	House of Representatives (%)	Senate (%)
Lingiari	77.71	77.85
Solomon	91.21	91.38
National	94.32	94.82

Source Australian Electoral Commission, *2004 Federal Election Voter Turnout by Division*, [http://www.aec.gov.au/\\_content/What/voting/turnout/2004.htm](http://www.aec.gov.au/_content/What/voting/turnout/2004.htm) (accessed 21 February 2007).

5.38 The Australian Electoral Commission raised concerns about the provision of assistance to Aboriginal voters in the Northern Territory who had to contend with the statehood referendum, in addition to the House of Representatives and Senate ballot papers, in the 1998 federal election.<sup>42</sup> It has been reported that about 70% of the Northern Territory Aboriginal population voted 'No' in the 1998 statehood referendum.<sup>43</sup>

5.39 The Steering Committee is aware of the need for statehood material to meet the needs of Aboriginal communities:

Across the Northern Territory there are over 100 Aboriginal languages spoken quite fluently today ... It is clear that one of the fundamental challenges for the Statehood Steering Committee is the method we use in educating and informing all people so they can be intrinsically involved in the direction of their own future.<sup>44</sup>

5.40 It was put to the Committee that the voting system should prioritise the views of long term Territorians considering the high turnover of the non-Aboriginal population in the Northern Territory:

41 Northern Territory Electoral Commission, *Submission to the Joint Select Committee on Electoral Matters Inquiry into Civics and Electoral Education*, 2006, p. 9.

42 House of Representatives Joint Standing Committee on Electoral Matters, *Report of the Inquiry into the conduct of the 1998 Federal Election and matters related thereto*, 2000, p. 73.

43 *Exhibit 5*, Indigenous Constitutional Convention, *Indigenous Constitutional Strategy Northern Territory*, 1998, p. 4.

44 Ms McCarthy MLA, *Transcript of Evidence*, 15 November 2006, p. 7.

... only continuing residents should vote in a future referendum on statehood. This could be on the basis of a qualifying period of time, say 10 years. The same rule should apply to the establishment of a Northern Territory constitution. A future electoral system should be a proportionate one, ensuring that transient Australian voters do not have the disproportionate influence they now enjoy.<sup>45</sup>

- 5.41 It was also suggested that with adequate political representation, there would be greater capacity to provide funding for Aboriginal health, and also to increase the social status of Aboriginal people.<sup>46</sup> Greater inclusion and participation in the political process, it was argued, has positive health benefits for Aboriginal people.

Where people feel excluded, where they feel, see and experience themselves at the bottom of the socioeconomic order, they are more likely – not all of them – to involve themselves in self-destructive or violent behaviour and other kinds of behaviour in terms of diet and exercise that are not the best for their health.<sup>47</sup>

### The view of the Committee

- 5.42 While the Committee acknowledges the particular demographic circumstances of the Northern Territory, the Committee believes that it would be impractical, divisive and contrary to democratic principles to restrict voting on a statehood referendum to long term Territorians only.
- 5.43 The Committee considers that Aboriginal disadvantage in the Northern Territory should be addressed through appropriate policy measures. Aboriginal people should be consulted on statehood matters, particularly on the future treatment of the *Aboriginal Land Rights (Northern Territory) Act 1976*. Discussions with the Aboriginal community concerning the constitutional statements and a possible framework agreement (or agreements), is generally a matter for the Northern Territory Government.<sup>48</sup> The Committee notes that

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45 Central Australian Aboriginal Congress, *Submission No. 5*, p. 9.

46 Mr Liddle, *Transcript of Evidence*, 14 November 2006, p. 13. The link between Aboriginal ill-health and political participation was also raised in *Exhibit No. 16*, M. Anne Brown, *Human Rights and the Borders of Suffering: The promotion of human rights in international politics*, Manchester University Press, 2002, p. 175.

47 Dr Mowbray, *Transcript of Evidence*, 15 November 2006, p. 82.

48 Subject to the agreement of the Commonwealth and the States where their interests intersect.

discussions between the Northern Territory Government and its Aboriginal community may very well determine the outcome of a future referendum on statehood.

