

Other Issues Presented to the Committee

Introduction

9.1 The previous chapters in this report have focused on issues arising from the Committee's terms of reference. However, the Committee also received comments about the recommendations in the Reeves Report that are beyond the Committee's terms of reference. The Committee considered all this evidence and, rather than let it go to 'waste', decided to briefly report on some of those issues outside its terms of reference. There are three main issues that the Committee wishes to report on, namely:

- the role of the Aboriginal Land Commissioner;
- the role of the Minister for Aboriginal and Torres Strait Islander Affairs;
- sacred sites; and
- the role of Land Trusts.

Aboriginal Land Commissioner

9.2 The Aboriginal Land Commissioner (the 'Land Commissioner') is a statutory position created under Part V of the Land Rights Act. The role of the Land Commissioner is to hear land claims and determine who are (and who are not) the traditional Aboriginal owners of the land under claim. The Land Commissioner then reports his findings to the Commonwealth Minister for Aboriginal and Torres Strait Islander Affairs and also recommends whether land should be granted to the traditional

owners.¹ The Reeves Report makes a number of recommendations to increase the powers of the Land Commissioner and streamline the processes for hearing land claims. This section of the chapter outlines the findings of the Reeves Report before detailing the Committee's views.

Reeves Report's Proposals

Land Commissioner as Mediator

9.3 The Reeves Report recommends that the Land Commissioner be given power to intervene by way of conciliation or mediation to assist in the settlement or disposal of land claims.² The Land Commissioner supports this recommendation, conditional on any conciliation and mediation attempts having the support of all parties concerned. However, he cautions that this role would give the Land Commissioner two roles, one as mediator, and one as decision maker if the mediation fails. The Northern Land Council (NLC) supports the recommendation, but again, only if all parties agree to the Land Commissioner taking on the mediation role.³ The Central Land Council (CLC) is more concerned, believing that the Reeves Report does not make a sufficient case for this expansion of the Land Commissioner's powers.⁴

Consent to a Claim: Section 50(1)(a)(ii)

9.4 There is currently no provision in the Act that allows the Land Commissioner to make a recommendation to the Minister about a land claim without a hearing process – this is something the Reeves Report recommends should be able to occur.⁵ The Land Commissioner agrees that this would be desirable and would save the time and cost of a hearing and the preparation of a report in cases where all the parties to the claim consent to the findings and recommendations. This view is supported by both larger land councils.⁶

1 s. 50, Land Rights Act.

2 *Reeves Report*, pp. 251-52.

3 Northern Land Council (NLC), Submissions, p. S967.

4 Central Land Council (CLC), Submissions, p. S1644.

5 *Reeves Report*, p. 262.

6 Aboriginal Land Commissioner (Land Commissioner), Submissions, pp. S50-51; NLC, Submissions, p. S967; CLC, Submissions, S1644.

Power to Dismiss Claims

- 9.5 Under the current Act, the Land Commissioner has no powers to dismiss a land claim if, for example, the claim has no foundation in law. The Reeves Report recommends that this power be given to the Land Commissioner, along with an amendment to s. 67A(5) of the Act to allow the dismissal of an application as one of the circumstances amounting to the final disposal of a claim.⁷
- 9.6 The Land Commissioner supports the recommendation. However, it is rejected by the two larger land councils. The NLC believes that such a recommendation denies Aboriginal people the right to be heard. The CLC rejects the recommendation on the basis that the Reeves Report does not sufficiently explain the conditions under which the Land Commissioner could exercise the power.⁸

Removing Formalities: Section 51

- 9.7 The Reeves Report believes that the land claims procedures are too formal. The Report recommends inclusion in the Act of a range of measures to reduce formalities and improve efficiencies in the land claims process.⁹ The Land Commissioner has no objection to the recommendation, but believes it unnecessary, as the Act already allows the necessary flexibility. The Land Commissioner is supported by the CLC, while the NLC supports the recommendation as long as it does not diminish the rights of Aboriginal claimants.¹⁰

Detriment and Recommendations by the Land Commissioner

- 9.8 Section 50((1)(a)(ii) of the Land Rights Act requires the Land Commissioner to report to the Minister on a land claim and also to make a recommendation on whether or not land should be granted. Section 50(3) of the Act requires the Land Commissioner, when making a report to the Minister, to 'have regard' to the claimants' strength of attachment to the land claimed. Section 50(3) also requires the Land Commissioner to have regard to the adverse consequences or 'detriment' a successful claim might have on other people or communities. The Land Commissioner may comment on the issues raised in s. 50(3) in his report. However, the Reeves

7 *Reeves Report*, pp. 261-62.

8 Land Commissioner, Submissions, p. S51; NLC, Submissions, p. S967; CLC, Submissions, S1644.

9 *Reeves Report*, pp. 262-63.

10 Land Commissioner, Submissions, pp. S51-52; NLC, Submissions, p. S967; CLC, Submissions, S1644.

Report argues that the Land Commissioner should also take the issues into account when formulating a recommendation to the Minister.¹¹

- 9.9 The Land Commissioner believes that such considerations are already taken into account when making recommendations and that s. 50(3) is primarily a guide for the Minister. The two larger land councils reject the Reeves Report recommendation, believing that in fact, issues such as detriment, should be left entirely to the Minister to decide.¹²

Conference to Settle Outstanding Land Claims

- 9.10 The Reeves Report recommends the Land Commissioner convene a settlement conference to settle as many of the outstanding land claims as possible (including sea closure applications). The conference would proceed on the basis that the Land Commissioner need not inquire into the question of traditional ownership. However, the Land Commissioner would be required to report on his recommendations about strength of attachment and detriment (see above) and only make recommendations on real and immediate detriment (on the assumption the Northern Territory Government will have a limited power of compulsory acquisition in relation to Aboriginal land).¹³
- 9.11 The Land Commissioner does not think that such legislative intervention is required. The Land Commissioner already brings parties together where there is a willingness to negotiate, but believes that it is not the role of the Land Commissioner to attempt to influence the outcome of negotiations. The CLC rejects the recommendation for other reasons, while the NLC supports the notion, but also notes the Land Commissioner's current powers to facilitate negotiation.¹⁴

Adding Land to Schedule One of the Act

- 9.12 Despite the 'sunset clause', it is still possible to bring new land under the Act by amending the details of land listed in Schedule One of the Act.¹⁵ This can only occur if claimants petition the Minister and legislation amending the schedule is passed through Parliament. The Reeves Report

11 *Reeves Report*, pp. 254-57.

12 Land Commissioner, Submissions, p. S52; NLC, Submissions, p. S967; CLC, Submissions, pp. S1644-45. See also comments about the legality of the Reeves Report's recommendation, ATSIC, Submissions, pp. S734-41.

13 *Reeves Report*, p. 256.

14 Land Commissioner, Submissions, p. S52; NLC, Submissions, pp. S967-68; CLC, Submissions, p. S1645.

15 Schedule One land was granted to Aboriginal people on passage of the Act, rather than having to be claimed through the Land Commissioner.

recommends that ‘if the Minister is minded to entertain an application to amend Schedule One to bring further land under the Act, a standard approach be adopted, involving the Aboriginal Land Commissioner inquiring into any such proposals’.¹⁶

- 9.13 The Land Commissioner believes this recommendation is unnecessary as the Act already has provisions to allow the office to undertake this role.¹⁷ Both larger land councils also reject the recommendation; the CLC because there is not sufficient detail and the NLC because it is unnecessary.¹⁸

Future Role of the Land Commissioner

- 9.14 Even when all outstanding land claims are settled, certain functions of the Land Commissioner will remain relevant, including:
- maintenance of a register of land claims;
 - functions requested by the Minister or pursuant to Northern Territory law; and
 - maintaining control over archival material.
- 9.15 The Reeves Report recommends that the administrative tasks could be undertaken by the Supreme Court Registry of the Northern Territory and any other tasks by a Northern Territory Supreme Court judge.¹⁹ The Land Commissioner does not comment on this recommendation. However, both larger land councils reject it, on the basis that it would pass powers from a Commonwealth to Territory jurisdiction and because it is premature to amend the Act in this way until all claims are heard.²⁰

Committee’s Conclusions

- 9.16 The Committee is mindful that it has not actively sought submissions on the role of the Land Commissioner. Accordingly, the Committee’s recommendation is deliberately phrased to leave maximum discretion to the Minister. As a general rule though, the Committee has been reluctant to suggest adding provisions or prescribing arrangements in detail if they are already covered by a broad power in the Act. For this reason, the Committee has not supported a number of the recommendations for the

16 *Reeves Report*, pp. 265-66, 269.

17 ss. 50(1)(d), 50(1)(e).

18 Land Commissioner, Submissions, pp. S52-53; NLC, Submissions, p. S968; CLC, Submissions, p. S1646.

19 *Reeves Report*, p. 268

20 NLC, Submissions, p. S969; CLC, Submissions, pp. S1646-47.

Land Commissioner in the Reeves Report even though, in isolation, they have merit.

Recommendation 40

9.17 **The Minister for Aboriginal and Torres Strait Islander Affairs consider the recommendations made in the Reeves Report to amend the powers and functions of the Aboriginal Land Commissioner with a view to amending the *Aboriginal Land Rights (Northern Territory) Act 1976* ('the Act') to, at least, give the Aboriginal Land Commissioner powers to:**

- **to intervene by way of conciliation or mediation to assist in the settlement or disposal of land claims; and**
- **to make findings and recommendations under section 50(1)(a)(ii) of the Act by consent.**

9.18 However, the Committee believes that it would facilitate the settling of outstanding land claims if the Minister for Aboriginal and Torres Strait Islander Affairs could host a settlement conference to determine whether there are any land claims that can be settled by negotiation.

Recommendation 41

9.19 **The Minister for Aboriginal and Torres Strait Islander Affairs host a settlement conference involving the Northern Territory Government, the land councils and other interested parties to determine whether any land claims can be settled by negotiation and voluntary agreement.**

Role of the Minister

9.20 Currently, the Minister for Aboriginal and Torres Strait Islander Affairs has an extensive role in the operation of the Land Rights Act. The Reeves Report lists a number of these roles, namely:

- **consenting to various activities on Aboriginal land, including determining the value of fixtures and improvements thereon;**

- establishing land councils and a number of roles connected with their operations;
- establishing and appointing the membership of Land Trusts;
- recommending grants of land under the Act;
- appointing an arbitrator or a Mining Commissioner;
- giving a range of consents and approvals under the exploration and mining provisions of the Act;
- appointing the Chair and members of the Aboriginals Benefit Reserve Advisory Committee; and
- publishing details of an agreement in respect of roads and tabling a proclamation of a mine proceeding in accordance with the national interest.²¹

9.21 The Committee agrees with the conclusions drawn by the Reeves Report that the role of the Minister should be reviewed and restricted to areas where it is absolutely necessary.²² This is in accordance with the Committee's belief that Aboriginal people should have as much autonomy as possible in running their own affairs. As a general rule, Aboriginal people should not require Ministerial sanction to undertake activities that other Australians can undertake without such Ministerial approval.

Recommendation 42

9.22 **The role of the Minister for Aboriginal and Torres Strait Islander Affairs in the administration of the *Aboriginal Land Rights (Northern Territory) Act 1976* be reviewed, with a view to reducing or removing that role altogether.**

Sacred Sites

9.23 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. Under s. 23(1)(ba) of the Act, land councils have responsibility to assist

²¹ *Reeves Report*, pp. 487-88.

²² *Reeves Report*, p. 493.

Aboriginal people to protect sacred sites, whether or not the sites are on Aboriginal land.

- 9.24 However, s. 73(1)(a) of the Land Rights Act also allows the Territory to make laws to protect or prevent the desecration of sacred sites in the Northern Territory. Accordingly, the Northern Territory Aboriginal Sacred Sites Act 1989 (NT) (the ‘Sacred Sites Act’) 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.

The AAPA and Land Councils

- 9.25 The Reeves Report notes an ongoing tension between the AAPA and the larger land councils. To resolve the issue, the Report recommends that ss. 23(1)(ba) and 69 of the Land Rights Act be deleted.²³ This would, by default, give the AAPA sole responsibility for the protection of sacred sites in the Northern Territory.
- 9.26 The AAPA agrees that s. 23(1)(ba) should be deleted, seeing:
- the blunt instrument of legislative reform as a necessary precondition for implementation of cooperative arrangements between the Authority and Land Councils for an integrated approach to the protection of sacred sites.²⁴
- 9.27 The land councils disagree, arguing that issues concerning sacred sites are central to the land management decisions that land councils undertake.²⁵ Support for the continuing role of the land councils in sacred site control also received the support of the Combined Aboriginal Nations of Central Australia.²⁶
- 9.28 The AAPA agrees with the land councils, however, that s. 69 of the Act should not be deleted on the basis that the section has not led to practical problems. The AAPA also believes that s. 69 has symbolic significance for Aboriginal people as it indicates the Commonwealth’s commitment to protecting sacred sites.²⁷

23 *Reeves Report*, pp. 289-90, 296.

24 Aboriginal Areas Protection Authority (AAPA), Submissions, p. S414.

25 CLC, Submissions, p S1648; NLC, Submissions, p. S970.

26 Combined Aboriginal Nations of Central Australia, Submissions, pp. S614-15.

27 AAPA, Submissions, p. S414.

- 9.29 The Committee has not taken enough evidence on this issue to come to any firm conclusions, other than to comment that the strained relations between the AAPA and land councils are counter productive. Given the evidence, the Committee believes that this issue needs to be resolved at the Ministerial level. The recommendations in the Reeves Report do have some merit if conflict and tension continues and new protocols to resolve problems cannot be negotiated and agreed upon. In that case, the recommendations of the Reeves Report should be revisited.

Recommendation 43

- 9.30 **The Minister for Aboriginal and Torres Strait Islander Affairs liaise with the Northern Territory Minister for Aboriginal Development and the land councils to establish protocols for cooperation between the Northern Territory Aboriginal Areas Protection Authority and the land councils when fulfilling their functions under section 23 (1)(ba) of the *Aboriginal Land Rights (Northern Territory) Act 1976*.**

Sacred Sites on Freehold Land

- 9.31 Under the Sacred Sites Act, the AAPA is required to maintain a register of sacred sites, on both Aboriginal and other land in the Northern Territory. Prospective land purchasers in the Northern Territory are advised to apply for a sacred site search from the AAPA before purchasing property on non Aboriginal land.²⁸ However, the AAPA can declare that land contains a sacred site at any time. This has led to several cases where owners have only found out after land purchases that a sacred site notification has been retrospectively declared on their property.²⁹ In such cases, the AAPA offers compensation to the land owners.
- 9.32 The Reeves Report recommends that the Sacred Sites Act be amended so that a person is not guilty of an offence under that Act in relation to a sacred site on freehold land in a town in the Northern Territory where that freehold land was purchased without notice that the land contained a sacred site.³⁰

28 For example, see Dominic Miller, Submissions, p. S632.

29 Dominic Miller, Submissions, pp. S629-32; Transcripts, Alice Springs, pp. 382-83.

30 *Reeves Report*, pp. 291-94, 296.

- 9.33 The AAPA has advised the Committee that it does not support this recommendation on the basis that the Sacred Sites Act already provides mechanisms for resolution of such conflicts and that the Reeves Report recommendation is likely to be inconsistent with s. 73 of the Land Rights Act.³¹
- 9.34 The Committee has sympathy with the predicament of people who have purchased property that is subsequently and retrospectively found to contain a sacred site. However, it is a matter relating to Northern Territory legislation and a Northern Territory Agency (the AAPA). It is therefore an issue for the Northern Territory Government to consider. Accordingly, the Committee is not prepared to make a recommendation on this issue.
- 9.35 For this reason, the Committee will also not comment on the recommendations of the Reeves Report to amend the Heritage Conservation Act 1991 (NT).³²

The Intertidal Zone

- 9.36 There is currently dispute over the seaward boundaries of coastal Aboriginal land. Titles under the Land Rights Act are granted to the low water mark and therefore include intertidal zones.³³ Issues of debate include whether Aboriginal land, and hence Aboriginal control, can extend over:
- estuaries and bays (the sea bed)
 - water (and hence access to the fish) over the intertidal zone when the tide is in;
 - intertidal zones adjoining non Aboriginal land (ownership of non Aboriginal land is to the high water mark); and
 - whether the low water mark is the mean or astronomical low water mark.
- 9.37 Given the tidal range in some areas of the Northern Territory the intertidal zone can comprise hundreds of square kilometres. At issue is that approximately 70% of the value of the commercial fish taken in the Northern Territory comes from the intertidal zone.³⁴

31 AAPA, Submissions, pp. 414-15.

32 See *Reeves Report*, p. 296.

33 See descriptions of the boundaries of Aboriginal land in Schedule One, Land Rights Act.

34 *Reeves Report*, p. 223.

- 9.38 The Reeves Report argues that the Act should be amended to provide that future land claims can only be made to the high water mark. The Report also recommends that the Northern Territory Legislative Assembly be given the power to pass legislation to provide for the joint management of the resources in the intertidal zone, and to allow fishermen licensed to fish in such waters to fish the intertidal zone.³⁵ These recommendations were supported by the Northern Territory Fishing Industry Council ('the Fishing Industry Council') when it gave evidence to the Committee.³⁶
- 9.39 The extent of Aboriginal ownership of seabeds, the water over intertidal zones and the definition of the low water mark is currently or likely to be the subject of litigation.³⁷ However, given the state of flux on these issues and because the recommendations in the Reeves Report may be overtaken by findings of the courts, the Committee has chosen not to make particular recommendations. In principle, Government Members of the Committee endorse the recommendations of the Reeves Report, but acknowledge that they may need revising in the light of any court decisions. Non Government Members, however, do not endorse the Reeves Report's proposals on these matters.
- 9.40 Regardless of the outcomes of these cases, the Committee hopes that regional agreements can be reached between traditional Aboriginal owners and fishing interests for mutual benefit. In this regard, the Committee welcomes the cooperative approach to such agreements by the Fishing Industry Council.³⁸ Such cooperative agreements could be negotiated within the framework of the 'Land Use Agreements' recommended by the Committee in chapter three.

Banks and Beds of Rivers

- 9.41 A related area of dispute about the extent of claimable land under the Land Rights Act concerns whether the banks and beds of rivers should be claimable.
- 9.42 The Reeves Report recommends that the banks and beds of rivers that fall wholly within Aboriginal land should be granted to the land holders. This recommendation has the support of the two larger land councils and the

35 *Reeves Report*, p. 247.

36 See Northern Territory Fishing Industry Council (NTFIC), Transcripts, Darwin, pp. 54-67.

37 See *Northern Land Council v Director of Fisheries*, Federal Court; land claim for the Beagle Gulf Area (Application 191). See also *Yarmirr v Northern Territory* (1998) 156 ALR 370.

38 See NTFIC, Transcripts, Darwin, pp. 55-56.

tacit support of the Northern Territory Government.³⁹ The Committee considers that this relates very much to one of the core principles of the report - that people should have, as far as possible, equal rights and obligations. Accordingly, the rights and obligations of land ownership of the banks and beds of rivers wholly within the land title of the land owner should also be similar – on Aboriginal and non Aboriginal land.

Recommendation 44

9.43 Title to the banks and beds of rivers wholly within Aboriginal land be granted to the title holders of that land.

However, before title is granted, a project team as outlined in recommendation 2, is to recommend amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* to ensure that the rights and obligations of the traditional Aboriginal owners of the banks and beds of rivers wholly within Aboriginal land are consistent with the provisions of the *Water Act 1992 (NT)* and the *Soil Conservation and Land Utilisation Act 1970 (NT)*.

9.44 An area of greater contention, however, concerns the ownership of the banks and beds of rivers that form the boundary between Aboriginal and non Aboriginal land and where rivers form a strip between two areas that are not claimable.

9.45 The Northern Territory Government told the Reeves Review that, in neither of these cases should the banks and beds of rivers be available for claim.⁴⁰ The Reeves Report recommends that the Land Rights Act be amended so that neither of these categories of land is claimable.⁴¹ As a matter of public policy, ownership of rivers by the Crown is the norm throughout Australia. The water resources of a state, territory or the nation as a whole are finite and extremely valuable. They must be protected and well managed on behalf of the whole community and Crown ownership of rivers is well accepted by Australians.

39 NLC, Submission, p. S963A; CLC Submission, S1639. Northern Territory Government referred to in *Reeves Report*, p. 222.

40 *Reeves Report*, p. 222.

41 *Reeves Report*, pp. 222-23.

- 9.46 The two larger land councils have told this Committee that ownership of the banks and beds of rivers in these situations should be determined through the normal land claims process.⁴²

Recommendation 45

- 9.47 **A project team, as outlined in recommendation 2, consider the recommendation of the Reeves Report regarding the beds and banks of rivers that:**
- **form the boundary between land that is available for claim and that which is not; or**
 - **comprise a strip of land between two areas of land that are not available for claim.**

Any amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* should reflect the interests of the Northern Territory community and principles of river resource management.

They should also, in principle, provide that claims over the beds and banks of rivers maintain rights of access as set out in section 13 of the *Water Act 1992 (NT)*, and that rights of public access be addressed before a claim is granted.

The Role of Land Trusts

- 9.48 While taking evidence for this inquiry, the Committee became aware of some confusion about the role of Land Trusts. As described previously, Land Trusts hold legal title to Aboriginal land. However, Land Trusts cannot act without the instructions of the appropriate land council, which in turn take their direction from the traditional Aboriginal owners.
- 9.49 Membership of Land Trusts rotates and it usually consists of a half a dozen people at any one time.⁴³ Membership is open to Aboriginal people living in the appropriate land council region. Thus, members of the Land Trusts need not be traditional Aboriginal owners or even residents of the Land Trust area although this is usually the case in practice.⁴⁴

42 NLC, Submissions, p. S963A; CLC Submissions, p. S1639.

43 For a list of current Land Trust members see *Reeves Report*, Appendix W.

44 Membership details are in s.7, Land Rights Act. See also *Reeves Report*, pp. 482-84.

- 9.50 Under the Act, Land Trusts have a passive role. However, membership of Land Trusts was seen by some Aboriginal people as providing a mechanism for including or excluding traditional Aboriginal owners from decision making.⁴⁵ The Committee was not in a position to judge the veracity, or otherwise, of these comments.
- 9.51 The Reeves Report sees no use for Land Trusts and recommends their abolition with land title being transferred to Regional Land Councils. In chapter three, the Committee has recommended a project team be established to review the potential for amending the Act to allow for 'Land Use Agreements'. If these agreements under s. 19 of the Land Rights Act increase, they may well require a greater role for Land Trusts.
- 9.52 It was only at a late stage in the inquiry that the Committee received a submission commenting on the role of the Land Trusts.⁴⁶ The Committee was therefore unable to seek the views of land councils, traditional Aboriginal owners and the wider community on this issue. Nonetheless, the Committee does think it appropriate for an education campaign to be undertaken about the role of Land Trusts.

Conclusion

- 9.53 This chapter concludes the Committee's comments on the recommendations of the Reeves Report. In the final chapter of this report, the Committee shares its visions for the future role of the Land Rights Act.

45 See Herman Malbunka, Mavis Malbunka, Davey Inkamala, Transcripts, Alice Springs pp. 282-92; Marie Allen, Transcripts, Katherine, pp. 425-34.

46 Aboriginal and Torres Strait Islander Commission(ATSIC), Submissions, p. S1705.