The Parliament of the Commonwealth of Australia

SENATE

FINANCE AND PUBLIC ADMINISTRATION

LEGISLATION COMMITTEE

CONSIDERATION OF LEGISLATION REFERRED TO THE COMMITTEE

PROVISIONS OF THE

ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY)

AMENDMENT BILL (NO. 2) 1999

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MEMBERS OF THE COMMITTEE

Senator Warwick Parer (Chairman)*

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Senator Trish Crossin***

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* Senator Parer replaced Senator Gibson from 1 July 1999

** Senator Bolkus replaced Senator Conroy for the purposes of the committee's inquiry into the Aboriginal Land Rights (Northern Territory) Amendment Bill (No. 2) 1999

*** Senator Crossin replaced Senator Ray for the purposes of the committee's inquiry into the Aboriginal Land Rights (Northern Territory) Amendment Bill (No. 2) 1999

\# Senator Lightfoot replaced Senator Watson from 1 July 1999

Secretariat

The Senate

Parliament House

CANBERRA ACT 2600

Tel: (02) 6277 3530

Fax: (02) 6277 5809

Email: fpa.sen@aph.gov.au

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REPORT ON THE PROVISIONS OF THE ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) AMENDMENT BILL (NO. 2) 1999

Reference and conduct of the inquiry

On 21 April 1999, the Senate referred to the Finance and Public Administration Legislation Committee the provisions of the Aboriginal Land Rights (Northern Territory) Amendment Bill (No. 2) 1999 for examination and report by 12 August 1999.

The committee sought and received submissions from the relevant stakeholders, namely the Northern Territory Government, the Central and Northern Land Councils, the Aboriginal Land Commissioner and the Northern Territory Cattlemen's Association. These submissions have been published by the committee and will be tabled in a volume entitled *Submissions and Documents* accompanying this report.

At a public hearing on 9 June 1999, the committee took evidence from the following groups and individuals:

Senator John Herron, Minister for Aboriginal and Torres Strait Islander Affairs, accompanied by the following officers:

Mr Brian Stacey, Assistant General Manager, Native Title and Land Rights Branch, ATSIC;
Dr Paul Kauffman, Manager, Land Rights Legislation, ATSIC;
Mr Joe Kilby, Assistant Manager (Corporate Law), Legal Branch, ATSIC;
Ms Yvonne Fetherston, Departmental Liaison Officer, Department of the Prime Minister and Cabinet;

Aboriginal Land Commissioner: *Justice H.W. Olney*;

Central Land Council: represented by *Mr L.B. Tilmouth,* Director, and *Mr Tony Keyes,* Senior Lawyer;

Northern Land Council: represented by *Mr John Roberts,* Senior Policy Officer, and *Mr Ron Levy,* Lawyer;

Northern Territory Cattlemen's Association: represented by *Mr Bob Lee,* Executive Director; and

Northern Territory Government: represented by *Mr Neville Jones*, Director, and *Mr Trevor Howard*, Land Policy Officer, both of the Office of Aboriginal Development.

Background to the inquiry

The *Aboriginal Land Rights (Northern Territory) Act 1976* ('the Land Rights Act') provides a mechanism for the grant of traditional Aboriginal land in the Northern Territory to Land Trusts who hold title for the benefit of the traditional owners. Claims can be made principally on unalienated Crown land; they are heard by an Aboriginal Land Commissioner whose recommendations go to the Commonwealth Minister for Aboriginal and Torres Strait Islander Affairs. If the minister accepts the Land Commissioner's recommendations, he or she recommends to the Governor-General a deed of grant to a Land Trust. The Act does not specify what can be done with land under claim but before the finalisation of the claim, hence 1987 amendments providing, inter alia, for a statutory freeze on the alienation of land subject

to a land rights claim and a 'sunset clause' prohibiting the Land Commissioner from dealing with claims lodged after 5 June 1997.

In 1997 the Government introduced the Aboriginal Land Rights (Northern Territory) Amendment Bill 1997 ('the 1997 Bill'). The 1997 Bill as passed by the House of Representatives dealt with extending the circumstances in which Aboriginal land claims could be disposed of in identical terms to Schedule 1 of the 1999 Bill but did not contain clauses relating to the Elliott stockyards. The 1997 Bill was introduced into the Senate but had not been debated when it lapsed with the calling of the 1998 federal election. The present Bill repeats the provisions of the 1997 Bill but also includes clauses relating to the Elliott stockyards.

What the legislation is intended to do

The Bill proposes to amend the *Aboriginal Land Rights (Northern Territory) Act* 1976 to:

- invalidate the deed of grant in favour of the Gurungu Land Trust made on 5 December 1991 to the extent that it included that area of land described as the Elliott stockyards land;
- dispose of Aboriginal land claims where an Aboriginal Land Commissioner, in his or her report to the Minister relating to the claim, has been unable to find any traditional Aboriginal owners of the land;
- dispose of Aboriginal land claims over stock routes and stock reserves; and
- dispose of Aboriginal land claims made after 5 June 1997.

In relation to the Elliott stockyards land the Bill also proposes to oust the provisions of the *Lands Acquisition Act* 1989 and to provide for compensation through Federal Court proceedings only if the resumption of land amounts to an otherwise invalid 'acquisition of property' under subsection 51(xxxi) of the Commonwealth Constitution.

Issues considered in some detail by the committee

Provision relating to Elliott stockyards

The Elliott stockyards, a public trucking yard and cattle dipping facility, were constructed in 1976 on 3.8 hectares of crown land comprising NT Portion 3869, which adjoined an Aboriginal community. The Northern Land Council (NLC) described the building of the stockyards in that location as the 'first error' in what became a protracted saga, pointing out that none of us would want to live next door to stockyards.[1] The facility commenced operations in 1976 under the management of the Northern Territory Department of Primary Industries and Fisheries; in April 1987 the Northern Territory Cattlemen's Association became responsible for the management of the Elliott stockyards.

A memorandum of agreement was reached in September 1989 between the Northern Territory and Commonwealth Governments to provide secure title to land for Aboriginal

1 Senate Finance and Public Administration Legislation Committee, *Hansard*, 9 June 1999, p. 4.

people in pastoral areas. To fulfil the Commonwealth's commitment under that agreement, the *Aboriginal Land Rights (Northern Territory) Amendment Act 1989* ('the 1989 Act') was passed, providing the grant of title to about 2312 square kilometres. The then Minister, the Hon. Gerry Hand, in his second reading speech specifically indicated that the Elliott stockyards were to be excluded from the grant:

> In accordance with concerns raised by the Northern Territory, an area used for cattle yards and a dip at Elliott has been excluded from the scheduling process ... [2]

However when the then Minister Robert Tickner handed over title to an area of land at Elliott to the traditional owners on 12 December 1991, NT Portion 3869 was included. The Land Management Branch of ATSIC recognised its mistake and wrote to the director of the NLC on 12 March 1992, stating:

> Through an oversight in this office Portion Number 3869 was inadvertently included in the description of the land contained in a regulation amending Schedule 1 following the completion of a survey of the area ... This led to that portion being included in the notice establishing the Gurungu Land Trust and in the title deed.[3]

The letter went on to seek the assistance of the NLC, within whose jurisdiction the land falls, in asking the Land Trust to surrender Portion Number 3869 to the Crown under subsection 19(4) of the Land Rights Act. The NLC refused, proposing instead the relocation of the yards and dip.[4] Further correspondence from the minister ensued:

> I would like you to inform the traditional owners that it was the will of the Parliament that the cattle yards and dip not be granted ... I believe that the traditional owners should surrender the land in question.[5]

He later wrote expressing regret that the clerical error resulting in the land grant had occurred, but also stating:

> this error must be rectified. The Commonwealth cannot allow the grant to stand unless, of course, the parties are happy that it should. Furthermore, for as long as the matter remains unresolved, it provides a basis for critics of the Land Council to argue that the Council and the traditional owners are now acting in bad faith, given the earlier consent for the yards to be excised from grant.[6]

He proposed negotiation on the environmental concerns of the nearby Aboriginal community and following their remediation, the surrender of the land. If that were not forthcoming, he indicated that the Commonwealth would examine other options for rectifying the error.[7]

Negotiations took place, an environmental study was conducted and a plan of management for the yards drawn up, and a proposed agreement between the Northern Territory

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2 House of Representatives *Hansard*, 31 October 1989, p. 2152.

3 Attachment to NT Cattlemen's submission, in *Submissions and Documents,* p. 30.

4 Attachment to NT Cattlemen's submission, in *Submissions and Documents,* pp. 31-2.

5 Correspondence dated 13 April 1993, in *Submissions and Documents,* pp. 47-8.

6 Correspondence dated 2 December 1993, in *Submissions and Documents,* pp. 33.

7 Correspondence dated 2 December 1993, in *Submissions and Documents,* pp. 33.

Government, the Northern Land Council and the Commonwealth was reached in 1995. Following legal advice from the Attorney-General's Department which suggested that the agreement potentially left the Commonwealth open to compensation claims, the Commonwealth withdrew. The NLC then produced a revised version of the agreement, to which the Northern Territory Government objected on the grounds that it proposed restrictive covenants on any subsequent title. The Northern Territory Government forwarded the NLC's proposed agreement to the new Commonwealth Minister for Aboriginal and Torres Strait Islander Affairs, stating that the NT Government was no longer prepared to negotiate over the matter, that is was an error of the Commonwealth and it was up to the Commonwealth to rectify it.[8]

During the committee's public hearing into the Land Rights Bill, the Minister for Aboriginal and Torres Strait Islander Affairs, Senator Herron, canvassed the current Commonwealth position:

> The arguments for the Commonwealth invalidating the grant of the Elliott stockyards are compelling. It was a mistake brought about by a clerical error. The Northern Land Council, the Northern Territory government and the Cattlemen's Association had reached agreement that the stockyards were to be excluded from the grant. The second reading speech, when the relevant bill was introduced in 1989, specifically indicated that the stockyards were to be excluded from the grant.

This position was supported by John Reeves, in his review of the parent act. His 1998 report stated:

> The submission from the Northern Territory Cattleman's Association raised the issue of the grant that was made in error in relation to the Elliott stockyards ... The stockyards were apparently included, in error, in the land grant made to the Gurungu Aboriginal Land Trust on 12 December 1991. It was always the intention of the authorities, when making the grant, to exclude the Elliott stockyards and the township of Elliott. Despite a long series of correspondence between Northern Territory Government authorities and Commonwealth Government authorities, this error has not yet been remedied 6½ years later. I recommend that this obvious error be remedied by the relevant authorities without further delay.[9]

Clause 3 of the Bill provides that the deed of grant executed by the Governor-General on 5 June 1991 of an estate in land including the Elliott stockyards is taken never to have been executed to the extent to which it relates to the Elliott stockyards land. The clause also states, to avoid doubt, that any estate or interest in the Elliott stockyards land held by the Gurungu Land Trust is taken to cease to exist.

The committee notes the view expressed by the NLC that the original error was 'that the stockyards were built there in the first place'.[10] Whether that was the case or not, the various stakeholders did not disagree that the granting of the Elliott stockyards to the Gurungu Land Trust had been an administrative error. Exactly how to rectify that error - whether by

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8 Senate Finance and Public Administration Legislation Committee, *Hansard*, 9 June 1999, p. 6.

9 Reeves J, *Building on Land Rights for the Next Generation,* 2nd ed., 1998, p. 267.

10 Senate Finance and Public Administration Legislation Committee, *Hansard*, 9 June 1999, p. 8.

compulsory acquisition of the land or by negotiated settlement - was in dispute. The Commonwealth's position was explained by Brian Stacey of ATSIC:

> The problem from the Commonwealth's point of view is that there has already been a significant amount of resources and effort devoted towards trying to reach an agreement and it has not worked. So, as I understand it, the Commonwealth's view is that it has waited, it has sought to have the land surrendered, it has sought to go through an agreement process that has not been achievable and, ultimately, it has decided to proceed with legislation.[11]

All parties appeared to accept that there were health concerns for the neighbouring Aboriginal community from aspects of the operation of the stockyards. The NLC indicated that the Gurungu Land Trust was prepared to consider surrendering the land, if a number of measures were taken, including the planting of a screen of trees to reduce the smells, noise and dust from the operations of the yard.[12] In its submission to the committee, the NT Government indicated it had taken steps to address the concerns expressed:

> In response to expressed concerns about health and environment, the Northern Territory Government in 1994, in consultation with the Northern Land Council and the Aboriginal community, prepared the *Elliott Stock Yards: Environmental Evaluation Report and Recommendations*. Some of these recommendations have been fulfilled and the Territory remains committed to the safe operation of the facility.[13]

During its public hearing, the committee learnt that ATSIC had funded the planting of the screen of trees by the Northern Territory Parks and Wildlife Commission, that the community was to look after the trees, and that the trees had died.[14] Neville Jones, director of the NT Office of Northern Development, indicated that other work, such as safety provisions for the dip and the tank, had been carried out at a cost to the Territory Government. He stressed, however, that the implementation of the health and safety recommendations should not be a condition precedent to rectifying the administrative land grant error nor should they be a condition on any ensuing title.[15]

The NLC proposed an alternative solution to compulsory acquisition, namely, that the NT Cattlemen's Association be granted a long or perpetual lease over the land so that health and safety concerns could be conditions of the lease and handled directly between the community and the association.[16] The Cattlemen's Association submitted that the title to the Elliott stockyards land should be restored to the Northern Territory Government.[17] Mr Jones, representing the NT Government, made the point that, while there had always been the assumption that the NT Government intended to hand the land to the Cattlemen's

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11 Senate Finance and Public Administration Legislation Committee, *Hansard*, 9 June 1999, p. 9.

12 *Submissions and Documents,* pp. 17-18.

13 ibid., p. 39.

14 Senate Finance and Public Administration Legislation Committee, *Hansard,* 9 June 1999, p. 10.

15 ibid.

16 ibid.

17 *Submissions and Documents*, p. 29.

Association, the resolution of the ownership issue was between the NT and Commonwealth Governments and the future disposition of the land was irrelevant.[18]

The committee appreciates the environmental and health concerns raised by the NLC but also notes the extensive negotiations which have already occurred in this matter without an acceptable solution having been reached. It has been generally acknowledged that the grant of the Elliott stockyards land was an administrative error and the committee considers that this error should be rectified in the manner proposed by the legislation.

Compensation for resuming the Elliott stockyards land

Clause 4 of the Bill deals with the issue of compensation for the retrospective resumption of the stockyards. The Bill itself provides no statutory entitlement to compensation. The Explanatory Memorandum to the Bill indicates that 'any compensation which may be payable would be nominal' and explains the clause as follows:

> The purpose of this clause is to ensure compliance with section 51(xxxi) of the Constitution. The clause provides that if the amendment effected by clause 3 would result in an acquisition other than on just terms and would be invalid because of that section the Commonwealth would be liable to pay such compensation as is necessary to ensure acquisition on just terms.

The Commonwealth Government's position was expanded on by Mr Stacey:

> the bill provides that the Commonwealth is only liable to pay compensation in the event that the Federal Court were to find that this is required by section 51 of the Constitution ... if there is a requirement under the Constitution for just terms compensation to be paid, it should be paid, but not otherwise. I believe the Commonwealth again takes the view that there should not be a moral obligation to pay compensation. The assets involved were not the property of the Land Trust to begin with. They were granted in error. The Commonwealth's view is that all the parties were put on notice at the outset that, ultimately, that error was going to be rectified.[19]

Whether or not section 51(xxxi) of the Constitution has application to the acquisition of property in the Northern Territory is not certain. In the *Newcrest* decision in 1997, the High Court by a majority of four to three held that the constitutional requirement of 'just terms' could apply in the Territory.[20]

In its written submission to the committee, the NLC opposed the compensation clause on the basis that the claimants would have to litigate to establish their entitlement to compensation, whether under clause 4(1) or under the Constitution and that this would impose a costly and onerous burden on those who could least afford to bear it.[21] When asked in the committee's public hearing whether the traditional owners would take the matter to the Federal Court, Mr Levy from the NLC stated:

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18 Senate Finance and Public Administration Legislation Committee, *Hansard,* 9 June 1999, p. 6.

19 Senate Finance and Public Administration Legislation Committee, *Hansard*, 9 June 1999, p. 11.

20 Bills Digest No. 181 1998-99, pp. 11-12.

21 *Submissions and Documents*, p. 21.

> We will certainly have to seek instructions from the traditional owners as to whether they wish to take that course. We have obtained legal advice regarding the validity of the proposed bill and we consider that, at the least, it will provide a right for compensation. We consider that compensation would certainly be greater than the things the traditional owners have asked for today.[22]

On the general question of compensation, Mr Tilmouth, director of the Central Land Council, suggested that the Aboriginal communities' position was that the negotiated outcome was the best way to go and that compensation would not cover the opportunity forgone.[23]

While sympathetic to the NLC argument that the stockyards may have been wrongly sited in the first place, the committee considers that no organisation should be permitted to profit by an administrative error. The NLC was aware that the stockyards were never intended to be included in the land grant and was informed of their unintended inclusion within three months of its occurrence. Compensation for the deprival of an unintended benefit would appear to be inappropriate and should rightly be only awarded after consideration by a court.

Exclusion of Lands Acquisition Act

The Commonwealth Government's decision to exclude the operation of the Lands Acquisition Act was explained by Mr Stacey:

> The Commonwealth thought about using the Lands Acquisition Act but ultimately took the view that essentially, as the error had been made in parliament, that is where it should be fixed …[24]

The NLC's view was provided by Mr Levy:

> The reason the Lands Acquisition Act is not to apply is because, if this was being done under the Lands Acquisition Act, procedures would have to be followed whereby there would be negotiation to see if you could reach a negotiated settlement.

Again the committee notes the protracted negotiations which have taken place concerning the Elliott stockyards land and considers that resolution of the matter by the enactment of specific legislation is preferable to acquisition of the land pursuant to the Lands Acquisition Act.

Disposal of land claims where the Aboriginal Land Commissioner is unable to find traditional owners

According to the Explanatory Memorandum to the Bill, Item 3 of Schedule 1 to the Bill would:

> substitute a new paragraph 67A(5)(c) under which a land claim would be taken to be finally disposed of if the Aboriginal Land Commissioner reports to the Minister that there are no traditional owners of the area which is the subject of a claim or that he is unable to make a finding that there are traditional owners of that land.

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22 Senate Finance and Public Administration Legislation Committee, *Hansard*, 9 June 1999, p. 8.

23 ibid., p. 12.

24 ibid., p. 13.

At the committee's public hearing the present Aboriginal Land Commissioner, Justice Olney, noted that the role of the Aboriginal Land Commissioner in considering a claim was to ascertain whether the Aboriginals who had made the claim or any other Aboriginals were the traditional owners of the land that had been claimed.[25] Justice Olney went on to outline the different situations which may arise in the consideration of a land claim:

> You also get the situation which is not uncommon where the evidence does not always extend to satisfying the commissioner that the claimants, or indeed any other Aboriginals, are in fact traditional owners. This may be through lack of evidence simply due to the absence of individuals or through the fact that when they come to give their evidence their material suggests that their boundary goes to a certain place and the claim area goes beyond that.[26]

In relation to the difficulties posed by this situation, Justice Olney stated:

> It would be a bold commissioner who could say that there are no traditional Aboriginal owners of a particular piece of land. The best you can say is that on the evidence you cannot make that finding. Under the present situation there is no further capacity for the land to be effectively claimed - it can be claimed, of course, but it cannot be processed through an inquiry by the commissioner. A finding that a commissioner is unable to conclude that there are traditional owners leaves the situation in limbo. The effect of section 67A is simply to operate effectively as a permanent injunction on the alienation of that land by the Territory.[27]

In its submission to the committee the Northern Territory Government described the situation from its point of view:

> unless this matter is resolved, land in the Territory can potentially be permanently frozen notwithstanding the fact that it had been dealt with by way of the hearing process, with no recommendation for a grant having been made.[28]

In its submission to the committee, the Central Land Council considered that the proposed amendment might give rise to injustice. By way of illustration it cited the Urrpantyenye (Repeat) Land Claim. The area in question was originally the subject of the North-West Simpson Desert Land Claim, but the Commissioner reported that he was unable to find traditional owners for the area. The Territory then granted a Crown Lease Perpetual to the Northern Territory Land Corporation. The repeat claim was lodged later. The Commissioner hearing the repeat claim determined that, because the North-West Simpson Desert Land Claim had not been finally determined, the alienation to the Land Corporation was invalid because of section 67A. The claim could proceed and was eventually settled. Had the present proposed amendment been enacted, the repeat claim would have been excluded by the alienation to the Land Corporation.[29] Justice Olney clarified in the committee's public hearing that the repeat claim did not proceed, but in fact as a result of negotiations, the land

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25 Senate Finance and Public Administration Legislation Committee, *Hansard,* 9 June 1999, p. 15.

26 ibid.

27 ibid.

28 *Submissions and Documents*, p. 38.

29 *Submissions and Documents,* p. 6.

was scheduled in the *Aboriginal Land Rights (Northern Territory) Amendment Act (No. 1) 1999* which was recently passed.[30]

Mr Stacey of ATSIC stressed that the Commonwealth's intentions regarding item 3 in schedule 1 was merely to end uncertainty about the status of particular land and that, rather than taking away any rights of Aboriginal people, it merely removed from the land claims register particular applications.[31]

Justice Olney suggested that, in view of the difficulties of determining traditional ownership, commissioners in the future might resort to the device of leaving a claim open, if there were the prospect of its succeeding at a later stage. He also pointed out that the commissioner's reports are subject to review under the Administrative Decisions (Judicial Review) Act so that, if this amendment were to be passed, it might be desirable for some provision to be made to ensure that the time for the review process was allowed to expire before finding became effective. Otherwise, land might be alienated too quickly.[32] This echoes a concern also expressed in the Reeves report:

> If the Aboriginal Land Commissioner is given power to dismiss a claim and s.67A(5) is amended to include such a dismissal as a final disposition of the claim, an estate or interest could then immediately be granted in the land the subject of the claim. In circumstances where the claimants wished to test the Aboriginal Land Commissioner's ruling dismissing the claim, the land under claim might therefore be alienated before they could do so. It would accordingly be sensible to allow some period between the Aboriginal Land Commissioner dismissing the claim and the claim being finally disposed of in accordance with s.67A(5). If during that period the claimants commence proceedings in a Court of competent jurisdiction to challenge the Aboriginal Land Commissioner's decision, the claim would not be finally disposed of in accordance with s.67A(5) until such time as those proceedings were finally determined.[33]

Mr Keyes, representing the CLC, submitted that in cases where the Aboriginal Land Commissioner was unable to make a finding about traditional ownership, it had not been the Parliament's intention that the claim be finally disposed of, and so it should remain. He stressed that the Land Councils did not take this stance to frustrate the land administration functions of the Northern Territory Government but because the Councils and the traditional owners preferred to resolve outstanding land claims and other issues to do with land use by negotiation, an avenue open to them under the present legislation. There was, in the Councils' view, no need for the amendment.[34]

The committee leans to the view that the calls for certainty in this process should be heeded and supports the amendment that claims in respect of which an Aboriginal Land Commissioner has been unable to find traditional owners should be finally disposed of under the Act. The committee regards it as unreasonable for the claimed land in these circumstances to be, in effect, permanently frozen by the operation of section 67A.

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30 Senate Finance and Public Administration Legislation Committee, *Hansard*, 9 June 1999, p. 17.

31 ibid., p. 19.

32 ibid., pp. 19-20.

33 Reeves, op. cit., p. 261.

34 Senate Finance and Public Administration Legislation Committee, *Hansard,* 9 June 1999, p. 20.

Disposal of land claims over stock routes and stock reserves

The disposal of land claims over stock routes and stock reserves is dealt with in clause 4 of Schedule 1 of the Bill. Land held by non-Aboriginals under a pastoral lease was not claimable under the Land Rights Act but it was recognised that Aboriginal people displaced from their traditional country by pastoralism still had legitimate aspirations to secure land title. The 1980s saw the commencement of the excision movement, whereby land could be excised from pastoral properties as community living areas, the quid pro quo being Commonwealth legislation limiting the right of Aboriginal people to claim stock routes and stock reserves, which was enacted in the 1987 Bill but not proclaimed. The Northern Territory Government representative Mr Jones outlined the details of the 1989 Memorandum of Agreement which was then reached between the Commonwealth and Northern Territory Governments. In return for the passage of specific NT legislation granting community living areas on pastoral properties, the Commonwealth would proclaim its 1987 amendments, section 50 (2D) and 50 (2E) of which precluded the Land Commissioner from conducting an inquiry into claims over stock routes or stock reserves; it would also grant some 35 stock routes under claim, while the remaining claims were to lapse.[35] In the event, although the required proclamation was made in 1990, the provision did not cause the land claims to stock routes to lapse - they remain on the land claim register, thus invoking section 67A which prohibits the Northern Territory Government from dealing with the land. The land, in effect, remains in limbo. The Land Commissioner cannot hear the claims, and from his point of view, as the person required to administer the Act, ‘if the commissioner has no function to perform, then it seems sensible – although perhaps not just – that those particular claims be finally disposed of, or deemed to be so’.[36]

A further agreement between the two governments was reached in 1995: the Commonwealth would amend the Land Rights Act so that stock routes and stock reserves claims that could not be heard by the Land Commissioner would be disposed of, in return for the Northern Territory Government’s expediting the excisions legislation. Legislation to achieve this was drafted in both jurisdictions but, as noted before, the 1997 Commonwealth Bill lapsed at the election and the Northern Territory amendments to its *Pastoral Land Act 1992* were then withdrawn.

The CLC and the NLC made detailed submissions to the committee on this issue, claiming that the agreements between the Commonwealth and the Northern Territory Governments were inadequate since the Aboriginal people affected by the agreements were never consulted.[37] The submissions also criticised the Northern Territory Government for not implementing a number of aspects of its obligations under the agreements particularly in respect of the legislation relating to the excision of community living areas from pastoral leases.[38] In the committee’s public hearing, Mr Keyes also questioned the extent to which land had actually been frozen as a result of the effects of the stock route claims in section 67A.[39] The Land Council representatives were critical of the community living areas

35 Senate Finance and Public Administration Legislation Committee, *Hansard*, 9 June 1999, p. 21.

36 ibid.

37 *Submissions and Documents*, pp. 8, 23.

38 *Submissions and Documents*, pp. 9-10, 24.

39 Senate Finance and Public Administration Legislation Committee, *Hansard,* 9 June 1999, p. 22.

legislation for its failure to ensure that grants be made on the basis of traditional interest. Mr Lee of the Cattlemen's Association pointed out that his members were more than willing to assist with genuine applications for land grants on particular pastoral leases with which the applicants had an association, a position supported by Mr Keyes who indicated that of the almost 100 living areas granted, the vast majority were titles granted pursuant to an agreement between the applicants and the pastoral lessee in question. Mr Roberts of the NLC summarised the the situation from the Land Councils' viewpoint as 'the Commonwealth government wanting to legislate to solve a purported problem that is still in the realms of being negotiable'.[40]

During the committee's public hearing concern was also expressed about the commencement of the stock routes provisions, which, if the legislation passed, would automatically come into effect after 12 months irrespective of whether the Northern Territory had passed the amendments to its Pastoral Land Act.[41] Mr Jones indicated that in 1989 the Northern Territory and Commonwealth Governments had agreed to commence respective pieces of legislation on the same day and did so, and the same undertaking had been given on this occasion.[42]

On balance the committee believes that these amendments are consistent with the agreements reached between governments over ten years and should be enacted without further delay.

Disposal of land claims made after 5 June 1997

The disposal of land claims made after 5 June 1997 is also dealt with in clause 4 of Schedule 1 of the Bill. The second reading speech to the Bill states:

> The sunset clause introduced in 1987 was intended to prevent land claims being made after 5 June 1997. However, while the Land Commissioner cannot deal with claims lodged after this date, it does not prevent such claims being lodged and remaining on the books.

In its submission to the committee the Northern Territory Government stated:

> A similar matter is the so called "sunset" clause in section 50(2A) and the unintended interaction between this section and the restrictions on dealing with land under claim in s. 67A. The clear intention of the Parliament in enacting s. 50(2A) was to prevent claims which were lodged on or after 6 June 1997 from being of any effect. However, the prohibition in s. 67A on dealing with land subject to claim, arguably applies no matter when the application under s. 50(1)(a) is made. Nor is there any test as to when an application should be accepted.
>
> Accordingly if an application was lodged in, say September of 1999, the Commissioner would not be able to perform any function in respect of the claim. But there is also a strong body of opinion which suggests the Territory would still

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40 Senate Finance and Public Administration Legislation Committee, *Hansard*, 9 June 1999, p. 24.

41 ibid., p. 23

42 ibid.

> be prevented from dealing with the land for as long as s. 67A stood on the statute books.[43]

In their submissions to the committee the Land Councils indicated that there was no legislative intention to prevent such claims for all time and the sunset clause could be repealed at any time. No applications had been lodged since 5 June 1997 so, in their view, the amendment was unnecessary.[44] Both Minister Herron and Justice Olney, however, indicated there was scope for claims to be made, in which case section 67A would apply, affecting the ability of the Northern Territory to deal with the land.[45]

It is unclear whether further claims are likely to be made. In the period immediately prior to 5 June 1997 when the sunset clause came into effect, 86 claims were lodged and in essence everything that could be claimed had been claimed. In his report, Mr Reeves suggested it was in the interests of all concerned now to move on from 'this costly, formal, legal, adversarial environment to a productive and co-operative approach to land rights'.[46]

In supporting the proposed amendments to the Schedule in general, however, Justice Olney summed up the situation as follows:

> from a practical point of view and on the assumption that that the sunset clause was intended to be a permanent feature of the act, it seems to me that, in the administration of the act where you have a situation that does not enable anything to be done one way or the other in resolving a claim, it would be appropriate simply to treat those claims as having been disposed of.[47]

As Minister Herron pointed out, these amendments were necessitated by drafting problems in the original amendments. The clear legislative intention of previous governments was that claims which could not be heard by the Aboriginal Land Commissioner should not remain alive and the claimed land be unavailable for other use. The proposed legislation in effect corrects errors of the past.

Recommendation

That the Bill be agreed to.

Senator Warwick Parer

Chairman

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43 *Submissions and Documents,* p. 37.

44 *Submissions and Documents,* p. 7.

45 Senate Finance and Public Administration Legislation Committee, *Hansard,* 9 June 1999, p. 2; *Submissions and Documents,* p. 2.

46 Reeves, op. cit., pp. 216-7.

47 Senate Finance and Public Administration Legislation Committee, *Hansard,* 9 June 1999, pp. 15-16.

ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) AMENDMENT BILL (NO. 2) 1999

LABOR SENATORS' MINORITY REPORT

Labor members of the Committee recommend that the Aboriginal Land Rights (Northern Territory) Amendment Bill (No. 2) should not be proceeded with. The Bill would not merely effect technical changes, as the Minister claims. It would effect substantial changes, which could yield unjust results.

Negotiated solutions to two of the major issues (Elliott Stockyards and the stockroutes) are more appropriate, less costly, and have only failed because of NT Government and Commonwealth Government intransigence.

Further the amendments subvert the purpose of the Land Rights Act in that the traditional owners (because the sunset clause is now in effect) are now precluded from lodging a claim over the stockyards which they would have been able to pursue (if the land had never been granted).

In addition, the subject matter is being considered as part of a major review of the *Aboriginal Land Rights (Northern Territory) Act 1976*, and any changes to the Act should be considered as a part of that review.

Commencement

Clause 2 provides for the commencement of the Bill on Proclamation or twelve months after assent, whichever is the earlier. The effect is that, if no proclamation is made sooner, the Bill will commence automatically twelve months after assent.

An important part of this Bill is the Commonwealth's side of a 1995 agreement with the Northern Territory about the disposition of claims over stock routes. The evidence before the Committee was that the Territory has yet to fulfil its side of that agreement. Automatic commencement of the Bill is therefore inappropriate.

Elliott Stockyards

In the Committee's hearing on the Bill, it emerged that there are very good prospects of the Elliott Stockyards case being resolved by agreement between the Northern Territory Cattlemen's Association and the Northern Land Council, and possibly the Northern Territory Government.

The extreme measure of retrospectively revoking a long-standing deed of grant, as proposed by clause 3 of the Bill, is probably not necessary at all, but in any case should not be considered while there is such a prospect of resolution by negotiation and agreement.

Clause 4(1) entitles persons whose property is acquired by clause 3 to just terms compensation if (a) the acquisition is not on just terms, and (b) the acquisition would be invalid because of paragraph 51(xxxi) of the Constitution. However such a purported right to compensation could only be vindicated by long and expensive litigation, as the application of the *Lands Acquisition Act 1989* would be expressly excluded by clause 5.

The Northern Territory Cattlemen's Association and NT Government have agreed that the operation of the Elliott Stockyards has not been adversely affected.

The NT Government has failed to respond to, or even acknowledge, the NLC's re-drafted agreement dated April 1996. This agreement gives legal force to the negotiated position reached between the parties in 1995, and was re-drafted in accordance with Commonwealth legal advice. The agreement provides for health and safety benefits (such as proper burial of carcases, reduction of noxious odour and dust, and measures to ensure children cannot be injured), as well as ensuring that ceremonial activity (on the adjacent ceremonial ground) over Christmas is not disrupted.

During the Senate Committee hearing a further proposal for resolving the issue was suggested, namely that the Cattlemen's Association enter a lease directly with the Gurungu Land Trust, with conditions that promote health, safety and ceremonial concerns. The Northern Territory Cattlemen's Association expressed no objection to this proposal.

Traditional owners, and the NLC on their instruction, prefer a negotiated solution which would be fulfilled if the NT Government (and Commonwealth Government) were prepared to engage on the terms agreed between all parties in 1995.

The NT Government has not objected to the substance of the NLC proposal for a negotiated solution, but has failed to respond over a period of more than three years.

The traditional owners' major concerns relate to health, safety and ceremonial matters. The Minister for Aboriginal and Torres Strait Islander Affairs, Senator Herron, has raised Aboriginal health as a major focus of his priorities, and has acknowledged that the 1995 agreement would alleviate the health concerns of the traditional owners. Nevertheless the Minister has failed to encourage the NT Government to facilitate a negotiated solution which is based on environmental heath issues.

Implementing the 1995 agreement has not been treated seriously by the NT Government or Commonwealth Government. This agreement meets the interests of the traditional owners, the NT Government and the Cattlemen's Association. Plainly it is a simpler, less risky and less costly option than legislating to acquire the property by revoking the deed of grant.

Further, the amendments have the effect of subverting the purpose of the Land Rights Act. Prior to 4 June 1997 (the date of the sunset clause) land which was reserved or used for public purposes under NT legislation was available for claim (and commonly claimed) under the Land Rights Act. In practice, after a successful claim, the Minister requires the parties to reach a negotiated agreement before land is granted as Aboriginal land. Such agreements are usually reached, and have always been encouraged by Commonwealth Ministers. For example, Senator Herron recently agreed to the grant of Muckaty Station as Aboriginal land, after successful negotiations regarding the proposed Alice Springs to Darwin railway corridor and regarding an existing gas pipeline.

In other words, if the stockyards had not been granted as Aboriginal land in 1991, it would have been open to the traditional owners to pursue a land claim regarding that land. It is undoubtedly the case that such a claim would have been pursued. Given that the Gurungu People have successfully claimed other land in the region, and that the stockyard adjoins an important ceremony ground, it is likely that such a claim would have been successful.

Negotiations would then have commenced between the parties. In contrast to the present circumstances, it is reasonable to expect that agreement would have been reached under the usual practice of encouragement by the Commonwealth Minister. The land would then have been granted as Aboriginal land in an amicable situation, and probably with similar conditions as to health, safety and ceremonial concerns as currently proposed.

The retrospective revocation of the 1991 grant of Aboriginal land subverts this process, to which traditional owners would otherwise have been entitled, because the sunset clause now precludes the lodgment of a land claim over the stockyards.

Final disposition of land claims under section 67A

Section 67A of the Principal Act prevents dealings with land under claim until the relevant claim is "finally disposed of". Subsection 67A(5) presently provides that a claim shall be taken not to have been finally disposed of until—

- the claim is withdrawn,
- the Governor-General grants the relevant land under section 12,
- the Aboriginal Land Commissioner (whose functions include hearing, and making reports and recommendations on, land claims) reports to the Minister that there are no traditional Aboriginal owners of the land, or
- the Minister decides not to recommend to the Governor-General a grant of the relevant land.

Schedule 1 to the Bill would amend section 67A to provide in addition that claims are "finally disposed of"—

- where the Commissioner reports to the Minister that he or she is unable to make a finding that there are traditional Aboriginal owners of the land,
- where the claim is made after 5 June 1997, or
- where subsection 50(2D) applies to the claim.

Commissioner unable to make a finding

The Central and Northern Land Councils submitted, and the Aboriginal Land Commissioner acknowledged in the Committee's hearing, that there are many reasons for which the Commissioner might be unable to make a finding that there are traditional Aboriginal owners at a particular point in time.

For example, due to factors beyond the control of any party, the evidence in the claim may fall short of establishing traditional ownership. Or succession processes may not have run their course at the time of the initial hearing. As a result, the Aboriginal Land Commissioner would be unable to make a finding, and may so report to the Minister.

Under the proposed amendment, the claim would be "finally disposed of", and the protection of section 67A would be lost. The Territory would be empowered to alienate the land,

removing it from the definition of "Crown land" in subsection 3(1), and from claimability under subsection 50(1). This would potentially result in gross injustice.

The Central Land Council submitted that this amendment could result in potential injustice, as illustrated by the Urrpantyenye (Repeat) Land Claim. The area in question was originally the subject of the North-West Simpson Desert Land Claim, but the Commissioner reported that he was unable to find traditional owners for the area. The Territory then purported to grant a Crown Lease Perpetual to the Northern Territory Land Corporation. The repeat claim was lodged later. The Commissioner hearing the repeat claim determined that, because the North-West Simpson Desert Land Claim had not been finally determined, the alienation to the Land Corporation was invalid because of section 67A. The claim could proceed (and was eventually settled: see *Aboriginal Land Rights (Northern Territory) Amendment Act (No 1) 1999*, which added a description of the land to Schedule 1 of the principal Act).

Had the present amendment been enacted, the repeat claim would have been excluded by the alienation to the Land Corporation, resulting in injustice to the traditional owners.

The Bill includes no indication of an intention that the amendment should apply to applications made before the commencement of the amendment. It could therefore have only very limited future application. The substantial risk of injustice that the provision, in its present form, poses should not be taken.

Sunset clause

The "sunset clause" on land claims under the principal Act (subsection 50(2A)) prevents the Commissioner from fulfilling a function in relation to claims lodged after 5 June 1997.

Schedule 1 item 4 (inserting subparagraph 67A(6)(b)(i)) of the present Bill would finally dispose of such claims for section 67A purposes.

There was never a legislative intention to prevent such claims for all time. The subsection could be repealed at any time. In the event, no applications have been lodged since 5 June 1997. The administration of land in the Territory has not been affected.

Stock routes

Subsection 50(2D) was inserted into the principal Act by the *Aboriginal Land Rights (Northern Territory) Amendment Act 1987*. It prevents the Aboriginal Land Commissioner from performing a function in relation to a claim over a stock route or stock reserve if the Commissioner had not commenced an inquiry into the claim before 1 March 1990.

Schedule 1 item 4 of the present Bill (which would insert subparagraph 67A(6)(b)(ii)) would finally dispose of such claims.

On 7 September 1989, the Commonwealth and the Territory entered into a Memorandum of Agreement ("MOA") about stock route claims and living areas pastoral districts in the Northern Territory. In short, the agreement was that the Commonwealth would proclaim the commencement of subsection 50(2D) in return for the Territory fulfilling its longstanding promise to provide a system for the grant of land to Aboriginals in pastoral districts.

The Territory enacted its *Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act* 1989 (which sets out the text of the MOA as a schedule), and the Commonwealth

proclaimed subsection 50(2D) to commence on 1 March 1990. (The living areas legislation was later transferred to Part 8 of the *Pastoral Land Act* 1992.)

The amendment to section 50 did not have the effect of finally disposing of claims for the purposes of section 67A. There was never a legislative intention manifest in the Act.

In 1995, the Commonwealth and the Territory made a further agreement. It appears that the agreement was that Commonwealth proposals for streamlining the processes of the Community Living Areas Tribunal under Part 8 of the *Pastoral Land Act* would be implemented in return for an amendment to section 67A to finally dispose of claims over stock routes and stock reserves.

The Land Councils claimed in their submissions that the Territory had not fulfilled its side of the 1995 agreement. So much was acknowledged in the Second Reading Speech on this Bill in the House of Representatives, and was not contradicted by the Territory in its submission.

The present amendment should not be entertained while the Territory's obligations under the 1995 agreement remain unfulfilled. The Appendix gives details of the Territory's failure to enact its side of the 1995 agreement.

Senator Nick Bolkus

Senator for South Australia

Senator Trish Crossin

Senator for the Northern Territory

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SUPPLEMENTARY REPORT

AUSTRALIAN DEMOCRATS

I regret that I was not able to attend the hearing on this matter.

The Australian Democrats note the arguments of the Government and the Opposition expressed in their respective reports, and are cognisant of their views. Both have some sound arguments. These reports are most helpful to a full understanding of the issues.

Senator Woodley, as the Democrats' portfolioholder with responsibility in these matters, will have talks with both parties with a view to finalising the Democrats' position, and to facilitate an early resolution of this bill.

Senator Andrew Murray

Senator for Western Australia