

**SUBMISSION BY ABORIGINAL AREAS PROTECTION AUTHORITY
TO PARLIAMENTARY INQUIRY INTO THE REEVES REPORT ON
THE ABORIGINAL LAND RIGHTS (NT) ACT**

March 1999

INTRODUCTION

This submission has been prepared in response to a request dated 20 January 1999 from the Secretary of the Parliamentary Inquiry into the Reeves' Report on the *Aboriginal Land Rights (NT) Act*. This submission is focussed on the area of the Authority's statutory responsibility, the protection of sacred sites and not the other terms of reference of the Review conducted by John Reeves QC. This submission summarises points previously made in the Authority's submission to the Reeves' Review and also responds to the findings and recommendations made in the Reeves Report relating to sacred sites.

BACKGROUND

The *Land Rights Act* And Complementary Northern Territory Sacred Sites Laws

Section 73(1) of the *Aboriginal Land Rights (NT) Act 1976*, hereafter referred to as the *Land Rights Act*, extends the power of the Legislative Assembly of the Northern Territory under the *Northern Territory (Self-Government) Act 1978* to the making of:

laws providing for the protection of, and the prevention of desecration of, sacred sites in the Northern Territory, including sacred sites on Aboriginal land, and, in particular, laws regulating or authorising the entry of persons on those sites, but so that such laws shall provide for the right of Aboriginals to have access to those sites in accordance with Aboriginal tradition and shall take into account the wishes of Aboriginals relating to the extent to which those sites should be protected.

The *Northern Territory Aboriginal Sacred Sites Act (1989)*, hereafter referred to as the *Sacred Sites Act*, is legislation pursuant to s.73 of the *Land Rights Act*.

In 1977 the Joint Select Committee on Aboriginal Land Rights (Bonner Committee) recommended that the most appropriate means of ensuring site protection in the Northern Territory would be "the creation of a statutory Authority with Land Council representation to co-ordinate requests for protection, initiate prosecutions and establish appropriate methods of protection". The Authority submits that the objective of establishing an independent body has been achieved under the Territory legislation in the creation of the Aboriginal Areas Protection Authority.

The success of the Authority as an institution owes much to the fact that the majority of the members of the Authority Board are Aboriginal custodians nominated by the Land Councils. Members of the Authority Board gain authority from the fact that they are the nominees of the peak Aboriginal representative bodies dealing with traditional concerns in the Northern Territory. The fact that Board members are formally selected by the Northern Territory Minister and appointed by the Administrator signals to the community at large that this body is an official instrument of Government policy.

LAND COUNCILS' PUBLIC OPPOSITION TO SACRED SITES ACT

The Northern and Central Land Councils have publicly opposed the laws passed by the Northern Territory Parliament in accordance with s.73 of the *Land Rights Act*. The Land Councils put their case to Toohey J. in 1983 that all functions relating to sacred site protection be transferred to the Land Councils under Commonwealth law. Toohey J. did not accept the Land Councils' argument but his comment that this situation may change if the Territory legislation was shown to be "demonstrably inadequate or not working effectively" has been read by the Land Councils as an invitation to demonstrate the existence of such inadequacies and/or ineffectiveness to the Commonwealth in order that this issue may be reopened¹.

The Authority has observed that the continued opposition by the major Land Councils to the *Sacred Sites Act* has

- led to confusion amongst Aboriginal custodians
- resulted in custodians not accessing the protection for their sites afforded under the Territory law
- fostered a culture of suspicion amongst Land Council employees about their counterparts working for the Authority which at best has led to a duplication of work and at worst an unproductive rivalry resulting in a reduction of both quality and efficiency of services provided to Aboriginal clients.

SUMMARY OF AUTHORITY'S SUBMISSION TO THE REEVES' REVIEW

The legal and administrative structures established in accordance with s.73 of the *Land Rights Act* in the Northern Territory have been developed with the aim of preventing the polarisation of issues relating to questions of land use and escalation of conflict.

The Authority submits that effectiveness of the complementary legislation passed in accordance with s.73 of the *Land Rights Act* has been adversely affected by continued opposition to the Territory legislation on the part of the major Land Councils. The unwillingness of the major Land Councils to support this legislation has reduced the efficiency with which services have been delivered to Aboriginal custodians in relation to site protection.

The Land Councils have been able to maintain this opposition, in part, because of the ambiguity of the *Land Rights Act* regarding the role of Land Councils in the scheme of site protection established in s.69 and s.73. In addition, the suggestion (notably in Toohey's "Seven Years On" report) that the Commonwealth may disallow the Northern Territory legislation and transfer responsibility for site protection legislation to the Land Councils if the Northern Territory legislation is shown to be inadequate has led to a situation whereby the Land Councils have an interest in finding fault with the Territory laws and little incentive for assisting in their smooth operation.

The Authority submits that this uncertainty over the Commonwealth Parliament's intention relating to the way in which site protection is to be achieved is best remedied through amendments to the functions (and possibly procedures) established under the *Land Rights Act*

¹Eg *Our Land, Our Life – Aboriginal Land Rights in Australia's Northern Territory*, published by the Northern and Central Land Councils 1995.

aimed at integrating the work of the Land Councils in this area with the work of the Authority.

The functions of the Land Councils should unambiguously reflect the objective of integration with the statutory body established under s.73. Those sections of the *Land Rights Act* dealing with the process of approvals for works on or use of Aboriginal land may also be amended to include specific reference to the requirement for site avoidance surveys along the lines established under Part III of the Northern Territory legislation. This does not mean that the Land Councils would be required to vacate the field of the documentation and protection of sacred sites but rather that activities relating to sacred sites should be carried out in accordance with the procedures established under the complementary legislation and not in an ad hoc manner with no specific legislative underpinning at the discretion of the Land Councils. There are a number of provisions of the *Sacred Sites Act* that are not applicable to Aboriginal land (eg the powers of the Territory Minister in relation to a Minister's certificate). Integration of the functions of the Land Councils and the Authority in relation to sacred sites may require amendment of the Northern Territory legislation.

The Land Councils have argued that all functions relating to the protection of sites should be vested with the Land Councils and not with an independent Authority under Northern Territory law. If implemented, such a proposal would likely mean substantial erosion of the public perception of the independence of the body charged with administering site protection laws. The Land Councils have a clearly defined role as advocates for Aboriginal interests including the carriage of land claims and claims under the Native Title Act. It is likely that owners of freehold or privately leased land would interpret the involvement of the Land Councils in the administration of site protection laws as being coloured by these other roles. The Authority submits that imperative for site protection required by the *Land Rights Act* is best achieved if the statutory body charged with implementing the scheme is seen to be independent from external considerations.

THE AUTHORITY'S RESPONSE TO FINDINGS OF THE REEVES' REPORT IN RELATION TO SACRED SITES

Section 23

The Authority accepts the findings of the Reeves' Report that:

The Land Councils' criticisms of the Northern Territory Aboriginal Sacred Sites Act are not valid.²

It is clear that the two large Land Councils are not willing to accept the legitimacy of the AAPA in this field and will do all within their powers to have it removed.³

The Northern Territory Aboriginal Sacred Sites Act offers a high level of protection to Aboriginal sacred sites and the AAPA is a well-resourced and effective body.

S.23(1)(ba) should be deleted to make it clear that the AAPA has the sole responsibility in this field [protection of sacred sites] and to remove any legislative

² Reeves, J (1998) Building on Land Rights for the Next Generation – The Review of the Aboriginal Land Rights (Northern Territory) Act 1976 ATSIC Canberra pg 288.

³ Reeves, J (1998) – pg 289-290.

*encouragement to the Land Councils to continue to attack the AAPA and frustrate its operations.*⁴

The Authority notes that having the "sole responsibility" for protecting sacred sites does not equate to being the sole body responsible in this field. There is a role for Land Councils assisting Aboriginal clients in protecting their cultural heritage, particularly on Aboriginal land. The Authority sees the blunt instrument of legislative reform as necessary precondition for implementation of co-operative arrangements between the Authority and Land Councils for an integrated approach to the protection of sacred sites.

Section 69

The Authority does not accept the findings in the Report relating to s.69. The problems with this section outlined in the Reeves Report (below) have not been realised in practice. The symbolic value of retaining this provision in the Commonwealth legislation continues to be regarded as significant by Aboriginal custodians. It should also be noted that this provision (s.69(1)) points towards the Territory legislation established under s.73 as the mechanism for managing restrictions on entry to sacred sites.

As to s.69, I believe it should be removed for the same reasons. Further, s.69 has become redundant over the years, with the development of a more comprehensive and rigorous system under the Northern Territory Aboriginal Sacred Sites Act. Moreover, s.69 may possibly conflict with the provisions of the Northern Territory Aboriginal Sacred Sites Act, which protect the holders of authority certificates from prosecution and may also cut across the recommendations I have made (below) in relation to the protection of the owners of freehold land in a town from prosecution in certain circumstances.

*In the unlikely event that the Northern Territory repealed its legislation, or considerably weakened it, the Aboriginal and Torres Strait Islander Heritage Protection Act would continue to apply in the Northern Territory and, if that was thought to be inadequate, a provision similar to s.69 could easily be re-inserted in the Land Rights Act by the Commonwealth Parliament.*⁵

Sacred sites on freehold land

The Authority does not accept the findings in the Reeves Report relating to sacred sites on freehold land. In practice the issues raised by Reeves have not presented a problem warranting such a major shift in the scheme of the Act. The recommendations relating to freehold land appear to be a response to one submission⁶. Part III Division 1 and 3 of the *Sacred Sites Act* provides mechanism for land owners to obtain approvals for works or use of land on or in the vicinity of sacred sites including, in special circumstances, the issue of an approval by the Minister for work on a sacred site. The Authority submits that recommendations for altering legislation protecting sites on freehold land are not warranted, that the existing Act already provides mechanisms for resolution of such conflicts and that

⁴ Reeves, J (1998) – pg 290.

⁵ Reeves, J (1998) – pg 290.

⁶ Reeves, J (1998) - pg 289.

further, the legislative remedy recommended by Reeves would appear to be inconsistent with s.73 of the *Land Rights Act*.

Compensation for landowners

The Authority submits that the issue of compensation of land owners would present administrative difficulties when linked to a scheme providing presumptive protection of all sacred sites existing in the Northern Territory. In contrast to the *Aboriginal and Torres Strait Islander Heritage Protection Act*, which applies to a mere handful of sites declared heritage places by the Minister, the *Sacred Sites Act* applies to tens of thousands of sites.

The Land Rights Act protects many existing interests in land, for example, mining leases, alienated crown land, mission land, etc. Following that principle, there seems to be little good reason why the owners of freehold land in a town in the Northern Territory, who purchased it without notice of a sacred site on it, should not have their property rights in that land fully protected, by providing them with a defence under the Northern Territory Aboriginal Sacred Sites Act, to any offence associated with their use of their land. This is what I recommend. In a sense, this offers landowners in this situation a choice. They can accept the existence of the sacred site on their land and protect it, and claim compensation from the Northern Territory Government for any loss in value of their land. Or, they can proceed to damage or destroy the sacred site without fear of prosecution. If the site is destroyed, they will generally not thereafter suffer any loss that would attract compensation. Of course, the quantum of any compensation will vary from case to case.

It should be noted that the right to compensation and/or protection from prosecution would only apply to the landowners who first receives notice of the existence of the sacred site on their land. Any subsequent purchasers would be subject to the provisions of the Northern Territory Aboriginal Sacred Sites Act in the usual way.⁷

Mandatory site avoidance surveys prior to subdivision of freehold

The Authority supports the findings in the Reeves' Report that:

There should be some system to ensure that the developers of sub-divisions within towns in the Northern Territory are required to seek an authority certificate from the AAPA before proceeding with a sub-divisional development.⁸

Sacred Objects

The Authority supports the recommendation that:

⁷ Reeves, J (1998) – pg 293.

⁸ Reeves, J (1998) – pg 293.

The Northern Territory Government take steps to amend the Heritage Conservation Act and Regulations to make it clear that Aboriginal people may enter and remain upon ancient Aboriginal sites, may use Aboriginal sacred objects and may otherwise deal with the places or objects referred to in the Act and Regulations, in accordance with Aboriginal tradition.