

Application of Northern Territory Laws to Aboriginal Land

Introduction

- 8.1 This chapter sets out the current law regarding the application of Northern Territory laws to Aboriginal land, then discusses the Reeves Report's proposals to amend the Land Rights Act.
- 8.2 Finally, the Committee makes its recommendations, in accordance with its core principle of developing constructive partnerships between Aboriginal and non Aboriginal people, and achieving equality before the law. The Committee also recognises the balance that must be maintained between the application of Australian law and the traditional rights of Aboriginal people to use and occupy their land in the Northern Territory.

Current Provisions of the Land Rights Act

- 8.3 The current law regarding the application of Northern Territory laws on Aboriginal land is found in ss. 71, 73 and 74 of the Land Rights Act. Section 74 provides that Northern Territory laws apply to Aboriginal land as long as they are 'capable of operating concurrently with' the Act. In Justice Toohey's opinion, this provision means that:
- a whole range of statutes dealing with matters such as planning, bush fire control, stock diseases, boundary fences and access to land for the purpose of boundary fencing or recovering straying

stock apply to Aboriginal land as much as they do to any other land in the Territory.¹

- 8.4 In considering whether a Territory law is able to operate concurrently with the Land Rights Act, account must be taken of both ss. 71 and 73 of the Act. Section 73 gives the Northern Territory Legislative Assembly the power to enact laws within the following areas with some qualifications:
- the protection of sacred sites, providing for the right of Aboriginal people to have access to those sites in accordance with Aboriginal tradition;
 - the regulation of entry on to Aboriginal land, preserving the right of Aboriginal people to enter such land in accordance with Aboriginal tradition;
 - the protection or conservation of wildlife on Aboriginal land in consultation with Aboriginal people, and preserving their right to utilise wildlife resources; and
 - the control of seas within two kilometres off Aboriginal land, preserving the right of Aboriginal people to enter and use the resources in accordance with Aboriginal tradition.²
- 8.5 The operation of s. 73 means that these (or other) Northern Territory laws can only apply to Aboriginal land if the laws are able to operate concurrently with the laws of the Commonwealth generally, and the Land Rights Act in particular.
- 8.6 Clearly, the content of Aboriginal tradition is crucial to determining the validity of a Northern Territory law on Aboriginal land. Section 71 provides the basis of traditional rights to use or occupy Aboriginal land held by Aboriginal people under the Land Rights Act:

Subject to this section, an Aboriginal or a group of Aboriginals is entitled to enter upon Aboriginal land and use or occupy that land to the extent that that entry, occupation or use is in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals with respect to that land, whether or not those rights are qualified as to place, time, circumstances, purpose, permission or any other factor.³

1 Justice Toohey quoted in *Reeves Report*, p. 385.

2 s 73(1)(a) to (d), Land Rights Act.

3 s. 71(1), Land Rights Act.

- 8.7 'Aboriginal tradition' is in turn defined by the Act as 'the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals', and includes those traditions that apply in relation to 'particular persons, sites, areas of land, things or relationships'.⁴ These traditions have been said to be flexible, not static.⁵
- 8.8 In summary, the question of whether a Northern Territory law applies to Aboriginal land must focus on whether or not it is capable of operating concurrently with the Land Rights Act. This question then turns on whether or not the law interferes with Aboriginal traditional rights to use and occupy the land. The onus rests on the Northern Territory Government to enact laws which, if intended to apply on Aboriginal land, are able to operate concurrently with the Land Rights Act.

Reeves Report's Proposals

Issues

- 8.9 The Reeves Report claims that there is uncertainty about whether certain Northern Territory laws apply to Aboriginal land. The Report lists the uncertainty and contention surrounding the issue of whether or not various Northern Territory statutes are able to operate concurrently with the Land Rights Act. The statutes in question include:
- the Bushfires Act;
 - the Control of Waters Act (now Water Act);
 - the Fences Act;
 - the Stock Diseases Act;
 - conservation laws, such as some provisions in the Territory Parks and Wildlife Conservation Act and the Soil Conservation and Land Utilisation Act; and
 - the Local Government Act.⁶

4 s 3, Land Rights Act.

5 See Justice Maurice quoted in *Reeves Report*, p. 390.

6 *Reeves Report*, pp. 394-97.

8.10 The Reeves Report states that:

The concerns of the Northern Territory Government as to the application of its laws in relation to Aboriginal land revolve around the uncertainty and the implications of giving paramountcy [sic] to rights under the Land Rights Act over the interests of the broader community, including the Aboriginal community.⁷

Proposed Amendments

8.11 The Report suggests that, to alleviate this uncertainty, the onus of proof should be reversed so that the laws of the Northern Territory generally apply to Aboriginal land unless they are directly inconsistent with the Land Rights Act. The Report therefore recommends the repeal of s. 74 of the Land Rights Act.

8.12 In addition, the Reeves Report suggests an amendment to s. 71 of the Land Rights Act. This amendment would specify that for certain subject areas, Northern Territory laws including delegated laws and laws made pursuant to s. 73, shall apply to Aboriginal land, even if inconsistent with the Land Rights Act. The subject areas are defined as:

- environmental protection and conservation;
- public health and safety;
- the supply of essential services; and
- the maintenance of law and order, or the administration of justice.

8.13 The Report recommends that a qualification should be included which ensures that the rights under s. 71 are preserved 'to the greatest extent possible'.⁸ An additional amendment is stipulated, providing that in applying these laws, 'all reasonable steps shall be taken to minimise any negative effects on the use or occupation of the land'.

8.14 Any other Northern Territory law, outside these subject areas, shall apply to Aboriginal land 'other than to the extent that that law is directly inconsistent with' the Land Rights Act.⁹

7 *Reeves Report*, p. 401.

8 *Reeves Report*, p. 412.

9 *Reeves Report*, p. 413.

- 8.15 A final amendment is recommended to ensure that the costs of fencing arising under the Fences Act is included as part of the costs of the Regional Land Councils (RLCs) suggested elsewhere in the Reeves Report. The Report states that, while Aboriginal Land Commissioners have accepted that the Fences Act is capable of operating concurrently with the Land Rights Act, doubts have been expressed about whether contributions to fencing costs can be enforced on a Land Trust.¹⁰

Comments on the Reeves Report's Proposals

Some Agreement in Principle

- 8.16 The Northern Territory Government supports the general principle of providing legislative certainty in relation to Northern Territory laws and their application to Aboriginal land.¹¹ Although, it was stated to the Committee that:

The Territory may have some concerns with the specific wording of the recommendations. In due course, the Territory will be ready to provide assistance to the Commonwealth in drafting appropriate amendments to the Act.¹²

- 8.17 Sir Edward Woodward agreed with the principle that laws of the Northern Territory should apply unless inconsistent with the Land Rights Act:

I would certainly be comfortable with the idea that there would be a presumption that any laws of general application should apply to Aboriginal land, provided that an exception could be made where the law was inconsistent with some aspect of the land rights legislation.¹³

No Difficulties in Practice

- 8.18 Some submissions argued that little difficulty arises in practice with the way in which the current provisions work, except in relation to the operation of the Local Government Act 1993 (NT).

10 *Reeves Report*, p. 412-13.

11 Northern Territory Government (NTG), Transcripts, Darwin, p. 626.

12 NTG, Darwin, p. 6.

13 Sir Edward Woodward, Transcripts, Canberra, p. 563.

8.19 The Jawoyn Association stated that:

In general, the Jawoyn is of the view that all Northern Territory laws apply and should apply, on Aboriginal land but that the protection of Aboriginal tradition offered by the Act should remain. There is little evidence of difficulties arising in practice.¹⁴

8.20 The Central Land Council (CLC) argued that there is no case for the amendments put by the Reeves Report. In its opinion, difficulties rarely occur and:

Nowhere in the discussion in this chapter [18] does the Reviewer provide an actual example of where a difficulty has occurred, which could not be, or was not solved by consultation, negotiation and agreement.¹⁵

8.21 The Committee notes that consultation has been the method adopted for resolving the inconsistencies experienced between the Local Government Act 1993 (NT) and the Land Rights Act (discussed further below).

Aboriginal Traditional Rights

8.22 Both the CLC and NLC argued that the Reeves Report proposals ‘turn the current workable provision on its head’. Their focus in terms of the recommendations was on the potential diminution of Aboriginal traditional rights in the key areas outlined by the Report (see para 8.11). As the CLC stated:

The Reviewer’s proposal...subjects Aboriginal land to the general unqualified application of Territory law in most key areas regardless of Aboriginal tradition. A weak form of protection of Aboriginal tradition is proposed in other areas.

8.23 In the CLC’s opinion, the Report’s proposal to insert a provision stating that in applying Territory laws ‘all reasonable steps shall be taken to minimise any negative effects on the use or occupation of the land’, represents ‘mere window-dressing’, is hard to enforce and easy to ignore.¹⁶

14 Jawoyn Association, Submissions, p. S847. However, the Jawoyn Association supports an amendment to the Territory Parks and Wildlife Conservation Act (NT) which would vest ownership in the totemic fauna and flora with traditional owners.

15 Central Land Council (CLC), Submissions, p. S1624. Northern Land Council (NLC), Submissions, p. S933-34. See also: Indigenous Law Centre, Submissions, p. S397; Larrakia Nation Aboriginal Corporation, Submissions, p. S1567; and Combined Aboriginal Nations of Central Australia (CANCA), Submissions, p. S607

16 CLC, Submissions, p. S1625.

- 8.24 The NLC indicated to the Committee that the amendments are ‘unworkable and would be extremely damaging to Aboriginal culture and law’.¹⁷ The NLC argues that this is because of the change in the onus of proof from the current situation. Currently, Northern Territory laws apply to the extent that they can operate concurrently with the Land Rights Act. Under the Reeves Report proposal, Aboriginal people must prove ‘direct inconsistency’ between the Northern Territory law and Aboriginal tradition under the Land Rights Act.

Legal Implications

- 8.25 The legal implications of the proposed amendments were also raised with the Committee. The CLC indicated its belief that the Reeves Report’s proposals would diminish the right of Aboriginal people to enjoy their culture and would breach Article 27 of the International Covenant on Civil and Political Rights, to which Australia is a party.¹⁸
- 8.26 This opinion is echoed by legal advice prepared for ATSIC, which agreed but added the caveat that an Aboriginal person would have to show some adverse affect from the Reeves Report proposals.¹⁹ It was further argued that specific application of some Northern Territory laws to Aboriginal land may be sustainable where there is reasonable justification. However, as a whole the proposals remove the special protection of traditional rights notwithstanding any negative effects. This is despite the requirement to minimise any negative effects on the traditional rights of Aboriginal people as the Territory law would still apply regardless.²⁰
- 8.27 The Indigenous Law Centre expressed the position of Aboriginal people succinctly:

From the perspective of Aboriginal people in the Territory, the acceptability of such a recommendation will depend upon the scope of interference with Aboriginal traditions, cultural practices and land. If the application of the laws discriminates against Aboriginal enjoyment of traditional land, any amendments to the ALRA [Land Rights Act] would violate the non-discrimination principle.²¹

17 NLC, Submissions, p. S933.

18 CLC, Submissions, p. S1620.

19 ATSIC, Submissions, p. S682.

20 ATSIC, Submissions, p. S697-98.

21 Indigenous Law Centre, Submissions, p. S397.

- 8.28 The Jawoyn Association stated that the need for Aboriginal people to prove direct inconsistency and the vague notion of protection of traditional rights in the amendments would result in ‘uncertainty and potentially litigation’.²²

Local Government Act 1993 (NT)

- 8.29 The operation of the Local Government Act 1993 (NT) in the Northern Territory is one area where Aboriginal groups argued that practical difficulties do occur. The major difficulty faced is the fact that the provisions of the Local Government Act do not acknowledge the rights of traditional Aboriginal owners in making decisions relating to the use of the land:

It is a continuing concern to traditional Aboriginal land owners, who see possible threats to their primary and determinative role as land owners being posed by local government structures that do not explicitly acknowledge the position of traditional owners.²³

- 8.30 The NLC described to the Committee a process of local government agreements that is already underway in the Northern Territory. The process is aimed at alleviating some of these tensions:

The NLC wants to clearly identify and recognise the rights of Aboriginal residents on traditional lands by developing local government agreements which operate in the larger communities. These agreements delineate the roles of local governing bodies and land owners in decision making, and provide a clear agreed framework for participation in decisions over local issues and access to lands...This process is merely a formalisation of the agreements which Aboriginal people in many places have already made through traditional legal processes.²⁴

- 8.31 The Committee notes that the NLC is currently part of a Structural Reform Advisory Committee, which is the key advisory body to the Northern Territory Government on its reform of the Local Government Act. The Northern Territory Government has invited the NLC to nominate representatives on the Regional Reference Groups in order to resolve the

22 Jawoyn Association, p. S858. See also comments by NLC, Submissions, p. S955.

23 Jawoyn Association, Submissions, p. S847. See also comments by ATSIC, Transcripts, Canberra, p. 78.

24 NLC, Submissions, p. S885. The issue is also discussed in chapter three of this report.

issue for the benefit of traditional Aboriginal owners and other residents on Aboriginal land.²⁵

- 8.32 If the Reeves Report's amendments were enacted, the areas in which Northern Territory laws would apply to Aboriginal land regardless of their inconsistency with traditional use and occupation of the land would probably include local government by-laws. This legislative prescription may cut across the mutually beneficial negotiations currently taking place between the NLC and the Northern Territory Government.

Fences Act (NT)

- 8.33 In relation to the Reeves Report's recommendation that RLCs be responsible for the costs of fencing under the Fences Act (NT), the CLC indicated that no assessment of the cost or need for this requirement was undertaken. In the opinion of the CLC and NLC, the costs would be prohibitive.²⁶
- 8.34 Section 26 of the Land Rights Act states:
- A Land Council shall pay or discharge any administrative expenses, charges or obligations incurred or undertaken by a Land Trust that holds, or is established to hold, land in its area.²⁷
- 8.35 The amendment proposed by the Reeves Report would note that the word 'charges' includes, *but is not limited to*, the cost of fencing which is due and payable in relation to Aboriginal land pursuant to any law of the Northern Territory or the Commonwealth.
- 8.36 The CLC submitted that wording of the amendment would have additional affects not discussed by the Report, including the imposition of costs which have never previously been contemplated.²⁸

Summary

- 8.37 The objective of the Reeves Report's proposals to achieve greater legislative certainty is supported in principle by the Northern Territory Government, although it has some concerns over the wording of any amendments.

25 NLC, Submissions, p. S1577.

26 NLC, Submissions, p S956; CLC, Submissions, p S1627.

27 s 26, Land Rights Act.

28 CLC, Submissions, p S1628.

- 8.38 Aboriginal groups and organisations are concerned that the recommendation for Northern Territory laws in certain subject areas to apply despite any inconsistency with the Land Rights Act will result in a diminution of their traditional right to use and occupy their traditional lands. They do not regard the amendments requiring the Northern Territory Government to minimise the negative effects of such laws and to ensure that Aboriginal traditional rights are preserved to the greatest extent possible as sufficient protection.
- 8.39 A further concern is that the onus of proof is now reversed so that, if their rights are interfered with by other Northern Territory laws (not in the specified areas), an Aboriginal person must prove that these laws are directly inconsistent with the Land Rights Act. This could lead to costly and unproductive litigation.

The Committee's Recommendations

Core Principles

- 8.40 As stated in the previous chapter, the Committee believes that negotiation and consultation are the best methods of achieving mutually satisfactory outcomes and a productive partnership between Aboriginal people, non Aboriginal people and the Northern Territory Government.
- 8.41 The Committee also believes that laws should apply equally as far as possible to all Australians. At the same time, the Committee recognises the special rights Aboriginal people have to freely enjoy their culture and their traditional lands.

Providing Legislative Certainty

- 8.42 The Committee believes that certain Northern Territory laws which are for the benefit of both the Aboriginal and non Aboriginal community should apply to Aboriginal land. The Committee agrees with the Northern Territory Government that legislative certainty with regard to certain issues affecting the whole community is necessary.
- 8.43 The Committee also respects the concerns of Aboriginal people about the proposals of the Reeves Report to specify these areas legislatively and enable these Northern Territory laws to apply even if inconsistent with the Land Rights Act.

- 8.44 The Committee also believes that the Reeves Report's recommendations regarding the cost of fencing and proposed amendments to section 26 of the Land Rights Act need further examination.

Recommendation 37

- 8.45 **The Minister for Aboriginal and Torres Strait Islander Affairs consider whether the power of the Legislative Assembly of the Northern Territory to make laws under section 73(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* ('the Act') needs to be extended beyond the matters listed in section 73(1)(a) to 73(1)(d) of the Act.**

A project team, as outlined in recommendation 2, should suggest processes to resolve future disputes concerning the application of Northern Territory laws to Aboriginal land.

Examples of difficulties encountered, or perceived difficulties, be examined by the project team to determine whether or not the existing law needs to be reviewed.

Recommendation 38

- 8.46 **The recommendations in the Reeves Report to:**

- **repeal section 74;**
- **amend sections 26 and 71**

of the *Aboriginal Land Rights (Northern Territory) Act 1976* be rejected at this time.

Land councils undertake negotiations with the Northern Territory Government to consider the practical difficulties associated with land councils complying with the Fences Act (NT).

Negotiated Agreements

- 8.47 As discussed in chapter three, the Committee supports the Northern Territory Government and the NLC's moves toward using formal consultation channels to develop local government agreements. The Committee notes the Australian Local Government Association's (ALGA)

most recent commitment to partnerships with Aboriginal people, as part of addressing the needs of the whole community and delivering better social and health outcomes. In particular, the ALGA supports consultation with Aboriginal people as an essential part of local government processes:

A communication bridge provided by a formal consultative mechanism can assist in achieving the goals of social justice and recognising mutual responsibilities.²⁹

- 8.48 The Committee believes that these commitments to reconciliation are to be commended and should be encouraged. The Committee further believes that local government agreements should act as a model for resolving other areas of concern that arise in the future regarding inconsistencies with Northern Territory laws and the Land Rights Act. In chapter three, the Committee has recommended that agreements between traditional Aboriginal owners and local governing bodies under section 19 of the Act should be encouraged.

Recommendation 39

- 8.49 **The Minister for Aboriginal and Torres Strait Islander Affairs seek the cooperation of the Northern Territory Government to review any inconsistencies between the Local Government Act 1993 (NT), and other relevant Commonwealth and Northern Territory Acts, and the *Aboriginal Land Rights (Northern Territory) Act 1976* and advise the appropriate Northern Territory and Commonwealth Ministers.**

Conclusion

- 8.50 In this chapter, the Committee has made recommendations to encourage formal consultation and negotiation processes which it hopes will achieve agreements for the benefit of the whole community. The Committee encourages the partnership and goodwill shown by parties in reaching local government agreements.
- 8.51 The Committee believes that these agreements, like 'Land Use Agreements', will provide the means by which local communities and

²⁹ Australian Local Government Association (ALGA) and ATSIC, *Justice and Equity for All, Local Government and Indigenous Partnerships*, Canberra, 1999, p. 12.

government cooperate to achieve social, economic and health outcomes for Aboriginal people.

- 8.52 The next chapter examines other issues, not strictly within the terms of reference of the inquiry, but about which the Committee received evidence.