

Review of Part V of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)

ISSUES PAPER FOR PUBLIC DISCUSSION

November 2022

I Background to the Review

On 7 April 2022 the former Minister for Indigenous Australians, the Hon Ken Wyatt AM, requested the current Aboriginal Land Commissioner the Hon John Mansfield AM KC (the Commissioner), pursuant to section 50(1)(d) of the *Aboriginal Land Rights (Northern Territory) Act 1976*, to conduct a Review of the future operation of Part V (Aboriginal Land Commissioners) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act). The request was made in the context of the current Commissioner's intention to finalise all land claims in his jurisdiction by the end of his term in June 2023.

On 17 June 2022, a letter was sent to key stakeholders and potential other stakeholders with an interest in the operation of Part V of the Land Rights Act. The letter requested that the stakeholders provide a brief outline of any particular matters they thought should be addressed along with other details. The letter enclosed the Terms of Reference.

The key stakeholders who received the letter were those entities identified in the Terms of Reference as key stakeholders. The potential stakeholders were those organisations whose functions suggest they may have a direct interest in the content of the review.

From 15 to 28 June 2022, a formal advertisement was published in various newspapers requesting that any person or organisation that wished to be heard in relation to the Review should give written notice to the Commissioner by 11 July 2022. The newspapers the advertisement appeared in were the Australian, the Northern Territory News, the Kimberley Echo, the Katherine Times, the Tenant and District Times, and the National Indigenous Times.

In consultation with the Aboriginal Resource and Development Services, a plain English version of the advertisement was also developed and published in the July publications of both the Central Land Rights News and the Northern Land Rights news.

A number of entities provided a notice of interest in the Review and some of the responses provided an accompanying outline of matters as requested in the letter of 17 June 2022 and the advertisement. In addition, the Commissioner has engaged in consultations with some key stakeholders including the Northern Land Council, Central Land Council, and Northern Territory Department of Chief Minister and Cabinet.

It is the purpose of this discussion paper to provide an overview of the issues raised and related matters so as to assist stakeholders and others who may wish to do so to now make their detailed submissions to the Review.

II Issues for Discussion

During the consultations it became clear that stakeholders are interested in a future role for the Aboriginal Land Commissioner following the finalisation of land claims over unalienated Crown land under the Commissioner's jurisdiction. This section summarises the discussions that took place with stakeholders on this matter, as well as outstanding issues that may be considered in submissions.

A) Dispute resolution function

Stakeholders have expressed preliminary support for a new function, as proposed in the Terms of Reference, to be given to the Aboriginal Land Commissioner to resolve disputes or to arbitrate or mediate in respect of complaints made in relation to traditional Aboriginal ownership of land granted under the Land Rights Act.

Decisions about traditional ownership after land has been granted under section 12 of the Act are made by Land Councils pursuant to sections 23 and 24. Land Councils are also responsible under Part III of the Land Rights Act for making other decisions in respect of Aboriginal land such as allocation of royalties, consulting and obtaining consent regarding future actions on the land from traditional owners and entering into leases on the behalf of traditional owners.

There is currently some history of litigation brought by Aboriginal people to have decisions made by Land Councils reviewed under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). However, it is acknowledged that litigation confined to matters of legal error and procedural fairness does not always lead to lasting outcomes and may create further divides in a community. The time and expense of such litigation also presents a barrier to traditional owners seeking to go down this path.

Options for Aboriginal people seeking resolution of disputes outside of the courts are relatively limited. The capacity of Land Councils to deal with disputes under section 25 of the Act depends to a large extent on the resources available to the Council at the time of the dispute, as well as the nature of the pre-existing relationships they have with the respective stakeholders involved in the dispute. There have been occasions when the relevant Land Council has been confronted with the difficulty of resolving disputes because it has in the past represented two or several competing traditional ownership interests. There is currently no other formal structure to effectively resolve such issues.

In the native title context, the Federal Government recently sought to address gaps in dispute management by creating an arbitration function in relation to post-determination disputes for the National Native Title Tribunal (NNTT) through the insertion of section 60aaa into the *Native Title Act 1993* (Native Title Act) by the *Native Title Legislation Amendment Act 2021*. This allowed the NNTT to manage disputes arising between Prescribed Bodies Corporate and common law holders which arose post Native Title determination.

Stakeholders agree that a new role for the Commissioner may draw from this amendment. However, it is suggested that because Land Councils are fundamentally representative bodies, it would not be appropriate to allow traditional owners to approach the Commissioner for dispute resolution assistance directly (as common law holders are able to under s60aaa of the Native Title Act), and that they should only be able to do so on referral from the relevant Land Council.

A question also arises about the qualifications required of a Commissioner in the event that such a function is provided for. At present, section 53 of the Land Rights Act requires that a Commissioner be a judge or former judge of the Supreme Court of the Northern Territory or Federal Court. It may be appropriate to vary or extend those qualifications in a manner which enables a suitably experienced or qualified person, including an Aboriginal person, to be appointed.

Staffing requirements may depend on the volume of work required of the Commissioner. The Commissioner currently has a staff of two Associates that work full time in the NIAA office in Darwin. Previous Commissioners have employed an Executive Assistant and Associate.

The Office of the Aboriginal Land Commissioner is currently funded by the National Indigenous Australians Agency (NIAA). It should be noted that the current Commissioner is employed on a 0.25 part-time basis and does not operate on a large budget.

Issues for discussion:

- 1) *How in the Act should such a dispute resolution function be provided for?*
 - Should such a function come as an expansion of the current dispute resolution powers of the Land Council under section 25 of the Land Rights Act, or under Part V with other powers of the Aboriginal Land Commissioner?
 - How should such a function be described?
- 2) *What should trigger the use of such a function?*
 - Should Land Councils remain the gatekeepers of such a provision, and be required to sign off before the mechanism is utilised?
 - Should the provision more closely mirror the provision of section 60aaa of the Native Title Act and be utilised directly by traditional owners with complaints about Land Councils?
 - Should an outside party to whom a complaint has been referred, such as NIAA or the Ombudsman, be entitled to refer such a complaint to the Commissioner?
- 3) *What qualifications and staffing requirements would the Commissioner need to carry out such a function?*
 - See considerations above and sections 53 to 54D of the Land Rights Act

B) Current functions under the Land Rights Act

The Land Rights Act also provides for the Commissioner to perform functions under section 50(1)(b) and section 50(1)(d).

Section 50(1)(b) has not yet been engaged. It says that the Commissioner can inquire into the likely extent of traditional claims to alienated Crown land, and to report to the Minister and to the Administrator of the Northern Territory, from time to time, the results of his or her inquiries.

Section 50(1)(d) provides for the Minister to refer to the Commissioner for advice ‘in connexion with any other matter relevant to the function of this Act.’ It is cast in broad terms. It has been used by the Minister to request the Review of Detriment in 2017 (to update the status of detriment issues in claims where the Commissioner has recommended the grant of the claimed area but the Minister has made no decision to activate the recommendation); the application for the establishment of a Katherine Regional Land Council in 2011, and on three occasions for the review of the Land Rights Act or parts of the Land Rights Act.

The consultations to date indicate that it is probably desirable to maintain these functions.

Issues for discussion:

- 1) *There is no clear indication in the Act as to the scope of section 50(1)(b). It appears from the Parliamentary debate that it was intended to facilitate the return of pastoral leased land to traditional Aboriginal owners. As the Commissioner has decided lands held by Northern Territory instrumentalities, such as the Conservation Land Corporation, are not ‘unalienated Crown Land’ and so not eligible for claims made under section 50(1)(a), such lands might also fall within section 50(1)(b).*
 - Is it useful to preserve section 50(1)(b)?

- What should be the proper scope of section 50(1)(b)?
 - Are there any amendments desirable to facilitate the use of this provision (including of section 50(1)(a) which does not currently require an application to be made to the Commissioner, and if so, what amendments?
 - Other comments on this provision should also be included.
- 2) *Section 50(1)(d) appears on its face to retain some significance.*
- Is it useful to preserve this provision?
 - Is it necessary or desirable to express in some different way the circumstances in which the Minister might request advice?
 - Other comments on this provision should also be included.

C) Provisions under the *Aboriginal Land Act 1978* that relate to the Aboriginal Land Commissioner

Outside of the Land Rights Act, the Aboriginal Land Commissioner also has the power to inquire into and report on the closure of seas within two kilometres of the shores of Aboriginal land on referral by the Administrator under section 12(3) of the *Aboriginal Land Act 1978* (ALA). Closed seas provide exclusive access to Traditional Owners.

Out of the nine applications for sea closures which have been made since the commencement of the Land Rights Act, only two have been successful. The Milingimbi, Crocodile Islands and Glyde River area was Gazetted in 1981, and the Castlereagh Bay and Howard Island area was Gazetted in 1988. The other seven applications have been withdrawn or treated as abandoned.

In the first sea closure hearing, the Commissioner Justice Toohey confirmed that persons who held current or renewed commercial fishing licenses could enter a sea closure, in accordance with the exemption under section 18 of the ALA. Government personnel are also exempt from closures pursuant to sections 16 to 20. This means that the sea closure framework only gives Aboriginal people the right to control the entry of tourist boats, recreational fishers, and future applicants for commercial fishing licences. Sea closures may also allow for increased protection of sacred sites through the Aboriginal Areas Protection Authority, and the potential for involvement of Aboriginal people in the management of the sea.

No new claims have been made since 1992, and there are no extant referrals under the Aboriginal Land Commissioner's jurisdiction. However, there has also been no sunset clause to prevent the conduct of inquiries into sea closure applications such as that which was put into place to prevent applications made under section 50(1)(a) of the Land Rights Act in 1997.

At least one of the key stakeholders has suggested that this function be preserved.

Issues for discussion:

- 1) *Should the existing role of the Commissioner in this regard be preserved?*
- 2) *Are there any additional amendments to the Land Rights Act or to the ALA which would improve the opportunity for indigenous Australians to benefit from such an application or ensure the powers of the Commissioner exist to effectively determine such applications?*

D) Provisions under the *Archives Act 1983* that relate to the Aboriginal Land Commissioner

The records of the Aboriginal Land Commissioner are important resources for traditional owners to pass on knowledge of land and culture to their descendants, and have national significance to the Australian public. Such records include land claim materials provided to the Commissioner by or on behalf of traditional Aboriginal owners and other claimants, including but not limited to, anthropology reports, genealogies, sacred site and dreaming maps and registers.

Because the Aboriginal Land Commissioner is a statutory office holder appointed under the Land Rights Act, the Commissioner's records are considered Commonwealth records under the *Archives Act 1983* (Archives Act).

Under a new agreement made between the Aboriginal Land Commissioner and the National Archives Australia (NAA), titled *Section 35 Arrangements – Records of the Aboriginal Land Commissioner – Agreement and Statement of Principles* (Agreement), the NAA will determine if records can be accessed by the public in accordance with guidelines agreed by the Aboriginal Land Commissioner. The Commissioner, however, continues to have a role in providing advice on sensitive records that may need to be classified as exempt from access under the agreement. This role is an important one, including because the early land claims did not focus on confidentiality material to the degree that is now commonplace. The '20-year rule' by which confidential records generally become public also applies, but the Agreement referred to ensures that such records of hearings before the Commissioner continue to be recognised as confidential.

The Office of the Aboriginal Land Commissioner also makes decisions on whether to retain or destroy records in accordance with a Records Authority developed between the Aboriginal Land Commissioner and the NAA in 2017.

Issues for discussion:

- 1) *If the Office of the Aboriginal Land Commissioner is to continue, should the Commissioner continue to deal with these issues?*
 - Otherwise, should the functions be transferred to another person or entity, and if so which one?
- 2) *The Agreement referred to was made after consultation with the Land Councils and NIAA.*
 - Should the continuance of the function by the Commissioner be informed by revised provisions for the persons eligible to be appointed as Commissioner?
 - Should the circumstances by which access to such materials to Land Councils, the NIAA, the courts, and to others (including scholars and those who can demonstrate a relevant personal interest) be the subject of specific provisions?

E) Further issues for discussion

- 1) *The present understanding is that the 1997 'sunset clause' prompted all claims over all unalienated land in the Northern Territory so they will all have been resolved. This prompts several questions:*
 - Is this assumption correct? If not, what further unalienated Crown Land might be available for claim? Is there any other reason why such a claim should not be permitted? What amendment would be necessary to enable such a claim to be pursued?
 - If the assumption is correct, is it necessary or desirable to amend the Land Rights Act in any way, and if so, how? This includes reference to relevant sections in Part VII (Miscellaneous) of the Land Rights Act.
 - Is it necessary to preserve provisions to ensure ongoing or new functions of the Commissioner can be performed? For example, is there a need to amend/remove section 67A from this Act?

2) *There may be other functions usefully prescribed for the Commissioner in the future which the discussions to date have not exposed. By way of example, the implementation of the Final Report of the Treaty Commissioner proposes a Treaty and Truth Commission, an Aboriginal Ombudsman, and a First Nations Treaty Tribunal. The Aboriginal Land Commissioner may be an appropriate, already-established office, to perform some of the functions of these proposed bodies. Further, the status of the Commissioner, particularly if the Commissioner is an Aboriginal person, may be relevant. At present, this is obviously speculation only, and would be relevant only if supported by the Commonwealth, the Northern Territory Government, and the Land Councils.*

- Are there any such additional functions that the Commissioner might perform?
- If so, are there any amendments to the Land Rights Act which presently might be desirable to keep such options open?

III Conclusionary Comments

This Discussion Paper is intended to ensure that all those persons and entities who or which have a relevant interest may have an opportunity to make submissions in the Review before a report is made to the Minister of Indigenous Australians.

It is not intended to exclude any submissions relating to any other matter or matters.

All responses to the Discussion Paper are requested as soon as convenient and in any event by 3 February 2023, having regard to the date by which the Report is requested by the Minister of Indigenous Australians.

The Hon John Mansfield AM KC

Aboriginal Land Commissioner