Aboriginal Land Rights and Other Legislation Amendment
Bill 2013

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The Bills Digest at a glance

This Bill arises from an agreement arrived at in November 2012 to resolve the longstanding Jabiru native title claim. As per that agreement it provides for certain areas of land, known as parcels\(^1\), to be scheduled under the *Aboriginal Land Rights (Northern Territory) Act 1976* (‘the ALRA’) as Aboriginal land. It recognises the Mirarr people as the traditional owners of Jabiru, and also allows for the land to be leased back to the Commonwealth and remain within Kakadu National Park.

It also makes amendments to the *Environment Protection and Biodiversity Conservation Act 1999* to ensure the continued protection of the values of Kakadu National Park, and schedules a parcel of land near Tennant Creek known as Patta to be granted as Aboriginal land.

\(^1\) A parcel of land is an area of land defined by measurement. A parcel may be represented as a “Lot”, “Portion” in a Parish, or as an “Allotment”.

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Aboriginal Land Rights and Other Legislation Amendment Bill 2013

Date introduced: 21 March 2013

House: House of Representatives

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Commencement: On the day after Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose of the Bill

The purpose of the Aboriginal Land Rights and Other Legislation Amendment Bill 2013 (the Bill) is to add several portions of Northern Territory land to Schedule 1 to the Aboriginal Land Rights (Northern Territory) Act 1976 (‘the ALRA’) so that the land can be granted as Aboriginal land to the relevant Aboriginal Land Trust. The land of the Jabiru township and two adjacent non-township parcels will be entrusted to the Kakadu Aboriginal Land Trust once leaseback arrangements are put in place to ensure the land can continue as part of the Kakadu National Park. An additional parcel of Patta land near Tennant Creek will also be scheduled as Aboriginal land, and the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) will be amended to ensure the continued protection of the values of Kakadu National Park in relation to Jabiru and to amend existing management plan requirements for towns in Commonwealth reserves.

Structure of the Bill

This Bill is divided into two Schedules:

- Schedule 1 of the Bill contains amendments relating to Jabiru, with Part 1 being multiple amendments to the ALRA and EPBC Act and Part 2 concerned with compensation for acquisition of property and
- Schedule 2 contains a single amendment to the ALRA concerned with the Patta area.

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Background

The Aboriginal Land Rights (Northern Territory) Act 1976

The ALRA was the Commonwealth Government’s landmark attempt, after a decade of Aboriginal activism, court cases and a commission of inquiry, to legally recognise Aboriginal attachment to land in the Northern Territory. The ALRA 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 Aboriginal owners. In general, towns were not claimable under the Act, but some townships which had been part of Aboriginal reserves did become part of Aboriginal land. Land is granted by the Governor-General on the recommendation of the Minister for Aboriginal and Torres Strait Islander Affairs, and the title is held by an Aboriginal Land Trust in fee simple. Although the latter usually means freehold ownership clear of any condition, limitation or restrictions, and although the ALRA gives traditional owners lots of rights over the use of the land, ALRA prescribes ways in which a Land Trust can deal with or dispose of any estate or interest in land vested in it (for example, Aboriginal land cannot be sold by the Land Trust holding title to it, just transferred to another Land Trust or surrendered to the Crown) and preserves a variety of interests in land which may become Aboriginal land (for example, rights to use public roads). The ALRA was significantly amended in 2006 to, amongst other things, facilitate 99-year leases of Aboriginal townships in the Northern Territory.

All the above is relevant to this Bill because the Bill schedules as Aboriginal land the township of Jabiru.

Jabiru

Jabiru is a township of the Northern Territory and is surrounded by and part of Kakadu National Park. The township grew as a function of the accommodation and services it offered the nearby Ranger uranium mine. While the mine itself was in an area excised from the Kakadu National Park, Jabiru was scheduled as part of the Park, and while much of the Park area had been allowed to be claimed under the ALRA, this township area had not. In recent years business operators have been concerned about what will happen to the town when the Ranger uranium mine head lease expired in 2021.

Kakadu

The Kakadu National Park is Australia’s largest national park (covering an area of over 19 800 square kilometres) and a World Heritage area recognised for its natural and cultural values (with evidence Aboriginal people have lived continuously in the region for over 50 000 years). In the early and mid-1970s, when establishing a National Park was first being discussed, two other developments took place which were to prove significant to the course of the Park’s development. One was the

4. Section 4, ALRA.

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passage of the above discussed ALRA. The other was the discovery of major uranium deposits in the Alligator Rivers Region at Ranger, Jabiluka and Koongarra, and the subsequent establishing of the Ranger Uranium Environmental Inquiry. In August 1977, the Commonwealth Government accepted the Ranger Inquiry’s recommendations about granting Aboriginal title to areas in the Alligator Rivers Region, arranging for traditional owners to lease land granted to them to the Australian Government for management as a national park, establishing Kakadu National Park in stages, and permitting mining in areas that would be excluded from the Park. The Park was first declared in 1979 under the National Parks and Wildlife Conservation Act 1975 (NPWC Act). There were subsequent extensions to the Park declared in 1984, 1987, 1989 and 1991. In 2000 the NPWC Act was replaced as the relevant Park scheduling legislation by the EPBC Act.6

Uranium mining

The Commonwealth Government, which had been an original half owner in the ore bodies under the Ranger and Jabiluka mining leases, sold these interests in 1979 to Energy Resources of Australia (ERA—whose parent company, North Ltd, was later bought by the Rio Tinto Group). ERA started mining at Ranger in 1980 but preparations for mining at Jabiluka were halted in 1998 due to indigenous and environmental activism and falling uranium prices. In 2009 another significant ore body was discovered—Ranger 3 Deeps. Mining has not yet commenced at that site, but proposals to commence mining there have been made and it is not impossible that proposals to mine at the Jabiluka lease could one day be revisited. The Ranger lease is due to expire in 2021.7

The Mirarr clan

Approximately half of Kakadu is recognised by legislative instruments as owned by Indigenous people and most of the rest has been under claim by Indigenous people. Kakadu National Park is jointly managed by the Australian Nature Conservation Agency and the traditional owners, 10 of whom sit on the 14 member board of management. The traditional owners still live on the land and come from several different language groups. The languages of the Gagudju (became ‘Kakadu’) and Limilngan were once spoken in the north. Still spoken are Kun-winjku in the north-eastern region, Gun-djeihmi in the central region and Jawoyn in the southern region. Communally the traditional owners today call themselves the Bininj/Mungguy (the former being a Kun-winjku and Gun-djeihmi word, and the latter a Jawoyn word for ‘man’ or ‘person’).8

One Gundjeihmi language group clan, the Mirarr, see their traditional lands as encompassing the Ranger and Jabiluka mineral leases, the mining town of Jabiru and parts of Kakadu National Park, including the wetlands of the Jabiluka billabong country and the sandstone escarpment of Mount Brockman. They have successfully claimed nearly all of their traditional country under the ALRA, and


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therefore hold beneficial freehold title to their country via the Kakadu and Jabiluka Land Trusts (and the clan campaigned hard and successfully against uranium mining at Jabiluka). As noted above, however, the township of Jabiru was excised from the area owned by the Kakadu Land Trust in the late 1970s, so the area around the township of Jabiru was never recognised as Mirarr land.\(^9\)

The Mirarr common law Native Title Claim over the township of Jabiru and surrounds has become the longest running land claim in the Northern Territory’s history. In September 1997 the Aboriginal elder Yvonne Margarula and the Mirarr people lodged a Federal Court claim against the Commonwealth, the Northern Territory and others, saying Jabiru was their traditional land and native title was never extinguished. In April 2009 the Federal Court’s Mansfield J cancelled the failed eight-year mediation process before the Native Title Tribunal and sent the case for trial. In November 2009 a deal was struck.\(^10\)

**The 2009 Agreement**

The agreement was that Mirarr ownership over the township area would be recognised through the ALRA and the land would consequently become Aboriginal freehold land, but would be leased back to the Commonwealth for 99 years, and would remain part of the Kakadu National Park. The 2009 agreement was welcomed by all parties, the Commonwealth and Northern Territory governments, the Ranger mining company ERA and the Gundjeihmi Aboriginal Corporation, representing the interests of the Mirarr.\(^11\) It was said at the time to be a win-win agreement. The Mirarr receive recognition of traditional ownership, business receives much-needed security of tenure and the Australian and Northern Territory governments establish certainty for the town’s future without affecting the National Park’s status.

**The Bill**

This Bill is intended to give effect to the above discussed 2009 agreement. It provides for a transfer of ownership of the claimed land from the Director of National Parks to the Kakadu Aboriginal Land Trust, which will hold the land on trust for its traditional owners. It then provides for the land to be

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leased back to the Commonwealth’s Executive Director of Township Leasing, so the Commonwealth can continue to have it scheduled as part of the Kakadu National Park. The Executive Director of Township Leasing’s position was established in 2007 under the ALRA in response to a new ‘Northern Territory Emergency Response’ related policy of endeavouring to secure 49 or 99 year leases over townships on Aboriginal land, and the position’s primary role is to hold long term leases over Aboriginal townships in the Northern Territory for the Australian Government and the respective Aboriginal Land Council and Land Trust.12

As noted in the section which follows under ‘Position of major interest groups’, the Bill has been welcomed without reservation by Indigenous and mining stakeholders but the Local Government Association of the Northern Territory and Northern Territory Government, while welcoming the Bill as a means of giving effect to the 2009 agreement, have suggested it needs to offer a better definition of the area involved and to clarify roles of bodies that have historically been involved with the management of the township. The latter was also concerned that the Bill may be leaving to further negotiations the exact nature of the head lease and sublease terms and the ensuring of on-going free access to the town and its infrastructure.

Parallel developments

The provisions in this Bill might be seen as complementing four other developments of recent years.

The first is the Northern Territory Government policy (in response to the High Court’s decision in Western Australia v Ward)13 of addressing the uncertainty regarding the validity of declarations of 49 territory parks through negotiations between the Territory and the traditional Aboriginal owners of certain parks and reserves for the establishment, maintenance and management of a comprehensive system of parks and reserves.

The second is the Commonwealth’s recent passage of the Completion of Kakadu National Park (Koongarra Project Area Repeal) Act 2013.14 The Koongarra area, a 1,288 hectare area within the Kakadu Park boundaries, had been excluded from the Park under the Koongarra Project Area Act 1981 due to its potential as a uranium mine. The 2013 Act repealed the 1981 Act.

The third has been the pursuit by successive Commonwealth governments since the 2007 Northern Territory Emergency Response of a policy, already alluded to above, of negotiating 49 or 99 year leases over townships on Aboriginal land, and making provision of some investments contingent upon such leases having been secured.

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The fourth has been the expansion over past decades of co-management regimes across Parks in the Northern Territory.15

Outstanding issues
The Mirarr, though positive about the agreement which will be entrenched by this Bill, remain opposed to any mining at the Jabiluka site, and are cautious about ERA’s proposal to build an underground ‘Ranger 3 Deeps’ mine (supporting the Federal Government’s decision that ERA’s proposal will be subject to a full Federal Environmental Impact Statement). They also insist that any proposal to continue mining at Ranger beyond 2021 be subject to the highest level of scrutiny with respect to potential environmental and social impact.16

Committee consideration
The Bill was referred to the Senate Standing Committees on Community Affairs on 21 March 2013. The first four submissions received by the committee are discussed below under ‘Positions of major interest groups’.17 The Committee is due to report on 25 June 2013.

Position of major interest groups
The Bill is supported without reservation in submissions to the Committee by the Northern Land Council and the Gundjeihmi Aboriginal Corporation, which also submitted correspondence from the Chief Executive of ERA, indicating the company’s support for the Bill.18

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The submission from the Local Government Association of the Northern Territory ‘supports the general thrust of the legislation in terms of Jabiru town land’ but recommends, that given the role the Jabiru Town Council and West Arnhem Shire Council have had in developing the town’s facilities and infrastructure, amendments be made to insert within subsection 3(1) a definition clause for the West Arnhem Shire and to change section 3AC so that it ensures that the Council is consulted as part of the legislative instruments that will be prepared in the future for the area. The Association’s submission suggests that care will need to be taken over the delineation of responsibilities between the Council and the newly involved Director of National Parks and Aboriginal Corporation:

To some, such questions might seem premature, however, there are examples of legacies in urban Aboriginal living areas in the Northern Territory where leases over whole areas have been granted and responsibilities between spheres of government and agencies have never been successfully resolved, largely for reasons of land tenure. ... The blurring of responsibilities between governments has all the hallmarks of been [sic] repeated in Jabiru unless the leases and land tenure arrangements are clearly catered for in the legislative instrument specified for the categories of land.

The Northern Territory Government notes that the Bill:

... gives effect to the legal framework of the settlement offer made by the Commonwealth in 2009 to the Mirarr Native Title Claimants and the subsequent variations to that settlement offer agreed between the Commonwealth, the Northern Territory and the Mirarr Native Title Claimants in 2010

but suggested that the Bill, if passed, will not resolve all outstanding issues regarding the implementation of the Jabiru settlement, in particular:

- the terms and conditions of a new Town headlease for Jabiru and subleases, including the principles upon which non-Government sublessees are to be transitioned to rental payments;
- completion of a new Jabiru Planning Scheme and arrangements under the NT Planning Act and the Commonwealth Environment Protection and Biodiversity Conservation Act;
- a variation to the 1985 Cost Sharing Agreement between the Northern Territory of Australia and Energy Resources of Australia;
- permit free access to the town once it becomes Aboriginal Land; and
- arrangements for access to town infrastructure.

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The Bill will therefore not obviate the need for the ongoing negotiations currently being undertaken by the Northern Territory with the Mirarr People.21

The Northern Territory Government was also concerned that the areas of land proposed to be scheduled were not being properly described and that roads in the area and their status were not properly identified.22 Amendments agreed in the House may have addressed these concerns.23

Financial implications

The Explanatory Memorandum states that the measures in the Bill are expected to have nil or negligible financial impact.24

Statement of Compatibility with Human Rights

The Government, at the end of its Explanatory Memorandum to the Bill, assessed the Bill as compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth). It observed that:

The Aboriginal Land Rights (Northern Territory) Act 1976 is discriminatory in nature as it confers rights and privileges upon Aboriginal Australians, which are discriminatory as against non-Aboriginal Australians ... However, the beneficial nature of this discrimination enables the Aboriginal Land Rights (Northern Territory) Act 1976 and this Bill to be each classified as a ‘special measure’ within the meaning of paragraph 4 of article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (the CERD) (and subsection 8(1) of the Racial Discrimination Act 1975).25

The Parliamentary Joint Committee on Human Rights, while agreeing that the legislation was consistent with Australia’s human rights obligations, found the Government’s justification of the underpinning land rights legislation as a ‘special measure’ inappropriate, arguing that rights such as those being supported by the ALRA, the rights of indigenous peoples to lands traditionally occupied

21. Ibid., p. 3.
22. Ibid.
by them, are ‘permanent rights, recognized as such in human rights instruments’ and not needing to be justified as a ‘special measure’. 26

Key issues and provisions

Schedule 1-Amendments Relating to Jabiru

Part 1 - Amendments

Aboriginal Land Rights (Northern Territory) Act 1976

Items 1-3 add three portions of land to the interpretation section of ALRA: category A Jabiru land, category B Jabiru land and category C Jabiru land. Item 5 inserts a definition of Jabiru town land within subsection 3(1) and has the meaning given by proposed section 3AC in item 10. Item 10 inserts new subsection 3AC(1) which provides that the Jabiru town land means the portions of land as specified in a legislative instrument under proposed subsection 3AC(2). However, before making a legislative instrument specifying these portions of land, the Minister must:

- have regard to the boundaries of the land comprising the whole of the Northern Territory Portion 2272 delineated on Survey Plan S79/31 (other than land on which there is a road over which the public has a right of way )27 and
- consult the Northern Territory Government, the relevant land council and other persons or bodies as the Minister thinks appropriate (proposed subsection 3AC(4)).

Item 10 also inserts a new section 3AD which makes possible leaseback arrangements for the Jabiru town land ‘by requiring the Minister to specify the areas of land within the Jabiru town land that are to be leased – namely, the category A Jabiru land, the category B Jabiru land and the category C Jabiru land’. 28 The Explanatory Memorandum states that the Minister will do this when negotiations and survey work are complete. 29

Subsection 4(1) of ALRA enables the Minister to establish Aboriginal Land Trusts to hold title to land in the Northern Territory for the benefit of Aboriginals and these trusts hold the ‘Crown’ land described in Schedule 1.

Item 11 omits the word ‘Crown’ from subsection 4(1) and enables the Minister to establish Aboriginal Land Trusts to hold land described in Schedule 1 (that is, such land will not be restricted to Crown land). However with respect to Jabiru, the Director of National Parks will hold an estate in

27. Proposed subsection 3AC (3); Explanatory Memorandum, Aboriginal Land Rights and Other Legislation Amendment Bill 2013, op. cit., p. 4.
28. Ibid., p. 5.
29. Ibid.
fee simple in the land described as JABIRU until immediately before the respective deeds of grant take effect.\textsuperscript{30}

**Item 16** provides that the Minister must recommend to the Governor-General that a grant of an estate in fee simple in the land described in paragraphs (a) and (c) under the heading of JABIRU in Part 4 of Schedule 1 of the ALRA be made to the Kakadu Aboriginal Land Trust. The Minister must also recommend to the Governor-General that a grant of an estate in fee simple in the Jabiru town land be made to the Kakadu Aboriginal Land Trust (new subsections 10(2AB) and (2AC)).

**Item 17** amendments basically provide for the execution and delivery of the two proposed deeds of grant by the Governor-General in relation to Jabiru. Certain conditions must be met in order for the deeds of grant to be made, the most important one relating to leaseback arrangements being in place. The amendments also enable the transfer of ownership of the land from the Director of National Parks to the Kakadu Aboriginal Land Trust.

**Item 20** repeals subsection 19(1) of the ALRA which relates to dealing with or disposing of any estate or interest in land. It is replaced by new subsection 19(1) which will enable the Land Trust to deal with the land prior to it becoming part of the Kakadu Land Trust, and so in practical terms means that the Kakadu Land Trust is able to grant lease variations and enter into leases in relation to Jabiru before it is vested in the Land Trust.\textsuperscript{31}

**Item 21** proposes the addition of new subsections to existing section 19 of the ALRA to enable the Kakadu Aboriginal Land Trust to grant and enter into leaseback arrangements subject to certain conditions being satisfied. These amendments are aimed at providing security for existing rights, titles and interests in relation to Jabiru land, a precondition for the land being granted as Aboriginal land.\textsuperscript{32}

**Item 23** significantly provides that the Minister must not give consent under subsection 19A(1) to the grant of a lease of a township unless the lease is for a term of 99 years and the Minister responsible for the EPBC Act is satisfied that the terms and conditions of the lease are consistent with protecting world heritage, and the natural and cultural value of Kakadu National Park.

**Item 27** inserts the Jabiru town land and two adjacent non-township portions (Northern Territory Portions 7126 and 7127) into Part 4 of Schedule 1 to the ALRA (after the item relating to INNESVALE).

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\item \textsuperscript{30} Ibid., p. 6.
\item \textsuperscript{31} Ibid., p. 10.
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Environment Protection and Biodiversity Act 1999

Environment Protection and Biodiversity Conservation Act 1999

**Item 28** provides an exception to subsection 345A(1) of the EPBC Act which provides that if the Commonwealth acquires a usage right relating to land or seabe in a Commonwealth reserve, the usage right vests in the Director of National Parks. With respect to Jabiru it will not.

**Part 2 – Compensation for acquisition of property**

**Item 36** makes provision for compensation to be payable to a person whose property is acquired as a consequence of the proposed amendments on the same terms as in section 51 (xxxix) of the Commonwealth Constitution.

**Schedule 2- Other amendments**

**Item 1** adds a further parcel of land for Patta to Schedule 1—there are already five portions of land known as PATTA.

**Concluding comments**

This Bill gives effect to the 2009 agreement which was aimed at ending a long native title dispute. It gives the Mirarr recognition as traditional owners over the area of the township of Jabiru, while providing for the township’s continued incorporation within the Kakadu National Park. The Bill limits itself to this essential goal. It does not try to resolve all issues to do with the nature of the leases to be written, nor does it try to anticipate resolution of any issues that may arise with respect to future uranium mining developments on the nearby Ranger and Jabiluka leases.