Aboriginal Land Rights (Northern Territory) Amendment Bill 2015

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Law and Bills Digest Section

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Date introduced: 24 June 2015
House: House of Representatives
Portfolio: Indigenous Affairs
Commencement: The formal provisions commence on the day of Royal Assent, and the operative provisions (Schedule 1) commence the day after.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website.
Purpose of the Bill

The purpose of the Aboriginal Land Rights (Northern Territory) Amendment Bill 2015 (the Bill) is to amend the Aboriginal Land Rights (Northern Territory) Act 1976 (the Act) to:

- extend the powers of the Executive Director of Township Leasing to encompass subleases, including to Aboriginal and Torres Strait Islander corporations and to broaden the Executive Director’s powers to deal with all Aboriginal land (rather than being confined to township leasing)
- to arrange for the Aboriginals Benefit Account to pay the costs associated with the new leasing arrangements and
- to incorporate two new parcels of land into the Act, thereby giving title to Aboriginal Land Trusts.

Background

The Aboriginal Land Rights (Northern Territory) Act 1976 has been subject to numerous amendments since it passed the Parliament with bipartisan support. The Act, as first passed by the Parliament, provides for title to land to be granted to a Land Trust on behalf of the traditional owners. Title is inalienable and equivalent to freehold title but is held communally, reflecting the nature of Aboriginal land ownership. The Act also provides for Land Councils who represent traditional owners and negotiate with developers on their behalf and provides that royalty equivalents from mining on Aboriginal land are paid into an Aboriginals Benefit Account (ABA), which used to have a statutory formula for distribution (but now is paid in part at the discretion of the Minister).

This Bill’s proposed amendments build on and extrapolate from amendments made in 2006 and 2007. The Bills Digests for those amendments give a comprehensive background to the issues and can be found here:

- J Norberry and J Gardiner-Garden, Aboriginal Land Rights (Northern Territory) Amendment Bill 2006. These amendments, in so far as they are relevant to the provisions of the current Bill, enabled the granting of 99-year township leases to ‘NT entities’ and for sub-leasing to occur and removed the statutory formula governing allocations from the ABA to Land Councils for their administrative costs and
- B Jaggers, Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Bill 2007. This amendment established the office of Executive Director of Township Leasing, to enter into and administer township leases on Aboriginal land in the Northern Territory.

The second reading speech for this Bill was given by Mr Tudge, the Parliamentary Secretary to the Prime Minister, who emphasised that the amendments in the Bill are specifically designed to address issues faced by the community of Mutitjulu, where, according to the Parliamentary Secretary, ‘tenure arrangements ... are irregular, uncertain, and inconsistent with other communities on Aboriginal land in the Northern Territory.’ As a result ‘the Minister for Indigenous Affairs, Senator the Hon. Nigel Scullion, has been working in close cooperation with the Mutitjulu community, traditional owners and the Central Land Council to negotiate a sublease which will provide certainty of tenure in Mutitjulu.’ While they may have been focussed on Mutitjulu, the amendments are framed so as to affect all the various arrangements under the ALRNT.

The historical background to this Bill is not fully explored in this Digest. As the Bill largely consolidates or expands the 2006 and 2007 amendments, relevant background can be found in the Digests for those Bills. Another useful and detailed account of the changes can be found in Associate Professor Sean Brennan’s exploration: ‘Economic development and Land Council power: modernising the Land Rights Act or same old same old?’ That article

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6. Ibid.
reviews key changes from the central 2006 Amendment Act ‘against the backdrop of the Land Rights Act’s chequered political history, in which bipartisan endorsement and ideological antagonism have jostled for priority’.  

While the Bill’s amendments are effectively minor, the issues involved are under ongoing consideration. Indigenous land administration and use has been the subject of a review under the aegis of the Council of Australian Governments (COAG), which in its communiqué of 17 April 2015 stated: ‘COAG agreed the report of the Investigation would be provided to the late 2015 meeting.’ The Abbott Government also issued a white paper on developing Northern Australia, which was received with some cautiously optimistic scepticism, mixed with some hope for effective implementation.  

**Public/Private ownership: but is this an appropriate dichotomy?**

Professor Brennan and others have pointed out that, while the ALR(NT)A was passed with bipartisan support in 1976, there has been an on-going tension around the communitarian aspects of the form of land holding and the more standard forms of title. Nicole Watson, when looking at the three different amendents to land tenure arrangements since 2006, summarised some of the tensions by observing:

> In the closing years of the Howard Government, conservative politicians and aligned think tanks advocated for the growth of individual property rights in Indigenous lands, on the basis that communal title impeded economic development.  

Watson goes on to explore the dichotomy and argues that the writings and thoughts of Hernando de Soto, upon which much of the economic analysis advocating approaches based on an ‘individual title’ model relies, cannot necessarily be applied to the relevant areas and conditions of land under the ALR(NT)A. Professor Brennan’s article also questions the applicability of Hernando de Soto’s analysis. He comments:

> In July 2004, Noel Pearson and Lara Kostakidis-Lianos discussed the applicability of the ideas of Peruvian economist Hernando de Soto to Aboriginal communities with communal landholdings in Australia. De Soto argues that one important explanation for the poverty of millions in Latin America and elsewhere is the weakness of economically important legal institutions and processes - in particular, the absence of individual property rights....

Pearson and Kostakidis-Lianos said that de Soto’s ideas encourage a focus on the structural barriers to Indigenous participation in the ‘real economy’ in Australia. For many Aboriginal people, they said, those barriers include their presence on communally-owned inalienable title:

> The majority of Indigenous assets exist outside the Australian economy. They are, in de Soto’s words ‘dead capital’, because they cannot be leveraging to create capital.

Pearson and Kostakidis-Lianos advocated moving Indigenous assets into the mainstream economy. On the other hand, they cautioned against simply breaking up communal titles into individual ones. Sites of cultural and environmental significance require protection and the risk of ‘surrender of land on unjust terms’ must be avoided. The objective, they said, is an ‘intelligent compromise’ that involves maximising the fungibility of assets while minimising the risk to communal ownership and values.

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8. Ibid., p. 1.
9. See generally Department of the Prime Minister and Cabinet (PM&C), ‘COAG Investigation into Indigenous land administration and use’, PM&C website, accessed 11 November 2015. See also Council of Australian Governments (COAG), Communique, COAG Meeting, Canberra, 17 April 2015, accessed 10 August 2015.
12. Nicole Watson is a Senior Research Fellow at the Jumbunna House of Learning, University of Technology, Sydney.
Professor Brennan goes on to point to possible dangers with applying de Soto’s analysis:

First, the case made by government about the link between private leaseholdings, home ownership and improved economic outcomes for Aboriginal people was largely rhetorical. The argument appealed to ‘common sense’ and formal equality – offering the same choice and opportunities as other Australians – rather than empirical evidence demonstrating an economic case. This concern has additional weight given the apparent shift within the World Bank – formerly a strong proponent of individual titling as a path to development in poor countries around the world – to a more sceptical view. In a recent article, Penny Lee attributes to ‘the World Bank’s key policy advisor’ a warning that in remote areas of low population replacing communal tenure with individual titling may not be cost-effective and that instead of ideologically-driven solutions, policy-makers ‘should focus on ways to enhance security and effectiveness of property rights under existing arrangements’.

Another detailed account of the ‘three principal reforms’ concerning land tenure between 2006 and 2008, (Township leases, five-year ‘intervention’ leases and 40-year Housing Leases) is offered by Kirsty Howey in ‘Normalising’ what? A qualitative analysis of Aboriginal land tenure reform in the Northern Territory. This account critiques the concept of ‘normalising’ aboriginal land tenure in the Northern Territory as an expression of a post-colonial impulse which constructs Aboriginal communities in the Northern Territory as ‘morally depraved, socially dysfunctional and anti-economic’. She argues that the relative success of the 40 year housing leases, as contrasted with the township leases and the five-year intervention leases is because ‘the first two reforms ... effectively involved the supplanting of traditional Aboriginal control of communities with Commonwealth Government control,’ while the 40-year housing leases ‘reflected the narrower focus of normalisation discourse at this time on securing tenure for government assets in communities and standardising services and infrastructure’. She also identifies de Soto as having been significant in the development of thinking about land tenure reforms.

Another resource which offers a contrasting analysis to Ms Howey’s analysis is Sara Hudson’s Centre for Independent Studies paper, ‘Can 99-year Leases Lead to Homeownership for Indigenous Communities’, which argues that the Rudd administration’s focus on 40 year Housing Leases was inappropriate.

More recently Mick Gooda and Tim Wilson have cited de Soto in their call to enable Aboriginal and Torres Strait Islander peoples to use their land to participate in the formal economy:

In his seminal book, The Mystery of Capital, Hernando de Soto described the challenge: “Capital, like energy, is also a dormant value. Bringing it to life requires us to go beyond looking at our assets as they are to thinking actively about them as they could be. It requires a process for fixing an asset’s economic potential into a form that may be used to initiate additional production.”

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16. S Brennan citing the call for ‘evidence-based’ approaches in J Altman, C Linkhorn and J Clarke, Land rights and development reform in remote Australia, Oxfam Australia, Fitzroy, Victoria, 2005. Brennan states: ‘The NT Government, which appears to have instigated the idea, has admitted that no economic assessment was done to assess whether the changed tenure arrangements would improve economic development in NT Aboriginal communities’; see also D Bree [Deputy Chief Executive, Department of Business, Economic and Regional Development, Northern Territory], Evidence to Senate Community Affairs Legislation Committee, Inquiry into the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006, 21 July 2006, accessed 11 November 2015.
20. Ibid., p. 19.
They went on to point out that, as Noel Pearson had put it:

> The challenge is to convert title into a fungible asset that can be used in economic transactions, without compromising its underlying communal nature.  

Gooda and Wilson convened a meeting of indigenous leaders in Broome in May 2015, which was widely reported, and approved by many, including *The Australian*, whose strongly worded editorial lauded the event and argued that ‘[e]conomists generally agree about the centrality of individual property rights in economic prosperity and development.’ The thinking from Gooda and Wilson’s meeting was also reflected in a subsequent opening address to the National Native Title Conference.

However Dr Leon Terrill, who is the Research Director of the Indigenous Law Centre and has directed the Indigenous Land Reform Project at UNSW argues that a dichotomous approach to these issues – which focusses on contrasting ‘communal ownership’ with ‘individual ownership’ and prioritising ‘private property’ and ‘secure tenure’ is inappropriate in the context of the *ALR(NT)*A. In particular he argues that these concepts have been applied and used incorrectly ‘with the result that there is a great deal of confusion about what the reforms actually do and what they mean for the affected communities’. The *Indigenous Land Reform Project* has a useful timeline regarding land tenure reforms in Indigenous communities across Australia and offers a variety of resources.

**Aboriginals Benefit Account**

The history of the management of the Aboriginals Benefit Account has been somewhat troubled. The Account was initially established as a holding mechanism for profits raised from land held under the *ALR(NT)*A. The Reeves Review suggested that there were problems with this arrangement and legislative amendments were made which transferred the powers of management away from indigenous people to the Minister. The Digest for the 2006 amendments details this history and since those amendments there has been ongoing criticism of the arrangements. The 2007 Bills Digest (for the Bill that introduced the Executive Director of Township Leasing) summarised some of the concerns as follows:

> The use of the ABA to fund the administrative costs of the headlease entity was widely criticised in the debate surrounding the 2006 amendments to [the Act], with opponents stating that by using the ABA to fund such entities, traditional landowners are being asked to pay for the administration of renting their own land.

More recently Nicholas Rothwell has commented in the context of an article examining the lack of consultation mechanisms for Aborigines:

> Projects funded by the NT Aboriginal Benefits Account, a half-billion-dollar royalty trust, were chosen for decades by an indigenous board, but changes to the Land Rights Act in 2007 quietly augmented the federal minister’s control.

> The consequences have swiftly become evident: the ABA’s financial resources are now being used as a handy source of extra commonwealth program funds. ABA revenues, which are royalties paid to traditional owners as

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23. Ibid.
28. Ibid.
recompense for mining, are now even being earmarked as the source of long-term loans to Aboriginal communities that agree to give the commonwealth 99-year township leases over their land.  

An earlier piece in The Australian looking at the uses to which the ABA should be put commented:

Accusations that the ABA has been used to fund discretionary or short-term items date back at least to 2007, when then Coalition indigenous affairs minister Mal Brough defended a $20m drawdown for Aboriginal housing.

and went on to comment:

... Last financial year, Ms Macklin drew $9.5m from the ABA to pay for township leases in two NT communities, while the account provided $4.75m to the Office of Township Leasing, which included running costs.

The article also commented there had been issues identified in the Office of Evaluation and Audit’s 2008 audit which had reportedly been ‘critical of the transparency, accountability and operation of the ABA’. Finally it reported:

Mick Gooda, the Aboriginal Social Justice Commissioner, criticised Ms Macklin’s use of the ABA to pay for township leases earlier this year. He said it was ”outrageous” the government negotiated just compensation and then paid for it with ”Aboriginal money”.

The National Indigenous Times’ Chris Graham was that much more robust in his commentary. After saying:

On a national scale, the conservative response to dysfunction in Aboriginal communities has not been to match funding with need, but to introduce assimilationist policies aimed at making Aboriginal people, particularly in remote communities ‘just like everyone else’.

He went on to say that the Aboriginals Benefit Account is:

... money earned by Aboriginal people, but the government doesn’t trust them to spend it, so it keeps control of the fund through an appointed panel.

... Late last year, the government introduced amendments to the NT Land Rights Act under the guise of helping Aboriginal people to realise an economic benefit from their ownership of land.

But when Aboriginal people do derive an income - mining royalties - the government pinches the cash to fund public infrastructure that all other Australians expect in return for paying tax.

Adding parcels of land to Schedule 1 of the ALR(NT)A

The two parcels of land to be handed back by being included in Schedule 1 of the ALR(NT)A seem unlikely to provoke controversy, although the Northern Land Council indicates it would have been unhappy if the return of Wickham River had been made contingent on entering into a lease arrangement. In a series of articles under the banner ‘Yarralin—Justice after 40 years’ the Land Rights News—Northern Edition provided background to the Wickham River handback. These include an article, ‘They never gave up the fight,’ which comments that when

35. Ibid.
36. Ibid.
38. Ibid., p. 6. The Australian has taken an ongoing interest in the Aboriginals Benefit Account, even reporting in its ‘Streth’ column at one stage that ‘A new art centre was opened ... the funds for which came from the Aboriginal Benefits Account [sic], a stream of mining royalty payments; in other words, Aboriginal money paid for the project. The commemorative plaque fleetingly mentions the ABA, but goes on mysteriously to declare: “Proudly Funded by Department of Families, Housing, Community Services and Indigenous Affairs.” ... J Jeffrey, “Streth: Er, whose money?” Weekend Australian, 17 March 2012, p. 22, accessed 20 August 2015.
the land is returned the Federal government ‘will have turned the last page of a long history of sorrow and disappointment’ which included a walk off by workers and their families from the Victoria River Downs station in 1972, and a story about Minister Scullion’s desire to enter into a 99-year township lease for this area, a move which is described by the *Land Rights News* as ‘a give-with-one-hand and take-with-the-other scenario: the Commonwealth has agreed to hand back the land at Yarralin (and land beyond the community itself) as Aboriginal freehold title, but wants to secure a township lease under section 19A of the *Aboriginal Land Rights Act*.’

**Committee consideration**

**Selection of Bills Committee and the Senate Standing Committee for the Scrutiny of Bills**

The Selection of Bills Committee resolved not to refer the Bill for committee consideration, and the Senate Standing Committee for the Scrutiny of Bills had no comment on the Bill.

**Parliamentary Joint Committee on Human Rights and the Statement of Compatibility**

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)*, the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.

The Parliamentary Joint Committee on Human Rights had no comment to make on the Bill since it ‘promote[d] human rights or contain[ed] justifiable limitations on human rights.’

**Policy position of non-government parties/independents**

The passage of the 2006 Amendment Bill was hotly contested and opposed by ‘all non-government parties other than Family First.’ However, the current Bill has not excited much public interest or commentary. Leasing arrangements are already in place, and while the Rudd/Gillard government focussed on 40 year leases of housing properties, rather than the broader and longer leases envisaged by the 2006 amendments those amendments were not seen as sufficiently pernicious as to need further amendment. Non-Government members have not commented on this Bill.

**Position of major interest groups**

Reactions to the Bill have been quite muted, possibly because the amendments are quite targeted in their effect. Nevertheless the various analysts and commentaries documented in the background section demonstrate that there is some feeling against the on-going development of provisions some people regard as inappropriate.

**Financial implications**

The Explanatory Memorandum says that ‘[t]he measures in the Bill have nil or negligible financial impact.’ The Bill is likely to have some financial implications for the Aboriginals Benefit Account, but these are not explored in the Explanatory Memorandum.

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40. ‘They never gave up the fight.’ *Land Rights News—Northern Edition*, op. cit., p. 3. There is also an article by Dr Philip Nitschke who worked in the area in the early 1970’s, ‘What I saw at Wattie Creek’, *Land Rights News—Northern Edition*, op. cit., p. 5.
44. The Statement of Compatibility with Human Rights can be found at pages 8–9 of the *Explanatory Memorandum* to the Bill.
Key issues and provisions

Amendments to Part IIA

Division 2—Functions of the Executive Director

Items 1 to 6 of the Schedule to the Bill operate to adjust or enhance Division 2 of Part IIA of the Act, which sets out the powers of Executive Director of Township Leasing. Under the 2007 amendments the Executive Director was established to enable the Commonwealth to arrange township leasing of Aboriginal land.

These amendments seek to ensure that leases and subleases that the Executive Director can manage are more generally available over Aboriginal land and that these powers are not confined to ‘community living areas, town camps and prescribed lands’ as the legislation was originally framed. Items 3 and 4 make this clear, both by adjusting the title of section 20CA, and by adding a reference to a generically framed lease of ‘Aboriginal land’ and the Executive Director’s capacity to offer a sublease of this lease. Item 2 has also been framed to ensure the Executive Director has the power to administer subleases acquired by the Commonwealth and then leased on or re-acquired from an Aboriginal and Torres Strait Islander Corporation, which is what new section 20CB would allow (item 6).

Another clarification that is made to the ‘Functions of the Executive Director’ by the Bill is that, ‘to avoid doubt’ the relevant ‘proprietor’ of Aboriginal land may be the Director of National Parks (item 5).

Division 6—Effect on other laws in relation to certain leases or subleases entered into by Executive Director

Items 7 to 17 of the Schedule deal with the ‘Effects on other laws in relation to leases or subleases held by the Executive Director.’ In essence there are a series of amendments ensuring that dealings by the Commonwealth do not come within the purview of the Land Acquisition Act 1989 (items 7-10) or Northern Territory taxes (items 11-13). It brings such transfers within the Northern Territory’s processes of registration (item 14) but exempts them from the Northern Territory’s procedures regarding subdivision (item 15). Various minor technical adjustments are made to section titles to reflect the changes made to the content of those sections.

Amendments to Part VI—Aboriginals Benefit Account

Item 18 is potentially one of the more controversial provisions, dealing, as it does, with Part VI of the Act – the Aboriginals Benefit Account. Section 64 of the Act sets out a framework for ‘Debits from the Account’ which makes some provisions for payments to Land Councils, to Land Councils in areas where the relevant mining interests are occurring, to ‘Aboriginals living in the Northern Territory’ and to cover various costs associated with the new leasing arrangements (subsection 64(4A)). Item 18 inserts into subsection 64(4A) four new paragraphs which extend the current coverage of costs for leasing arrangements to provide that the costs of acquiring and administering a sublease by an Aboriginal and Torres Strait Islander corporation can also be paid out of the Aboriginals Benefit Account, as can the costs of the Executive Director in re-acquiring or administering the lease.

Amendments to Schedule 1

Items 19 and 20 add two parcels of land (identified as ‘Simpson Desert’ and ‘Wickham River’ respectively) to Schedule 1 of the ALR(NT)A, which, through the operation of sections 4, 10 and 12 of the Act, gives title to these lands to Aboriginal Land Trusts.

Concluding comments

The changes being made by the Bill simply enhance or clarify changes which have been made in earlier legislation, nevertheless they represent a policy approach which has been the subject of critiques by academics and activists alike. The responses to this Bill have been minimal and this may well be because the Bill will particularly affect one specific community, the Mutitjulu community and has been devised with the assistance of the Central Land Council. The return of the two parcels of land will be welcomed by the relevant Indigenous communities.