

**REFORM OF THE *ABORIGINAL LAND RIGHTS*
(*NORTHERN TERRITORY*) ACT 1976**

OPTIONS PAPER

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Introduction

There has been little change to the *Aboriginal Land Rights (Northern Territory) Act* 1976 since 1987. The Act has not kept pace with changes in the way in which Aboriginal people manage land in the Northern Territory, or with moves to increase economic participation of Aboriginal land holders.

In 1997 the government commissioned a comprehensive review of the Act by Mr John Reeves QC who reported in 1998. In 1999 the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs reviewed Reeves' recommendations, and a national competition policy review of the exploration and mining provisions of the Act was also undertaken. The three reports comprise an extensive consideration of possible reforms and involved wide consultation with stakeholders.

The government is committed to remedying the deficiencies of the Act during this term of government. The government's priorities, as announced in the 2001 election campaign, include reducing barriers to economic development of Aboriginal land and facilitating effective devolution of control from existing Land Councils to more localised regional bodies. The government is also committed to ensuring that the Aboriginals Benefit Account is well targeted and viable over the longer term.

This options paper is a synthesis of review recommendations and government and stakeholder views. The paper provides a range of options on reforms to the provisions in the Act relating to Land Councils, exploration and mining on Aboriginal land, the Aboriginals Benefit Account and land claims.

The paper also lists other possible reforms to the Act including the promotion of economic development and the role of the Northern Territory government in administration of the Act. The latter issue was previously raised in the context of proposals for statehood in the Northern Territory. The current reform exercise presupposes that the Commonwealth will continue to have responsibility for the Act. An alternative approach would be to transfer the Act in its current form to the Northern Territory and allow it to reform the Act.

The government is seeking an agreed approach on the principal reforms to the Act that will maximise the potential benefits for Aboriginal people in the Northern Territory.

Issue	Options
Land Councils	
<p><u>1. New Land Councils</u></p> <p>The Act allows for the establishment of new Land Councils. However, only two applications for new Land Councils have succeeded since 1977. One of the reasons for this is the lack of precision in the provisions of section 21.</p>	<p>1a. Reform section 21 by including:</p> <ul style="list-style-type: none"> - an assessment process relating to operational capacity; and/or - a plebiscite of all resident Aboriginal people conducted by the AEC; or - a plebiscite of only traditional owners; or - a plebiscite of all resident Aboriginal people and separate traditional owner consent; and/or - a fixed percentage of the vote between 50% and 75% for an application to be successful. <p>1b. Establishment of further Land Councils by legislation.</p>
<p><u>2. Regionalisation of existing Land Councils</u></p> <p>The Act provides for delegation of Land Council powers under section 28. Delegation of powers can provide a fledgling organisation with control of certain affairs and valuable experience without undertaking full Land Council responsibilities. However, section 28 is restrictive and does not allow for regionalisation of Land Council powers to any significant degree.</p>	<p>2a. Enable greater delegation of Land Council powers than currently provided under section 28.</p> <p>2b. Enable delegation by a Land Council in the first instance with possible review by the Minister following any appeal by a disaffected Aboriginal group.</p> <p>2c. Enable an application to be made to the Minister by an Aboriginal group who could delegate certain Land Council powers after a capacity assessment.</p> <p>2d. Allow for Aboriginal groups to 'opt out' of the requirement that they be represented by a Land Council. This could be allowed on an event or service basis (ie. for a particular development project or for Part IV decisions).</p>

Exploration and Mining	
<p><u><i>Background</i></u></p> <p>Exploration and mining on Aboriginal land has been slow which has not assisted in overcoming the socio-economic disadvantages faced by Aboriginal Territorians. There is a need to streamline the regulation of exploration and mining on Aboriginal land for the benefit of Aboriginal and non-Aboriginal people in the Northern Territory.</p> <p>The following subheadings are somewhat artificial but try to tease out the range of interconnected factors in the exploration and mining provisions. Different models to improve the exploration and mining provisions would include a range of the options under the various subheadings (for example an unrestricted model would generally include options numbered 'a').</p>	
<p><u><i>3. Selection of companies</i></u></p> <p>The process needs to be fair and transparent.</p>	<p>3a. Traditional owners select companies.</p> <p>3b. Northern Territory government selects companies in consultation with traditional owners.</p> <p>3c. Northern Territory government continues to select companies on a first-come, first-served basis.</p> <p>3d. Northern Territory government selects companies on a first-come, first-served basis and limit consent to negotiate to a defined timeframe (eg. one or two years).</p>
<p><u><i>4. Negotiation timeframes</i></u></p> <p>Negotiations have been lengthy and sometimes inconclusive.</p>	<p>4a. Unrestricted.</p> <p>4b. Defined timeframe (eg. one or two years) without extension.</p> <p>4c. Defined timeframe with one extension (eg. one year) at request of both parties.</p> <p>4d. Defined timeframe with unlimited extensions at the request of both parties.</p>
<p><u><i>5. Negotiations unresolved after defined timeframe (ie. no veto or agreement)</i></u></p>	<p>5a. Deemed veto.</p> <p>5b. Deemed consent.</p> <p>5c. Consent to negotiate lapses.</p> <p>5d. Arbitration.</p>

<p><u>6. Exploration agreements</u></p> <p>Exploration agreements have been unnecessarily complex.</p>	<p>6a. Unrestricted, including allowing for a contractual veto at the mining stage and/or allowing any types of payments.</p> <p>6b. Continue restrictions, including a once only veto at the exploration stage and/or restrictions on types of payments.</p>
<p><u>7. Reasonableness of agreements</u></p> <p>There could be alternatives to a Land Council satisfying itself that an agreement is reasonable.</p>	<p>7a. Provide that if a Land Council has concerns about the reasonableness of an agreement, it can raise its concerns with the Commonwealth Minister, who can direct the parties to renegotiate.</p>
<p><u>8. Moratorium period</u></p>	<p>8a. Decided by traditional owners.</p> <p>8b. Maintain five years but allow for it to be put aside at any stage.</p> <p>8c. A set period of between two and five years.</p> <p>8d. No moratorium.</p>
<p><u>9. Prevention of warehousing</u></p> <p>Companies can intentionally slow down negotiations while preventing other companies accessing the tenements (warehousing).</p>	<p>9a. Traditional owners select companies.</p> <p>9b. Consent to negotiate can be transferred to another company:</p> <ul style="list-style-type: none"> - after one year; and/or - after a veto; and/or - at any time if the original company is not negotiating in good faith.
<p><u>10. Reduced role of the Commonwealth Minister</u></p> <p>A Commonwealth Minister is directly involved in what is primarily a land management issue in the Northern Territory.</p>	<p>10a. Remove Commonwealth Minister from Part IV decision making (advising the Governor-General on the national interest would remain with the Commonwealth) and replace with:</p> <ul style="list-style-type: none"> - the Northern Territory Mining Minister; and/or - traditional owners. <p>10b. Maintain Commonwealth Ministerial sign off on agreements but allow for the Northern Territory Mining Minister to administer some provisions either expressly or by delegation (eg. approving an extension for negotiations if such a system is provided for).</p>

Economic Development	
<p><u>11. Possible reforms to promote economic development</u></p> <p>In addition to reform of the exploration and mining provisions, other reforms to the Act could promote the economic development of Aboriginal land.</p>	<p>11a. Enable agreements concerning land under claim under section 11A to take effect immediately and not wait until the land is granted.</p> <p>11b. Adding flexibility to section 19 including confirming that advance approval can be given for the transfer of a lease (to facilitate mortgaging).</p> <p>11c. Raising or removing the \$100 000 threshold requiring Ministerial consent of contracts in section 27.</p> <p>11d. Make the economic development of Aboriginal land an object of the Act.</p>
Aboriginals Benefit Account	
<p><u>Background</u></p> <p>The equivalent of most mining royalties derived from mining on Aboriginal land are paid to the Aboriginals Benefit Account (ABA) by the Commonwealth and the ABA (administered by ATSIC) distributes 40% to Land Councils for their administrative costs (plus supplementation that has averaged over 10% annually), 30% to Aboriginals affected by mining and the balance to Northern Territory Aboriginal people, the Land Councils where supplementation is required and for the administrative costs of the ABA.</p> <p>Reviews of the Act have suggested that ABA funds could be distributed and used more effectively, particularly to promote economic development, and that accountability mechanisms for recipients could be improved.</p>	
<p><u>12. Distribution formula</u></p> <p>The ABA distribution formula could be changed to better reflect the funding requirements of the Land Councils and to promote economic development on Aboriginal land.</p>	<p>12a. 50% for Land Councils and 50% for Aboriginals affected.</p> <p>12b. 40% to 50% for Land Councils, 30% for Aboriginals affected and 20% to 30% for Northern Territory Aboriginal people.</p> <p>12c. As 12b. for <u>existing</u> mines but for <u>new</u> mines increase amount for Aboriginals affected to 50% (Northern Territory Aboriginal people could utilise draw down funds from a self-sustaining ABA reserve built up from existing mines).</p>

<p><u>13. Land Council Funding</u></p> <p>Land Council funding is currently divided on the basis of population and the provisions relating to their accountability to clients and the public need to be modernised.</p>	<p>13a. Land Council funding to be based on functions and outputs.</p> <p>13b. Include provision for Land Councils to charge for certain services and within parameters.</p> <p>13c. Require the Land Councils to prepare strategic plans covering at least 3 years for approval by the Minister.</p>
<p><u>14. Possible reforms to improve the operation of royalty associations</u></p> <p>Royalty associations which receive funds for Aboriginal people affected by mining are perceived as being poorly managed, lacking transparency, having poor accountability and of having no clear purpose for the expenditure of funds.</p>	<p>14a. Require royalty associations to be subject to the <i>Commonwealth Authorities and Companies Act 1997</i> as appropriate including annual reporting.</p> <p>14b. Increase accountability of royalty associations to Land Councils.</p> <p>14c. Improve transparency by:</p> <ul style="list-style-type: none"> - legislatively defining areas affected by mining; and - having clear purposes and distribution mechanisms applying to the use of funds for areas affected by mining.
<p><u>15. Possible reforms to the amount for the benefit of Northern Territory Aboriginal people</u></p> <p>There is a perception that the grants programme used for the general benefit of Northern Territory Aboriginal people has not been an optimal use of these funds and has resulted in few lasting benefits. The ABA does not have a legislative investment strategy to ensure its long term viability given the limited life of mines and commodity market volatility.</p>	<p>15a. Establish a fund using the ABA reserve and any ongoing amounts for the benefit of Northern Territory Aboriginal people with an investment strategy that it become self-sustaining with draw downs being used for economic development and land management purposes for the benefit of Northern Territory Aboriginal people.</p> <p>15b. Specify that priority for amounts for the benefit of Northern Territory Aboriginal people should be for people not in areas affected by mining.</p> <p>15c. Change the ABA Advisory Committee to an independent Board appointed by the Minister on the basis of professional expertise and with a Northern Territory Aboriginal majority.</p>

Land Claims	
<p><u>16. Finalising outstanding claims</u></p> <p>Although the sunset clause relating to the hearing of claims by the Aboriginal Land Commissioner came into force in 1997 there remain approximately 100 outstanding land claims including claims to the beds and banks of rivers, the intertidal zone, the seabed and land held by the Conservation Land Corporation and Northern Territory Land Corporation. Aspects of these claims have been subject to Court proceedings and the issue of whether the seabed can be claimed is currently before the High Court.</p>	<p>16a. Leave to the normal claims process and the outcome of litigation in relation to the seabed and any further litigation (for example in relation to Conservation Land Corporation and Northern Territory Land Corporation land).</p> <p>16b. Grant certain categories of claim by legislation including claims to rivers where both sides are Aboriginal land.</p> <p>16c. Dispose of certain categories of claim by legislation including strip claims to rivers and claims to the intertidal zone adjacent to land unavailable for claim. Native title claims could still be pursued and forms of joint management could be encouraged where appropriate (eg. of the intertidal zone and of Conservation Land Corporation land).</p> <p>16d. Settlement conference.</p> <p>16e. Provide that the Land Councils only fund claims where they are satisfied that a claim has a <i>prima facie</i> chance of success.</p> <p>16f. Provide that, once a recommendation is received, the Minister must make a decision as quickly as practicable.</p>
<p><u>17. Aboriginal Land Commissioner powers</u></p> <p>The powers of the Aboriginal Land Commissioner could be extended in an effort to facilitate the finalisation of claims.</p>	<p>17a. Extend the powers of the Aboriginal Land Commissioner including:</p> <ul style="list-style-type: none"> - mediation with the consent of the parties; and/or - the power to make a recommendation without a hearing (ie. by consent); and/or - the power to dismiss a claim.
<p><u>18. Land claims that cannot proceed</u></p> <p>There are a number of claims in respect of which the Aboriginal Land Commissioner is prohibited from exercising any function but the claims remain on foot. Stock route claims are the most numerous of this type.</p>	<p>18a. Provide a mechanism for the disposal of claims if the Aboriginal Land Commissioner cannot perform his/her functions.</p>

<p>Other</p>	
<p><u>19. Role of the Northern Territory government in administration of the Act</u></p> <p>The Northern Territory government has a limited role in an Act that affects more than half of the Territory. Patriation of the Act has been previously raised in the context of possible statehood for the Northern Territory. (Refer to issue 10 for options for greater Northern Territory involvement in the administration of the exploration and mining provisions.)</p>	<p>19a. Retain current responsibilities.</p> <p>19b. Transfer the Act or parts of the Act to the Northern Territory by extending Northern Territory executive authority by amendment of the <i>Northern Territory (Self-Government) Regulations</i> 1978 or by an agreement under regulation 4(5)(f) of the Self-Government regulations.</p> <p>19c. Transfer the Act to the Northern Territory and retain some form of Commonwealth oversight of any amendments made by the Northern Territory.</p> <p>19d. Expressly provide for administration by the Northern Territory of parts of the Act.</p> <p>19e. Delegate Ministerial powers to the Northern Territory. The prohibition on delegating Part IV powers would require amendment if delegation of the exploration and mining provisions was proposed.</p>
<p><u>20. Compulsory acquisition of interests in Aboriginal land for public purposes</u></p> <p>Governments generally have the power to compulsorily acquire land for certain purposes. The Northern Territory government lacks the power to acquire any interests in Aboriginal land for any purposes. Any proposals on this issue need to consider that the future act regime of the <i>Native Title Act</i> 1993 is expressly disapplied in relation to Aboriginal land as the Land Rights Act offers greater protection than the Native Title Act.</p>	<p>20a. No change required as section 19 agreements allow the Northern Territory government to acquire interests in Aboriginal land.</p> <p>20b. Provide the Northern Territory government with the power to acquire interests (short of freehold) in Aboriginal land for public purposes.</p> <p>20c. As 20b with:</p> <ul style="list-style-type: none"> - appropriate amendment of the Northern Territory <i>Lands Acquisition Act</i> to provide for the views of traditional owners to be taken into account; and/or - the requirement for the Commonwealth Minister's agreement in cases where the relevant Land Council, on behalf of traditional owners, objects; or - each acquisition requiring a separate Act of the Northern Territory Legislative Assembly.

<p><u>21. Clarification of the application of Northern Territory laws</u></p> <p>There is a perception of uncertainty about the application of Northern Territory laws on Aboriginal land.</p>	<p>21a. Provide that certain Northern Territory laws (such as those related to the areas of environmental protection and conservation, public health and safety, the supply of essential services, the maintenance of law and order, or the administration of justice) apply in relation to Aboriginal land. The laws could be specified by regulations made under the Act.</p> <p>21b. No change required.</p>
<p><u>22. Clarification of the powers of Land Councils concerning sacred sites</u></p> <p>There is some confusion in regard to the roles of the Land Councils and the Aboriginal Areas Protection Authority (established by the <i>Northern Territory Aboriginal Sacred Sites Act</i>) particularly on non-Aboriginal land.</p>	<p>22a. Provide that the function of the Land Councils in relation to sacred sites is to assist traditional owners in making applications under relevant Northern Territory and Commonwealth laws to protect such sites on Aboriginal land.</p>
<p><u>23. Security of tenure for long term Aboriginal residents</u></p> <p>There are situations where non-traditional owner Aboriginal people were resident on what is now Aboriginal land prior to the commencement of the Act and continue to reside on that land without any security of tenure.</p>	<p>23a. Provide a mechanism to enable long term Aboriginal residents on Aboriginal land to obtain security of tenure.</p>
<p><u>24. Disamalgamation of Land Trusts</u></p> <p>The Minister currently has the power to amalgamate Land Trusts but not the power to disamalgamate them. Allowing for the disamalgamation of Land Trusts would facilitate a more accurate representation of traditional owner geographical divisions. Amalgamation requires the traditional owners to be in favour of the amalgamation.</p>	<p>24a. Provide the Minister with the power to disamalgamate Land Trusts on a similar basis to the power to amalgamate Land Trusts.</p>