Cowboys *v* suits

Russell Goldflam

Sacred sites laws in Never Never Country.

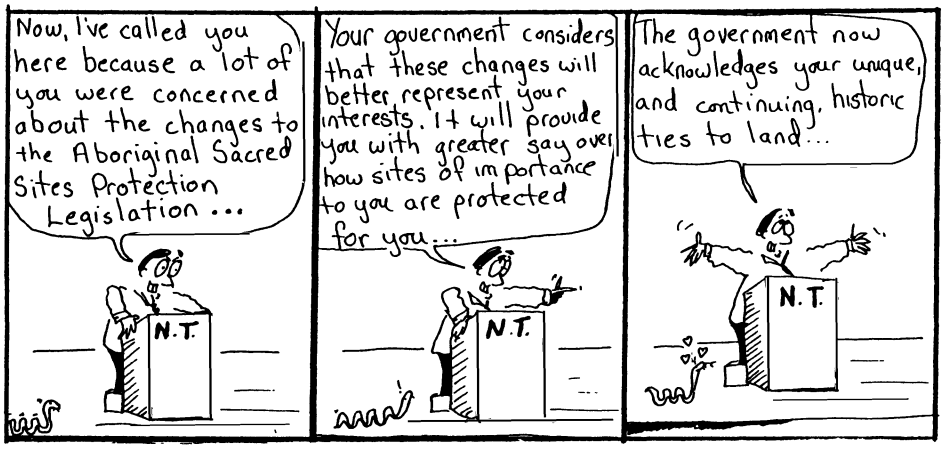
For most practical intents and purposes, the powers of the Northern Territory (NT) legislature are identically plenary to those of its State counterparts: 'to make laws for the peace, order and good government of the Territory'.[1] Continuing resentment, however, of the Commonwealth's residual dominion over this Claytons State bubbles up from time to time. The most notorious contemporary example has been the bi-partisan expression of Territorian outrage at the *Euthanasia Laws Act 1997* (Cth), which has involuntarily euthanased the Territory's voluntary euthanasia legislation.

It may seem paradoxical that the campaign against the Andrews Bill has been led by avowed opponents of euthanasia, such as NT Chief Minister Shane Stone and ALP Senator Bob Collins. But their conduct is entirely consistent with the traditional role of Territorian politicians in a protracted and at times bitter political contest between the cowboys from the bush and the suits from the city.

That contest, and the distinctive intra-federal tensions which underlie the governance of the Northern Territory, are exemplified by the passage and application of another contentious item of local legislation, the *Aboriginal Sacred Sites Act 1978* (NT), and its replacement, the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) (both referred to as the Sacred Sites Act).

An Act is born

In the wake of the Gurindji and Yirrkala campaigns of the 1960s, Gough Whitlam rode to power on a promise to grant national Aboriginal land rights. He commissioned Justice Woodward (with Mr Gerard Brennan, as he then was, as assisting counsel) to devise appropriate measures to implement this promise. Woodward's two Reports, which included several key recommendations for the protection of sacred sites, provided a framework for the drafting of the nation's first Aboriginal land rights legislation.



Russell Goldflam is an Alice Springs lawyer.

The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the Land Rights Act), eventually enacted with some crucial changes to Whitlam's draft Bill by the Fraser Government, was a landmark in Northern Territory constitutional history. Section 69 established the offence of entering or remaining on a sacred site, except, *inter alia*, 'in accordance with... a law of the Northern Territory'. Furthermore, s.73 (which was enacted over Opposition objections) empowered the Northern Territory to make 'laws providing for the protection of, and the prevention of the desecration of sacred sites in the Northern Territory...'

These provisions together constituted an offer the then embryonic Northern Territory Government, despite its open opposition to Aboriginal interests, could not refuse. A failure to pass legislation pursuant to s.73 would have left the field to the Commonwealth, allowing s.69 of the Land Rights Act to run unrestricted.

However, this did not mean that the NT would approach the task of protecting sacred sites with enthusiasm. Its first draft Bill fell far short of establishing an effective protection regime, and had to be withdrawn following strong criticism from Canberra.[2] As ultimately enacted in 1978 (and revised in 1989), the Sacred Sites Act uncomfortably embodies the tension between compliance with the principles imposed by the Land Rights Act and the Northern Territory Country/Liberal Party Government's commitment to entrenching the private property rights of its natural constituency, the white tribe of the outback.

An Act of contradiction

The result is a statute riddled, perhaps fatally, with contradiction. For example, as expressly required by s.73(1) of the Land Rights Act, the Sacred Sites Act provides, in s.46, that 'Aboriginals shall have access to sacred sites in accordance with Aboriginal tradition...' But this is apparently in clear conflict with s.44 of the Sacred Sites Act, which permits 'the owner of land comprised in a sacred site...[to] enter and remain on that land and do anything thereon for the normal enjoyment of the owner's proprietary interest in the land'. It is assumed that an incident of the 'normal enjoyment of the owner's proprietary interest' is the right to exclusive possession of the land in question, which in turn gives rise to a right to prevent strangers from entering the land.

Part III of the Sacred Sites Act establishes a scheme under which developers 'may' (but, significantly, need not) apply for a Certificate from the Aboriginal Areas Protection Authority (AAPA) to issue a Certificate permitting work on a site. On its face, this scheme is consistent with the Woodward recommendations referred to above. However, the offence provisions of the Act are drafted so as to have the effect of actually deterring developers from applying for a Certificate. Under s.36(1), it is a defence to charges of entering, working on or desecrating a sacred site that 'the defendant had no reasonable grounds for suspecting that the sacred site was a sacred site'.

Thus a developer who chooses not to make inquiries as to the status of his or her property under the Sacred Sites Act prior to commencing work could well be better off than one who conscientiously applies for, but is then refused a Certificate, on the basis that if you never never know, you'll never never get convicted.

In some cases, even developers who know that their land is on a sacred site may be immune to a prosecution under s.34 for carrying out work on or using a sacred site. They could seek to rely on s.44, which, as stated above, affirms proprietors' rights to 'do anything...for the normal enjoyment' of their property. This could occur if, for example, a homeowner were to excavate a swimming pool in his or her backyard (surely an instance of 'normal enjoyment') on a sacred site.

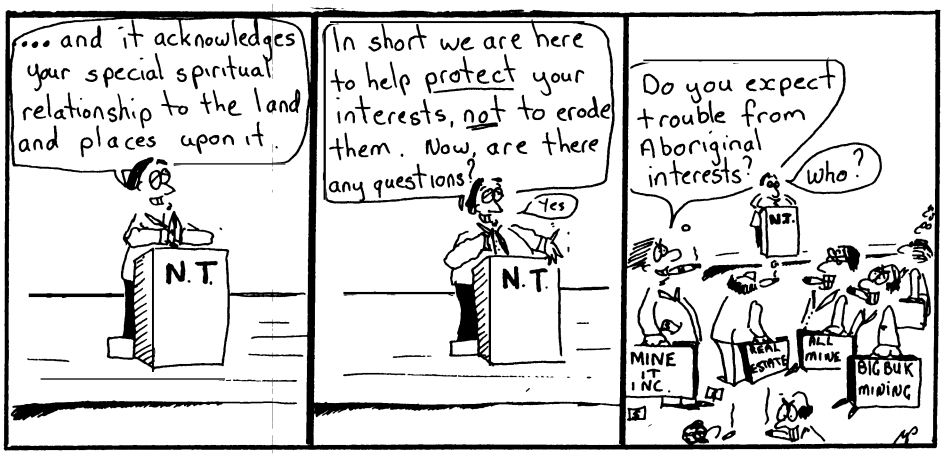
Again, the legal position of proprietors who simply ignore the Act and commence work without seeking an Authority Certificate may in some cases be stronger than that of those who diligently approach the AAPA before commencing work. This is because the diligent proprietors are statutorily estopped from relying on s.44 protection, which is expressed to be '[s]ubject to...the conditions, if any, of an Authority Certificate...'

In order to avoid this unsatisfactory conclusion, a magistrate read down the effect of s.44 in the only prosecution to have gone to hearing under the Sacred Sites Act to date.[3] This interpretation may cure one mischief, but possibly gives rise to an even greater one. The act of narrowly construing s.44 may inadvertently sterilise the intended effect of the section, which was introduced in 1989 to remedy another apparent defect in the Act, namely that it invalidly purported to acquire property 'otherwise than on just terms'.[4] If s.44 is indeed ineffective in remedying this defect, then, in the event that the issue is one day judicially tested, the offence provisions of the Act may well be held to be invalid.

A balancing Act?

These anomalies are not the result of careless drafting. They stem directly from the fundamentally contradictory impulses which gave rise to the Sacred Sites Act. As stated above, the Land Rights Act empowered the NT to make 'laws providing for the protection of, and the prevention of the desecration of sacred sites in the Northern Territory...' But the object of the Sacred Sites Act, as can be seen from its long title, diverges from the purpose of the granted power, and immediately betrays the Act's essential ambivalence:

> AN ACT to effect a *practical balance* between the recognized need to preserve and enhance Aboriginal cultural tradition in relation to certain land in the Territory and the aspirations of the Aboriginal and all other peoples of the Territory for their economic, cultural and social advancement...[emphasis added]



Cartoon by Michael Pickering, Regional Officer AAPA Alice Springs 1994–1997. Originally drawn in 1988 in response to early drafts of the current legislation. Used by permission of author.

In practice, the 'practical balance' applied by the Northern Territory Government has been one weighted heavily in favour of the so-called 'other peoples of the Territory'. For example, it ordered the bulldozing on Boxing Day 1982 of part of the Ntyarlkarle Tyaneme sacred site in Alice Springs to build an access road to the Alice Springs Casino. The resulting prosecution had to be abandoned when it was conceded that the Sacred Sites Act, as then applying, did not bind the Crown. Following a public outcry, the Government, to its credit, did at least remedy this particular defect when it passed the 1989 Act.

Commonwealth/Territory tensions over the Sacred Sites Act came to a head in 1992 over a proposed dam which would have inundated the site complex of Atniltye/Atnyere Arrkelthe/Urewe Aterle (Junction Waterhole) near Alice Springs. One of the changes effected by the 1989 Act (despite a concerted campaign of community opposition) had been to empower the Minister for Lands to override decisions of the Authority and issue his own Certificate authorising works on sacred sites, and he used this power for the first time on that occasion. This in turn provoked a successful application to the Commonwealth to protect the site by way of a declaration under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). Predictably, the Territory Government cried foul, and in the ensuing election was returned with an increased majority on the back of a campaign focused on the slogan 'One law for all Territorians'.

The Act in action: the case of Akere Kwatye

The administration of the Sacred Sites Act also reflects the profound reluctance of the Northern Territory to do the job it was originally given by the Commonwealth, namely to effectively protect sacred sites. As described above, the Act not only fails to require developers to seek site clearances, but in some respects it actually disadvantages those who do so. At best, the Government emits mixed signals to developers, as indicated by the following case study.

In 1981, the Northern Territory Department of Lands invited developers to tender for the subdivision of 'Larapinta Stage 1' in Alice Springs, a suburban extension planned to cater for the expansion of what was then fast in the process of becoming a boom tourist town. Notification was provided that '[t]he onus rests with the developer to familiarize himself with any statute or other document which may have a bearing on the land development process'. The first item on the attached list of 'certain Acts, Regulations and Manuals which are considered to have particular relevance' was the '*Aboriginal Sacred Sites Protection Act* [sic]'.[5] Elsewhere in the Invitation Document it was stated that '[s]ubdivision works have to be completed...in accordance with detailed plans and specifications approved by appropriate authorities, prior to estates in fee simple being issued over new allotments and these allotments being able to be sold'.[6]

Despite these apparently clear requirements, Certificates from the AAPA's predecessor, the Aboriginal Sacred Sites Authority, were neither sought by, nor issued to, the successful tenderer, and as a result titles for residential allotments on the northern side of Taylor Street, Alice Springs, were issued over land on which, possibly without the knowledge of subsequent purchasers, the sacred site of Akere Kwatye was situated.

And so some twelve years later a group of Arrernte custodians discovered to their consternation that one part of the site had been irreparably damaged, while another section was under imminent threat from further proposed work.

This could not have occurred had the so-called 'onus' on the developer been a legal obligation, as has been frequently proposed.[7] But the NT Government has steadfastly dismissed these proposals, while at the same time rhetorically supporting compliance with the Act. Thus when interviewed about the Taylor Street issue, then Minister for Lands, Steve Hatton, said:

> we've argued for a long time if people are wishing to do any subdivisional development they should first and foremost, just like they get planning approval, check engineering, economic and other issues, should check and confirm that they are not going to run into any sacred site problem.[8]

This seemingly authoritative and unequivocal statement did not, however, represent the complete view of the Northern Territory Government on the matter. Just three days later Acting Chief Minister, Shane Stone, commenting on the position of an affected Taylor Street proprietor bent on excavating a swimming pool on Akere Kwatye, came out with six-guns blazing:

> I just want to make it very clear to Territorians that their Government takes the view that their backyard is sacrosanct... Make no mistake about it: a man's backyard is his kingdom...[9]

In the event, Stone's view apparently prevailed: a few months later, he succeeded Marshall Perron as Chief Minister, and promptly replaced Steve Hatton as Minister for Lands.

But the story did not finish there. In November 1994 the proprietor in question had sought a Ministerial review of the AAPA's refusal to provide him with a Certificate permitting him to excavate on the site. In accordance with the Act, the Authority provided a report and recommendations on the matter to the Minister in March 1995. And two years later, the Minister has yet to give notice of his decision, despite the fact that under s.31 of the Act he is required to consider the report as soon as practicable after he receives it, and then determine the matter by either issuing, or declining to issue, a Certificate authorising work on the site.

Finally, it should be noted that the AAPA itself appears to have acted throughout this saga with professionalism and sensitivity, conscientiously applying the Act as best it could in what has become an increasingly difficult situation.

The round-up

This case study shows the Northern Territory Government in characteristic mode, oscillating between (re)conciliatory reasonableness and uncompromising confrontation. As with a number of statutory schemes and funding arrangements imposed on the NT by the Commonwealth (which, it should be noted, subsidises the Territory at a rate many times in excess of per capita subventions to the States), local politicians are at best half-hearted, and at worst subversively opposed to implementing the law.

Claims under the Land Rights Act, for example, have been opposed at every turn by the NT Government, which has spent over ten million dollars on legal challenges to decisions of the Aboriginal Land Commissioner over the last 20 years. The fact that these challenges have been invariably unsuccessful seems only to have spurred the cowboys on to evermore strident calls to be relieved of the yoke of Canberra and be granted Statehood.

Continued on p.96.

crime prevention planning and whether a Safer Community Compact has been developed, the Attorney-General will determine if the legislation will be extended to the community making the application.[2]

On top of its plans to extend the application of the *Children (Parental Responsibility) Act* the NSW Government intends to amend the legislation. These changes were identified as necessary by the report of the Evaluation Committee. Amendments will be made to ensure police inform a parent or guardian of a child's removal under the Act; young people may be taken to another relative if a parent/carer is not home; and the police must accompany a child *into* his or her home or the home of a relative if he or she has been picked up under the Act. It is envisaged that these amendments will be introduced during the coming parliamentary session.

Given the 'law and order' rhetoric associated with the 1995 NSW election, it is not surprising that the Labor Government has ignored the findings of the Evaluation Committee on this legislation and decided instead to extend its operation. Its approach to matters of juvenile justice has been characterised by 'a get tough on crime' strategy possibly even more extreme than some of those adopted in this and other jurisdictions by Liberal governments. In late 1996 the NSW Government proposed the enactment of anti-gang legislation which would allow police to break up groups of three or more young people on the suspicion that they may harass or intimidate others. Despite the moves to extend the *Children (Parental Responsibility) Act* this legislation may yet remain on the drawing board.

The irony of extending the operation of the *Children (Parental Responsibility) Act* while simultaneously calling, in the wake of the Wood Royal Commission, for tough measures to address paedophilia and the mistreatment of children within the NSW education system is apparently lost on the Government. While on the one hand the NSW Government relies on the status of children as vulnerable members of our community to justify initiatives to protect them from the illegal actions of adults, it has failed to acknowledge that under the *Children (Parental Responsibility) Act* it relies on this very vulnerability to justify its illegal incursions on the rights of children and young people and to threaten their freedom to use public space.

Catherine Duff

Catherine Duff is Sydney lawyer.

References

1. The Youth Justice Coalition, 'Media Release: Carr's Law Against Children may be Tested in Geneva', 10 March 1997.
2. Safer Community Compacts refer to proposed agreements that will outline a community's strategy for preventing crime and addressing issues such as adequate street lighting. These compacts are an initiative of the Carr Government's $1.15m Safer Communities Development Program also announced on 11 March 1997.

Goldfam article continued from p.88.

A key element of the NT Government's push for Statehood is the 'patriation' of the Land Rights Act to the Territory. Perhaps to make this more palatable to the Commonwealth it is proposed that the patriated Land Rights Act be entrenched as an 'Organic Law' requiring a special majority of Parliament to repeal or substantially amend it.[10] However, as the Country/Liberal Party has been able to consistently maintain commanding legislative majorities since self-government, there is every possibility that it could muster the required special majority even without bi-partisan support. Moreover, with only a unicameral Parliament, there would be no Upper House to resist the excesses of a future NT State government hellbent on dismantling land rights legislation. If and when this occurs, the continuing contest between the Darwin cowboys and the Canberra suits would shift to a new phase, but the cowboys' grins would be as wide as the Gulf of Carpentaria.

References

1. *Northern Territory (Self-Government) Act 1978* (Cth), s.6.
2. See Renwick, J., 'Protection of Aboriginal Sacred Sites in the Northern Territory — A Legal Experiment' (1990) 4(19), *Federal Law Review* 378-419.
3. *Aboriginal Areas Protection Authority v Ben Tapp* (unreported decision No. 9311030 of McGregor SM, 21 September 1994, Northern Territory Court of Summary Jurisdiction, Katherine).
4. Section 50(1) of the *Northern Territory (Self-Government) Act 1978* (Cth) limits the power of the Northern Territory legislature in terms identical to those by which Article 51(xxxi) of the Constitution limits Commonwealth legislative power.
5. *An Invitation Document for the Private Development of Crown Land at Larapinta Stage 1 in Alice Springs NT Lot 6481 Town of Alice Springs,* Northern Territory Department of Lands, Darwin, n.d. (c.1981), 2.
6. *An Invitation Document for the Private Development of Crown Land at Larapinta Stage 1 in Alice Springs NT Lot 6481 Town of Alice Springs,* above.
7. See, for example, Toohey J, 'Seven Years On: Report by Mr Justice Toohey to the Minister for Aboriginal Affairs on the Aboriginal Land Rights (Northern Territory) Act 1976 and Related Matters', AGPS, Canberra, 1984; and Hon. Elizabeth Evatt, AC, 'Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984', Commonwealth of Australia, Canberra, 1996.
8. Steve Hatton, ABC Radio, 13 September 1994.
9. Shane Stone, NT News, 16 September 1994.
10. See Sessional Committee on Constitutional Development *Exposure Draft — Parts 1 to 7: A New Constitution for the Northern Territory and Tabling Statement,* Legislative Assembly of the Northern Territory, Darwin, June 1995.