The Aboriginal Land Rights Act – Its heart and spirit

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The Aboriginal Land Rights Act is unquestionably one of the most significant laws ever made in New South Wales.

It carried an acknowledgment of the importance of land for Aboriginal people and the injustices wrought on them by colonisation. And while the land compensation mechanisms in the Act could never live up to the claims which politicians made for them at the time, the Act has been far more successful than many suspected in addressing some of those historic and ongoing wrongs.

Most bills which come before a Parliament have modest objectives. They regulate the amounts of duty payable on property sales in order to raise revenue to enable hospitals to care for the sick. They determine what water a farmer can take from a river to use on their property or the criteria that entitles a person to drive a car on a public road. These are all important things.

But, unlike the Land Rights Act, they don't bear directly on the capacity of a people to express their identity or the legitimacy of the State's sovereign claim to its territory.

For many, both black and white, the Act was created in a spirit of justice and reparation. People saw it as the right thing to do. Some, however, also felt that while these historic grievances remained unaddressed, the legitimacy of European claims to sovereignty were at risk. If the principle was that those who believed that they had a better use for the land, and the means to enforce it, were entitled to come and take it, replacing the existing laws and ways of living with their own, what right would we Europeans have to complain if the same occurred to us; for wasn't that the sole basis on which this State was founded.

Thus, although never expressed, one key purpose of the Aboriginal Land Rights Act was a belated move to build legitimacy in the State.

The 1970s and early 80's had seen strident calls for the recognition of Aboriginal sovereignty and an open attack on the legitimacy of the State.

While in 2011 it is easy to dismiss the idea that the State needed the endorsement of Aboriginal people, many of the legislators at the time were men who had fought in defence of Australia in the Second World War and had a different perspective on the country's place in the region to that of post war generations.

On this view, the Act was not just for the benefit of Aboriginal people. To the extent that it operated as a pressure valve, relieving grievances and improving harmony, it would fundamentally benefit everyone in the State. In hindsight, the Act, in combination with many other measures, appears to have achieved that objective. Claims for sovereignty have subsided and Aboriginal people are now publicly and almost universally willing to work within the framework of the State.

Also, unlike most laws, the Land Rights Act was not the product of bureaucratic policy development. Indeed it was an anathema to the bureaucracy, and to some degree it still is. Rather, it was the product of a political vision; a wider vision that understood both its historic importance and necessity.

What about the spirit of those who had campaigned for land rights and what did they desire?

Aside from the history of armed resistance, the struggle for government bestowed recognition of land rights goes back to the early years of the colony, with Aboriginal people petitioning Governor Macquarie for land to be set apart for their needs.

The Land Rights Act was not the product of unprompted European beneficence but the outcome of a concerted and hard fought political struggle commencing in the 1930s and intensifying from the time of the 1967 referendum. In an era before TA (travel allowance), poverty was no bar to committed political action. Over five years before the Act was created a body known as the NSW Aboriginal Land Council existed. It was formed by Aboriginal people, using their own resources, and with the object of organising the community in its push for recognition of their entitlement to their land.

The concept of land rights, ill defined as it was, had become a rallying point and perceived cure for a wide range of grievances. There was recognition that the land was at the base of culture. People drew their identity from their place and the removal from place was an attack on identity. Where for many years, Aboriginal people had felt pressured to live their culture in secret, a confident and proud spirit emerged during this period that took many Europeans by surprise.

Land was also the basic economic resource. With land, anything was possible, so it was believed. Without it, people risked being forever confined to the margins.

People wanted a future for their children and their communities that did not see them ghettoised in reserves and missions but where their relationships and their shared history and culture remained the foundation of their social existence.

They held values born of hardship and struggle. They were angry, but they knew hard work, they knew sacrifice, they knew loss, they knew resilience, and they knew joy in shared company, in supportive relationships, in mutual struggle. Many were people who, despite their poverty and marginalisation, could draw strength from one another and express themselves with undiminished dignity.

The original Act

Not surprisingly, the form in which the Aboriginal Land Rights Act was first enacted now looks fairly threadbare. The fact that there have been at least eight major sets of amendments reflects this. Nevertheless, the original vision looks more farsighted with each year. From my personal perspective, three features, all found in the original Act, stand out:

- A self-governing structure, including local autonomy
- Independent funding; and

- A streamlined land claim system

I will come back to these features but first it is worth saying something about the Act's limitations.

The Select Committee of the Legislative Assembly considered that a key focus of any scheme ought to be on building an economic base for Aboriginal people through the transfer of land. However, the enacted form was somewhat narrower than the recommendations, focusing the claims mechanism on vacant Crown land rather than enabling claims over any land. Importantly, the Act gave land councils a presumptive entitlement to be granted claimed Crown lands unless certain disqualifying conditions applied. The Minister, in theory, did not have a discretion in making his or her assessment of whether those conditions existed and if a claim was refused the Act gave land councils a right to a full merits appeal to the Land & Environment Court with the Minister carrying the onus of proof. Within this scheme, however, the Act also provided that the Minister could issue an evidentiary certificate declaring that the land was needed for an essential public purpose, thus removing it from the capacity of the Court to grant. One judge described the provision as akin to giving food with the one hand and taking it away with the other before the food had reached the mouth. Another called it 'conceptually hostile'.

The original Act also lacked much in the way of effective governance machinery. There were no boards, other than for the NSW Aboriginal Land Council, with all members of the land council being the primary decision makers. I remember handing the Act to a senior barrister about fifteen years ago who, after thumbing through it for the first time said: "Where is the rest of it?" Another lawyer described the Local Aboriginal Land Council governance regime as the "tennis club" model. The early legislation also had a mid-tier level, the regional land councils, which were abolished in 2006 but have seen an informal revival in bodies like the Sydney-Newcastle LALC forum and the Northern Tablelands Forum.

Another shortcoming was the lack of any real relationship between the funding mechanism, 7.5% of State land tax for 15 years, and the likely costs of running the system. While there was an advantage in having a funding formula that was not dependent on annual budget allocations, Aboriginal people had little control over the costs of the system. The Minister determined the number of land councils while the Parliament progressively expanded the functions and compliance costs. And the markets, either property or equities, have always had the last say on the value of the fund. Whereas those who passed the Act envisaged that there would be a substantial pool for the purchase of land, the amounts provided have barely been sufficient to cover basic administrative costs.

Perhaps an even greater leap of faith in the early legislation was the lack of clarity as to how ownership of land might, of itself, translate into better lives for Aboriginal people. The original Regulation to the Act contained a provision requiring Local Aboriginal Land Councils "to ensure that no part of the income or property of the Council is transferred directly or indirectly by way of dividend, bonus or otherwise by way of profit to members of the Council". Ignoring the fact that prior to 1991 land councils could not sell their land, the philosophy seemed to be that land councils

were meant to use their land assets by leasing them to build an economic base but, whatever else they did, they could not use that base to benefit their members, other than perhaps through the right to go on to land. It was a strange form of socialism that inevitably produced creative efforts on the part of the members of some land councils to extract the benefit that they had been induced to believe was their entitlement. It was not until the 2006 amendments, over two decades after the original Act, that the concept of community benefits schemes was introduced.

Has the Act lived up to its objectives?

After nearly 30 years, has the existence of the Act improved the lives of Aboriginal people in New South Wales and, if so, how? This is a question for Aboriginal people alone to answer.

No doubt the answer is likely to vary from person to person and place to place. For tenants of land council housing, the shift from government ownership saw a significant scaling back of resources available for repairs and maintenance, as well as community infrastructure on former reserves. On the other hand, it also often meant a more sympathetic and flexible rent collection process.

Certainly the Act has not been any sort of economic panacea. Land claims have taken, in some instances, over twenty years to determine. The Department of Lands has through most of the Act's history taken a miserable and very often wrong view of what land is claimable, seeking to refuse claims if that option, even if only on the most contorted view of the facts, appears available.

Even where the Minister has decided to grant a claim, it can sometimes take over a decade for the land to be surveyed and transferred. Now the Department is resistant to carrying out surveys and has started issuing limited titles, casting the very considerable cost of having the lands surveyed on the land council.

Once the land council has title to the land, it faces a planning process that is commonly both hostile and discriminatory. Land that was refused on the basis that it was needed for residential lands has been rezoned after the claim was successfully appealed to preclude any development on account of the asserted environmental sensitivities. These sensitivities were assessed from aerial photos taken from 25,000 feet. This scenario has repeated itself across the State and the land rights system struggles to find the resources to maintain the zonings that applied when the land was claimed, let alone seek controls that might see the land put to a higher economic use.

Prior to the Act's commencement, the Select Committee had already reported that 'the Aboriginal people of New South Wales suffer discrimination from various Government decision-makers in relation to land development and planning'. This is a Government led Committee talking about its own agencies. The Committee recommended 'land owned by Aboriginal communities should be governed by special planning provisions… which would permit Aboriginal communities to develop projects that might otherwise be contrary to local planning ordinances, provided such

projects were of special importance to the Aboriginal community and did not adversely affect adjoining residents.' Thirty years on, the calls for such provisions continue.

But all of this might seem far too negative, and perhaps it is worth returning to the three key features of the Act identified earlier.

Self-governance

Remarkably, the Act and the work of Aboriginal people have sustained a network of 120 Local Aboriginal Land Councils for nearly 30 years. These land councils have provided a point for the discussion and advancement of all manner of issues of concern to their communities. They have also provided a point of engagement for every level of government as well as other commercial and community interests with local Aboriginal communities.

The demise of ATSIC was not felt nearly as severely in New South Wales because local communities retained an organised voice and capacity to deliver information and services through their local land councils.

The sophistication of Local Aboriginal Land Council operations has improved enormously over that period, as has the range of services that many LALCs provide. Certainly, there are land councils that perennially do not perform well, usually because of entrenched difficulties in managing social housing, particularly on former reserves. There are also significant issues of sustainability that the network needs to address. But the 2006 reforms have generally seen greater stability and improved performance from LALCs across the State. They have also seen a growing confidence and maturity, especially from the larger eastern LALCs and particularly in relation to their commercial and government dealings.

A few LALCs lament the regulatory functions of the NSW Aboriginal Land Council, preferring it to be either a regulatory body or an advocate but not both. However, to take self-governance seriously necessarily involves both. Without rational internal regulation, its external advocacy is easily dismissed. This external capability has enabled NSWALC to advocate the interests of Aboriginal people on a wide range of State and National issues, including playing a critical role in the formulation of the Native Title Act, the Indigenous Land Fund, State fishing and cultural heritage issues and, more recently, the human rights implications of the intervention in the Northern Territory.

Independent funding

Perhaps the most distinguishing feature of the NSW land rights system is that it is independently funded. While this funding might be modest compared to its Territory counterparts, land councils in New South Wales know a freedom from mainstream political interference that is unique.

It is possible for a land council in NSW, commonly with NSWALC support, to tackle governments on important issues without fear that in doing so, they will be forced to sack their staff following the next year's State budget. Regardless of whether such

fears are founded, they would operate as a real curb on an organisation's ability to advocate the interests of its constituents.

It is also worth noting that NSWALC's management of its fund, currently valued at over $560 million, has significantly outperformed both the State Treasury's medium and long term investment funds over the last 5 years.

Land Rights

Despite many serious faults with the land claim provisions, land councils in NSW have managed to accumulate a substantial asset base. On any counting, its monetary value runs into the billions of dollars. Admittedly, the grants have been uneven. Aside from a couple of large properties, very little land has been turned over in the west of the State. Even the central districts have little to show for their struggles. In relation to travelling stock reserves, one significant source of Crown land in the west, the opposition from the government and rural lands protection boards has been trenchant. The Act envisaged the transfer of these lands under special provisions that ensured their lease back yet not a single stock reserve has been returned.

On the coast and ranges, many LALCs are now in possession of lands which, with careful management and sympathetic planning reforms could enable them to develop long term income streams that, in turn, can be applied to critical economic and community development initiatives.

Compared with native title or even the Northern Territory land rights scheme, the relative cost of making and prosecuting a land claim in New South Wales is low. Moreover, the process does not entail the painful intra-group disputes that native title claims can often generate. On the contrary, land rights claims have a tendency to build community cohesion.

The work of NSWALC and some of the larger LALCs has also seen a renewed push to lodge and prosecute claims. Since the commencement of the Act around 35,000 claims have been lodged of which over 27,000 were made in the last 5 years. In that period the Courts have determined 18 appeals from a decision of the Minister refusing a claim, with land councils winning 15 of them. On any view, a loss rate of over 80% on the part of the Minister does not reflect well on the Department's judgment of the merits of its case. In the same period the Minister has settled another 26 claims with the transfer of lands after the land council commenced an appeal, also suggesting a less than thorough determination process in the first instance.

In addition to land claims, the Act provides a regime for the hand back of culturally significant national parks. While not of great economic consequence, these lands have immense cultural and social importance and their return can be of incalculable value. Regrettably, these provisions are not enforceable in the manner of land claims and the government has shown an increasing unwillingness to commit resources to the process.

What lies ahead?

What are the challenges facing the land rights system as it approaches its thirtieth anniversary.

Leaving aside the fortunes of claimable Crown land and the impact this has on a land council's asset base, the effectiveness of a council appears related to the confidence and capability of its member base. Those land councils with a high proportion of members in employment or whose members include tertiary graduates tend to be better organised, more capable of carrying out their functions and well equipped to offer a wider range of services.

It would be gratifying if this was the norm but, tragically, a spirit of despair and hopelessness still afflicts many Aboriginal communities in NSW today.

The destructive impact of unemployment is well known. It is not merely the absence of income but its impact on a person's self esteem. Long term or generational unemployment produces its own psychosis, capable of affecting whole communities as well as families. Finding employment near to families for many inland communities is often very difficult and when people move away in search of work they commonly lose their support structures. Discrimination and marginalisation also remain a factor and alcohol and substances abuse lead to violence and social breakdown.

Where do land rights fit into this picture and where should it fit in?

As noted already, land rights is not an economic panacea. The capital resources of the system are significant but still limited, relative to the scale of the problem. Having assets to draw on in building an economic base can give confidence and potential capability, but many of the communities suffering the most do not enjoy a viable land base. Moreover, unless the land can generate employment, passive income is merely another form of welfare. To the extent that land rights supports a recognised connection with places of cultural significance and a means of ensuring their protection it can play a fundamental role in building community confidence, but we have seen that many desert communities which control all their traditional lands still live with high levels of despair.

Aside from the assets and the 'rights', however, the system at its heart is a network of people and one that, in my view, could be better activated. Despair is treated not with money but human care. It is not something that is legislated but given. And the land rights network, if nothing else, even if otherwise stone-broke, ought to be a system that supports Aboriginal people in caring for one another.

In the process of developing increased technical competence in complying with regulations and policies, even in rolling out 'services', there is a risk that land rights loses its heart, the spirit of care and shared struggle that created it.

Land rights is the result of a grand vision and it can only be sustained with a grand spirit. It is not primarily about annual reports and balanced books, or even economic advancement, although these are all part of it. It must be fundamentally about nurturing and sustaining a people through shared values, commitment and care. It is

not an end but a means and unless people are active in determining what that end should be and how best to use this tool for the benefit of all, it will be at risk of outliving its usefulness.

How this might be done is a matter for a separate discussion.

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