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# The Pitjantjatjara Land Rights Act 1981

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## Introduction

The aim of this paper is to present a brief overview of the *Pitjantjatjara Land Rights Act 1981* ('the Act'), its history, operations, limitations and its future.

Such qualifications as I have to speak on the subject are of fairly recent origin. Until two years ago, I simply shared the vague pride of most South Australians in the Act which was invariably described as 'landmark' legislation, without any real understanding of its actual provisions or how it affects the Pitjantjatjara people. My understanding of the history of the Act was limited to the knowledge that the legislation was first mooted by Premier Don Dunstan and that he was thwarted by his Liberal successor, David Tonkin, who personally guided the Act through Parliament and who, ever thereafter, proudly extolled its novelty and historic importance.

I was given the shadow portfolio responsibility for Aboriginal Affairs in the Parliament at a time when there was much upheaval on the lands. I was appointed to a Select Committee to examine the Act. This provided an opportunity for me to speak with many people, to hear evidence and to read submissions from differing perspectives. Most invaluable of all---I visited communities on the lands and heard from many Aboriginal people. This experience provided me the best insights of all. The scales have fallen from my eyes and I now know that much of the lustre which has surrounded the Act is no longer justified.

## The lands and the people to which the Act applies

The lands cover 102,360 square kilometres in the north-west corner of South Australia. The distance from east to west is over 400kms and from north to south, 240 kms. Along the northern boundary are the Musgrave Ranges, the Mann and the Tomkinson Ranges. Contrary to popular misconception, this mountain country is not barren desert. In many places, it is of quite spectacular beauty.

The lands comprise an aggregation of areas which, at different times prior to the Act, had been in varying tenures. The westerly section comprising over half the lands was formerly the North West Aboriginal Reserve, first proclaimed in 1921. Other former leasehold land, formerly known as Everard Park, Kenmore Park and Granite Downs are included in the lands.

The 'traditional owners' of the lands (as defined in the Act) are Pitjantjatjara people (which term is defined to include Yungkutatjara and Ngaanatjara people).

The population of this vast area is not precisely known. Estimates vary from 2,000 to 3,000 and it is generally accepted that about 2,500 Anangu live on the lands. The population is relatively young: approximately 65% are under the age of 27 years: [Ngananampa Health Council]. They live in seven main communities and up to fifty occupied outstations or homelands. The main communities are, from west to east, Pipalyatjara, Kalka, the Murputja Homelands (Kanypi and Nyapari), Amata, Pukatja (Ernabella), Kaltjiti (Fregon), Mimili, and Iwantja (Indulkana).

The administrative centre of the lands is Umuwa, located 40 kms south of the most populous community, Pukatja, which was the site of the first significant European establishment in the region: Ernabella Mission (1937-1974) formed by the Presbyterian Church as the instigation of Dr Charles Duguid: [Edwards]. There are about 270 permanent residents at Pukatja and a further 150 in nearby communities.

The closest regional service centres to Pukatja are Alice Springs (500km to the north), Port Augusta and Adelaide (1300 and 1500 kms respectively to the south).

It has been calculated that $60 million per annum of Commonwealth and State government funding is paid to or for the benefit of people on the lands, (ie, about $24,000 for each man, woman and child on the lands). Payments to individuals through Centrelink and CDEP represent the largest component---$16 million pa: [SA Coroner, para 9.4]. Much funding goes to pay non-indigenous administrators, managers and bureaucrats and to meet the high costs of infrastructure.

The sources of funding for the lands are diverse and bewildering: [see ATSIC, 2002]. However, if funding were the sole determinant of quality of life, this ostensibly high level of funding is either inadequate or inappropriately targeted; or both.

Whilst I do not wish to denigrate the efforts of those who have attempted and are endeavouring to ameliorate conditions on the lands, there is no escaping from the brutal realities. The health status, longevity, educational attainments and prosperity of people on the lands are abysmal by any standard. There is virtually no economic activity. There are some small-scale cattle enterprises, some arts and crafts but no mining, no tourism and virtually no employment outside government agencies. Substance abuse is endemic and the signs of welfare-ism and despair are ever present.

As for the youth, their abiding interest is betrayed by abundant posters of AFL stars and football jumpers. I sense that, like many other Australian young people, their most potent spiritual drivers come from television, rather than tradition. They dream of money and fame and the good life of sporting heroes and rock stars.

At Amata, I saw the slabs being laid for new houses. There were no indigenous workers on site. The builder informed me that the contract required him to have indigenous workers on the payroll and that he complied with his contractual obligations!

Petrol sniffing is a scourge in some places on the lands. Despite all the working parties, cross-agency taskforces, sub-committees, inquests, advisory bodies, experts and collaborative teams which have examined the issue, this destructive practice persists.

As I spoke with an apparently sensible and committed police officer, a petrol-sniffer strolled by. When I asked why the officer took no action, his response was (in effect):

> *What can we do? We are told by the Deaths in Custody Royal Commission that there are too many aboriginals in custody. We cannot fine them because they have no money to pay. There are no community corrections programs.*

The worst aspect of the situation is that things are not getting better. In 1988, Neville Bonner undertook a review of the situation on the lands. His report, *Always Anangu,* painted a melancholy picture which is as accurate today as it was then.

The following observation made last year by a non-indigenous person who has lived on the lands for over 20 years graphically describes conditions on the lands:

> *The whole region is experiencing profound community, family and personal problems underpinned by absolute poverty, high morbidity and mortality rates, a failing educational system, little employment and training opportunities and a huge burden of personal grief and trauma.* [Tregenza, p.4]

Any objective observer who spends much time on the lands today would be hard-pressed to come to different conclusions.

The journalist, Rosemary Neill, in her book *White Out: How politics is killing black Australia* quotes Lowitja O'Donoghue as saying:

> *Land, of course, is at the core of it all, people must have land in order to move forward.* [Neill, p. 266]

Even if one accepts that Lowitja O'Donoghue was correct to argue that aboriginal people must have land to move forward, it does not follow that merely having land means that anyone will 'move forward'. The fact is, on the Pitjantjatjara lands, the people have not 'moved on' since the lands became 'theirs'.

I turn now to the Act itself.

## The political background to the Act

The Act which was eventually passed in 1981 had earlier origins. The *Aboriginal Affairs Act 1962,* passed during the last term of Playford's long reign, had removed many restrictions on aboriginal people, eg, the offence for a non-aboriginal person to 'habitually consort' with an aboriginal woman was abolished. Subsequently, restrictions on possession and consumption of liquor in the metropolitan area and then other towns and cities were revoked. Playford appointed the State's first Minister for Aboriginal Affairs, GG Pearson.

The *Aboriginal Lands Trust Act 1966* was the first significant enactment in this field of the Walsh Labor government. It established the Aboriginal Lands Trust and empowered the Governor to transfer to the Trust any Crown land or lands reserved for aboriginal people. However, it specifically provided that the North-West Reserve could not be transferred to the Trust until a 'Reserve Council' had been constituted and that Council had consented to the transfer.

In 1976, an activist group, the Pitjantjatjara Council ('the Pit Council') was formed to lobby for land rights for the Pitjantjatjara people across South Australia, Western Australia and the Northern Territory. Premier Dunstan established a Working Party to investigate the feasibility of a separate lands trust to cover the North-West Reserve.

*'Helped by their solicitors',* the Pit Council concluded that they should *'avoid imposing an alien notion like trusteeship'*: [Cocks, 66, 68]. The solution was vesting title in a new entity of which all Pitjatjantjara people would be members. It appears that the aboriginal people had been convinced that they needed the 'fee simple' to their lands. They wanted something superior to the communal title arrangements which had been granted by the Fraser government under the *Aboriginal Land Rights (Northern Territory) Act, 1976* (the 'NT Act').

In November 1978, Dunstan introduced a Bill which adopted most of the recommendations of the Working Party. In his second reading speech Dunstan did not disguise that he was seeking a wider audience than his Parliamentary colleagues and the indigenous people of the north-west.

> *...the provisions of this Bill will give South Australians an honourable place in international eyes with regard to the relation of Government to the treatment and status of ethnic minorities.*
>
> [SA Parliament (a), 22.11.78]

The Bill had not passed when Labor lost office in September 1979, Dunstan having resigned in February of that year.

In October 1980, the Tonkin Liberal government introduced an amended Bill after a long period of negotiations in which Premier Tonkin took a leading and personal role. The earlier Bill was said to be 'unworkable', especially in its dealing with issues relating to exploration and mining. The new Bill finally passed through both Houses in March 1981: [SA Parliament, (b)].

## The provisions of the Act

The Act contains a number of essential elements, some of which will be considered separately. The essential elements are:

- The establishment of a body corporate called 'Anangu Pitjantjatjara' (AP) with defined powers and functions. [As Anangu Pitjantjatjara simple means Pitjantjatjara people, the selection of the name was deliberately designed to create the impression that everyone 'owned the land'.]
- The Governor is empowered to issue to AP a land grant, *in fee simple*, of the lands. [This was also deceptive. The Act also provides that the title is unalienable, ie, not saleable. It is a contradiction in terms to confer the widest property rights but to exclude the most effective, viz, the right of disposal.]
- An elected Executive Board of AP is established.
- Right of entry to the lands is regulated.
- A special exploration and mining regime is created.
- A dispute mechanism involving a 'tribal assessor' is established.

## Powers, functions and responsibilities of AP and the Executive Board

It will be recalled that AP is the corporate body in which the lands are vested, ie, it is the land-owning entity. Its functions are as follows:

- to ascertain the wishes and opinions of traditional owners in relation to the management, use and control of the lands and to seek, where practicable, to give effect to those wishes and opinions;
- to protect the interests of traditional owners in relation to the management, use and control of the lands;
- to negotiate with persons desiring to use, occupy or gain access to any part of the lands; and
- to administer the lands. [PLRA section 6]

All Pitjantjatjaras (including Yungkutatjaras and Ngaanatjaras) are 'members' of AP. (The inclusion of the latter is anomalous. There are no Ngaanatjaras in South Australia: they live in Western Australia. Apparently, they were included to aid the political campaign for similar rights in Western Australia!)

Section 11 of the Act provides that the function of the 10 person, annually elected, Executive Board is to 'carry out the resolutions of AP'. The idea that a Board is to be governed by the resolutions of 2,000 people living in remote isolation from each other was impractical. It is a high-watermark of collectivist nonsense.

In my view, this governance structure is unwieldy and ineffective. According to the Act, AP itself has the rather passive roles of ascertaining the views of TOs, protecting their interests and issuing permits for entry to the lands. But it also has the responsibility to 'administer' the lands. The Act does not give the AP any source of revenue nor the capacity to generate funds. Both AP and the Executive Board must obtain grants from others: ATSIC, Commonwealth and State government or their agencies.

Historically, one of the major impediments to effective management by the Executive Board has been the role of the Pit Council. As already mentioned, this was the activist body which campaigned for land rights in the first place and through which much of the original negotiations took place.

After the Act came into operation, the Pit Council provided services to the lands, obtaining funding from ATSIC and other sources to do so. Pit Council was, and is, based in Alice Springs.

Over the years the Executive Board of the AP become disenchanted with the level of service provided by Pit Council and, in early 2002, the Board terminated the engagement of Pit Council to provide legal and anthropological services to AP.

The newly-appointed SA Minister valiantly (but unwisely) intervened to reinstate Pit Council *'because of its historic role in the struggle'!*

Although the Minister's ham-fisted intervention failed because ATSIC supported AP, the incident showed the fragility of the so-called 'self-determination' of AP.

Under the Act, it is clear that AP and its Executive Board are intended to be more than entities to hold land. In my view, the Act should be amended to provide a stronger form of governance by defining the responsibilities of the Executive Board and making it more representative of communities across the lands. The authority of the Board vis-à-vis the members and AP should also be more clearly defined. The somewhat outdated concept of a 'tribal assessor' to resolve disputes has been a dead-letter and should be abolished.

A Select Committee of the Parliament is currently examining the issue of the best form of governance for the lands.

It is unlikely that the Labor government will embrace the more radical proposals of Pastor Paul Albrecht in his comments on the Reeves Report on the NT Act, viz, devolution of areas to familial groups based on well-accepted traditional practice. The current government is unlikely to abandon the collectivist model notwithstanding that it has been discredited by its ineffectiveness.

## The mining regime

Exploration and mining activities in South Australia are governed by the *Mining Act* and the *Petroleum Act.* Both of these Acts continue to apply on the lands but some special provisions are superimposed. An applicant seeking to conduct mining operations (which includes exploration, drilling, production etc) must apply to both the Minister and AP which can refuse permission or grant permission on conditions which might include payment. There is an arbitration process if agreement cannot be reached.

If minerals are ultimately recovered, the royalties which would otherwise be payable to the Crown are divided into three parts: one for AP, one for the health, welfare and benefit of the aboriginal inhabitants of the State generally and one for the general revenue.

Reading the debates at the time when the Act was first mooted, it is clear that both the government and the people on the lands (and their advisers) believed that the lands were highly prospective and likely to generate enormous wealth. That hope has not been realised: despite some exploration, no major finds have been made.

Section 7 of the Act provides that, before authorising or permitting any activity on the lands, AP must

> *... have regard to the interests of, and consult with, traditional owners [TOs] having a particular interest in that portion of the lands ...*

Notwithstanding interest by a number of mining companies, the process of obtaining approvals has been very slow. Until 1999, AP had a 'one-at-a-time' policy, ie, AP would only consider one application for an exploration licence at a time. These applications are protracted because of the need of AP to have legal and anthropological advice, especially on who is entitled to be regarded as a TO for this purpose, what are the areas of cultural significance etc. This policy has now changed to 'three tenements at a time'.

It is fair to say that the miners are frustrated by the slow progress as is the government department responsible for mining. So, too, are many TOs.

Whilst the provisions of the Act are complex, the real difficulty with the mining regime has been the *policies* adopted by AP, exacerbated (I suspect) by the fact that the Pit Council was, for a long time, the legal and anthropological 'gatekeeper' for AP.

## Conclusions

In his findings at the so-called 'petrol sniffing' inquests in 2002, the South Australian Coroner said:

> *Clearly, socio-economic factors play a part in the general aetiology of petrol sniffing. Poverty, hunger, illness, low education levels, almost total unemployment, boredom and general feelings of hopelessness form the environment in which such self-destructive behaviour takes place.*
>
> *That such conditions should exist among a group of people defined by race in the 21st century in a developed nation like Australia is a disgrace and should shame us all.* [SA Coroner, Executive Summary, paras 8-9]

The Act itself cannot be blamed for petrol sniffing on the lands. Indeed, the Act specifically prohibits petrol of alcohol being taken onto the lands. Nor is the Act to blame for the depressing catalogue of social and economic failures mentioned by the Coroner.

The optimism which accompanied the passage of the legislation has faded. The legislation of itself has delivered little in the way of practical benefits to the very people in whose interests it was supposedly passed. That is not to deny or decry its symbolic significance to many who had a hand in its initial passage. However, if the Act is not significantly amended, it will become a symbol of failure.

The Act was the foundation-stone of a mansion which has not been built. The stone was laid with great ceremony and many clamoured to have their names carved upon it. But the attempts to put bricks and mortar around it have largely failed. To use another building metaphor, those who were responsible for this Act crafted a keystone---but we have not yet constructed the arch to support it!

The task of the people on the lands is to start to build, if not a mansion, at least a sturdy home. The task of governments and the wider community is to find ways to help give the Anangu Pitjantjatjaras the capacity to do the building. In the end, it will be leaders who must provide solutions, not legislation.

One innovation which I do support was the recent establishment of a Parliamentary Standing Committee to have ongoing oversight of issues on the lands. This Committee should provide an active engagement between elected parliamentarians and the people on the lands. Without such engagement, no government is likely to grasp the nettle and replace symbols with substance.

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