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Framing, agency and multiple streams – a case study of parks policy in the Northern Territory

An ANZSOG Teaching Case by Dr Prudence Brown

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Teaching Notes: This Case has a Teaching Note associated with it. To access a copy, please email caseibrary@anzsog.edu.au with a request and citing the title.

Abstract

This case study looks at the development and implementation of significant reforms to the parks estate in the Northern Territory from 2002-05. A High Court decision over a native title in Western Australia created challenges for the validity of a significant proportion of the Northern Territory parks estate. The case study explores the creative and pragmatic approach adopted, which saw a shift away from litigation to pursuit of a negotiated package. The result was a range of reforms which balanced the legitimate rights and interests of all stakeholders and set in train a new approach to parks management in the Northern Territory.

Key Points and Lessons

- The creative use of agency by public leaders in the face of external triggering events is essential to bring about significant reforms within the constraints of existing institutions, including a politicized environment with competing stakeholder interests.
- Different approaches to dealing with issues such as native title are possible and can accommodate the legitimate rights and interests of all stakeholders.
- Existing institutions need to be used effectively and creatively. Where there is a structural barrier it is not always insurmountable; policy actors can devise ways around them if the stakes are high enough.
- Coordinated approaches and transparency are critical to achieve holistic policy goals
- Positional power and strong political mandate is important, but creative framing is essential for securing acceptance of reforms.

Summary

A very large spanner in the works for parks in the Northern Territory

In 2002, the Northern Territory Government (NTG) was newly elected and facing a significant challenge. The challenge was particularly problematic for a government inheriting a highly politicised and contested environment around land issues, yet promising to repair relations with Aboriginal[1] interests by promoting self-determination and Aboriginal employment. As part of this commitment, the new government had decided to establish an office within the Chief Minister's department to coordinate the new approach.

When the new Chief Minister, Clare Martin, tapped Neil Westbury on the shoulder to head up the new office, she knew that she was gaining a highly experienced and pragmatic bureaucrat who brought strong relationships with Aboriginal and Torres Strait Islander people and a track record of delivering. He would need all of these skills, and more, to deal with a decision over native title in Western Australia which was handed down by the High Court on 8 August 2002 .

When the Solicitor for the Northern Territory told Neil, shortly after commencing his new role, that the decision threw the declaration of much of the Territory's parks estate into doubt, he had to decide whether to fight the issue through the courts, or find a way to leverage the dilemma to achieve broader policy goals. He decided to do the latter through a collaborative effort. He set up a taskforce and got to work.

Background

Within Australia, the Northern Territory is unique in that there is Commonwealth legislation for Aboriginal Land Rights – the *Aboriginal Land Rights (Northern Territory) Act 1976* (or ALRA) – as well as the *Native Title Act 1993* (or NTA) which applies nationally. Land utilisation is therefore a complex and contested area, which has been traditionally highly politicised in the NT. The long-standing convention was to fight all issues through the courts.

Close to half of the Northern Territory has been granted to Traditional Owners under ALRA. Land held under ALRA is freehold (land that is owned outright and in perpetuity), but a particular type of freehold termed Aboriginal freehold, which is inalienable (that is, it cannot be sold). Further, native title is likely to exist over much of the Northern Territory. However, the term "native title" is misleading for the layman because it is generally held not to be an exclusive "title" in the usual sense, but more a right (or bundle of rights) relating to land use.

In 2002, the law pertaining to native title was still being tested and defined. On 8 August 2002, the High Court handed down its decision on *Western Australia v Ward & Ors*, relating to the native title claim by the Miriuwung-Gajerrong peoples. The decision found, amongst other things, that native title is equal to other property rights and can co-exist with other rights and interests that may have been granted in the land. The decision had profound implications for

[1] Note that in the Northern Territory, the vast majority of Indigenous people are Aboriginal rather than Torres Strait Islander (or both) and it is usual to refer to Indigenous citizens as 'Aboriginal'.

many of the national parks and reserves in the Northern Territory, because if native title existed over them, the initial declaration would have been invalid. This was because the legislation at the time required that there be no existing rights and interests in the land for a park to be “declared”. For the majority of the parks, they could theoretically have been re-declared under a revised Act, however there were some parks for which this could not occur.

This situation arose because the ALRA allowed claims lodged over parcels of land to remain indefinitely, even if there was little prospect of those being able to proceed. As a result, just prior to the deadline for final lodgment of claims (the sunset clause), a number of claims were made, which had subsequently sat dormant, but with the capacity to be revived should circumstances regarding the relevant pieces of land change.

The High Court decision therefore threw into doubt the declaration of the 11 parks over which claims had laid dormant, because the ALRA claims constituted other interests in the land. If the declaration was invalid, this meant the land could no longer be classed as a national park. As soon as this occurred, the claims on the national park would become active, and given the history of ALRA claims in the Northern Territory, they were likely to succeed, even after long and costly litigation through the courts. These parks would then have been lost to the parks estate.

On top of this, even though the other parks could potentially have been re-declared, this would still leave native title and compensation issues to be resolved. So, a solution had to be found to the larger problem of the 11 parks which were now under ALRA claim, as well as the broader issue of the existence of native title over the other parks and reserves and possible compensation payments.

The traditional approach by governments in the Northern Territory had been to resolve Aboriginal land issues through litigation. However, rather than going down that path, the new government wanted to pursue a course of pragmatic negotiation leading to the achievement of broader policy goals such as consolidation of the parks estate and increasing Aboriginal employment and regional development.

Reflection activity: Take a moment to pause and think. Imagine you are a policy advisor to the Chief Minister. Who are the main stakeholders whose interests need to be considered in resolving this issue? How have Aboriginal interests been dealt with in the past? What would you do differently?

Ormiston Gorge, Tjoritja National Park, Northern Territory

Photo source: Northern Territory Government, n.d. Available from https://nt.gov.au/__data/assets/image/0005/234446/tjoritja-national-park-ormiston-gorge.jpg

The People and Institutions

The key players are the then Chief Minister (Clare Martin) who provided critical political leadership and the seven senior managers on the taskforce formed to prosecute the reforms.

The political situation at the time was unique, with a new (Labor) government after 26 years of uninterrupted Country Liberal Party rule since self-government. The new government was intent on a different approach to dealings with Aboriginal interests, as well as being keen to promote self-determination, Aboriginal employment and regional development. The Chief Minister signalled the importance of these issues by establishing the Office of Indigenous Policy within her agency. She also stated a clear preference to pursue a negotiated settlement to the dilemma.

The taskforce was headed up by Neil Westbury in the newly established Office of Indigenous Policy in the Department of the Chief Minister. Neil wanted to pursue the broader policy commitments made by the Chief Minister to move away from an adversarial approach to land issues. The Minister for Tourism had also raised the issue of increasing calls from tourists for “authentic” Indigenous tourism experiences and the Minister for Regional Development wanted to create a sustainable economic base for future development. So, Neil was after a comprehensive package.

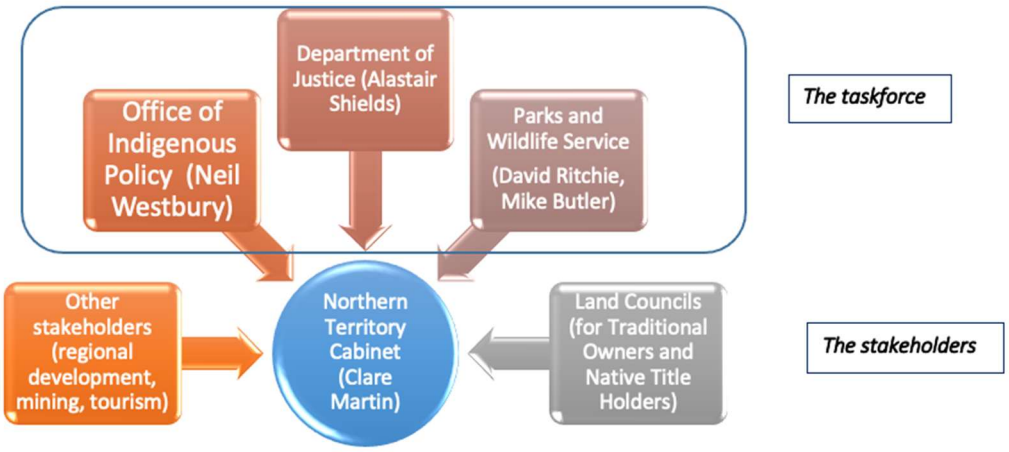
David Ritchie and Mike Butler were senior managers from the Territory Parks and Wildlife Service within the taskforce. David was an anthropologist and relatively new to Parks, whereas Mike had worked there for many years. Both saw an opportunity to consolidate the parks estate and incorporate a number of significant conservation sites. The inability to achieve this had come about because much of the Northern Territory was held by Aboriginal interests under ALRA. This meant that park acquisition had, up to that time, been opportunistic and ad hoc. This was particularly the case for the proposed West Macdonnell National Park (now Tjoritja), which was quite literally a patchwork of smaller parks and Aboriginal land. This obviously would require securing the support of Traditional Owners to lease their land to the government for use as a park – a difficult proposition in an adversarial environment.

The legal counsel for the taskforce was provided through the Department of Justice. Alastair Shields was fresh from negotiating access to Aboriginal land for the Adelaide-Darwin railroad (the Ghan). The lawyers saw the opportunity to resolve the legal issues and uncertainty created by the Ward High Court decision.

Under ALRA, Land Councils have been established to support Land Trusts (which hold the title). Obtaining informed consent from Traditional Owners for any changes to land use is one of their statutory obligations. The parks under consideration fell within the jurisdiction of either the Northern Land Council (NLC) or the Central Land Council (CLC). The Northern Territory is also unique in that the Land Councils are also the Native Title Representative Bodies (NTRB), set up under the Native Title Act to manage Native Title claim process on behalf of Native Title Holders. The Land Councils would therefore be the ones seeking informed consent from Aboriginal interests.

The final decision maker is the Northern Territory Cabinet, chaired by the Chief Minister, Clare Martin. They would also need to define the parameters for any negotiations to occur.

Decision making actors



Problems and options

From the Government's perspective, there was a very real risk that, if ALRA land claims were pursued, then a number of parks would be lost to the parks estate, including iconic parks in the West McDonnell Ranges in Central Australia. Also, if land claims were pursued, then the costs of litigation were likely to be in the hundreds of millions of dollars, and take many years to decide. The result would be continuing uncertainty.

As well, native title claims may well have been successful, meaning that at a minimum native title holders would be granted usufructuary rights for traditional use. This would be potentially in conflict with the use of the land as a park (hunting with rifles and tourists are not a good mix). Of course, there would also likely be compensation issues for past acts while the parks had been in operation, but the existence of native title was not known.

At the same time, there was significant political risk within the adversarial environment surrounding land issues. The opposition could be expected to highly critical of any proposal that "gave away" land. As a result, the media was likely to be very interested in the issue, but not keen on spending the time to understand the complexity that surrounded it.

The Solicitor General had identified the problem before anyone else became aware of the issues. This created a short window to formulate a plan of action before the usual politics of land issues in the NT kicked in. So, the taskforce knew that this would be the calm before the storm if the situation was not handled well.

The Opposition could be expected to see any concessions to Aboriginal interests without pursuing all legal options as "giving away" the parks. At the same time, the taskforce recognised the legitimate rights and interests of Aboriginal people to the parks in question and knew that the land councils would pursue these interests with vigour. So, contestations over the very different rights and interests of all stakeholders needed to be contained within a potentially volatile environment. And the taskforce needed to come up with a way to do this before the implications of the High Court decision were more widely appreciated.

From the perspective of the Land Councils (representing the traditional owners), a protracted process through the courts was not attractive, as many of the original claimants were elderly and likely to die before the claims were resolved. At the same time, they would not concede on the granting of land back to the traditional owners. Traditional Owners were all keen to pursue employment opportunities on country for young people.

The situation was very different for each of the parks – there were 11 which could reasonably be expected to be granted ALRA title if pursued, others that would still be subject to Native Title claims, and then there were the additional parcels of land that the Territory Parks and Wildlife had long coveted as part of the parks estate. In any

proposal put forward, there was therefore likely to be a very strong temptation – on both sides – to try to pursue only the most attractive elements to them.

A number of other parties stood to lose out if a resolution could not be found. Tourist and commercial concessions already granted in parks would be threatened, and future arrangements thrown into doubt. Mining exploration leases would be curtailed, and future mining activity become uncertain.

The taskforce saw an opportunity to secure a number of the policy objectives through joint management of parks and reserves. The idea of parks as a means to increase Aboriginal employment was relatively new, but joint management was an increasing international trend, and not unknown in the Northern Territory. In 1991, the Northern Territory negotiated with the Jawoyn people to secure continued access to Nitmiluk (or Katherine Gorge), through a joint management agreement. This arrangement led to Aboriginal tourism operations as well as employment of rangers within the park. Joint management was also a feature in the Commonwealth parks of Kakadu and Uluṟu-Kata Tjuṯa. But securing agreement to jointly manage a park is a very different proposition when it is land that you own as against land owned (or which might reasonably be expected to be owned) by another party.

The first problem was to devise a way to set up a process of negotiation with the Land Councils that allowed for the comprehensive settlement of the issues that the Government wanted to see, as well as dealing with any uncertainty that might prevail during the negotiations. In particular, existing commercial, tourism and mining interests and continued access to parks would need to be guaranteed.

Negotiating a settlement package was only the first step though. Agreement of the Traditional Owners and Native Title Holders as well as by members of parliament would be needed. The taskforce recognised that political pressure would increase over time, and the initial enthusiasm of the government for ambitious reform might wane over time. The temptation to “cherry-pick” needed to be managed. As well, there are a wide range of stakeholders, including the general public, mining, tourism and pastoral sectors, key industry and interest groups, and the Commonwealth Government. The support of all of these stakeholders needed to be secured and maintained.

A further problem would arise if granting title to Traditional Owners land for use as a park. If this was to occur, a form of title was needed which allowed for covenants on the title, including inalienability, and the requirement that the land be used as a park. Normal freehold title does not allow for this. And if a settlement were to proceed, a cultural shift within the parks service would be needed if joint management were to be effective. This would require park rangers to recognise and value the contributions of the Aboriginal joint managers so that productive working relationships could be established.

The taskforce was faced with a difficult dilemma indeed!

What actually happened

The government agreed to try to negotiate a comprehensive package which would see:

- ownership of some parks to transferred to Aboriginal interests, subject to immediate lease back for 99 years as a jointly managed park
- ownership of some parks to be retained by the government, but jointly managed for a minimum of 99 years
- additional existing Aboriginal land to be added to the parks estate under a lease back arrangement and subject to joint management
- statutory recognition of the benefits of joint management, Indigenous land management practices, and the importance of the cultural landscape as well as the physical landscape .

Within these parameters, the latitude of the taskforce to negotiate the exact details of which parks sat in each category was tightly constrained.

An extensive communications strategy was developed to ensure that the media was fully informed and able to provide balanced coverage. An open and transparent process was considered important to maintain good will, both within the negotiations and more broadly. The strategy proactively managed what might have been a volatile situation within the adversarial environment of land issues.

The negotiation process

Since the two mainland Land Councils – the Northern Land Council (NLC) and the Central Land Council (CLC) – would be responsible for securing the informed consent of Aboriginal interests, as soon as the parameters of the offer was agreed, the Chief Minister met with the heads of the Land Councils. This meeting was to seek their agreement to entering into a negotiation to resolve the uncertainty caused by the High Court decision, and to seek their agreement to core principles for that negotiation process. These core principles were designed to manage the uncertainty by agreeing to put litigation to one side, protect existing legitimate rights and interests and commit to future joint management arrangements.

The taskforce then entered into a complex negotiation process with the NLC and CLC. All parties to the negotiation were bound by the core principles outlined above. The taskforce was further bound by the offer that had been agreed by Cabinet. This set out the parks to be included in the negotiations, and the changes to land tenure that the government was prepared to consider. It also set out the conditions that were mandatory for any changes to occur.

The first meeting was tense. The government had the upper hand because they had realised the implications of the High Court decision before the Land Councils, which did not go down well with the Land Councils. As well, the long-standing adversarial relationship between the government and the Land Councils did not augur well for a harmonious negotiation process.

The saving grace was the fact of a new government which had committed to repairing relationships, and the personal positive relationships with the Land Councils built up over many years by Neil Westbury. The positive experiences from the negotiation of the railway corridor also helped ease tensions. At the first meeting, Neil decided to lay the complete offer on the table – in the interests of transparency and given the lack of latitude that was allowed to the taskforce. The Land Councils assumed that this was a negotiating tactic, and that more could be gained. However, after a few interesting exchanges, it became clear that Neil meant what he said, and the details could then begin to be trashed out.

These details included the parks that could be included in each category, what joint management would look like into the future, how to deal with native title issues as well as long-standing issues relating to parks and reserves from both perspectives. A large part of the negotiations involved working out the details of the Indigenous Land Use Agreements (ILUAs) which would allow for the land to be used as a park whilst leased back to the government, without extinguishing the underlying native title.

During the negotiations a number of issues emerged about the original package which required the taskforce to return to Cabinet for advice. As well, issues that had not originally been envisaged emerged requiring further Cabinet advice. There were also a number of sticking points that required amendments to the package on offer. As a result, the taskforce found itself reporting to Cabinet regularly. The need for quick turnaround on the Cabinet submissions meant that key government stakeholders needed to be kept advised of progress with negotiations.

The enabling legislation

After a year, the negotiations were complete and the package was then embodied in enabling legislation: the *Parks and Reserves (Framework for our Future) Act 2003* (the Parks Act). This gave effect to the core principles and set clear timeframes for all parties to reach agreement. Unusually, it constrained the powers of the Chief Minister who could only agree to proceed with the package if the integrity of the offer was maintained. At the same time, if the Traditional Owners complied with the requirements in the Act, the Chief Minister was legally bound to proceed. Enshrining the offer, and limiting the powers of the government within legislation was unprecedented, as was the briefing of key stakeholders on the Bill for the Parks Act before it was tabled.

For more information the legislation, please see:
https://webarchive.nla.gov.au/awa/20040401064825/http://www.dcm.nt.gov.au/dcm/indigenous_policy/parks.shtml

The government maintained stakeholder support by promoting the package as ensuring "all Territorians" benefitted from the parks estate and framing the dilemma as more than a legal issue over land tenure and compensation, but as a broader issue of development and inclusion, to benefit all NT citizens and stakeholders. The Chief Minister stated that the package: 'draws together the Indigenous obligation to care for country, with a range of government objectives, and that includes generating jobs and enterprises, training, and creating a sustainable economic base for regional development'[i].

Once the legislation was in place, the Land Councils commenced a process of securing informed consent from Traditional Owners and Native Title Holders. Unfortunately, not all Traditional Owners were prepared to agree to the terms and conditions set out in the legislation. This meant that a number of parks were removed from the final package (including sadly the Keep River National Park which adjoins the native title claim that started the whole thing off).

Overcoming obstacles

Existing institutions were used creatively. For example, the provisions of the Native Title Act allow for Indigenous Land Use Agreements (ILUAs) to manage native title issues without the need for a legal determination, at the same time as preserving the underlying native title. So, rather than pursuing the matter through the National Native Title Tribunal, a package of 32 ILUAs over 27 parks and reserves was agreed. As part of the commitment to transparency of process, the ILUAs were tabled in Parliament.

Where existing institutions were not suitable, other solutions were found. Notably, for those land grants outside ALRA a new property category – NT Parks Freehold – was created to allow for a title with the necessary covenants, such as inalienability and the requirement that the land be used as a park. In addition, the cultural shift in the parks service was assisted by including a focus on recognising the value brought to the parks estate through joint management. This was assisted by including clauses within the Territory Parks and Wildlife Act and the Joint Management Framework recognising the cultural landscape of the parks and reserves as well as the physical landscape.

Conclusions and key lessons

The dilemma created by the High Court decision could have resulted in a business-as-usual response, with the issues pursued through the courts creating years of uncertainty and costly litigation to resolve all of the land ownership and native title issues individually, and the opportunity to add land to the parks estate would be lost. Instead, the decision to pursue a negotiated package of reforms, to use the opportunity to establish a "world class parks system" for all "citizens to continue to enjoy the benefits of access to some of the most pristine, culturally enriched and unique areas on the Australia continent"[ii].

The shift in thinking is reflected in the preamble to the Joint Management Deed, agreed by the Northern Territory Government, Northern and Central Land Councils on 2005:

> *The parties have agreed to jointly, establish, maintain and manage a comprehensive and representative system of parks in the Northern Territory for the purposes of benefitting both Aboriginal landholders and the wider community and of protecting biological diversity, serving visitor and community needs for education and enjoyment*[iii]

The *Parks and Reserves (Framework for our Future) Act 2003*, laid the foundations for the current situation with joint management of nearly one third of the parks estate, vastly increased Aboriginal employment and business opportunities on their country and for a cultural shift in the Parks Service. It also allowed for the creation of the proposed West Macdonnell National Park (now Tjoritja), which, following the consolidation achieved through the reforms, is now under consideration for national and world heritage listing.

All of this remains a significant achievement in the contested and highly politicised area of Aboriginal land ownership in the Northern Territory. Despite the significance of the achievement, the reform has received little attention. The only

review is in the book, *Beyond Humbug* which largely focusses on the innovative use of native title to achieve broader policy goals. In their book, Mike Dillon and Neil Westbury (2007) identify a number of factors which they felt contributed to the success of the reforms.

A number of these were procedural, including transparency, communication across boundaries, developing practical and positive legal solutions, and facilitating cultural change in the parks and wildlife service.

Some further issues related to the effective use of existing institutions, including the political mandate of the Chief Minister, the centralised Office of Indigenous Policy, the NTA and strong representative bodies.

They also point to issues of effective framing, including creating a complete package, mandating core principles for negotiation, creating certainty through timeframes, focusing of negotiation rather than litigation and creating the opportunity for significant new parks such as the Tjoritja (West Macdonnell) National Park. The framing is further explored in an article in the *Australian Journal of Political Science*, which examines the creative use of agency by members of the task force to create an open window of opportunity through which the reforms could occur[iv].

Further reading

Brown, P. R. (2020). Framing, agency and multiple streams- a case study of parks policy in the Northern Territory. *Australian Journal of Political Science, 55*(1), 55-71. doi:10.1080/10361146.2019.1669532

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Northern Territory Parliamentary Record No:15. (2003b). *Question: Parks and Reserves - Future Development, Scrymgour to Chief Minister (Martin), 07/10/2003*.

Endnotes

[1] Northern Territory Parliamentary Record No:15. (2003b). *Question: Parks and Reserves - Future Development, Scrymgour to Chief Minister (Martin), 07/10/2003*.

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[1] Brown, P. R. (2020). Framing, agency and multiple streams- a case study of parks policy in the Northern Territory. *Australian Journal of Political Science, 55*(1), 55-71. doi:10.1080/10361146.2019.1669532

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[i] Northern Territory Parliamentary Record No:15. (2003b). *Question: Parks and Reserves - Future Development, Scrymgour to Chief Minister (Martin), 07/10/2003*.

[ii] Northern Territory Parliamentary Record No:15. (2003b). *Question: Parks and Reserves - Future Development, Scrymgour to Chief Minister (Martin), 07/10/2003*.

[iii] Northern Territory Government. (2005). *Joint Management Deed agreed by the Northern Territory Government, Central Land Council and Northern Land Council*. Tabled in the NT Legislative Assembly, 17 February 2005.

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