LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Economic Policy Scrutiny Committee

Inquiry into the Pastoral Land Legislation Amendment Bill 2017

March 2018

Contents

Chair's Preface

The Committee's inquiry into the Pastoral Land Legislation Amendment Bill 2017 received significant community attention with a range of issues raised in submissions. This attention highlighted the importance of the management of the pastoral estate for economic, social and environmental development and sustainability.

The purpose of the Bill is "to improve the effectiveness of the existing legislation, correct technical irregularities identified since the legislation was introduced in 1992, and provide for the contemporary management of the pastoral estate".[1] The provisions in the Bill address technical issues, such as the methodology for distributing rental fees across the estate and the provisions made for subleasing. The Bill does not seek to implement any significant policy changes in the management of the pastoral estate. However it is important to get procedural and technical details correct so that the Act achieves its objectives effectively without unintended consequences.

The report details the Committee's consideration of the issues raised with the provisions of the Bill and recommends some consequential amendments.

As the Bill raised procedural issues for the non-pastoral use of land and the contemporary management of the pastoral estate, the Committee also received submissions on broader procedural issues with the Pastoral Land Act with suggestions on how the management of the pastoral estate could be improved to provide for a wider range of development opportunities, to better provide for the coexistence of the interests of both pastoralists and native title holders, and better ensure environmental sustainability.

The report also outlines the Committee's consideration of these broader issues and makes further recommendations for the Government's action following the passage of the Bill.

The Committee welcomes the Bill as an important step towards improving the management of the pastoral estate.

On behalf of the Committee, I wish to thank all of the organisations that made submissions to the inquiry and appeared as witnesses at the public hearings. I would also like to thank the Department of the Legislative Assembly for the support it provided to the Committee and the Committee members for their bipartisan support in the examination of this Bill.

Tony Sievers MLA

Chair

[1] Hon Lauren Moss MLA, Minister for Environment and Natural Resources, Pastoral Land Legislation Amendment Bill 2017 (Serial 34), Explanatory Speech, Northern Territory Legislative Assembly, 18 October 2017.

Committee Members

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	**Jeff Collins MLA** Member for Fong Lim	
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Acknowledgments

The Committee acknowledges the individuals and organisations that have made written submissions to this inquiry and appeared as witnesses at public hearings.

Acronyms and Abbreviations

AAPA	Aboriginal Areas Protection Authority
ALEC	Arid Lands Environment Centre
CPC	Consolidated Pastoral Company
GHG	Greenhouse gas
NTA	*Native Title Act 1993* (Cwlth)
NTCA	Northern Territory Cattlemen's Association
NTCAT	Northern Territory Civil Appeals Tribunal
NT EPA	Northern Territory Environmental Protection Agency
PLRF	Pastoral Lease Rent Factor

Terms of Reference

Sessional Order 13

Establishment of Scrutiny Committees

(1) Standing Order 178 is suspended.

(2) The Assembly appoints the following scrutiny committees:

  (a) The Social Policy Scrutiny Committee

  (b) The Economic Policy Scrutiny Committee

(3) The Membership of the scrutiny committees will be three Government Members and one Opposition Member nominated to the Speaker in writing by the respective Whip and one non-party aligned Member to be appointed by motion.

(4) The functions of the scrutiny committees shall be to inquire and report on:

  (a) any matter within its subject area referred to it:

    (i) by the Assembly;

    (ii) by a Minister; or

    (iii) on its own motion.

  (b) any bill referred to it by the Assembly;

  (c) in relation to any bill referred by the Assembly:

    (i) whether the Assembly should pass the bill;

    (ii) whether the Assembly should amend the bill;

    (iii) whether the bill has sufficient regard to the rights and liberties of individuals, including whether the bill:

      (A) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

      (B) is consistent with principles of natural justice; and

      (C) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

      (D) does not reverse the onus of proof in criminal proceedings without adequate justification; and

      (E) confers powers to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and

      (F) provides appropriate protection against self-incrimination; and

      (G) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(H) does not confer immunity from proceeding or prosecution without adequate justification; and

(I) provides for the compulsory acquisition of property only with fair compensation; and

(J) has sufficient regard to Aboriginal tradition; and

(K) is unambiguous and drafted in a sufficiently clear and precise way.

(iv) whether the bill has sufficient regard to the institution of Parliament, including whether the bill:

(A) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and

(B) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and

(C) authorises the amendment of an Act only by another Act.

(5) The Committee will elect a Government Member as Chair.

(6) Each Committee will provide an annual report on its activities to the Assembly.

Adopted 24 August 2017

Recommendations

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Pastoral Land Legislation Amendment Bill 2017 with the proposed amendments set out in Recommendations 2, 3 and 4.

Recommendation 2

The Committee recommends the Bill be amended to make it clear to the reader that the estimation of carrying capacity should not take into account improvements to the land.

Recommendation 3

The Committee recommends that the estimated carrying capacity review timeframe in proposed subsection 54(2) be removed.

Recommendation 4

The Committee recommends the Bill be amended to give the Agency the discretion to review the estimated carrying capacity of land subject to a pastoral lease at any time, either at its own initiative or at the request of the leaseholders.

Recommendation 5

The Committee recommends the Government consider further legislative options to facilitate appropriate non-pastoral uses of pastoral land in addition to primary production activity, such as conservation and environmental remediation activities, and also allow such purposes under subleases.

Recommendation 6

The Committee recommends that the Department of Environment and Natural Resources consider issues relating to increased non-pastoral use of pastoral land in its environmental regulatory reform program.

Recommendation 7

The Committee recommends the Government consider options to enhance the protection of sacred sites on pastoral lands.

Recommendation 8

The Committee recommends the Government consider options for better protecting the rights of native title holders, such as through a right to negotiate, when consideration is being given to granting permits for non-pastoral uses to leaseholders under the *Pastoral Land Act*.

Recommendation 9

The Committee recommends the Minister consider diversity, and experience in and understanding of native title interests and Aboriginal cultural heritage and traditions in the Northern Territory when appointing members to the Pastoral Land Board.

1 Introduction

Introduction of the Bill

1. The Pastoral Land Legislation Amendment Bill 2017 (the Bill) was introduced into the Legislative Assembly by the Minister for Environment and Natural Resources, the Hon Lauren Moss MLA on 18 October 2017. The Assembly subsequently referred the Bill to the Economic Policy Scrutiny Committee for inquiry and report by 13 March 2018.[2]

Conduct of the Inquiry

2. On 20 October 2017 the Committee called for submissions by 8 November 2017, although it received some submissions after the due date. The call for submissions was advertised via media release, the Legislative Assembly website, Facebook, Twitter feed and email subscription service.

3. The Committee received submissions from 13 people and organisations, including four supplementary submissions, and held public hearings in Darwin on 2 February 2018.

Outcome of Committee's Consideration

4. Sessional order 13(4)(c) requires that the Committee, after examining the Bill, determine:

    (i) whether the Assembly should pass the bill;

    (ii) whether the Assembly should amend the bill;

    (iii) whether the bill has sufficient regard to the rights and liberties of individuals; and

    (iv) whether the bill has sufficient regard to the institution of Parliament.

5. Following examination of the Bill, and consideration of the evidence received, the Committee is of the view that the Legislative Assembly should pass the Bill with the proposed amendments set out in Recommendations 2, 3 and 4.

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Pastoral Land Legislation Amendment Bill 2017 with the proposed amendments set out in Recommendations 2, 3 and 4.

[2] On 6 February 2018 the Assembly amended the reporting date from the first meeting day in 2018 to 13 March 2018.

Report Structure

6. Chapter 2 provides an overview of the policy objectives of the Bill and the purpose of the Bill as contained in the Explanatory Statement.

7. Chapter 3 considers the main issues raised in evidence received.

2 Provisions of the Bill

Purpose and Overview of the Bill

8. As noted in the Explanatory Statement, the Bill is to make amendments to address shortfalls and irregularities in the *Pastoral Land Act* and the Pastoral Land Regulations. The primary purpose of the Bill is to implement a new methodology to calculate pastoral rents and to enhance diversification opportunities by enabling the granting of subleases for non-pastoral purposes.

9. Key features of the Bill include:

- Repealing the current pastoral rent methodology which uses the unimproved capital value of land and establishing a rent methodology based on the pastoral estates' estimated carrying capacity.
- Expanding non-pastoral use provisions contained within the Pastoral Land Regulations to allow subleases to be granted for horticulture, agriculture, aquaculture and forestry.
- Allowing for subleases to be registered as security on the title.
- Strengthening the consent to transfer provisions to ensure that all proposals to transfer ownership or a controlling interest are assessed, including any foreign interests and maximum holding triggers.
- Allowing the Minister to appoint additional members to the Pastoral Land Board to provide a wider pool of members to more readily enable a quorum to be reached.[3]

[3] Explanatory Statement, Pastoral Land Legislation Amendment Bill 2017 (Serial 34), https://parliament.nt.gov.au/committees/EPSC/LPP

3 Examination of the Bill

Introduction

10. The submissions received highlighted a range of issues for the Committee to consider in its examination of the Bill which can broadly be grouped into rent methodology; Ministerial consent for lease transactions; subleases for non-pastoral purposes; environmental degradation; protection of sacred sites; and native title rights and interests.

11. The Department of Environment and Natural Resources (the Department) informed the Committee that prior to the public hearings, it met with the majority of submitters to discuss and provide clarity on the issues raised in their submissions. The Department advised the Committee that, as a result of the additional consultation, they would be recommending to Cabinet a number of small amendments to the Bill.

12. The Committee notes that the purpose of the Bill "to improve the effectiveness of the existing legislation, correct technical irregularities identified since the legislation was introduced in 1992, and provide for the contemporary management of the pastoral estate"[4] is quite broad. Consequently, the Committee has made some recommendations addressing the terms of the Bill and others proposing further legislative development in the future.

Rent Methodology

13. The Bill proposes a new methodology for calculating rents for pastoral leases in response to industry dissatisfaction with the existing methodology. The Minister explained to the Assembly that:

> 15 years ago, there was a general upward trend in pastoral land values with an unprecedented escalation in sale price and unimproved values. The pastoral industry has expressed its dissatisfaction with the current valuation process and called for it to be either amended to suit Territory conditions or abolished in favour of a new process.
>
> An industry-led pastoral rent review working group reviewed the rent methodology to address concerns from industry about the potential fluctuating nature of rental calculations and to establish a framework for an efficient, predictive and objective process. Options examined were based on corporate structure, property size and the productive capacity of land when used for pastoral farming.
>
> A methodology based on the pastoral property's estimated carrying capacity is proposed to be introduced and has industry support. Carrying capacity is reflective of the land's capacity to produce an economic return and is based on unsupplemented native vegetation.[5]

[4] Hon Lauren Moss MLA, Minister for Environment and Natural Resources, Pastoral Land Legislation Amendment Bill 2017 (Serial 34), Explanatory Speech, Northern Territory Legislative Assembly, 18 October 2017.

[5] Hon Lauren Moss MLA, Minister for Environment and Natural Resources, Pastoral Land Legislation Amendment Bill 2017 (Serial 34), Explanatory Speech, Northern Territory Legislative Assembly, 18 October 2017.

14. The Chief Executive Officer of the Department explained to the Committee that:

> The changes to the rent methodology came about because of a 441% increase in the rents invoiced in 2009—and some members will remember that—resulting in 120 objections out of 224 invoices issued lodged that year. We had a good six months of review with a number of those objections upheld. The concern at the time, and ongoing is that large market based fluctuations are not good for the industry overall. It also resulted in the Territory not generating income that year or not to the extent that we expected.
>
> The methods being proposed are quite deliberately intended to reduce market volatility, using a carrying capacity based methodology. I appreciate that there are people who have a very strong view about the principles of market settings.[6]

15. To avoid the problems experienced with the unimproved capital value methodology, and following the recommendation of the pastoral rent review working group, the Bill proposes to replace the use of 'unimproved capital value' of the land with the 'estimated carrying capacity' of the land to calculate pastoral rents.

16. The Chief Executive Officer of the Department also noted:

> that the method for determining the baseline valuation of a pastoral estate is proposed to change, but there is no change to the process overall that we use to calculate rent. The pastoral lease rent factor is set by the Minister each year, and it determines what the rent revenue will be. So, there is still a manipulation of the rent established through that pastoral lease rent … [factor], which is set each year by the Minister. That is to ensure that a certain level of revenue is raised.[7]

17. Under the existing Act, the total rent to be collected each year is controlled by the percentage of unimproved capital value, which is determined by the Minister. Similarly, the provisions in the Bill allow the total rent to be collected to be set through the pastoral lease rent factor. The formula used for calculating rents is to multiply a value attributed to each lease (whether that be determined by market value or carrying capacity) by the percentage or rent factor to determine the rent payable for each lease. The Minister can adjust these at their discretion.

18. In practice, the methodology used to determine the relative value of each lease is used to determine the proportion of the total rent payable across the Territory for that lease. The rent factor is then adjusted so that when applied to the total values given to each pastoral lease, the amount of rent payable across the Northern Territory totals a predetermined amount.

19. It was explained to the Committee that it was the practice of the government to adjust the rent factor to keep the total rent collected from pastoral leases to around $5 million.[8]

20. Concerns were raised regarding whether the changes to rents under the Bill levied improvements to the land, whether they fairly distributed the rental burden, how the proposed estimated carrying capacity would be determined, and how often the estimated carrying capacity would be reviewed.

[6] Department of Environment and Natural Resources, Committee Transcript, 2 February 2018, p. 29.
[7] Department of Environment and Natural Resources, Committee Transcript, 2 February 2018, p. 29.
[8] Mr Higgins MLA, Committee Transcript, 2 February 2018, p. 27.

Improvements affecting Estimated Carrying Capacity

21. The Committee received a number of submissions questioning whether estimated carrying capacity would be based on the unimproved landscape of the pastoral estate or include improvements to the land and feed supplementation. The submissions stated the Department referred to 'unimproved carrying capacity' during the Bill consultation period and were concerned to find the term 'estimated carrying capacity' was used in the Bill instead.

22. Proposed section 3A of the Bill defines estimated carrying capacity as "the number of animal equivalents that an area of pastoral land can sustainably support"[9] with each animal equivalent "equal to one 450 kg non-breeding beast".[10]

23. Clarification of this definition was a primary focus for pastoralists, with two submissions expressing concerns that including improvements and supplementation in the carrying capacity calculation would result in a higher carrying capacity, and consequently increase rent for pastoralists that have improved their estates at their own expense.

24. When questioned about the definition of estimated carrying capacity, the Department advised the Committee that "unimproved carrying capacity and estimated carrying capacity are actually one and the same."[11] The Department further stated:

> we will be recommending to government … to insert some clarity around that, specifically the word, unimproved; that is what is missing. The advice we received is that unimproved carrying capacity is not a known term, whereas estimated carrying capacity is recognised.[12]

25. This was also the understanding of Mr Frank Peacocke, the Director of Herron Todd White Valuers:

> And just to clarify, the estimated carrying capacity is a description of the balance of country types on a cattle station. It is not the improved carrying capacity.[13]

26. Evidence provided by pastoralists at the public hearings indicates they are supportive of a rent methodology using estimated carrying capacity provided it is clear in the Bill that this means the unimproved carrying capacity of the land. The Northern Territory Cattlemen's Association (NTCA) proposed that the definition should be amended to state "estimated carrying capacity is the number of animal equivalents that an area of pastoral land can sustainably support in its unimproved state".[14] The Consolidated Pastoral Company (CPC) expressed support for the NTCA proposed amendment.[15]

[9] Pastoral Land Legislation Amendment Bill 2017
[10] Pastoral Land Legislation Amendment Bill 2017
[11] Department of Environment and Natural Resources, Committee Transcript, 2 February 2018, p. 30.
[12] Department of Environment and Natural Resources, Committee Transcript, 2 February 2018, p. 30.
[13] Herron Todd White (Northern Territory) Pty Ltd, Committee Transcript, 2 February 2018, p. 15.
[14] Northern Territory Cattlemen's Association, Committee Transcript, 2 February 2018, p. 7.
[15] Consolidated Pastoral Company, Committee Transcript, 2 February 2018, p. 8.

Committee's Comments

27. The Committee notes that while the Bill does not make explicit that 'estimated carrying capacity' is not affected by improvements to land, that was how the Department and professional valuer who appeared before the Committee understood the terminology.

28. However, for the avoidance of doubt and to avoid confusion, the Committee considers that the Bill should be amended to make it clear to the reader that the estimation of carrying capacity should not take into account improvements to the land.

Recommendation 2

The Committee recommends the Bill be amended to make it clear to the reader that the estimation of carrying capacity should not take into account improvements to the land.

Relationship between Carrying Capacity and Economic Capacity

29. In her explanatory speech, the Minister stated that "carrying capacity is reflective of the land's capacity to produce an economic return".[16]

30. Herron Todd White criticised the use of estimated carrying capacity as a basis for setting rents as it allows little practical ability to account for qualitative factors such as:

- Physical access and access to markets
- Manageability
- Suitability of country type for development to a higher and better use (ie, irrigated horticulture, cropping under Diversification Permits or under the proposed introduction of sublease)
- Potential for further pastoral development (does the property have good or bad groundwater?)[17]

31. As a consequence of estimated carrying capacity not taking into account these other factors that affect land's capacity to produce an economic return, it can only provide a rough proxy for its relative unimproved economic capacity. It is also somewhat counterintuitive to limit the factors for setting rent to carrying capacity at the same time as allowing non-pastoral economic production from that land, as that would result in a further divergence between the economic capacity of the unimproved land and its estimated carrying capacity.

32. As a general principle, the market is the best indicator of the economic capacity of property, as a business' willingness to pay for a property will reflect its evaluation of what it can produce from that property.

33. Mr Peacocke explained:

> The good thing about the way it currently is—and I am all for trying to think of an easier, cheaper method—it is difficult, but the benefit of this method is that it should be fair. So someone with a remote pastoral lease where its value is less

[16] Hon Lauren Moss MLA, Minister for Environment and Natural Resources, Pastoral Land Legislation Amendment Bill 2017 (Serial 34), Explanatory Speech, Northern Territory Legislative Assembly, 18 October 2017.

[17] Herron Todd White (Northern Territory) Pty Ltd, Submission No. 12A, 2017, p. 2.

> because if it went to market it would attract a buyer who understood the economic challenges that property has, so it gets a lower value. Whereas a big cattle station on the Barkly its UCV will be naturally higher. The idea is that everyone pays their fair share of rent, and whether the market increased 30% or dropped 30%, as long as the bucket of money was still $5m everyone really should just pay their same proportion of rent.[18]

34. Mr Peacocke explained to the Committee how there had been significant problems with how unimproved capital value had been assessed over the previous decade but considered that this had largely been resolved so that the values now in place fairly reflected the values of the leases:

> The big fluctuations came in 2006, 2009 and 2012. That was a combination of the UCV process—I know about this because we were asked to check on the drafts. Somewhere along the line—it could have been the carrying capacity assessments—the relativities got out of whack. Then pastoralists rightly objected and had them changed. But I could not even see how the changes or adjustments were made. It just put them further out of whack. Then the market went up 25% per annum for five years or something, so it just blew everything out of whack.
>
> The problem is—and I accept this—it has taken me 10 years just to get my head around the relativities. That is how long it takes. There are not many rural valuers out there. I am not going to necessarily be around for ages. So, it is a problem. I can see how—if you thought more about it, there are good people in government and there should be a system of people the valuer needs to speak to in order to stay relatively close to reality.
>
> There are 227-odd leases and it is the valuer's skills, I guess, to look at that one and say, 'It is definitely two thirds better than that one, or 90% as good as that one'. And the carrying capacity gets you half way there. It only gets you half way.[19]

35. To illustrate the extent to which determining rent by estimated carrying capacity diverged from unimproved capital value, Mr Peacocke calculated how it would change rents for individual properties from that under the present system:

> But if we apply the rate in northern Alice Springs … to the current estimated carrying capacities we have worked out—this is if I have it right and if that is the actual formula—the changes are substantial. Some are 5% to 6% but they range to a 45% increase. One is a 166% increase. So their pastoral UCV, the rent they are paying now is $17 000, it will go to $24 000. This is without any change in the market, this is just applying the same rate.
>
> … And I can tell you that property, the 166%—because when I valued it, and it is quite remote, it has difficult access—it should not have the same dollar rate for the block just north of Alice.[20]

36. The Committee asked a number of witnesses if the proposed methodology could equitably divide the total pastoral rent to be collected among the pastoral estates, given the absence of any qualitative assessments. The pastoralists providing evidence at the public hearing appeared to be unconcerned about the potential inequity of the rental calculations. The NTCA stated:

> The consultation in relation to amending the rental calculation methodology has been through a rigorous process with presentations, information sessions at

[18] Herron Todd White, Committee Transcript, 2 February 2018, p. 16.
[19] Herron Todd White, Committee Transcript, 2 February 2018, p. 17.
[20] Herron Todd White, Committee Transcript, 2 February 2018, p. 17.

> NTCA branch meetings in Alice Springs, Tennant Creek, Katherine and the Top End on numerous occasions receiving overwhelming support.[21]

37. The Department provided the Committee with an overview of proposed rent methodologies that were considered by the pastoral rent review working group which:

> had a broad range of skill set to assess that and over a number of years they looked at all those options and then whittled it down as the estimated carrying capacity being the most beneficial and workable out of the ones put to them.[22]

38. The Department advised the Committee that only two pastoral leaseholders had questioned the valuations based on the 2015 estimated carrying capacity assessments and stated this suggests that the proposed methodology is widely accepted:

> In 2015, when the ECCs were undertaken through wide consultation, Heron Todd White put together a package the Valuer-General sent to all lessees, explaining the methodology and modelling that was used to calculate those ECCs, and spoke to every individual lessee about that.
>
> … We only had two people who questioned their valuation or their ECC. Also, the current president of the NTCA and members from Central Australia and the Sturt Plateau were representatives on the working group. They were representing industry stakeholders and we use that as a guide that it was—and we refer to them as to whether it would be a widely accepted model to use, you look to them for guidance in that regard. Following the correspondence that was sent out in 2015, we have not received anything back saying they disagree or do not like it or following that methodology that was used.[23]

Committee's Comments

39. The Committee acknowledges that estimated carrying capacity is a crude tool for determining the unimproved economic capacity of land. It does not take into account other factors affecting the value of that carrying capacity, such as proximity to market, or other factors affecting the economic capacity of the land, such as its potential for improvement or permissible non-pastoral uses.

40. The Committee notes however that those affected by the crudeness of the measure have expressed support for it over the existing system. It also notes that it does not adversely affect the government's policy aim of collecting a set rent from the entire pastoral estate rather than making a direct connection between the economic capacity of individual properties and the rent paid for that property.

41. While the use of estimated carrying capacity may be subject to a range of criticisms, it appears those who will be affected by it consider that its benefits, such as its simplicity and lack of volatility, outweigh its imperfections.

42. The Committee therefore accepts the Department and industry's preference for using estimated carrying capacity as the means of determining the relative rent payable for individual properties.

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[21] Northern Territory Cattlemen's Association, Committee Transcript, 2 February 2018, p. 7.
[22] Department of Environment and Natural Resources, Committee Transcript, 2 February 2018, p. 31.
[23] Department of Environment and Natural Resources, Committee Transcript, 2 February 2018, p. 33.

Determination of Estimated Carrying Capacity

43. Proposed subsection 54(1) requires the Department ('the Agency') to determine the estimated carrying capacity of pastoral land that is the subject of a pastoral lease. The NTCA, Arid Lands Environment Centre (ALEC) and Herron Todd White all noted in their submissions that the Bill does not prescribe a methodology for calculating estimated carrying capacity.

44. Herron Todd White informed the Committee that it assessed the carrying capacity of each pastoral estate as part of the 2015 Pastoral Revaluation for Unimproved Capital Value contract. Herron Todd White expressed a number of concerns regarding the proposed rent methodology, including whether the Department will be using the 2015 figures and if it would be able to "properly address any concerns or challenges relating to their assessment."[24]

45. The NTCA and CPC stated in their submissions that the Pastoral Land Board "is the most appropriate and qualified authority"[25] to determine the carrying capacity of a pastoral estate, however in their evidence to the Committee at the public hearings, the NTCA advised they now support the Department making these determinations.[26]

46. In their submission to the Committee, Mr and Mrs Armstrong from Gilnockie Station questioned what procedure would be in place for pastoral leaseholders to object to an estimated carrying capacity determination, noting that the process needed to be "easily explained, transparent and affordable."[27]

47. In response to questions about the suitability of the Department to make carrying capacity determinations, and appeal processes, the Committee was advised:

> The Department is the best placed body to handle setting the ECCs and distributing the notices for the rent and setting those ECC amounts because we have the capacity and the established procedures in place to handle any objections. We can do that through sending out the notice and giving someone two or three weeks or whatever to respond if they have an objection and then we can adjust it in consultation. If they want to take if further we have the established NTCAT, civil administrative tribunal, already set up within our legislation that we can refer it to and go through that way.[28]

Committee's Comments

48. The Committee agrees that the Department is the most appropriate entity to determine the estimated carrying capacity of pastoral estates.

Reviews of Estimated Carrying Capacity

49. Proposed subsection 54(2) states the Department ('the Agency') "may conduct a review of the estimated carrying capacity at any time, but not more than 10 years after

[24] Herron Todd White (Northern Territory) Pty Ltd, Submission No. 12A, 2017, p. 3.
[25] Northern Territory Cattlemen's Association, Submission No. 8, 2017, p. 2; Consolidated Pastoral Company, Submission No. 10, 2017, p. 7.
[26] Northern Territory Cattlemen's Association, Committee Transcript, 2 February 2018, p. 10.
[27] Gilnockie Station, Submission No. 1, 2017, p. 2.
[28] Department of Environment and Natural Resources, Committee Transcript, 2 February 2018, p. 34.

the previous determination."[29] Conflicting evidence was presented to the Committee on whether the estimated carrying capacity would change over time and consequently whether reviews would be required.

50. The NTCA stated an unimproved carrying capacity would remain constant over time, therefore there would be no requirement for it to be reviewed.[30] Conversely, ALEC stated the estimated carrying capacity should be reviewed every five years at a minimum as "the carrying capacity is volatile and varies seasonally."[31]

51. When questioned by the Committee about the limitations of the proposed subsection, the Department advised they were seeking to have this amended to remove the timeframe associated with reviews:

> As part of the consultation process this is one of the ones that we are looking to amend and propose to government, move away from the cycle and to adjust it to say at the Department's discretion or when the Department feels at any time and essence. That has come out as a result of discussions and submitters.[32]

52. The Committee questioned whether both pastoral leaseholders and the Department would be able to initiate a review, with the Department advising:

> That would be one of the reasons you would want to get away from—your 10 years is up or your five years is up—if there was a significant level of advocacy from the community or certain stakeholder groups you had the option as government to initiate a review or to respond to certain kinds of events. It would seem more efficient for us to be able to say we can initiate the review but we would certainly be taking advice and suggestions from others in that.[33]

Committee's Comments

53. The Committee supports amending the Bill so that a review of the estimated carrying capacity can be initiated by the Department or requested by the leaseholder and not requiring a review within a particular time.

54. Should this recommendation not be accepted, the Committee notes the wording of proposed subsection 54(2) appears to not require a review within 10 years, but gives the Department a discretion to conduct a review which expires after 10 years. This arguably means that if a review was not conducted within 10 years, no review could be conducted in future. If this provision were to be kept, it should be amended to require a review at least every 10 years.

55. Deleting the words "but not more than 10 years after the previous determination" would remove the prohibition on conducting a review after 10 years and leave the Agency with a general discretion to conduct a review.

[29] Pastoral Land Legislation Amendment Bill 2017
[30] Northern Territory Cattlemen's Association, Submission No. 8, 2017, p. 2.
[31] Arid Lands Environment Centre, Submission No. 6, 2017, p. 2.
[32] Department of Environment and Natural Resources, Committee Transcript, 2 February 2018, p. 34.
[33] Department of Environment and Natural Resources, Committee Transcript, 2 February 2018, p. 34.

Recommendation 3

The Committee recommends that the estimated carrying capacity review timeframe in proposed subsection 54(2) be removed.

Recommendation 4

The Committee recommends the Bill be amended to give the Agency the discretion to review the estimated carrying capacity of land subject to a pastoral lease at any time, either at its own initiative or at the request of the leaseholders.

Ministerial Consent for Lease Transactions

56. Proposed section 30B "inserts the definition of **lease transaction** explaining what transactions need Ministerial consent and includes the provision that a body corporate needs to get consent if it is changing ownership, or the controlling interest of the body corporate changes."[34] Other transactions that constitute a lease transaction are a transfer of a pastoral lease; sublease of a pastoral lease; transfer of a sublease; and variation or extension of a sublease.[35]

57. The Committee notes that the Bill does not explicitly state that consent is required to enter into a lease transaction, but proposed section 67 makes it an offence to enter into a lease transaction without Ministerial consent. The maximum penalty for an individual is 40 penalty units and 650 penalty units for a body corporate, which at the time of report writing equated to $6,160 and $100,100 respectively.

58. The Committee questioned the Department about the effect of a lease transaction made without consent and was advised:

> The legal basis for that drafting is on advice from parliamentary counsel, however it is basically saying that if you do not obtain the Minister's consent to enter into a lease transaction, you will then be liable. A lease transaction is selling a lease and transferring it to another entity without the Minister's consent.
>
> It is a complex thing to write. If you do sell it without consent, then you are liable and you can be penalised … the Land Titles Office requires a letter of consent from the Minister to register the new ownership. If they do not have that letter from us, they will not go through with the transaction and settlement cannot occur.
>
> However, at the moment, if you are buying the whole company, you do not need to go to the title, because you are assuming that company as part of your company, and the name stays the same. So it is closing that loophole, and that wording is stating that. I am assured it is the right way to say it by the drafters.[36]

59. The NTCA suggested that the penalty for a body corporate entering into a lease transaction without Ministerial consent is too high and they:

> cannot support the proposed penalties identified in section 30B. The consequence of non-compliance with this section is $100,000 and possible

[34] Explanatory Statement, Pastoral Land Legislation Amendment Bill 2017 (Serial 34), https://parliament.nt.gov.au/committees/EPSC/LPP
[35] Pastoral Land Legislation Amendment Bill 2017
[36] Department of Environment and Natural Resources, Committee Transcript, 2 February 2018, p. 36.

> forfeiture of title. This is deemed grossly excessive and the NTCA would counter a figure of $10,000 be more appropriate.[37]

60. The Bill's Explanatory Statement notes:

> the current penalty applying to a body corporate is 200 penalty units. Proposed section 67 introduces a new penalty of 650 penalty units to be applied to bodies corporate to act as an adequate disincentive for not giving the Territory the opportunity to assess a proposed sale. The penalty for individuals remains unchanged.[38]

61. The NTCA also advised the Committee that they disagreed with the threshold for acquiring a controlling interest in a body corporate, stating:

> 15% is far too low. In a family operation, it could be dad retiring and someone else coming through like one of the kids coming through. It is far too low and from a corporate entity—someone trading on the stock exchange—I am not sure how you could regulate that. There are already federal government laws that apply to … [share] transactions in agriculture.[39]

62. When asked why the threshold had been set at 15%, the Department advised:

> There is a current loophole where, if a company is purchasing another company, they do not need to get the Minister's consent to transfer because there is no change of name on the title at the Land Titles Office. To close that loophole we have looked at amending the Act. We set the 15% because in a small organisation, a person may have a controlling interest if the person holds 50% or more of the total shares. However, this is aimed at public companies where there may be hundreds of thousands of shareholders and the controlling interest will be a much smaller portion of those shares. The 15% was suggested because it is consistent with other NT legislation such as the *Gaming Machine Act* and the *Liquor Act*. That is where we drew that knowledge of that figure from.[40]

Committee's Comments

63. The Committee is satisfied with the explanations for increasing the penalty for body corporates entering into lease transactions without Ministerial consent and the 15% threshold for acquiring a controlling interest in a body corporate.

Subleases for Non-Pastoral Purposes

64. One of the key features of the Bill is to enhance diversification opportunities by expanding the range of non-pastoral purposes for which a sublease can be granted. The Department advised the Committee that the:

> current amendments in the *Pastoral Land Act* seek to align the existing sublease provisions with the allowable purposes in the *Native Title Act* and those listed in the *Pastoral Land Act* for non-pastoral use permits—forestry, aquaculture, horticulture and agriculture.[41]

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[37] Northern Territory Cattlemen's Association, Committee Transcript, 2 February 2018, p. 8.
[38] Explanatory Statement, Pastoral Land Legislation Amendment Bill 2017 (Serial 34), https://parliament.nt.gov.au/committees/EPSC/LPP
[39] Northern Territory Cattlemen's Association, Committee Transcript, 2 February 2018, p. 10.
[40] Department of Environment and Natural Resources, Committee Transcript, 2 February 2018, p. 36.
[41] Department of Environment and Natural Resources, Committee Transcript, 2 February 2018, p. 30. The Committee notes that these purposes are not literally listed in the *Pastoral Land Act*, but are those provided for under s. 87 of the Act as falling within the meaning of 'primary production' under Part 2, Division 3, Subdivision G of the NTA.

65. Pastoral leaseholders can currently apply for non-pastoral use permits to undertake the aforementioned activities, however as they are not prescribed purposes under Regulation 31 of the Pastoral Land Regulations, subleases cannot be granted for those purposes. The Department provided the Committee with some background to the evolution of the *Pastoral Land Act* to provide some clarity regarding these issues:

> In 2014, the Northern Territory amended its *Pastoral Land Act* to achieve three things: extend the term of a grant for a non-pastoral use permit from five years to 30 years; to issue that permit to the property rather than the lessee so it was able to be registered with the title; and amended the allowable uses for a non-pastoral use permit to align with those in the *Native Title Act* changes of 1998 described before. Those, again, are forestry, aquaculture, horticulture and agriculture.
>
> When those changes were made in 2014, the allowable uses for sublease in the *Pastoral Land Act* were not also changed as part of those amendments, which means that subleases in regulations are still limited to the uses described in the original Act. They are limited to infrastructure-type activities and pastoral use.[42]

66. The Department further explained that the expansion of sublease provisions in Regulation 31 are aimed at encouraging investment and economic stability in non-pastoral activities on pastoral estates:

> The sublease provisions in this Bill are intended to encourage non-pastoral use – the non-pastoral use provisions that apply and diversification of the pastoral estate. This can occur now if the lessee seeks a non-pastoral use permit, but that lessee cannot then enter into a corresponding sublease agreement that is registered on the title. The effect of that is you may want to enter into a sublease for a certain type of activity—whether it is an agricultural development—but pastoralists may say they want someone with some expertise to take that on as a sublease. The person taking that on would ideally like that to be part of registration on the title, recognised on the title so they can use it for financing purposes.[43]

67. The Committee received evidence from the Environment Centre NT, The Pew Charitable Trusts, ALEC, the NTCA and the Aboriginal Carbon Fund recommending the amendments to Regulation 31 should not be limited to primary production activities and should include conservation land management, carbon abatement, carbon farming and environmental remediation work.

68. In their submission to the Committee, The Pew Charitable Trusts proposed the inclusion of conservation land management in Regulation 31:

> Conservation land management presents opportunities to maintain and restore natural values on pastoral lands, and, increasingly, opportunities for diversification of income by pastoral leaseholders. With public and philanthropic support, private land conservation has expanded rapidly over the past decade, with an increasing number of properties managed for a combination of conservation and production purposes … This amendment would provide new opportunities for pastoral leaseholders to diversify their income, maintain and restore the long-term health and productivity of their land and enter into land management partnerships with traditional owners and conservation organisations.[44]

[42] Department of Environment and Natural Resources, Committee Transcript, 2 February 2018, p. 29
[43] Department of Environment and Natural Resources, Committee Transcript, 2 February 2018, p. 28.
[44] The Pew Charitable Trusts, Submission 11A, 2017, pp. 2-3.

69. The Pew Charitable Trusts advised the Committee that "public and private investment in the management of land-based carbon stocks is increasing over time. To date, the pastoral sector in the Northern Territory has derived limited income from the carbon sector".[45] In respect to income diversification for pastoralists, The Pew Charitable Trusts noted:

> managing land for carbon abatement (including regeneration of native vegetation) provides opportunities for pastoral leaseholders to diversify their income while managing land condition for the long term. Permitting the issuing of sub-leases for the purpose of carbon abatement on pastoral land would provide new opportunities for collaboration between pastoral leaseholders and native title holders, including Indigenous ranger teams supported by the Federal and Territory Governments, building on existing savannah burning programs currently being delivered successfully on Indigenous lands in the Territory.[46]

70. The Aboriginal Carbon Fund noted:

> there are considerable opportunities for the Territory and Territorians to benefit from the carbon farming market. This market includes both the Commonwealth funded [Emissions Reduction Fund] and the voluntary carbon market, where often projects with additional social, environmental and cultural core benefits attract a premium. AbCF [Aboriginal Carbon Fund] has developed and been involved in a number of carbon projects which deliver significant benefits for indigenous communities through the creation of jobs, use of traditional practices, transfer of knowledge and improved environmental outcomes. These projects are attractive to investors who are often looking to manage not only GHG [greenhouse gas] emission targets, but also their UN Sustainability Development Goal commitments adopted by their organisations.[47]

71. The Department acknowledged that there may be value in further consideration of non-pastoral activities on pastoral land in addition to those falling within 'primary production' under the *Native Title Act 1993* (Cwlth) (NTA):

> The current amendments in the *Pastoral Land Act* seek to align the existing sublease provisions with the allowable purposes in the *Native Title Act* and those listed in the *Pastoral Land Act* for non-pastoral use permits—forestry, aquaculture, horticulture and agriculture. We are aware, because we have spoken to as many of the submitters as we can, that has raised a number of issues around non-pastoral use, who benefits from those provisions and whether there is equity in those decisions. That is a broader question and one worthy of consideration, but not necessarily where we were going in these amendments.[48]

72. There are two difficulties with granting permits for non-pastoral activities that are not 'primary production activities' under the NTA.

73. The first difficulty is that any grant of a permit that may affect native title must comply with the NTA to be valid. The NTA provides simplified procedural requirements for primary production activities in Part 2, Division 3, Subdivision G. Permits for any other activities on native title land need a different source of validity under Commonwealth law, such as an indigenous land use agreement under the NTA.

[45] The Pew Charitable Trusts, Submission 11A, 2017, p. 3.
[46] The Pew Charitable Trusts, Submission 11A, 2017, p. 4.
[47] Aboriginal Carbon Fund, Submission 13, 2018, p. 2.
[48] Department of Environment and Natural Resources, Committee Transcript, 2 February 2018, p. 30.

74. The second difficulty is that the *Pastoral Land Act* only provides assessment processes for non-pastoral use permits for primary production or farm tourism activities in line with the simplified procedural requirements of the NTA.

Committee's Comments

75. The narrow range of prescribed non-pastoral purposes allowable for a sublease under Regulation 31 has gained considerable comment because it does not include contemporary opportunities for economic development around activities such as carbon farming. However, the Committee notes that broadening the prescribed purposes under Regulation 31 would not address the issue, as that regulation only expands the range of non-pastoral use permits that may attach to a sublease. It does not affect the range of non-pastoral permits available under the *Pastoral Land Act*.

76. While permits for such non-pastoral purposes as carbon farming fall outside the issues around subleasing the Bill seeks to address, it is nevertheless a technical irregularity that is restricting the contemporary management of the pastoral estate.

77. Submissions to the inquiry indicate there are potential economic, social and environmental benefits from opening the pastoral estate to other non-pastoral uses in addition to primary production and farm tourism.

78. The Committee considers that the government should take further legislative action to ensure that the law provides processes for considering and, where appropriate, allowing non-pastoral uses of pastoral land in addition to primary production purposes.

Recommendation 5

The Committee recommends the Government consider further legislative options to facilitate appropriate non-pastoral uses of pastoral land in addition to primary production activity, such as conservation and environmental remediation activities, and also allow such purposes under subleases.

Environmental Degradation

79. The Committee received evidence from a number of environmental organisations expressing concerns about increased potential for environmental degradation through the expansion of prescribed purposes for subleases in Regulation 31 to include horticulture, agriculture, aquaculture and forestry. A number of submitters proposed that environmental safeguards should be strengthened to protect pastoral lands. The Environment Centre NT informed the Committee:

> By granting subleases for these purposes, the Minister would facilitate large-scale conversion of relatively natural rangeland habitats to far more intensive land uses. The stated purpose of the *Pastoral Land Act* is to provide a form of tenure of Crown land that facilitates the sustainable use of land for pastoral purposes and the economic viability of the pastoral industry, and also, significantly, to

> provide for the prevention or minimisation of degradation or other damage to the land and its indigenous plant and animal life.[49]

80. These concerns were similarly raised by The Pew Charitable Trusts who stated:

> Clearing of native vegetation, infrastructure development and increased water extraction associated with these land uses has the potential to modify and degrade pastoral lands in a manner that is inconsistent with the purposes of the *Pastoral Lands Act 1992* (s.4) and the Government's commitment to protect the unique natural environment of the Territory.[50]

81. A number of organisations suggested that the changes to the prescribed purposes were premature given the legislative reviews the government is undertaking as part of the environmental regulatory reform program:

> We note and are very much involved in the government's current review of existing legislation in relation to environmental assessments and approvals, land clearing and water management and strongly recommend that the Committee carefully consider the environmental risk associated with poorly regulated intensification of land use in pastoral landscapes.
>
> We believe that it is premature and inappropriate to open the door to largescale conversion of pastoral land while these reviews are still under way. We urge the government to withdraw its proposal to permit subleases for agriculture, horticulture, forestry and aquaculture and instead we recommend that the Pastoral Land Regulations be amended to permit subleases for carbon abatement and conservation; land uses that are consistent with the purpose of the *Pastoral Land Act* and the health and productivity of our rangelands.[51]

82. The Pew Charitable Trusts made a similar recommendation to the Committee:

> To manage environmental risks associated with intensification of land use on pastoral lands, we recommend that the Territory Government: (a) remove agriculture, horticulture, forestry and aquaculture from the proposed list of prescribed purposes, pending completion of current reviews of environmental legislation; or (b) introduce clear and binding provisions in the *Pastoral Land Act* to prevent degradation of pastoral lands associated with intensification of land use.[52]

83. The Committee notes that the Bill does not increase the potential non-pastoral purposes that land under a pastoral lease may be used for. Rather, it increases the range of non-pastoral purposes for which a lessee may enter into a sublease, if they have a non-pastoral use permit for the relevant purpose.[53]

84. Consequently, the Bill does not increase the range of non-pastoral purposes allowed. However, it is expected that the Bill will lead to an increase in the incidence of non-pastoral use of land as it enables more convenient arrangements for permissible non-pastoral purposes.

85. The expected increased incidence of non-pastoral use does increase the risk of environmental damage, so the adequacy of environmental controls is a relevant concern.

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[49] Environment Centre NT, Committee Transcript, 2 February 2018, p. 25.
[50] The Pew Charitable Trusts, Submission 11A, 2017, p. 5.
[51] Environment Centre NT, Committee Transcript, 2 February 2018, p. 25.
[52] The Pew Charitable Trusts, Submission 11A, 2017, p. 5.
[53] Proposed subsection 68(5)(c) Pastoral Land Legislation Amendment Bill 2017

86. The Committee notes that subsection 38(1)(h) of the *Pastoral Land Act* states "that the lessee will not clear any pastoral land except with and in accordance with the written consent of the Board or guidelines, if any, published by the Board".[54] The *Northern Territory Pastoral Land Clearing Guidelines* require leaseholders wishing to clear land for non-pastoral purposes to submit an application to the Pastoral Land Board, with the applications advertised in the *NT News* and on the government's website.[55] The Northern Territory Environment Protection Authority (NT EPA) has published *Environmental Assessment Guidelines*:

> to assist proponents of pastoral land clearing projects and the Pastoral Land Board in determining when development proposals submitted under the *Pastoral Land Act* will not require referral for assessment under the *Environment Assessment Act*.[56]

87. The *Environmental Assessment Guidelines* provide a tool to assist the leaseholder to determine whether the application for clearing needs to referred to the NT EPA. The Pastoral Land Board will also consider whether an Environmental Impact Assessment is required under the *Environment Assessment Act*.

88. The ALEC expressed concerns that the current safeguards are insufficient, suggesting that leaseholders and the Pastoral Land Board may not have the required skills to assess the environmental impacts of land clearing:

> the current approval system does not provide sufficient and transparent oversight of applications for non-pastoral uses as it remains highly discretionary.
>
> The degree of environmental assessment that a non-pastoral use undergoes should not be entirely determined by the discretion of the lessee and the pastoral board. Lessees do not always possess the necessary capacity or capability to self-assess the impact of a non-pastoral use. Therefore, it is recommended that the amendments should include mandatory referral provisions to the NT EPA to ensure that there is consistent environmental scrutiny of applications. It is necessary to improve consistency and certainty over the management of pastoral lands by reducing the role of discretion in management decisions.[57]

89. The Committee further heard that "the challenge is that when a big development is being planned on a pastoral estate it can slip through the net and there are not any clear guidelines for the EPA to assess it."[58] The Department informed the Committee that when applications to clear land for non-pastoral use are made to the Pastoral Land Board, the "more significant ones will certainly be referred to the NT EPA".[59]

Committee's Comments

90. The Committee acknowledges the concerns raised regarding the potential for increased environmental degradation from intensification of non-pastoral activities

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[54] *Pastoral Land Act*
[55] Pastoral Land Board, *Northern Territory Pastoral Land Clearing Guidelines*, viewed on 26 February 2018, https://nt.gov.au/__data/assets/pdf_file/0003/236865/nt-pastoral-land-clearing-guidelines.pdf
[56] Northern Territory Environmental Protection Agency, *Environment Assessment Guidelines*, viewed on 26 February 2018, https://ntepa.nt.gov.au/__data/assets/pdf_file/0004/287419/guideline_assessment_land_clearing_pastoral_land.pdf
[57] Arid Lands Environment Centre, Submission No. 6, 2017, 2.
[58] Arid Lands Environment Centre, Committee Transcript, 2 February 2018, p. 26.
[59] Department of Environment and Natural Resources, Committee Transcript, 2 February 2018, p. 39.

which may require extensive land clearing. At the same time, the Committee notes that there is an environmental assessment regime in place that requires both the leaseholder and the Pastoral Land Board to consider whether the *Environmental Assessment Act* requires an application to clear land for a non-pastoral purpose be referred to the NT EPA.

91. As the Bill does not circumvent the environmental assessment system in place, and that system appears to take a reasonable approach to managing environmental risks relating to the non-pastoral use of land, the Committee does not consider that the Bill needs to be amended to make further provision for environmental assessment.

92. However, the Committee considers it important that environmental protection systems should be subject to ongoing monitoring and review to ensure they are effective, and adapt to changing land use. As previously noted, the government is reviewing existing legislation through the environmental regulatory reform program and the Committee considers that issues relating to non-pastoral use of pastoral land raised in submissions should be considered further as part of that review.

Recommendation 6

The Committee recommends that the Department of Environment and Natural Resources consider issues relating to increased non-pastoral use of pastoral land in its environmental regulatory reform program.

Protection of Sacred Sites

93. The *Northern Territory Aboriginal Sacred Sites Act* (NT) protects all sacred sites in the Northern Territory, and the Aboriginal Areas Protection Authority (AAPA) maintains records of both 'registered sacred sites', which have been entered in the Public Register of Sacred Sites, and 'recorded sacred sites', which are sites that have not yet been evaluated or formally registered, but there is information indicating they are significant according to Aboriginal tradition.[60]

94. The Pastoral Land Board's *Application for Non-Pastoral Use of Pastoral Land* form requires permit applicants to state whether there are "any sacred sites or significant sites protected under the Aboriginal Sacred Sites Act located within the proposed area for non-pastoral use".[61] The applicant is also required to supply an Abstract of Records from the AAPA which is:

> a written abstract and a map of all the known sites including both Recorded and or Registered Sites. The abstract may also contain any Restricted Works Areas (RWAs) that have been created as part of the Authority Certificate process …
>
> It is important to emphasise that requesting Information from Records is not a definitive way of determining the location of all sacred sites in a given area, particularly where use of land or sea may result in disturbance of features. There is a risk that a sacred site previously unknown to the AAPA may be identified after the commencement of works, leaving no option but to cease works under the

[60] Aboriginal Areas Protection Authority, *Request for Information of Records*, viewed on 13 February 2018, http://www.aapant.org.au/system/files/fileuploads/information_from_records2015_2016.pdf .

[61] Pastoral Land Board, *Application for Non-Pastoral Use of Pastoral Land*, viewed on 13 February 2018, https://nt.gov.au/industry/agriculture/farm-management/diversify-your-land-non-pastoral-use-permits

> provisions of the Northern Territory Aboriginal Sacred Sites Act. This is because the Act applies to all sacred sites in the NT, not just sites registered or recorded by the AAPA.[62]

95. The AAPA issues Authority Certificates to protect sacred sites from damage by consulting with custodians of the land and setting conditions on how land may be used or works carried out within the vicinity of a sacred site. It is a legal document that indemnifies the holder against prosecution for damage to sacred sites under the *Northern Territory Aboriginal Sacred Sites Act*, provided the holder complies with any conditions contained within the Authority Certificate. Applications for Authority Certificates are "voluntary and provide an effective risk management tool for developers and act as site protection measures for custodians."[63]

96. Subsection 39(b) of the *Pastoral Land Act* states that a pastoral leaseholder will "take all reasonable measures to conserve and protect features of environmental, cultural, heritage or ecological significance".[64] The AAPA provided a submission to the Committee, which was subsequently withdrawn, proposing that there should be increased safeguards for sacred sites on pastoral lands by including a specific reference to sacred sites within the *Pastoral Land Act* and mandating a requirement to apply for an Authority Certificate as part of the non-pastoral use permit application process. The Northern Land Council supported the recommendations proposed by AAPA, informing the Committee:

> The AAPA submission refers to, which the land council submits as appropriate for this Committee, to support that there would be specific reference to conserving and protecting sacred sites in the legislation. That … an applicant for a permit be compelled to have an Authority Certificate, so given the intensive nature of these developments—the Authority Certificate, as you probably know, acts as defence to a criminal charge but there is no requirement that you actually get the certificate. So, it would be a great assistance, I think, to our comfort and confidence of native title holders and Aboriginal custodians if that was a requirement, like a standard planning requirement that those certificates be obtained.[65]

Committee's Comments

97. The Committee notes that while the *Application for Non-Pastoral Use of Pastoral Land* requests a copy of the Abstract of Records to be provided to the Pastoral Land Board for consideration in issuing a non-pastoral use permit, there is no provision within the existing or proposed pastoral land legislation mandating this requirement.

98. The Committee considers that the inclusion of horticulture, forestry, aquaculture and agriculture as prescribed purposes in Regulation 31 may increase the amount of land used for non-pastoral purposes, which could lead to significant changes to the

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[62] Aboriginal Areas Protection Authority, *Request for Information*, viewed on 13 February 2018, http://www.aapant.org.au/our-services/request-information

[63] Aboriginal Areas Protection Authority, *How can development and sacred sites work together?,* viewed on 13 February 2018, http://www.aapant.org.au/sacred-sites/how-can-development-and-sacred-sites-work-together

[64] *Pastoral Land Act*

[65] Northern Land Council, Committee Transcript, 2 February 2018, pp. 22-23.

landscape. This, in turn, poses a risk to the protection of identified and unidentified sacred sites.

Recommendation 7

The Committee recommends the Government consider options to enhance the protection of sacred sites on pastoral lands.

Native Title Rights

99. A number of submissions to this inquiry stated that the Bill has insufficient regard for Aboriginal tradition and consultation with Aboriginal organisations and land councils had been inadequate, and questioned how the diversification of pastoral lands will interact with the NTA.

100. The Committee again notes that the Bill does not allow new types of non-pastoral use of land, but rather allows subleasing for non-pastoral purposes in circumstances where a permit for that non-pastoral purpose has been given. Consequently, the Bill does not directly affect the rights of native title holders. However, by providing increased options for how to undertake non-pastoral uses already allowed, the Bill is expected to facilitate increased incidents of non-pastoral use of land, which may increase the incidence of non-pastoral use of pastoral land affecting the exercise of native title rights.

101. While acknowledging that its concerns related more directly to the 2014 amendments to the *Pastoral Land Act*, the Northern Land Council expressed concern that the Bill would increase the incidence of non-pastoral primary production activity on native title land in a way that would adversely impact on native title holders.

102. In its submission the Northern Land Council noted how the *Native Title Amendment Act 1998* (Cwlth) created provisions that allowed primary production activities to be undertaken on pastoral leases without native title holders or claimants having the right to negotiate and that the "non-extinguishment principle does apply but the native title is effectively suspended without upfront compensation for the term of the primary production activity."[66] The Northern Land Council elaborated on this when providing evidence at the public hearing:

> For example, with the right to negotiate provisions that used to apply, the National Native Title Tribunal acts [as] an independent arbitral body that can determine issues. This has become what you would suppose call a minor procedural right that you get notified that X pastoralist want a non-pastoral use permit to grow opium poppies on such and such, can be rather large areas of land that, by the very nature of their development, mean you cannot exercise native title rights and interests anymore because it needs to be fenced off, there are security considerations, all sorts of things. Then, if the native title holders concerned want to be compensated for that, they have to run a court case, effectively after the event …
>
> The fact is, the non-extinguishment principle applies. At the moment you get a non-pastoral use permit that is of a 30-year term. If this amendment was to go through, it would be a registerable sublease, which is proprietary interest,

[66] Northern Land Council, Submission No. 4, 2017, p. 2.

> permanent for the period of the head pastoral lease. That effectively sterilises that area of land - which can be up to half of the pastoral lease legally under the *Native Title Act*—for many years if not decades. People then have to run an expensive court case to get compensation …
>
> Now we are left with the situation for native title holders where they have a right to get a notice and opportunity to comment—and there it goes. You can catch up with the compensation case later. That is really, in broad terms, the primary concern. With the best of intentions, some people have moved these amendments forward and see them as merely a technical land tenure exercise.[67]

103. A number of organisations suggested that further consultation with land councils and Aboriginal organisations needed to occur to consider any effect the proposed changes may have on native title rights and interests. The Department advised the Committee:

> It is really evident that the concerns from the land council that we underestimated are really around how subleases will encourage non-pastoral use and where native title holders might be in that picture. As the NLC spoke to the Committee earlier, I was able to hear some of that. We have had some discussions with them around that and the option around their desire that the *Pastoral Land Act* refers to a right to negotiate.[68]

104. The Northern Land Council advised the Committee they are seeking for "native title holders and pastoral leasers to have a say in the development and subsequent grant of any non-pastoral use permits or subleases"[69] and recommended that:

> a legal right be recognised in the *Pastoral Land Act* that will enable the co-existing native title holders on pastoral leases a substantive say and involvement in the grant of any non-pastoral use permit or sub-lease so that they can also benefit from new economic activities on their traditional lands.[70]

105. In their supplementary submission to the Committee, The Pew Charitable Trusts expressed support for the Northern Land Council's recommendation and noted:

> While the grant of a permit or sub-lease for a 'primary production activity' over a non-exclusive pastoral lease would not ordinarily trigger the right to negotiate provisions of the *Native Title Act 1993*, native title holders may be entitled to seek compensation from the Territory Government for extinguishment of their native title rights arising from the grant of the permit or sub-lease.
>
> To manage the Territory Government's native title compensation liability and provide an equitable pathway for native title holders to participate in economic development on their traditional lands, we recommend that the *Pastoral Land Act* be amended to require pastoral leaseholders to obtain the consent of relevant native title holders prior to the grant of a non-pastoral use permit or sub-lease.[71]

106. Subsection 87(2)(a) states the Pastoral Land Board must comply with the requirements of Part 2, Division 3, Subdivision G of the NTA when assessing an application for a non-pastoral use permit.

107. The Department described the process followed by the Department and the Pastoral Land Board when an application for a non-pastoral use permit is received:

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[67] Northern Land Council, Committee Transcript, 2 February 2018, p. 20.
[68] Department of Environment and Natural Resources, Committee Transcript, 2 February 2018, p. 33.
[69] Northern Land Council, Committee Transcript, 2 February 2018, p. 18.
[70] Northern Land Council, Submission No. 4, 2017, p. 2.
[71] The Pew Charitable Trusts, Submission No. 11A, 2017, p. 4.

> Currently we follow section 24GB of the *Native Title Act* when we receive a non-pastoral use application. For any non-pastoral application for horticulture, agriculture, forestry or aquaculture, we follow the processes to notify them of that.
>
> We do a search through the Native Title Tribunal to identify who the registered native title holders are. We then have a notification document that we prepare and send off to the native title holders, usually through the relevant land council. Although I know some are not represented by the Land Council so one way or another they get it. And then that is notifying them with a copy of the application of the proposal.
>
> Through the recent months and years we have identified that it would be more useful to extend the timeframe that we give the Land Councils to respond because we understand they have to go out and liaise with them. We have increased that from the four weeks we were previously giving, to now to the 60 to 90 days, taking that on board.
>
> And under 24GB of the *Native Title Act* we do not have to notify for tourism non-pastoral use purposes, but we have taken on-board that just because it says we do not have to, that that is not fair. We now also send a letter advising that we have received one and that is out of courtesy.
>
> Out of the 17 non-pastoral uses that have issued since 2014, we have had only a couple responses to those notifications. We always take those on board and submit them to the Pastoral Land Board for their consideration when they are assessing the application.[72]

108. Although recommendations to the Committee have proposed a legal right to negotiate be established for both non-pastoral use permits and subleases for prescribed purposes, the Department has advised that the notification requirements prescribed by the NTA occur during the permit application process. The Department further explained that subleases are considered commercial arrangements and the Department does not involve itself in these contract negotiations:

> Subleases are a commercial arrangement between the lessee and a third party, so we do not get involved with what that entails and what that agreement is. It is a contract between them that we do not have any say in the format or what goes on. It is really a commercial in confidence. We do not advertise it on the Internet publicly. We do not make it available.
>
> At the moment the subleases are only for pastoral or a prescribed purpose which is—we do not circulate it for government comment. If they are applying [for] a sublease for one of those primary production activities under the *Native Title Act*, they will have to have a non-pastoral use [permit] first … consultation will happen through that process before they can enter into the sublease. Any issues that may arise will be identified through that process before the Minister considers the sublease.[73]

109. The Northern Land Council expressed the view that providing a right to negotiate "is not without its legal complexity, but there are, I believe, ways forward to get Aboriginal people at the table with the pastoralists to be involved in these activities."[74] The Land Council also made it clear that there were opportunities though the non-pastoral use of land, but wished to ensure an adequate level of involvement of native title holders:

> Our position should not be taken as antagonistic towards the Northern Territory Cattlemen's Association or Territory Cattlemen in general … In fact, there is a

[72] Department of Environment and Natural Resources, Committee Transcript, 2 February 2018, pp. 36-37.
[73] Department of Environment and Natural Resources, Committee Transcript, 2 February 2018, p. 38.
[74] Northern Land Council, Committee Transcript, 2 February 2018, p. 21.

> long history of the land councils working with the NTCA around the Indigenous Pastoral Program to create jobs on the pastoral estate …
>
> What we are seeking is for native title holders and pastoral leasers to have a say in the development and subsequent grant of any non-pastoral use permits or subleases.[75]

110. When questioned about exploring how a right to negotiate could be incorporated, the Department advised the Committee "that would be something we would need to have a much more considered look at. There are two issues; is it legally possible and is it policy government wants to pursue?"[76]

Committee's Comments

111. The Committee notes that the permitting forestry, agriculture, horticulture and aquaculture under a sublease has the potential to increase non-pastoral use of pastoral land, which may affect the exercise of the rights of native title holders.

112. The Committee further notes the Northern Land Council's view that the minimum procedural requirements under the NTA that apply to the granting of permits for non-pastoral primary production purposes on pastoral land do not allow for sufficient consideration of the rights of native title holders before such permits may be granted.

113. The Committee considers that the processes for effectively managing co-existing rights and interests of native title owners and leaseholders when considering permitting non-pastoral uses should be given further consideration.

Recommendation 8

The Committee recommends the Government consider options for better protecting the rights of native title holders, such as through a right to negotiate, when consideration is being given to granting permits for non-pastoral uses to leaseholders under the *Pastoral Land Act*.

Pastoral Land Board Composition

114. The *Pastoral Land Act* requires the Minister to appoint five members to the Pastoral Land Board and the proposed amendments to section 12 will allow for at least five members to be appointed. In respect to the composition of the Board, the Department advised the Committee:

> the Act specifies out of the five currently allowed, two must be pastoralists. We are looking to increase that so we can have a more diverse representation on the Board. Five is a bit limiting because we have to have a quorum of four. Due to the vast spread of members, if we have trouble with technology, they have to rush off to birth a cow or fix a bore, or someone is sick, then we cannot meet our quorum. So, we are looking to increase that membership, then we can certainly look at having representation from other groups that can bring their expertise and knowledge to the table.[77]

[75] Northern Land Council, Committee Transcript, 2 February 2018, p. 19.
[76] Department of Environment and Natural Resources, Committee Transcript, 2 February 2018, p. 34.
[77] Department of Environment and Natural Resources, Committee Transcript, 2 February 2018, p. 35.

115. In addition to requiring two Board members to have pastoral experience, the *Pastoral Land Act* requires "as far as practicable, the members collectively have expertise or experience that, in the opinion of the Minister, is relevant to their role as members."[78]

116. The Northern Land Council recommended the government mandate the appointment of an Aboriginal person to the Board:

> We are also seeking to ensure that Indigenous interests are taken into consideration in the deliberation of the Pastoral Land Board by suggesting that there be a specific position created on the Pastoral Land Board for Indigenous people.[79]

117. The Northern Land Council further stated that the appointee should have a comprehensive understanding of native title rights, interests and associated legislation:

> I think that there could be benefit in having an Aboriginal person that is across these matters on the Pastoral Land Board, and given the native title rights and interest and the determinations that are taking place, particularly in our region, there is substantial Indigenous interest on a pastoral estate.[80]

Committee's Comments

118. The Committee understands that one of the five current Board members is an Aboriginal pastoralist. The Committee is of the view that there is merit in expanding the composition of the Board to increase diversity and experience in key areas. The Committee considers that the Minister should call for public nominations and Board appointments made by the Minister should ensure appropriate diversity, and also experience in and understanding of native title interests and Aboriginal cultural heritage and traditions in the Northern Territory.

Recommendation 9

The Committee recommends the Minister consider diversity, and experience in and understanding of native title interests and Aboriginal cultural heritage and traditions in the Northern Territory when appointing members to the Pastoral Land Board.

[78] Section 12, *Pastoral Land Act*
[79] Northern Land Council, Committee Transcript, 2 February 2018, p. 18.
[80] Northern Land Council, Committee Transcript, 2 February 2018, p. 21.

Appendix A: Submissions Received and Public Hearings

Submissions Received

1. Gilnockie Station
1A. Gilnockie Station
1B. Gilnockie Station
2. Katherine Mining Services Association
3. North Australian Rural Management Consultants
4. Northern Land Council
5. Northern Territory Pastoral Land Board
6. Arid Land Environment Centre
7. Aboriginal Areas Protection Authority – submission withdrawn
8. Northern Territory Cattlemen's Association
9. Sturt Plateau Best Practice Group
10. Consolidated Pastoral Company
11. The Pew Charitable Trusts and Environment Centre Northern Territory
11A. The Pew Charitable Trusts
12. Herron Todd White (Northern Territory) Pty Ltd
12A. Herron Todd White (Northern Territory Pty Ltd
13. Aboriginal Carbon Fund

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- Mr John Armstrong: Gilnockie Station
  Mrs Helen Armstrong: Gilnockie Station

- Mr Paul Burke: Chief Executive Officer, Northern Territory Cattlemen's Association
  Mr Tom Ryan: Executive Officer, Northern Territory Cattlemen's Association
  Mr Troy Setter: Chief Executive Officer, Consolidated Pastoral Company

- Mr Geoff Crowhurst: President, Katherine Mining Services Association
  Ms Teresa Cummings: Corporate Manager, North Australia Rural Management Consultants (via telephone)
  Mr John Jansen: Director, North Australia Rural Management Consultants (via telephone)

- Mr Frank Peacocke: Director, Herron Todd White (Northern Territory) Pty Ltd

- Mr Joe Morrison: Chief Executive Officer, Northern Land Council
  Mr Michael O'Donnell: Principal Legal Officer, Northern Land Council

- Mr Mitch Hart: Northern Territory Manager - Outback to Oceans, The Pew Charitable Trusts
  Mr Pepe Clarke: Deputy Director (Terrestrial), The Pew Charitable Trusts
  Ms Shar Molloy: Director, Environment Centre NT

Mr Jimmy Cocking: Chief Executive Officer, Arid Lands Environment Centre
Mr Alex Read: Policy Officer, Arid Lands Environment Centre

- Ms Joanne Townsend: Chief Executive Officer, Department of Environment and Natural Resources
  Ms Tania Moloney: Director, Pastoral Lease Administration & Board, Department of Environment and Natural Resources
  Mr Luis Da Rocha: Acting Executive Director, Rangelands Division, Department of Environment and Natural Resources

Note: Copies of submissions, hearing transcripts and tabled papers are available at: https://parliament.nt.gov.au/committees/EPSC/LPP

Bibliography

Aboriginal Areas Protection Authority, *Request for Information of Records*, viewed on 13 February 2018, http://www.aapant.org.au/system/files/fileuploads/information_from_records2015_2016.pdf

Aboriginal Areas Protection Authority, *Request for Information*, viewed on 13 February 2018, http://www.aapant.org.au/our-services/request-information

Aboriginal Areas Protection Authority, *How can development and sacred sites work together?,* viewed on 13 February 2018, http://www.aapant.org.au/sacred-sites/how-can-development-and-sacred-sites-work-together

Explanatory Statement, Pastoral Land Legislation Amendment Bill 2017 (Serial 34), https://parliament.nt.gov.au/committees/EPSC/LPP

Moss, L, (Minister for Environment and Natural Resources), Pastoral Land Legislation Amendment Bill 2017 (Serial 34), Explanatory Speech, Northern Territory Legislative Assembly, 18 October 2017.

Native Title Act 1993 (Cwlth)

Northern Territory Environmental Protection Agency, *Environment Assessment Guidelines*, viewed on 26 February 2018, https://ntepa.nt.gov.au/__data/assets/pdf_file/0004/287419/guideline_assessment_land_clearing_pastoral_land.pdf

Pastoral Land Board, *Application for Non-Pastoral Use of Pastoral Land*, viewed on 13 February 2018, https://nt.gov.au/industry/agriculture/farm-management/diversify-your-land-non-pastoral-use-permits

Pastoral Land Board, *Northern Territory Pastoral Land Clearing Guidelines*, viewed on 26 February 2018, https://nt.gov.au/__data/assets/pdf_file/0003/236865/nt-pastoral-land-clearing-guidelines.pdf

Pastoral Land Act (NT)

Pastoral Land Legislation Amendment Bill 2017 (Serial 34) https://parliament.nt.gov.au/committees/EPSC/LPP