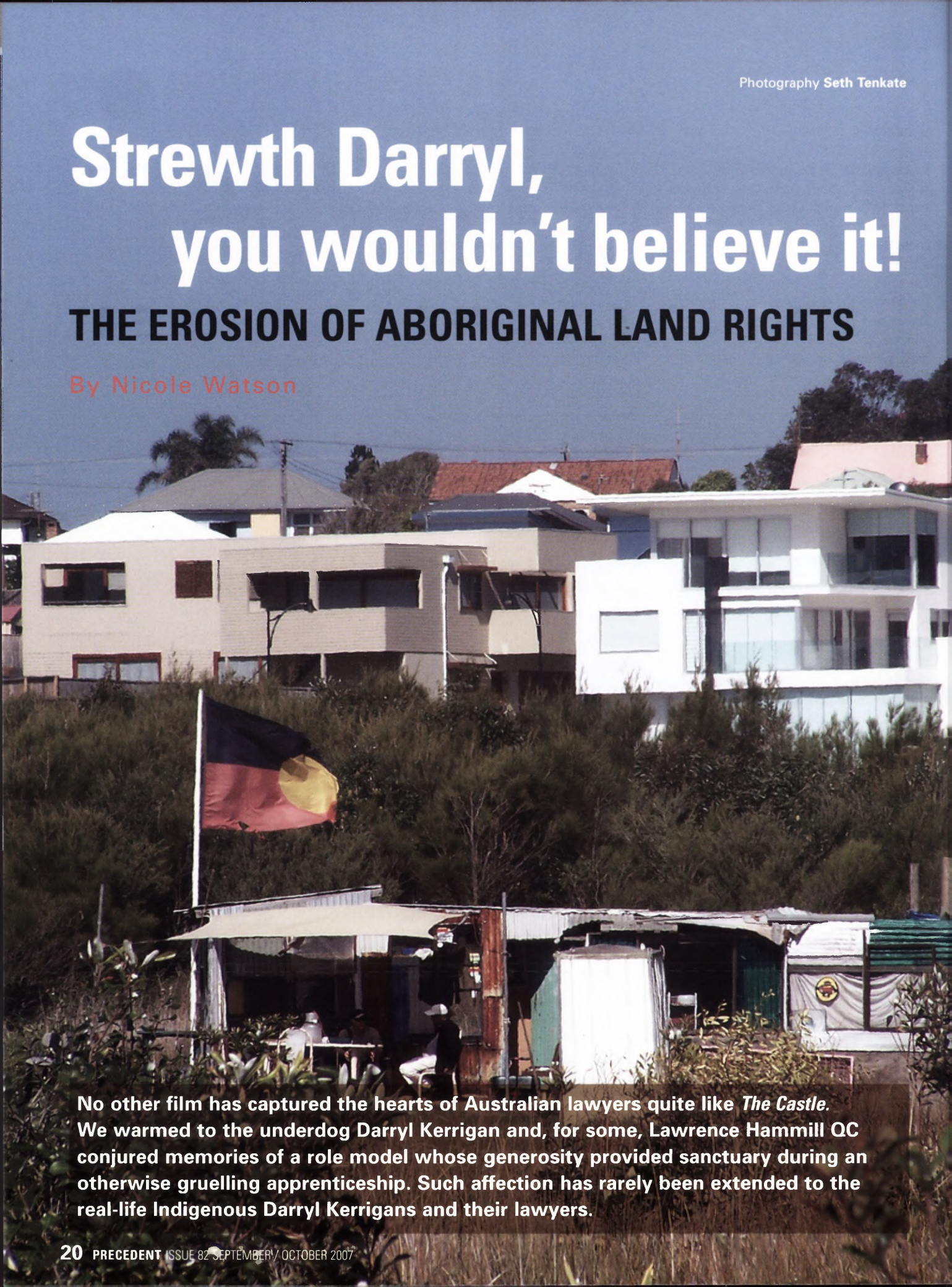
Photography **Seth Tenkate**

Strewth Darryl, you wouldn't believe it!

THE EROSION OF ABORIGINAL LAND RIGHTS

By Nicole Watson



No other film has captured the hearts of Australian lawyers quite like *The Castle*. We warmed to the underdog Darryl Kerrigan and, for some, Lawrence Hammill QC conjured memories of a role model whose generosity provided sanctuary during an otherwise gruelling apprenticeship. Such affection has rarely been extended to the real-life Indigenous Darryl Kerrigans and their lawyers.

Like Darryl, Eddie Mabo was a blue-collar worker, whose passion for his castle probably would have earned him an invitation to Bonnie Doon. However, Mabo's victory was so much more impressive than the Kerrigans' – he took on a government that made Airlink look angelic, and his lawyers had even fewer resources than the bumbling Denis Denuto. Unlike *The Castle*, where justice was achieved in a matter of minutes, Mabo and his lawyers battled against Goliath for ten years before finally succeeding in the High Court.

The reality that so many of us are charmed by fictitious characters, yet feel removed from such real-life heroics, helps to explain why native title and land rights have been eroded in recent years, with little dissent from the legal profession. Unless one works for a land council or an Aboriginal legal service, such matters are considered largely irrelevant to everyday practice and, in a hectic world where long hours are the norm, who has the time?

But this approach ignores the very real impacts that such injustices have on the profession. When governments acquire private property from the most marginalised Australians by stealth, they should be censured. But a legal fraternity that does little to condemn such wrongs is deserving of even greater censure.

THE WINDING BACK OF ABORIGINAL LAND RIGHTS IN THE NORTHERN TERRITORY

The sight of Gough Whitlam pouring dirt into the hands of the Gurindji leader, Vincent Lingiari, is one of the defining images of the 1970s. Its timelessness is appropriate, given the importance of the Gurindji strike to the modern land rights movement.[1] Spanning over seven years, the strike forced the issue of Indigenous dispossession into the public consciousness. This flourishing political movement provided the background for the Whitlam government's promise of national land rights legislation, which began in earnest with the appointment of Sir Edward Woodward to the first commission of inquiry into Aboriginal land rights. The *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) (ALRA) was the culmination of Woodward's two reports.[2] Although this Act would result in almost half of the Northern Territory being returned to Indigenous ownership, national land rights legislation would never become a reality.

ALRA made provision for the transfer of Aboriginal reserves to Land Trusts and established a process for land claims to be determined by an Aboriginal Land Commissioner. Title to Aboriginal land is freehold and held communally. In addition to creating the machinery for gaining title to traditional lands, Woodward also made provision for control of access:

> 'One of the most important proofs of genuine Aboriginal ownership of land will be the right to exclude from it those who are not welcome. The Land Councils believe that this principle should be supported by a permit system and I agree with them.'[3]

By now, few would be unfamiliar with the federal government's interventions to address child sexual abuse in Indigenous communities in the Northern Territory, including proposals to acquire five-year leases over

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Aboriginal townships and the winding back of the permit system.[4] The measures were a response to the report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse.[5] However, neither land tenure nor the permit system featured in the report's recommendations. Whether there is any nexus at all between land and child sexual abuse remains a vexed question. What is clear, however, is that the Howard government has long harboured a desire to seize the rights of Indigenous freeholders in the Northern Territory.

THE HOWARD GOVERNMENT'S TRACK RECORD

One of the most memorable phrases from the divisive Wik debate was Tim Fisher's promise of 'bucket loads of extinguishment'. It not only symbolised the Coalition's >>

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contempt for native title, but was also an omen that extended beyond the provisions of the *Native Title Amendment Act* 1998 (Cth). In 1997, John Reeves QC was appointed to review ALRA. Reeves argued for the abolition of the permit system because, in his opinion, it impeded economic development and lacked the support of the majority of Aboriginal people in the Northern Territory.[6]

However, his approach was strongly resisted by Aboriginal communities, and was rejected by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HORSCATIA).[7] Recognising the importance of Indigenous self-determination, the Committee's first recommendation was that:

> 'The *Aboriginal Land Rights (Northern Territory) Act* 1976 (the Act) not be amended without:
> - Traditional Aboriginal owners in the Northern Territory first understanding the nature and purpose of any amendments and as a group giving their consent; and
> - Any Aboriginal communities or groups that may be affected having been consulted and given adequate opportunity to express their views.'[8]

The Howard government has never formally responded to the HORSCATIA report, precluding any robust debate of its recommendations. This stymieing of public scrutiny has been mirrored by recent developments. In August last year, the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 was passed into law. Arguably, the most controversial aspect of the reforms was the introduction of a scheme for 99-year headleases over Aboriginal townships.[9] Traditional owners now have the option of granting 99-year leases to a new government entity that will be responsible for negotiating sub-leases. However, the government entity will be under no obligation to obtain the consent of traditional owners when granting sub-leases.[10] Despite numerous question marks over the 99-year leases, there was no public consultation program. Even though the Bill was the subject of an inquiry by the Senate Community Affairs Committee, its timeframe was so tight that the Committee's only public hearing lasted for one day.[11]

The prime minister recently envisaged further amendments to ALRA to facilitate Commonwealth control over Aboriginal townships. Judging by the Howard government's track record, it is doubtful that Aboriginal people in the Northern Territory will be adequately consulted.

CONCLUSION

Many, including the Law Council, have voiced their concerns over recent developments, but the entire profession should be vigilant. I struggle to imagine how I would feel if, without any consultation, the government decided that my home was going to be acquired because there had been unproven allegations of child sexual abuse in a home down the street. Most will have the luxury of knowing that this will never happen to them, but the reality that such an injustice is apparently sanctioned by our legal system diminishes all of us.

My favourite scene in *The Castle* is an exchange between Darryl and Sal Kerrigan after their defeat in the Federal Court. Packing things into boxes in his beloved pool room, Darryl says:

> 'I'm really starting to understand how the Aborigines feel … Well, this house is like their land. It holds their memories. The land is their story. It's everything. You just can't pick it up and plonk it somewhere else. This country's got to stop stealing other people's land.'

If a fictitious tow-truck driver can place himself into the shoes of Indigenous people, then members of the legal profession can surely do so. ■

ADDENDUM

On 17 August 2007, the Commonwealth Parliament passed a legislative package that will implement the so-called 'emergency intervention' in the Northern Territory, including the compulsory acquisition of Aboriginal lands and the dismantling of the permit system. The five Acts were passed after a Senate Inquiry that lasted for a mere day. Although a delegation of Aboriginal leaders from the Northern Territory was in Canberra as the legislation was being debated, their calls for meaningful consultation were ignored. It is sadly ironic that this blatant attack on the human rights of Aboriginal people occurred only days before the anniversary of the Gurindji strike.

Notes: **1** For further discussion about the Gurindji strike, see M Hokari, 'From Wattie Creek to Wattie Creek: An Oral Historical Approach to the Gurindji Walk-Off' (2000) 24 *Aboriginal History* 98. **2** AE Woodward, Aboriginal Land Rights Commission, *First Report* (1973); AE Woodward, Aboriginal Land Rights Commission, *Second Report* (1974). **3** AE Woodward, Aboriginal Land Rights Commission, *Second Report* (1974) 18. **4** Interview with the Hon John Howard, Prime Minister and the Hon Mal Brough, Minister for Families, Community Services and Indigenous Affairs (Canberra, 22 June 2007) http://www.pm.gov.au/media/Interview/2007/Interview24380.cfm at 25 June 2007. **5** Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children Are Sacred* (2007). **6** John Reeves QC, *Building on Land Rights for the Next Generation: The Review of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* (1998). **7** Standing Committee on Aboriginal and Torres Strait Islander Affairs, House of Representatives, *Unlocking the Future: The Report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* (1999). **8** *Ibid*, xvii. **9** *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s19A. **10** *Ibid*, s19A(14). **11** The Committee's report is available at: http://www.aph.gov.au/Senate/committee/clac_ctte/aborig_land_rights/report/index.htm.

Nicole Watson *is a research fellow at the Jumbunna House of Indigenous Learning, University of Technology, Sydney.*
PHONE *(02) 9514 9711* **EMAIL** *Nicole.Watson@uts.edu.au*