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# Land Rights at Risk? Evaluations of the Reeves Report

Edited by J.C. Altman, F. Morphy  
and T. Rowse

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NO. 14



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Evaluations of  
the Reeves Report

Edited by

J.C. Altman, F. Morphy and T. Rowse

Centre for Aboriginal Economic Policy Research  
The Australian National University, Canberra

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# Contents

Preface	v
List of abbreviations	ix
Introduction Tim Rowse	1
<b>1.</b> The Reeves Report as public policy Brian Galligan	11
<b>2.</b> Reeves in the context of the history of land rights legislation: anthropological aspects Nicolas Peterson	25
<b>3.</b> The Reeves Report and the idea of the 'region' Howard Morphy	33
<b>4.</b> The Reeves Report and the idea of the 'community' Peter Sutton	39
<b>5.</b> The nature of 'permission' Nancy Williams	53
<b>6.</b> Legal issues in implementation of the Reeves Report Ernst Willheim	65
<b>7.</b> Statehood, land rights and Aboriginal law Garth Nettheim	89
<b>8.</b> The social, cultural and economic costs and benefits of land rights: an assessment of the Reeves analysis John Taylor	99
<b>9.</b> The proposed restructure of the financial framework of the Land Rights Act: a critique of Reeves Jon Altman	109
<b>10.</b> Local organisations and the purpose of money Robert Levitus	123

<b>11.</b> Delays and uncertainties in the negotiations for mining on Aboriginal land John Quiggin	131
<b>12.</b> Smaller land councils: value for money? David Pollack	141
<b>13.</b> The Reeves Report's assumptions on regionalism and socioeconomic advancement David Martin	155
<b>14.</b> Municipalising land councils: land rights and local governance Martin Mowbray	167
<b>15.</b> The Reeves Review and the prospects of a Northern Territory 'partnership' Tim Rowse	181
<b>16.</b> Land rights at risk Ian Viner	187
Contributing authors	195
Index	198

# Preface

*Building on Land Rights for the Next Generation: Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976* was completed in August 1998, and became publicly available in September. Now commonly called the Reeves Review or the Reeves Report, after its author, John Reeves QC, it is the product of an expansive (and expensive) review of the federal Land Rights Act that began in October 1997. The main report is 617 pages and a second volume of appendices is 413 pages. It contains many controversial recommendations that, if implemented, would fundamentally change the nature and functioning of land rights legislation in the Northern Territory. There has been a strong and broadly negative reaction by indigenous stakeholders to the review's public policy and constitutional recommendations.

The controversial nature of the Reeves Review has been recognised by the Federal Government. In January 1999 the Minister for Aboriginal and Torres Strait Islander Affairs formally instructed the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs to undertake an inquiry into the Reeves Review. It is anticipated that the Standing Committee will complete its deliberations by late August 1999.

The two-day conference, 'Evaluating the Reeves Report: Cross-Disciplinary Perspectives', on which this monograph is closely based, was jointly convened by the Department of Archaeology and Anthropology and the Centre for Aboriginal Economic Policy Research (CAEPR) at The Australian National University. The conference was held on 26 and 27 March 1999.

The impetus for organising this conference came from two quite different directions. Grave concern was openly expressed at the annual Australian Anthropological Society conference, held in Canberra from 1 to 3 October 1998, about the quality of the anthropological research undertaken by the Reeves Review and presented in the report. A number of anthropologists whose research had been cited by Reeves were also concerned that their research had been selectively quoted, misinterpreted and misunderstood. Consequently, at its annual general meeting on 2 October 1998 the society decided to develop a formal submission to government critiquing this research. This critique, which was prepared by Peter Sutton, has now been tendered as early evidence to the Standing Committee Inquiry (Submission No. 2, S3–S48, Submission volume 1).

The impetus also came from public policy research more generally. CAEPR was involved in undertaking research for the Reeves Review on financial aspects of land rights legislation in the Northern Territory. It also undertook desk-based research for the Northern Land Council that formed a part of the council's submission to the Reeves Review. A great deal of CAEPR's published research on the socioeconomic status of indigenous people in the Northern Territory had been used by Reeves but, like some anthropologists, CAEPR academics felt that much of this had been selectively and inaccurately used.

CAEPR had offered to convene a workshop for the Reeves Review in early 1998 to canvass academic perspectives on the Land Rights Act. This suggestion was initially embraced enthusiastically by both John Reeves and the two major land councils. But it did not proceed, primarily because of financial constraints. With the benefit of hindsight, such a workshop might have proved extremely cost-effective. As a university-based research centre focused on indigenous policy issues, CAEPR realised that the aftermath of the Reeves Review and the Standing Committee Inquiry into the Reeves Report would be a key component of its research agenda in 1999.

A convergence of these two sets of interests resulted in the convening of a conference early in 1999. As organisers, we felt that there was a need for open and independent evaluation and debate of the Reeves Report from a diversity of disciplinary perspectives, not just anthropology. We also believed that, given the complexity of the Land Rights Act and the considerable size of the Reeves Report, a two-day conference would assist all participants to disassemble and more fully understand the interrelationships between the report's numerous, and at times quite unexpected and controversial, recommendations for change. The conference also afforded an opportunity to gather together a critical mass of indigenous stakeholders, academics, professionals, bureaucrats, and staff of Aboriginal organisations to discuss and debate the Reeves Report. And finally, it afforded participants the opportunity to lay the groundwork for independent submissions to the Standing Committee Inquiry.

The conference was widely advertised and open to the public. It was attended by well over 100 participants, many travelling especially to Canberra from the Northern Territory. We were extremely pleased that we were able to sponsor the participation of Mr John Reeves QC, the head of the review, his senior economic adviser, Emeritus Professor Richard Blandy, and his senior anthropological adviser, Dr John Avery (collectively referred to on a number of occasions during the conference as the Reeves or Review Team).

It is noteworthy that some interests were not represented, at least formally, at the conference, despite the conveners' best efforts. We were unable to persuade the Northern Territory Government and the Minerals Council of Australia to provide their perspectives. Indeed, the Department of the Chief Minister was somewhat dismissive, stating that a Northern Territory government representative would not be attending and adding, 'No doubt the Chair of the session, Mr Viner, with his intelligent, profound and objective understanding of all aspects of the Territory Government and the Land Rights Act will be able to fill the void'. He did so admirably. Nor did the Groote Eylandt-based Anindiyakwa Land Council choose to participate.

As conveners of the conference and editors of this monograph, it is our great pleasure to thank a number of individuals and organisations whose contributions ensured that the conference was a success and that this monograph has been completed for publication extremely quickly. First and foremost, we would like to thank all the paper-givers for their efforts in providing high-quality and thoughtful papers for the conference. The authors whose papers are included in the volume also demonstrated great commitment and professionalism in finalising papers for publication to a strict deadline.

The volume does not reflect the important contributions made by session chairs at the conference in ensuring timeliness of presentations and, more importantly, in leading discussions, providing summary statements and, in some cases, providing written comments on individual papers. We would like to thank Robert Blowes, Kingsley Palmer, Nic Peterson, Diane Smith, John Taylor, David Trigger and Ian Viner for their sterling efforts.

It is all too easy to overlook the work involved in convening a conference of this size at short notice. Important advice on potential speakers was provided to us, as conveners, by Julie Finlayson and others listed above. We would like to especially thank staff of the two sponsoring organisations, the Department of Archaeology and Anthropology and CAEPR, especially Sue Fraser from the former and Ilona Crabb and Deborah Mitchell from the latter, for their assistance. We also thank Louise Hamby and Lori Sciusco for their administrative efforts during the conference and Kerry-Anne Walsh for media management.

Considerable effort is involved in transforming stylistically disparate conference papers to a monograph in a timely fashion. We would like to thank the Green Words & Images production team of Trish Boekel (copy-editing), Sally Cracknell (design) and Olga Howell (indexing) for their willingness to meet a very tight production schedule. We are not quite sure who to thank for the existence of electronic means of communication, but that too has played a part in allowing the rapid production of this volume. Finally, we would like to thank the Aboriginal and Torres Strait Islander Commission (ATSIC) for their financial assistance in convening the conference.

And now to the volume itself. As editors, we decided to emphasise the conference's interdisciplinary focus, and the 16 papers presented here represent a broad cross-section of disciplines from the social sciences and humanities, including social anthropology, political science, law, economics, public policy, geography and social work. The papers published here accurately reflect the presentations as made, but present the authors' arguments in more detail than was possible at the conference, where presentation time was strictly limited to 20 minutes per paper.

We decided not to include stakeholder responses to the Reeves Report in this monograph, believing that there are other more appropriate options for disseminating these perspectives. However, we would like to stress that the indigenous voice, as articulated in formal presentations by John Ah Kit (speaking as both an Opposition MLA and an Aboriginal person), by ATSIC Commissioner, Josie Crawshaw, by John Hicks and Marius Puruntatameri from the Tiwi Land Council, by Francine McCarthy, Alison Anderson and Max Stuart from the Central Land Council, and by Jeff Stead on behalf of the Northern Land Council, was present, and extremely powerful.

The monograph's title, *Land Rights at Risk?*, is neither a cosmetic change nor a marketing ploy: it clearly reflects the majority sentiment of the conference participants. We would like to signal clearly to readers of this volume both its aims and its limitations.

This monograph is, first and foremost, an evaluation of the Reeves Report from a variety of perspectives. We decided to publish it for two reasons. First, it is a contribution to the continuing debate about possible reforms of the Land Rights Act, and is designed to inform that debate. Only a limited number of people were able to attend the conference. The rapid production of this monograph allows the dissemination of the conference findings to a much wider audience, including stakeholders, policy-makers and governments, while the Standing Committee Inquiry is under way. Our second major reason for publication is to place on the public record concerns, from a number of disciplinary perspectives, about the unworkability of the Reeves recommendations and likely costs that would result if they were implemented.

Discussions about amending the Land Rights Act are likely to continue for a considerable time; the papers presented in this volume capture one important phase in this ongoing process. They focus on evaluating the Reeves Report rather than on spelling out alternative proposals for reform. Arguably, it is now incumbent on contributors to this volume, among others, to take the next step and advise policy-makers, perhaps initially via the House of Representatives Standing Committee Inquiry, how the Land Rights Act might be reformed.

The papers in this volume do not represent directly the views of all stakeholders, particularly the views of Aboriginal people in the Northern Territory whose lives are most directly affected by land rights and who are most vulnerable to adverse changes in land rights. But we hope that those stakeholders will find this volume a useful tool in preparing their own responses to the Reeves Report.

One of the key messages in this volume is that if the Land Rights Act is to be amended – and no contributor argues that it is perfect statute – proposals for change must be based on further research, debate, canvassing of options and full consultation with all stakeholders. All papers presented here raise legitimate and serious concerns. The challenge now for policy-makers, starting with the House of Representatives Standing Committee, is to make recommendations for law reform that constitute good public policy. It is our hope that this volume makes an initial contribution to that process.

Jon Altman  
Frances Morphy  
Tim Rowse

Canberra  
April 1999

# List of abbreviations

ABR	Aboriginals Benefit Reserve
ABTA	Aboriginals Benefit Trust Account
ABTF	Aborigines (Benefits from Mining) Trust Fund
ALRA	<i>Aboriginal Land Rights (Northern Territory) Act 1976</i> (Cth)
ATSIC	Aboriginal and Torres Strait Islander Commission
CAEPR	Centre for Aboriginal Economic Policy Research, The Australian National University
CERD	United Nations Committee on the Elimination of Racial Discrimination
CLC	Central Land Council
CLP	Country Liberal Party (Northern Territory)
CLR	Commonwealth Law Reports
Cth	Commonwealth
FLR	Federal Law Reports
FCA	Federal Court of Australia
HREOC	Human Rights and Equal Opportunities Commission
IRR	Internal rate of return
Land Rights Act (the)	<i>Aboriginal Land Rights (Northern Territory) Act 1976</i> (Cth)
NLC	Northern Land Council
NPV	Net present value
NSW	New South Wales
NT	Northern Territory
NTAC	Northern Territory Aboriginal Council
Qld	Queensland
RDA	<i>Racial Discrimination Act 1975</i> (Cth)
Reeves Report, the	Reeves, J. 1998. <i>Building on Land Rights for the Next Generation: Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976</i>
RLC	regional land council



# Introduction

## **Tim Rowse**

The Reeves Report attempts to set new goals for the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act). Though it was appropriate for the Act to make the securing of Aboriginal land tenure a priority, Reeves concedes, it is now necessary to amend the statute to ensure that Aboriginal land contributes more to the well-being of Northern Territory Aborigines and to a harmonious political climate in the Northern Territory. Reeves recommends a range of reforms, including a new regionalised structure of representative and service delivery institutions, changed institutional accountability for the use of income derived from Aboriginal land, the abolition of the permit system, and enhanced powers for the Northern Territory Government over Aboriginal land. In this introduction I will highlight some themes of the debate stimulated by Reeves's recommendations: the relationship between land and economic well-being; the prospects of regionalism; and the relevance of anthropology to public policy.

## **Land and Aboriginal well-being**

Critics of Reeves's economic vision for the Land Rights Act have questioned not only his understanding of Aboriginal welfare but the rationality of his proposals to enhance it.

In John Taylor's opinion, Reeves's assessment of the Act's contribution to the socio-economic status of Aborigines is flawed. Without baseline data (c. mid-1970s) he cannot compare before 'land rights' with after. As well, some of the Aboriginal land mass has only recently been placed under Aboriginal title, yet Reeves fails to discuss how long such title should be held before it can reasonably be expected to yield socioeconomic benefit. Reeves also neglects the contribution made by factors other than the Land Rights Act to Aborigines' comparatively low socioeconomic status – for example, poor performance by other public agencies and the uncommercial qualities of the land itself.

A wider point made by Taylor is that Reeves does not reflect on the cultural limits of his measures of Aboriginal well-being, nor does he concede the specificity of indigenous goals. Reeves does not weigh up the benefits of land title (such as informal economic activity, cultural autonomy) against the costs associated with the enjoyment of such benefits (low formation of human capital). Aboriginal land owners, argues Taylor, are engaged in trade-offs whose complexity is obscured by the phrase 'locational disadvantage.' Taylor reformulates the lifestyle choices facilitated by land rights as a search for 'the spatial optimum in a locational trade-off which is aimed at balancing a range of cultural, economic, social and political considerations.'

Robert Levitus also raises the problem of defining and assessing Aboriginal welfare. Has Reeves considered the ways that waged work may erode personal autonomy? What significance has he attached to Aborigines' regional sociability through their ceremonial and sporting gatherings? Does he give any weight to remote Aborigines' contribution to

sustainable land management (a contribution acknowledged in the Howard Government's Indigenous Protected Areas Program)?

Even if Reeves's critics set to one side his failure to consider the problems of defining and measuring Aboriginal well-being, they are sceptical of his wish to (in Ian Viner's words) 'clear the decks for new social and economic engineering'. A theme of Brian Galligan's critique is that Reeves's economic vision for Aborigines is self-contradictory. On the one hand, seeing little economic potential in Aboriginal land, Reeves commends the development of human capital as the better route to indigenous economic advancement. This appears to be his rationale for new institutions of governance – the regional land councils and the Northern Territory Aboriginal Council (NTAC) – to replace the current land councils and royalty associations. However, Reeves is unable to show how these institutions will better enable Aborigines to adopt as their main economic strategy the development of their human capital. The business of these new institutions would still be 'mixing the usual ingredients of Aboriginal land, Aboriginal culture and outside funds and assistance', writes Galligan. Reeves invites us to believe that the 18 proposed regional land councils will be more responsive to Aboriginal opinion than the existing land councils. However, what is the content of such opinion when it comes to land use and other economic advancement options? Reeves does not say, and so his hope that the new institutions will be better than the existing land councils at developing strategies for social and economic improvement remains simply that – a hope. Indeed, Galligan suggests that 'the economic disadvantages of being land-based in tiny communities scattered over enormous tracts of marginal land would be exacerbated by such an extreme diffusion of political and administrative power' as the regional land councils would impose.

Levitus also finds it difficult to believe that the proposed institutions of indigenous governance would adopt the economic strategies favoured by Reeves. Regional land councils would bid for funds from NTAC for economic and social development. Levitus draws on western Arnhem Land experiences to predict that the regional land councils would be likely to distribute the moneys from NTAC in ways that would defeat Reeves's vision of Aboriginal advancement. Aboriginal perceptions of entitlement to negotiated royalties and to mining royalty equivalents have emphasised such factors as customary ownership and compensation to proximate residents. To the extent that such considerations are influential in regional land councils, the councils' income from NTAC grants would be less likely to be invested in projects yielding long-term collective income. While it may be said in Reeves's defence that NTAC, in his proposal, would also distribute monies that are not derived from mining on Aboriginal land, the point remains that his institutional design takes no account of the likely persistence and local political effectiveness of such indigenous notions of entitlement.

Indeed, such indigenous notions of entitlement may become relevant to the politics of allocating the local use of *all* NTAC grants, not just those NTAC funds derived from mining on Aboriginal land. Reeves wishes to erode the distinction – clear in the present legislative and policy regime – between moneys paid to owners and to others living near a mining venture and moneys disbursed to fund the essential services (health, education) of the region as a whole and to address the region's socioeconomic disadvantage. The erosion of

the distinction between mining money for particular people and government money for all – a predictable effect of NTAC being the distributor of all finance to Aboriginal councils – may subject all moneys received by regional land councils to a local politics of ‘entitlement’ previously associated only with negotiated royalties and statutory royalty equivalents. Howard Morphy argues that policy should retain the distinction between money derived from land (which should remain within the domain of the land councils and the royalty associations) and money which could be allocated to ‘regional Aboriginal bodies’ for service provision to local residents. This difference in ways of handling money, he points out, accords with a customary distinction between land ownership and land use.

Jon Altman foresees another pernicious consequence of Reeves’s effort to remove the institutional distinction between money from mining and money from the government. Why would Aboriginal owners put up with mining on their land if all the royalties and ‘areas affected’ moneys go to NTAC and if such money comes back to them only if NTAC thinks they have established their need for it? The effect of Reeves’s reforms, suggests Altman, would be to reduce the incentive for Aborigines to cooperate with one of the few commercially productive uses of their land.

The Aboriginal incentive to cooperate with mining is clearly a concern of the Reeves Report, yet Reeves’s hostility to the ways that the current Land Rights Act privileges owners’ entitlement to returns has prevented him from grasping an opportunity to improve dealings between miners and Aboriginal owners. The reform which Reeves has overlooked is advocated by John Quiggin: vest full ownership of minerals in the Aboriginal land owners. Quiggin’s proposal arises from his consideration of Reeves’s thoughts on the costs imposed by uncertainty and delays in the negotiation of miners’ access to Aboriginal land. Quiggin distinguishes between the cost imposed by delay and the cost imposed by uncertainty. Reeves overestimates the costs of *delay* by a factor of three because his calculations have not taken into account that the costs of mining generally are falling due to technological progress. While not disputing the costs of *uncertainty*, Quiggin is not prepared to blame uncertainty solely on Aboriginal owners. Rather, it is our system of land tenure which is at fault, he argues. Rights to minerals are ill-defined. Though the Crown nominally owns them, effective rights attach to the ‘first appropriator, normally a mining company which makes a claim for exploration rights’, and rights of a kind are held by Aboriginal owners who trade ‘on their ability to be more or less cooperative in negotiations’. Australian law thus sets up a three-way negotiation (Crown, mining company, Aboriginal owners) in which each party’s interests and strategies are rendered unclear and unstable by poor definition of their rights. Policy reform should clarify and confirm rights. If Aborigines’ property rights were redefined as rights of mineral *ownership*, rather than left as mere rights of negotiation of miners’ access to land, Aborigines would lose the incentive to put their cooperativeness in doubt and acquire a direct interest in minerals extraction.

Altman shows that there has long been debate about the ‘public’ or ‘private’ status of the incomes flowing from mining on Aboriginal land. In the transition from the Hasluck to the Woodward policy philosophy, the ‘private’ character of such moneys was more readily

conceded. Reeves would reverse that trend. He is dismissive in his judgments about payments to individuals, to royalty associations and to the land councils, and he finds no rational, long-term investment strategy in the Aboriginals Benefit Reserve. His assertions about royalty associations are not backed by evidence, Altman complains, and he ignores the Northern Land Council's wish to make royalty associations more accountable to land councils. Reeves sees royalties and statutory royalty equivalents as being for public purposes – specifically, for increasing Aboriginal welfare, as measured by certain socioeconomic indicators. In Altman's view, Reeves's proposals would result in the substitution of private for public money: Aborigines would finance their own citizen entitlements. In a related argument, greatly abbreviated for publication in this volume, Ernst Willheim raises doubts about the legal validity of Reeves's view that royalty associations' moneys are public moneys.

Levitus gives a name to this denial of the private character of Aboriginal income from land: 'deep accountability'. So attached is Reeves to this concept that he undermines his political vision of a decentralised Aboriginal polity. If NTAC were to enjoy authority over 'a centralised and discretionary system that responds to the competitive demonstration of social need by the regions', as proposed by Reeves, then what remains of his intention to empower regional assemblies of Aboriginal residents/owners? The empowerment of these supplicant regional land councils, Levitus points out, would consist merely in *not prescribing* their internal processes for deciding how to use the money granted by NTAC for the social and economic advancement of their members. Reeves's vision of rational investment strategies would be debauched in a local politics of patronage.

## The prospects of regionalism

Like many other observers of the Northern Territory scene, Reeves is attracted to the idea that Aboriginal people can mobilise themselves, for representation and service delivery, into regional organisations. In these broad terms, Reeves shares ground with his critics. However, there are reasons to doubt the practical sense and political intentions of Reeves's proposed regional land councils.

Both Altman and David Pollack wonder whether the regional land councils will have sufficient funds to do their job. After calculating the average cost of employing each member of staff in the four existing land councils, Pollack estimates that, on Reeves's anticipation of regional land council budgets, each of them would be able to employ only five staff. This would be insufficient personnel for the new bodies, Pollack predicts. He offers the reader a detailed projection of regional land council functions and a tabular comparison of the eighteen land councils' likely responsibilities. An adequate budget for the new bodies would be almost three times the amount suggested by Reeves, estimates Pollack. NTAC's running costs are also likely to be higher than Reeves's hopeful estimates. To implement the Reeves reforms effectively, Pollack concludes, would result in all income from mining on Aboriginal land being consumed by NTAC and by the 18 regional land councils. This would be a move away from cost-effectiveness. To date, as Jon Altman points out, only 52.5 per cent of statutory royalty equivalents have been spent on running the

land councils. It follows from Pollack's paper that, in his recommendation to set up NTAC and the regional land councils, Reeves has presented the government with an unpleasant choice: a less cost-effective apparatus or a less effective apparatus.

The Reeves Report would appear to be financially naive in another respect. According to Ernst Willheim, to constitute the 18 regional land councils and to abolish the land trusts and royalty associations would imply a number of compulsory acquisitions of property, requiring 'just terms' compensation to be paid. Reeves has made no assessment of the cost to the public purse of such compensations.

Whatever the costs of setting up and resourcing regional land councils, they are unlikely to be stable and effective political arenas, warn David Martin and Peter Sutton. Both are dismayed by Reeves's wish to give residents and land owners of a region an equal say in the running of regional land councils. This political structure, Sutton reminds us, would repudiate Aboriginal custom, which privileges the decision-making prerogatives of those with certain connections to the land in question, and affords to 'residents' a secondary role, at most, in land use decisions. Reeves would make it impossible to be a member of more than one regional land council, ignoring the fact that in Aboriginal law a person is likely to have rights in respect of countries in more than one 'region' – a problem also raised by Morphy.

After examining a number of plausible scenarios – based on the known distribution of Northern Territory Aboriginal people and on *their* understandings of their rights in land – Sutton concludes that to impose Reeves's superficially more equitable 'membership' rules on Aboriginal owners would exacerbate tensions and inequalities among Aboriginal people. Martin also foresees local political instability. He is worried by the size of the Reeves regions – tiny political arenas vulnerable to the dynamics of what Martin calls Aboriginal 'localism'. Martin sees localism as a deeply embedded feature of Aboriginal sociality, whereas Reeves mistakenly believes Aboriginal disputation to be merely an artefact of the institutions he wishes to abolish. Martin argues that localism generates rivalries which could easily lead to the factional capture of each regional land council, making them unrepresentative and 'highly prone to destabilisation'. Nic Peterson agrees that 'intense localism' threatens the representativeness of smaller political bodies. He adds that Reeves's regional councils could 'aggravate internal conflict' because 'there is no natural community of interest between traditional owners, Aboriginal community residents and Aboriginal councils'.

Martin argues that by not requiring the regional land councils to observe any principles or procedures for obtaining the informed consent of the owners, Reeves has violated an essential principle of institutional design: that the institutions of land rights must articulate with both the Aboriginal polity and the wider Australian polity. Ian Viner chooses to be quite blunt about this: 'Reeves's recommendations are built upon the destruction of traditional ownership of Aboriginal land in the Northern Territory'.

In Martin Mowbray's view, Reeves's repudiation of the traditional owners' interest is consistent with Northern Territory local government policy. In the constitutions of community governments, the customary political eminence of traditional owners is

subverted by treating such owners as if they were individual voters, no more significant than other voters. The Northern Territory's local government policy, Mowbray suggests, must be understood in the light of the persistent hostility of Territory governments to the land councils. Unless community governments *choose* to recognise, as a matter of policy, the specific rights of the customary owners of the land which they encompass, community governments and the land councils are competing structures of representation and governance. Mowbray explores affinities between Reeves's regional land councils and the Northern Territory Government's recent outline of a revised local government structure. Not only do the two proposals envisage local political structures of similar size, but neither scheme accords any political status to traditional owners. Mowbray goes on to identify other points of correspondence between Reeves's regional land councils and 'typical features of local government systems'. He notes Reeves's anticipations of practical cooperation between regional land councils and local government bodies, tending toward 'an association ... that is increasingly seamless'.

### **Anthropology and public policy**

A number of the critics of Reeves gathered in this book are anthropologists. Nic Peterson's association with land rights policy stretches back further than any other, to Woodward's Royal Commission (1973–74), so it is significant that he cautions anthropology against assuming that public policy reformers must answer only to ethnographic accounts of what is 'culturally appropriate'. Institutional designers, from Woodward to Reeves, have had to grapple with the question: do ethnographic models of Aboriginal sociality provide a blueprint for the legal codification of Aboriginal rights? Noting Reeves's appeal to ethnography to justify his proposed reforms, Peterson argues that a statutory land rights regime can and should go beyond 'anthropological appropriateness', in order to honour the (always contestable) demands of 'fairness, justice and equity' and of administrative practicality. However, anthropology is relevant to land rights reform in its knowledge of 'the organisation and working of communities, the nature of internal social structures and processes and the impediments within the Aboriginal domain to the functioning of articulating institutions'. Peterson concedes the attractions – 'on the grounds of fairness, justice and equity' – of Reeves's proposed title holding and representative regional institutions, the regional land councils, but he warns Reeves that it is not easy to 'ride over the notion of traditional owner'.

Morphy finds fault with Reeves's use of ethnography. Anthropology provides no warrant for drawing the boundaries of regions in any particular way: 'regional systems of social organisation are abstract concepts which neither reflect named indigenous units nor define a social field.' Regions are emerging, but their bases are dynamic. Reeves's top-down definitions of them will fix regional dynamics into an arbitrary shape.

Sutton, like Peterson, worries about inequities among Aboriginal people: 'the concentration of wealth in the hands of the few clans on whose immediate estates developments have occurred, when the interests of the regional polity have been downplayed.' Nonetheless, his critique of Reeves assumes that 'the Land Rights Act should

continue to attempt a reflection of Aboriginal cultural practices, not to impose a radical change which ignores them'. To postulate as primary one 'level' of Aboriginal sociality – the region, in which owners and residents would be of equal standing – is to ignore the 'complex machinery that coordinates different kinds of persons and groups of different types and sizes, and calls on different sets of people to deal with different kinds and scales of decisions about land as they arise'. The best institutional accommodation of that indigenous machinery, in Sutton's opinion, is the large land council with regional branch offices, employing professional staff committed to consulting the people identified as appropriate to each decision.

Notwithstanding his fears of inequitable action by traditional owners, Sutton's critique of Reeves presents an account of the Aboriginal polity as fundamentally sound because of its many checks and balances. Those mechanisms should be given the institutional space in which to function. To erode the significance of the local land-owning group would be a mistake, as it 'remains critical to the composition and stability of many of the wider groupings to which people belong'.

Martin wants land rights reform to honour the cultural demands of both Aborigines and non-Aborigines. Institutional design cannot eliminate so endemic a feature of Aboriginal culture as 'localism', and so advocates of 'devolution' (including Martin himself) must take the hazards of localism into account. He urges as a wider principle of land rights policy that the institutions of land rights must be designed so as to address simultaneously the principles of two persistently different political domains: the local indigenous and the national non-indigenous. Procedures of 'informed consent' secure indigenous legitimacy, while non-indigenous legitimacy is assured by institutionalising a professional/managerial culture of accountability – both to indigenous constituents (such as a representative elected council) and to the wider public (through financial acquittal and other public tests of professional performance). Martin points out that the Land Rights Act currently provides the flexibility to devolve land council decisions to structures that would meet his test of dual accountability, on a region by region basis. This requires judgment (the federal Minister's, in Martin's suggestion) about the 'political maturity and social capacity for a regional land council to be formed'. Reeves's model would *impose* regional structures on the 18 areas he has identified, without heed to local demand or benefit of ministerial appraisal. Martin concludes his paper with a number of proposals for improving the procedures for land council devolution.

In response to Reeves's views on Aboriginal property and permission, Nancy Williams offers an ethnographic challenge to policy reform. Elucidating an enduring Aboriginal sense of land ownership, Williams gives an account of Aboriginal customs of granting or withholding permission to be on the land and to use its resources. She draws attention to the inclusive nature of customary proprietorship. The use of land and sea *resources*, including flora and fauna, is also subject to owners' permission. Williams warns that those sceptical of customary ownership who read the ethnographic record for evidence of 'clans' seeking and granting permission, and do not find it, should rethink their question. Although rights in property are communal – in Aboriginal custom and in land rights statutes – they are exercised by individuals or by groups smaller than the full set of owners.

Moreover, the subtle manner in which permission is requested and granted may escape the attention of observers who look for 'clans' as collective actors and who look for clear boundaries, and for refusals of permission to cross them, as the clinching evidence of proprietary 'right'. For Aborigines, writes Williams, 'boundaries do not exist primarily for the purpose of excluding non-owners. Rather, they use boundaries to express varying categories of interest, both of owners and of users.'

## The politics of land rights reform

One clear implication of the account given by Williams of Aboriginal protocols is that non-Aboriginal people seeking permission to enter Aboriginal land and to use its resources place themselves in a relationship of reciprocal obligation to the owners. Abolishing the permit system would deny the possibility and desirability of such reciprocity.

Is it remarkable that Reeves could be so indifferent to the attractions (and heedless of the disciplines) of reciprocity? Perhaps not, for Reeves Report is replete with implications of unyielding settler colonial sovereignty, not least in its very method of review. Ian Viner recalls Woodward's vision of legislative 'review' as 'a formal conference between the land councils and the government' to examine 'anomalies that might have arisen' in the course of the Act's implementation. In Woodward's vision, writes Viner, there would be 'no change without the consent of the Aboriginal people'. Galligan finds a contradiction between the process of the Reeves review and the rhetoric of the Reeves Report. It is 'preposterous', writes Galligan, that Reeves 'purports to speak about new institutions for Aboriginal governance and self-determination without the support and consent of Aboriginal people'. Altman sees Reeves's procedure as an opportunity lost: a politically competent review of the Act would 'negotiate with all interests, indigenous, non-indigenous, private sector and government, to improve an existing statutory framework'. Aboriginal speakers at the March conference, in addresses not published here, expressed anger at Reeves. ATSIAC Commissioner, Josie Crawshaw, complained that 'the steering committee overseeing the review was not even offered a draft and there was no contact between the reviewers and the steering committee for seven months'. John Ah Kit, ALP Member for Arnhem, described the Reeves Report as 'a root and branch attack on the Aboriginal Land Rights Act' and 'a deeply regressive approach to indigenous affairs'.

Reeves has stated his underlying intention to promote a spirit of 'partnership' in the Northern Territory. Would anyone quarrel with that aim? Yet he goes too far, Viner complains, in attributing to the original legislators a desire to 'balance' the interests of Aboriginal and non-Aboriginal Territorians. Viner could find no 'balance of interest' theme when he re-read his 1976 speeches as Minister for Aboriginal Affairs. It is not that Reeves's critics see no problems in the polarised atmosphere of Northern Territory politics. As Sutton points out, the 'downside' of the land councils having highly committed staff is their 'contribution to the political temperature in a Territory where the party of long-term power is not the main party of choice of the substantial Aboriginal minority'. It is rather that Reeves's passages on 'partnership' are among the least cogent in his report, as Tim Rowse points out. It is not always clear who are to be the parties to this 'partnership'.

Reeves is undecided on whether the Commonwealth would be a party. And he finds it impossible consistently to identify those in the Northern Territory who are currently antagonised, according to Reeves, by the Act. On this point his language strays towards 'One Nation' rhetoric of exclusion. Reeves is unable to point to concessions that the Northern Territory Government would have to make in order to join a partnership with Aborigines, but on Aboriginal concessions he is specific and demanding. Finally, Reeves sees no value in making a Northern Territory 'partnership' subject to independent arbitration. If Reeves's partnership rhetoric is not disingenuous, then it is at least naive.

The politics of the Reeves Report is placed in the contexts of Northern Territory, national and international politics by Garth Nettheim and Ernst Willheim. Nettheim reminds us that land rights has become central to the discussion of Northern Territory statehood. A Sessional Committee of the Northern Territory Legislative Assembly produced a Final Draft Constitution in 1996, which was reviewed and revised by an unelected constitutional Convention in April 1998. The draft's recognition of Aboriginal rights, particularly land rights, was weakened by the latter forum. Meanwhile, Aboriginal constitutional conventions have been maintaining an alternative constitutional vision, resulting in the Kalkaringi Statement and the Batchelor Resolutions, both in 1998. The Batchelor Convention occurred after the publication of the Reeves Report. Delegates rejected Reeves's recommendations as contrary to the Aboriginal vision of the standing which Aboriginal land rights – both as property rights and as political rights – should enjoy in any Northern Territory Constitution. (Indeed, Viner compares the Land Rights Act to the Australian Constitution: as a similarly foundational statute, it should be no easier to amend.)

ATSIC has complained to the United Nations Committee on the Elimination of Racial Discrimination (CERD) about several of Reeves's recommendations, but the committee has declined to comment until the Australian Government makes its response to Reeves. According to Willheim, there is much in Reeves to worry an Australian Government sensitive to censure. In following Reeves, Australia would breach the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination. The risk of such international embarrassment is attached, in particular, to: the repeal of land owners' permit powers, giving precedence to the application of Northern Territory law over Aboriginal land, removing the restrictions on the Northern Territory Government's powers of acquisition, reserving to the Crown the ownership of all living fish and native fauna, the limitation of Aboriginal powers of consent to minerals exploration, the abolition of land trusts, and the taking over of the assets of royalty associations.

John Reeves (1998: 507) did not offer his recommendations 'as a "take it or leave it" package.'

This is so because, while the materials I have considered during this Review have been extensive, I cannot, and do not, claim to have identified every possible consequence of every recommendation I have made. Neither have I had the benefit of a wide public debate and comment on my recommendations, which may illuminate alternative approaches that are eventually considered more appropriate.

The main thrust of this collection of papers is negative, letting Reeves know where he went wrong. At the March conference, a number of people made the point that critics of Reeves should venture their own agenda of reform, unless they considered the Land Rights Act a work of legislative perfection. A number of authors in this book, for example Martin, Morphy, Quiggin and Altman, have embarked on the course of being proactive, not simply reactive, policy intellectuals. If we have reason to thank Reeves, it is for his challenge to any intellectual complacency among the supporters of the principles enunciated by Justice Woodward a quarter of a century ago.

Note: I would like to thank Jon Altman and Frances Morphy for their comments on an earlier draft of this introduction.

# 1. The Reeves Report as public policy

## **Brian Galligan**

John Reeves QC was appointed in October 1997 by the Minister for Aboriginal and Torres Strait Islander Affairs, Senator John Herron, to conduct a review of the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act). The Minister issued terms of reference for the review that set down fairly precise guidelines as to its scope and the particular matters to be considered. In August 1998 Reeves presented the Minister with his report, *Building on Land Rights for the Next Generation: Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976*. This was the result of a comprehensive review of the Land Rights Act, indeed, the first comprehensive review of the Act since Justice Toohey's review in 1983. *Building on Land Rights for the Next Generation*, as the title suggests, is a most ambitious report that purports to recommend a new land rights regime for the next generation.

My main concern is with how well Reeves has done his work in terms of the merits of the report as a coherent piece of public policy research. I am concerned with how adequately the report responds to its terms of reference; the appropriateness of its methodology; the coherence of its argument; and the quality of its research.

## **Terms of reference**

According to its terms of reference, the review was asked to 'examine and report on the operation of the Act and suggest any areas for possible change including recommending amendments where appropriate'. In particular, the review was charged with considering eight specific matters and a ninth catch-all head of 'any other matters relevant to the operation of the Act'.

The first two specified matters are the most significant and encompassing – to consider:

- (i) the effectiveness of the legislation in achieving its purpose; and
- (ii) the impact of the legislation in terms of its social, cultural and economic costs and benefits.

The next five matters are rather more specific and concern particular aspects of the working of the Act or related issues: mining provisions, trust accounts, royalties, compulsory acquisition, and the operation of Northern Territory laws.

The eighth matter is also fairly specific but concerns the future:

- (viii) the role, structure and resource needs of the land councils following the coming into effect of the sunset clause relating to land claims.

In this evaluation I focus on the following:

- the first two terms of reference, concerning the effectiveness of the Land Rights Act in achieving its purpose and its impact in terms of costs and benefits;
- the eighth term of reference, concerning the role, structure and resources of the land councils after the sunset clause;
- the ironic success of acquiring land that is an economic cul-de-sac;
- the new purpose of social and economic advancement that Reeves would have a revamped Land Rights Act serve;
- the rhetorical structure of Reeves's argument in favour of this new purpose to be achieved via Aboriginal governance and self-determination;
- proposals for institutional restructuring; and
- the right of Aboriginal people to have a say in matters that affect them.

I do not consider the other more specific matters concerning mining provisions, trust accounts, royalties, compulsory acquisition by government, and the operation of Northern Territory laws. These are specialist issues for specialists in those areas.

## **Purpose of the Act**

The first matter, the effectiveness of the legislation in achieving its purpose, is the crucial one. That purpose is specified in the long title to the Act: 'An Act providing for the granting of traditional Aboriginal land in the Northern Territory for the benefit of Aboriginals, and for other purposes'.

Reeves finds that the Act has been 'an unqualified success' in achieving its main purpose of granting traditional land to Aboriginal people. As he (Reeves 1998: 61) says:

The main purpose of the Act was to grant traditional Aboriginal land in the Northern Territory to, and for the benefit of, Aboriginal people. The Act has been an unqualified success in achieving this purpose.

According to Reeves (1998: 63, 65–67) the Act has been less effective in achieving one of its other purposes that he identifies as providing Aboriginal people with effective control over activities on the land granted.

More contentious is Reeves's (1998: 65) extension of the rubric of purpose to 'new purposes of a new era of land rights to obtain better outcomes for the next generation of Aboriginal people in the Northern Territory'. Reeves does this in chapter 4, which deals with 'Effectiveness of the Act in Achieving its Purposes'. And he makes no bones about admitting that he is dealing with 'a new purpose of the Act': namely, 'providing opportunities for the social and economic advancement of Aboriginal peoples in the Northern Territory' (1998: 75). Indeed, Reeves sees this as a 'new era' for land rights now

that its original purpose has been largely achieved or soon will be. Reeves's (1998: 75–76) conclusion in chapter 4 makes this clear:

Aboriginal land rights in the Northern Territory are about to pass into a new era. Most of the original purposes of the Act have been achieved, or will be achieved in the space of the next few years ... the Act should be directed to new objects and purposes in the future. Forging a working partnership between Government and the Aboriginal people of the Northern Territory and the attainment of social and economic advancement for Aboriginal people, are the most obvious purposes for the Act in the future.

In going beyond the purpose of the Act to explore possible new purposes for a new era, Reeves is clearly exceeding his terms of reference. In order to do this, both in chapter 4 and subsequent key chapters 10 and 25 through 28, Reeves moves from land rights to the more general social and economic condition of Aboriginal people. He investigates the social and economic condition of Aboriginal people and how that might be improved in the future by adapting the Land Rights Act. All of this is quite speculative and, not surprisingly, entails major institutional restructuring. Whatever its interest and worth, it is outside the terms of reference.

One obvious reason why a public review should stick to its terms of reference is to ensure integrity in its purpose and process. When government decides the purpose of a review, that is publicly noted and interested parties decide to contribute and comment according to their particular interest and expertise. Moreover, their contribution will be tailored to what the review is about as expressed in its terms of reference. The reviewer who goes chasing off in other directions is, to an extent, acting behind the public's back or without its formal knowledge. Moreover, there is not the same benefit of public contribution and criticism in refining recommendations for novel purposes that the inventive reviewer establishes.

This is very much the case with the Reeves Report. In exploring new purposes and recommending new institutional arrangements to serve them, Reeves enters a more speculative world than land rights. Achieving social and economic advancement of Aboriginal people through rejigging the Land Rights Act is highly contentious and problematical. It would be better to stick with the more limited agenda of the Land Rights Act serving its purpose of 'providing for the granting of traditional Aboriginal land in the Northern Territory for the benefit of Aboriginals'. Reeves should have focused his recommendations on the working of the Act: on improvements to ensure more effective control by Aboriginals over activities on their land; on measures to cope with the current backlog of claims; and on changes for future operation of the Act after the sunset clause when there are no more land claims to be made.

## **Social, cultural and economic costs and benefits of land rights**

A second major finding of the Reeves Report is that the consequences of land rights for Aboriginal Territorians have been highly beneficial – spiritually, culturally and

socially. Moreover, he finds that, overall, after taking account of the costs to other Territorians and the scorecard for major industries, benefits have outweighed costs. This is in response to his second specific term of reference.

Reeves (1998: 92) finds that 'the Land Rights Act has underpinned and strengthened a sense of Aboriginal cultural identity and has fostered respect for traditional Aboriginal values'. In later discussions he (1998: 571) is more categorical:

The possession of traditional lands has been important to Aboriginal Territorians culturally, spiritually, and in the direct satisfactions they have brought to their Aboriginal spiritual owners and the communities living on or visiting these lands.

The 'consumption gain' that Aboriginal Territorians derive from enjoyment of their land far exceeds the opportunity cost of alternative uses for such land:

Easily the most important social, cultural, and economic outcome arising from the transfer of 573 000 km<sup>2</sup> – 42.3 per cent of the Northern Territory to Aboriginal Territorians is the huge consumption gain that has accrued to them as a result ...

The immense satisfaction that Aboriginal Territorians derive from their land rights is the only justification needed to support their ownership of the land, notwithstanding no 'productive' use is made of it. It is simply their home – and valued as such like anyone else's (1998: 575).

Aboriginal use of this land for domestic and cultural purposes is an efficient use, partly because the land has little alternative economic value.

While benefits have 'greatly exceeded' costs for Aboriginal Territorians, Reeves insists that there have been real costs, such as paying too much for land. There have been additional costs, Reeves points out, for other Territorians, with some 42.3 per cent of the land mass of the Northern Territory being acquired by Aboriginal people. Some of these costs might well be unnecessary and capable of being reduced by more flexible access regimes and better methods of negotiation with the government, as Reeves suggests (1998: 552, 568, 576). Such costs should not be overstated, however, because the land involved is pretty marginal economically. In any case, access and transaction costs are partly amenable to reduction through better understanding and more flexible procedures.

The scorecard of costs and benefits for major Northern Territory industries is surprisingly even, according to Reeves's analysis. For the pastoral industry, costs have been negligible because the land is so poor. Reeves (1998: 576) even suggests, somewhat ironically, that the voluntary transfer of pastoral leasehold land must have resulted in an economically superior use of the land because the pastoralists were willing to sell at agreed prices! For the mining industry, Reeves (1998: 577) estimates negligible impact despite transaction costs associated in gaining access to Aboriginal land. For tourism, benefits have exceeded costs because tourists are interested in the traditional culture of Aboriginal people (1998: 577). For other industries such as harvesting 'bush tucker' and aquaculture, the situation is unclear but benefits probably exceed costs (1998: 577). In sum, and despite the

uncertainties inherent in such estimations, Reeves concludes that benefits of the Act have exceeded costs, but that the benefits could have been even greater and the costs less.

While one might quibble with particular estimations and judgments that Reeves makes, it is hard to fault his overall assessment that benefits have exceeded costs. Moreover, it would be surprising if there had not been some costs that might have been avoided in implementing such an extensive land rights regime. These are Reeves's (1998: 575) 'Findings in relation to Term of Reference (ii)', but that is not the full story that Reeves wants to tell. The other part concerns the 'new purpose' he wants to give the Act in securing economic benefit in the future.

### **The future is another country**

The most contentious part of the Reeves Report is the proposal to give the Land Rights Act the ambitious 'new purpose' of securing 'the social and economic advancement of the Aboriginal peoples of the Northern Territory' through forging of partnerships with government and business (1998: 75).

In chapter 5 the report rehearses the well-known case that Aboriginal people, including Aboriginal Territorians, are relatively deprived and that their situation has not been remedied either by land rights or substantial government expenditure on a range of welfare and other programs. The remedy must go beyond land rights to bold new initiatives, Reeves (1998: 92) proposes:

I have concluded that the economic and social advancement of Aboriginal communities is not likely to be accomplished by modest measures and will require significant departures from the way things have been done so far ... If more rapid social and economic progress is to occur, more representative, responsive and effective Aboriginal institutions of governance must be put in place to support Aboriginal Territorians' employment prospects, in partnership with the Northern Territory and Commonwealth Governments and other Territorians.

Here we see in the early part of the Reeves Report a switch from the purpose of the Land Rights Act – granting traditional Aboriginal land for the benefit of Aboriginals – to the new and more ambitious purpose of 'rapid social and economic advancement' of Aboriginal people.

This argument is taken up and embellished in chapter 25, which deals with the social, cultural and economic costs and benefits of the Land Rights Act. Reeves (1998: 568) claims that 'the development of Aboriginal freehold land is unlikely to be a major source of jobs and income for Aboriginal Territorians'. The nub of Reeves's diagnosis is that the future is not in land but in education and skills. Given that Aboriginal land is often marginal in economic terms and in isolated and out-of-the-way places, as Reeves has repeatedly insisted, it is hardly surprising that he takes this negative position regarding Aboriginal land. In so doing he flatly contradicts Jon Altman's claims that Aboriginal land will become valuable in the twenty-first century if Aboriginal owners negotiate multiple use deals and joint ventures with mining, tourism and other commercial ventures (1998: 568). Such a

focus on land leads to 'an economic cul de sac', Reeves insists, appealing to the more general proposition that 'Land ownership is no longer particularly important in making a living in modern societies' (1998: 571). Rather, economic advancement comes from education and skills.

This is well summed up in Reeves's second set of conclusions for chapter 25 (the first set examined above concerned assessing costs and benefits according to the terms of reference). Reeves's (1998: 578) anti-land conclusions are as follows:

- The future is not in land, therefore focusing on land is an 'economic cul de sac for Aboriginal Territorians'.
- Economic advancement comes from having productively useful skills, technology and capital of the kind in demand in the mainstream Australian economy.
- The future for Aboriginal Territorians is therefore in education and skills formation, and partnerships with governments and industry.

In effect, what Reeves has done is to propose a new agenda for which different institutions are required, and purports to find these in a system of regional land councils.

### **The land rights dilemma**

The key to any policy solution is a clear articulation of the problem. If we do not know what the problem is, it is hard to come up with a right solution. And even if we do know precisely what the problem is, we may fail to devise an adequate solution. There are difficulties both in defining the policy problem and in devising the appropriate policy solution. On the policy problem side, pitfalls include defining something as a problem when it is simply the state of affairs; incorrectly defining the problem for which the wrong solution is then sought; or, endemic to complex public policy issues, oversimplifying the problem or selecting only partial aspects of it. Even if the right question is posed, policy solutions are often difficult. Common pitfalls include working from incomplete knowledge to inappropriate solutions; choosing or devising policy instruments or institutions that are flawed in their design; or, for policy problems that are deeply embedded in specific cultural and economic environments, proposing incompatible policy arrangements that will not work.

Indeed, we might be inclined to think that good public policy is beyond mere mortal capabilities, except that it is essential in complex human communities. Giving up and doing nothing when confronted with hard policy problems is an option, but that, too, is really adopting a policy stance. Because of the difficulties entailed, much public policy-making is incremental and has been described as 'muddling through'. This is obviously a lower risk strategy than policy leaps or sweeping innovations that some policy entrepreneurs might favour. Whatever the approach, there is some consolation in the fact that human persons implement and operate policy systems and they are, or can be, thinking and reflexive beings who can adapt and make things work. On the other hand, human agents can also be perverse in making things not work, or work for different purposes and

advantage to some rather than others. Nevertheless, this is the policy world in which we live. It is as well to remind ourselves of these policy truths before assessing Reeves's articulation of the policy problem and his proposed solution.

According to Reeves, the dilemma with the Land Rights Act is that it has delivered land to Aboriginal people but that has not helped their economic advancement. The Land Rights Act has been a great success in fulfilling its primary purpose – granting traditional Aboriginal land for the benefit of Aboriginal people and benefiting Aboriginal people in human, social and cultural ways. But alas, this has been a pyrrhic victory. Land is a dead end, a cul-de-sac; the economic future is not with land.

The way out, for Reeves, is through economic advancement in other directions: focusing on education, skills and partnership with government and business enterprises that will help take the next generation of Aboriginal Territorians into the mainstream economy. Reeves's policy solution is to rejig the Land Rights Act by abolishing the two large land councils and creating 18 small regional ones. But rearranging land-based institutions seems an odd recipe for escaping the poverty trap of being land-based.

How could rearranging the land rights regime resolve the poverty trap of Aboriginal land? On this crucial issue the Reeves Report is deeply flawed. Having stated that the economic future was not in land when he is establishing a new future for the Land Rights Act, Reeves backtracks in the final chapters of the report to advocate a different means for mixing the usual ingredients of Aboriginal land, Aboriginal culture and outside funds and assistance. But you cannot have it both ways.

If the ingredients are essentially the same, whence comes the magic in the new pudding? It comes from the supposed vitality of small regional land councils instead of large regional land councils. The main rationale for a multitude of smaller regional land councils is given in Chapters 9 and 10. They are offered as a solution to the problem of 'irreconcilable disputes' about traditional Aboriginal ownership of land within 'a bureaucratic and legalistic framework' presided over by the large land councils (1998: 200). Reeves (1998: 204) describes them as 'active regional representative organisations' that 'allow Aboriginal people at the regional level to make their own decisions relating to the use of their traditional lands and thus give them a real measure of self-determination'.

Chapter 26 extends the rhetoric of Aboriginal governance and self-determination as a means of economic advancement. Reeves (1998: 581) purports to find a framework that would more effectively enable Aboriginal people 'to pursue their own social and economic advancement'. That requires a high order of institutional design, as Reeves (1998: 583) acknowledges: 'a key requirement in the design of effective institutions of Aboriginal governance must be quality and reliability in assisting Aboriginal Territorians to become less dependent, more productive and more self-determining'. Reeves proposes to kill two birds with the one stone: Aboriginal self-determination as specified in the Draft Declaration of the Rights of Indigenous Peoples currently before the United Nations Working Group on Indigenous Rights, and economic advancement. Reeves (1998: 583) affirms that Aboriginal people have 'the right to determine their own futures according

to their own priorities within an institutional framework that comprises Aboriginal governance’.

This is a tall order: to devise institutions of Aboriginal governance and self-determination that facilitate and promote social and economic advancement, all within a revamped Land Rights Act. But are these noble goals achievable through establishing a multitude of small regional land councils under the Land Rights Act? Smallness has some virtues. For example, Gulliver could not deal properly with the tiny Lilliputians because he was too large and clumsy. Small regional councils might serve local interests better, as local government does in parts of rural Australia. But smallness has disadvantages. Gulliver was hopelessly unsuited to deal with the Brobdingnag giants.

Effective governance, even at a local level, requires a certain critical mass and scale. The 18 regional land councils proposed by Reeves, however, are tiny bodies, the majority of them having less than 2,000 people, administrative budgets of some \$400,000 and administrative staff of less than 10 people. Moreover, they are scattered throughout enormous tracts of marginal land in isolated areas. They seem more like a Lilliputian solution to a Brobdingnag problem. No local government bodies are as small, and the trend is to enlarge them as has been done in Victoria.

In part, Reeves’s advocacy of new institutions is grounded in his criticisms of the existing ones. Reeves (1998: 591–92) criticises the Land Rights Act for not providing ‘satisfactory governance and self-determination for Aboriginal Territorians’. This is unfair because the Land Rights Act and the land councils established under it were never designed to serve those purposes of active governance, self-determination and social and economic advancement. The old saws of ‘Horses for courses’ and ‘Sticking to your job’ do have a kernel of truth and common sense. It is simply not possible to do all good things at once, especially in the complex field of public policy and even more especially in the difficult area of Aboriginal advancement. Overload is a real constraint. Had the 1976 Land Rights Act tried to give Aboriginal people self-determination and provide for their social and economic advancement as well as granting land rights, would it have worked? In my view, only in the minds of wishful dreamers.

The other problem that Reeves ignores when lauding his proposals for delivering self-determination and social and economic advancement via small regional councils is that they are still land-based councils. This is indeed surprising given his previous dismissal of land as an economic cul-de-sac. You cannot have it both ways. Land might be the wrong basis for future economic advancement in our sort of world, and Aboriginal land in the Northern Territory especially so because of its marginality and isolation from the mainstream. If so, a large land council regime will not deliver future social and economic advancement. But nor will a small land council regime. Indeed, given the marginality and isolation of much Aboriginal land, small councils would likely be much worse in this regard.

The nub of the case is that smaller regional councils will produce greater participation by Aboriginal people who will be more vigorous in pursuing their economic self-interest. The Northern Territory Government will cease being antagonistic and instead become

cooperative, entering into partnership with more entrepreneurial Aboriginal communities. There is no compelling evidence either that this is wanted by Aboriginal people or that it will work. The main work is done by rhetorical ploy: using only positive and aspirational language about the proposed smaller regional land councils, and negative critical language about the existing larger regional land councils. In the latter instance there is a real record to attack, but for their proposed replacements there is only an idealised supposition.

## **Institutional restructuring**

The Reeves Report claims that Aboriginal governance and self-determination and delivering social and economic advancement can all be achieved by restructuring the institutions of the Land Rights Act. We need to examine Reeves's proposed institutional arrangements and assess whether they are likely to achieve these larger goals; and if not, whether they are likely to do so more effectively than the existing larger land councils; and, indeed, whether they make sense at all.

First, it is as well to remind ourselves of some of the difficulties and pitfalls in institutional design. A common methodological ploy is to compare like and unlike: actually existing institutions with real records and problems compared to imagined institutions that have the positive attributes selected by their advocate and no recognised problems. To put it another way, we can be all too familiar with the operation and shortcomings inherent in existing institutions but would be foolish indeed if we assumed that alternative ones would be problem-free. A related tendency is impatience with what we have and too hasty grasping at novelty. The 'grass is greener on the other side' is a well-known saw that captures a common human propensity, especially when we are confronted with hard issues. Institutional restructuring is often a surrogate for substantive action.

Reeves proposes two main institutional changes: replacing the two large land councils with 18 small regional land councils and creating a new umbrella Northern Territory Aboriginal Council (NTAC). The groundwork for the change is laid back in chapter 6 where Reeves contrasts the two large land councils, the Northern Land Council and the Central Land Council, with the existing two small land councils, the Tiwi Land Council and the Anindilyakwa Land Council.

The large land councils are credited with being 'almost totally successful' in their main purpose of securing land claims for Aboriginal people (1998: 104). But they have engaged in political activities that have put them at odds with the Northern Territory Government on many issues, 'to the extent that almost all the dealings between the two large land councils and the Northern Territory Government are acrimonious' (1998: 101).

More than that, Reeves (1998: 117–18) accuses the two large land councils of being 'large bureaucracies' in the pejorative sense:

They are perceived to be bureaucratic, remote, tardy and uninterested in local Aboriginal problems. They have been accused of duplicity, causing division within Aboriginal communities, disempowering Aboriginal people, ignoring Aboriginal tradition and generally, running their own agendas.

Note that these are only reported perceptions and accusations: they are not findings of the review. Indeed, Reeves (1998: 118) makes this clear: 'It is not possible for me in this Review to determine who is right and who is wrong with respect to these accusations'. Such a disclaimer is required because Reeves has made no systematic attempt to sift and evaluate these adverse perceptions and accusations. Nevertheless, he fills 12 pages, or half of the total chapter on the structure and performance of land councils, in reporting such unsubstantiated criticisms and only three pages on positive accolades. Moreover, Reeves (1998: 103) dismisses the positive affirmations as coming from community meetings organised by the two large land councils and people who have held positions in the land councils.

Here we have serious issues of integrity and adequacy of evidence. On his own admission, Reeves produces no reliable evidence on the performance of the large land councils from their own constituency, Aboriginal people themselves or, as current managerialism would designate them, customers and client groups. The positive affirmations are discounted as being orchestrated by the land councils, whereas the negative criticisms are unsubstantiated hearsay and anecdote. Why reproduce 12 pages of this stuff? For example, 'Hello. I'm Raylene S ... the staff of Central Land Council's not helpful ... (1998: 114). Why didn't Reeves assess the truth of this material before including so much of it in his report if his purpose is not to cast negative aspersions? And, most importantly, why didn't he get some real evidence to make a proper assessment of performance? Many bodies, including government service departments and local governments, carry out proper surveys of customer and client satisfaction as a matter of routine. Such surveys are standard practice in professional evaluations. Yet on this key issue Reeves offers only anecdote and accusation from self-selecting critics. Hence we just do not know how well the two large land councils are performing their functions from the point of view of key stakeholders.

Nor is the evidence in favour of the small Tiwi and Anindilyakwa Land Councils credible. These two small councils have not had to concern themselves with land claims or develop a political role so, consequently, they enjoy better relations with the Northern Territory Government (1998: 100). They are also tiny organisations: Tiwi has a sum total of seven staff compared with 116 for the Central Land Council and 85 for the Northern Land Council (1998: 97). In short, these two small land councils do not perform the primary function of the large councils – securing land claims and representing the political interests of Aboriginal people – and so are hardly comparable institutions.

In any case, the Reeves Report provides no hard evidence that these tiny councils operate effectively. The best Reeves (1998: 118) can say is that they 'appear to perform their functions in a more harmonised fashion' and that they 'appear to operate more pragmatically, with less formality and with much more flexibility in performing their functions'.

But incomparability and lack of evidence, it seems, are no barrier to restructuring institutions for land rights. In chapter 27 Reeves (1998: 208ff, Appendix H) proposes 18 regional land councils: 16 new ones based on the existing regions and regional communities

established by the large land councils, and the continuation of Tiwi and Anindilyakwa Land Councils. In advocating smaller regional land councils, Reeves is extending what is already in place: bolstering the regions already set up by the large land councils with larger functions and providing them with fuller institutional arrangements. That was the way things were developing and it might be beneficial to extend and formalise the process. Making smaller regional land councils serve as substitutes for the larger regional Northern and Central Land Councils is rather more contentious. Making these tiny bodies responsible instruments of Aboriginal governance and self-determination for the purposes of social and economic advancement of Aboriginal people is implausible in the extreme.

Small might be beautiful, but only in certain respects and for limited purposes. Small bodies are usually not very powerful. Small groupings of people lack political clout; they lack bargaining strength; they lack critical mass for developmental purposes. And small these new regional land councils will be! Ten have less than 2,000 people and three have less than 1,000 people. The only ones of appreciable size, with more than 3,000 Aboriginal people, are Darwin–Daly, Alice Springs, East Arnhem and West Arnhem (1998: Appendix H). But even these numbers do not provide a serious base for achieving the purposes of self-governance and economic advancement that these new councils are supposed to serve.

The proposed administrative backup for the new councils is pitifully small: they are to have only the same administrative costs as the two existing small councils – about \$400,000 (1998: 612). Incidentally, it should be obvious that the larger land councils are not particularly large in absolute terms or in view of the functions they perform: the Northern Land Council has 85 staff and the Central Land Council has 116 (1998: 96).

The political consequences of having a host of smaller land councils instead of a couple of larger ones should be obvious. The classic way to weaken power and influence is to fragment and diffuse it geographically and among smaller tribes and communities. That is especially the case if those tribes and communities are scattered over large land territories. Nor is it the case that smaller political groupings make for better representation than larger ones if the units are simply too small. Rather, too small bodies absorb energies and frustrate coordinated action. Moreover, small bodies are notorious for internal strife and paralysis. Precisely for these reasons, few serious political thinkers favoured democracy in its participatory form that was only possible in small communities. It was only after the invention of the principle of representation that enabled larger political communities to function through elected representatives that modern democracy became viable. The idea that there can be good Aboriginal governance and self-determination effectively pursuing social and economic advancement in the tiny groupings Reeves proposes is really quite bizarre.

Nor is the situation saved in the final chapter by the new Northern Territory Aboriginal Council (NTAC) that is to act as an umbrella organisation to the 18 small regional land councils. This body will have some of the functions of the large land councils, such as completing the outstanding land claims, but mainly a ‘strategic oversight’ and support role with respect to the regional land councils. Initially its members will be appointed but later they will be elected by Aboriginal Territorians. NTAC’s major function is ‘to assist

the long-term social and economic advancement of Aboriginal Territorians' through various avenues of coordination, encouragement, assistance and support (1998: 610–11). The hoped for sweetener in all of this is a boost in government funding from the Northern Territory Government and the Commonwealth Government and from funnelling Aboriginal and Torres Strait Islander Commission business and community development funds via NTAC. If the tiny regional land councils are as inappropriate for economic development as suggested here, and if they have so little administrative expertise, governments would be foolhardy indeed to entrust them with so much money.

We do not know much about NTAC. From some of what is said in the report, it seems to be a weak umbrella organisation mainly providing support and facilitation functions for the multitude of small land councils. They are the primary organs of Aboriginal governance and economic decision-making. It is aptly branded by Reeves (1998: 207) as 'a peak body' that 'can house a confederation of RLCs'. A peak body is the agent of its member associations in representing their interests and doing their bidding. A confederation is similar: technically, an association of sovereign member states that send delegates to the central body which, in turn, makes decisions that are subject to approval by the member states. It is a weak type of association where the real power is with the member states. Reeves's proposed council is not strictly a confederal body because its members will be elected by Aboriginal people and not the regional land councils. But its function and purposes are of that kind. So the tiny regional land councils are left with the main task of providing Aboriginal governance and economic advancement, for which they are totally unsuited. NTAC adds only a weak unifying structure.

On the other hand, NTAC is charged with banking and investment trust fund responsibilities (1998: 610). If that means NTAC controls the money, it would likely be a powerful body. Given the tiny size and dispersion of the regional land councils, it is also likely that NTAC would have to take a strong role in providing administrative services and backup. If that is the case, we would need to know much more about NTAC than is sketched in the final chapter of the report.

### **Who chooses?**

There is a curious disjuncture in the Reeves Report. On the one hand, it champions self-determination for Aboriginal people and proposes institutions that are supposed to enhance their control over their own affairs. On the other hand, the report prescribes a fundamental restructuring of the key set of institutions under the Land Rights Act that has done most for Aboriginals in the Northern Territory without their substantial input or support. Throughout the report there is a surprising lack of systematic consultation with Aboriginal people and their leaders. What Aboriginal people think about the working of the Land Rights Act and the performance of the established land councils is surely important.

Indeed, it should now be accepted as a first principle that no major initiatives affecting Aboriginal people are proposed without their input, and certainly nothing is done without their consent. Aboriginal people have a right of say in their own affairs and in institutional

restructuring that affects them in significant ways. That is especially the case when it comes to devising institutions of self-determination and governance. It is quite preposterous that a major report purports to speak about new institutions for Aboriginal self-determination without the support and consent of Aboriginal people. For that reason alone, the Reeves Report should be scuttled.

## **Conclusion**

Reeves's proposed institutions would most likely have the opposite effect to his grand intentions of providing social and economic advancement for Aboriginal Territorians under Aboriginal governance and self-determination. The economic disadvantages of being land-based in tiny communities scattered over enormous tracts of marginal land would be exacerbated by such an extreme diffusion of political and administrative power. In brief, Reeves should have stuck to his terms of reference. His ambitious forays beyond them are implausible and should be rejected. Moreover, Aboriginal Territorians have a right to participate in the design and restructuring of institutions that affect them, especially if such institutions purport to be ones of Aboriginal governance and self-determination.

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## 2. Reeves in the context of the history of land rights legislation: anthropological aspects

### *Nicolas Peterson*

Mr Justice Woodward was asked to inquire into:

the appropriate means to recognise and establish the traditional rights and interests of the Aborigines in and in relation to land, and to satisfy in other ways the reasonable aspiration of the Aborigines to rights in or in relation to land ...

In his First Report, Woodward (1973: 1) noted that he had received very few submissions from Aboriginal people and those that he had were mainly from secretaries of community councils asking him to visit to talk to them. He did not see this as indicating a lack of interest in the subject but as evidence of a lack of contact and information. He sought to overcome this by visiting all the major Aboriginal communities and holding meetings in Alice Springs and Darwin.

Woodward (1973: 2) went on to say that he also felt:

very strongly the lack of any cohesive organisation linking these various peoples to whom ... [he had] spoken. There is no body or council which can speak for the Aborigines of the Territory as a whole. They have, with one exception, had no professional assistance in putting a case to the Commission. They have no means by which they can formulate a generally supported claim or make their voices heard in a way likely to influence ultimate decisions.

Woodward went on to recommend that two Aboriginal land councils be set up and that in the first instance they be constituted by one representative from each of the major communities in their designated region. He rehearsed various arguments for and against a single council or more numerous smaller councils (1973: 42).

He went on to recommend that these two bodies be given a statutory basis and that the land returned to Aboriginal people be held by various land trusts.

The work of the Woodward Commission did not involve any detailed anthropological consideration of the various systems of Aboriginal land tenure found in the Territory. This was because the general principle informing the Commission's approach was to avoid codification by placing a protective legal shell around Aboriginal land which would allow Aboriginal people the maximum internal flexibility in the present and keep the way open for transformation and change in the future.

There was, however, a concern to ensure that the two centralised land councils remained accountable to the people on the ground with rights and interests in particular areas of land. It was primarily out of this concern that the role of traditional owner was born.

Debate about anthropological issues relating to the Commission's work only came to public attention with the objections of the Finke River Mission to the idea of land councils and land trusts. The argument, in summarised form, as put by Pastor Albrecht to the Commission was as follows (Woodward 1974: 394–412). Hermannsburg had experimented with elected councils as a vehicle for self-determination. After an initial period of success the town council, the school council, the village council and the church council, which were all elected and staffed by Aboriginal people, turned out to be failures. The council as an institutional structure was a failure, in Pastor Albrecht's view, because Hermannsburg was not a community but made up of a number of clans which were the largest political and land-holding bodies. Democratically elected councils and bodies like trusts had no parallel in indigenous life but were imposed institutions that could not work because they did not coincide with traditional leadership and authority structures or recognise clan autonomy.

The only appropriate form for the recognition of land rights, Pastor Albrecht argued, was the codification of the traditional system: estates should be surveyed and title given to the owning patriclan. This is what eventually happened in the area of the old mission lease.

Thus while the Commission saw it as anthropologically appropriate to try to avoid codification, the Finke River Mission saw it as anthropologically essential. Now the Reeves Report introduces a third view based on what it understands to be anthropologically appropriate. The report argues that the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act) 'did not, and does not, adequately reflect either the state of anthropological knowledge, or the reality of traditional Aboriginal processes and practices in relation to the control of land' (Reeves 1998: 148). And the report goes on to say that 'the importance of regional populations as the level at which Aboriginal culture is reproduced and at which land was occupied, used and "owned", has not been acknowledged in the current scheme' (Reeves 1998: 148). Thus on the grounds of greater anthropological appropriateness, the Reeves Report recommends the abolition of the concept of traditional owner and the replacement by regional councils holding community title.

What are we to make of these appeals to anthropological appropriateness? How necessary is it for the legislation to be successful? And what can and cannot be ignored in Aboriginal social arrangements?

If anthropological appropriateness, in the sense of conforming as closely and accurately as possible to present indigenous arrangements, were the crucial issue, then the case for native title rather than statutory land rights would, on the face of it, appear to be overwhelming. Not only might the statutory definition be misconceived, but a single definition for the whole Territory might not allow for all of the complex ramifications of each or any local native title system. However, native title itself, in the form that it is currently receiving recognition, also requires a process of translation of practices and traditions into the language of Australian law. Since any recognition of Aboriginal rights by the Australian legal system is inevitably an intervention into Aboriginal arrangements,

transforming them as it recognises them, native title codification could only claim to be more appropriate than statutory rights and not to be culturally neutral.

I do not believe, however, that the degree of anthropological appropriateness is the sole criterion by which the difference between a native title regime and a statutory regime should be judged, nor even the different formulations within the statutory regime. The advantages of a statutory regime lie in the fact that it can go beyond such appropriateness.

### **Beneficial legislation and appropriateness**

As the long title of the Land Rights Act makes clear, the purpose of the Act is to benefit Aboriginal people. Legislating to benefit people is notoriously difficult, especially where radical cultural difference is involved and the purpose is to facilitate change. Such legislation does not act on a social *tabula rasa*, nor is it free from history, politics or unforeseen consequences and contradictions.

While the Commission gave little explicit attention to what beneficial legislation entailed in the abstract, the whole of its work was predicated on the belief that land rights could and should be beneficial for Aboriginal people, not only in terms of natural justice but in terms of cultural support and of economic betterment. There was a further goal which was taken for granted and not given specific billing in the list of aims set out in the Reeves Report relating to self-determination (Woodward 1974: 2). Land rights worldwide has always been as much about the restoration of some of the autonomy that was lost with colonisation as about property rights. The Commission was well aware that the quality of land rights legislation is judged not just by the property rights it grants but by the combination of property and empowerment rights. Central to this empowerment, of course, were the two land councils which were to help Aboriginal people not only to acquire and administer their land but to advance their interests as land holders.

Assessing whether the legislation is achieving these beneficial goals is more difficult. It can be assumed, however, that common to both the Aboriginal and the wider Australian assessments will be evidence that Aboriginal people are getting closer to the statistical norms for the key social indicators of health, education, employment and income, since Aboriginal material circumstances are the source of legitimate grievance and reflect badly on Australia in international eyes.

In respect of assessing the improvement to social harmony, the basic principles underlying liberal democratic polities can be expected to apply. In particular, the standards of fairness, justice and equity. Where the benefits or consequences of the legislation are seen or claimed to be unfair or inequitable, there may be legitimate grounds to alter the Act. Appeal to these principles partly underwrites Reeves's objection to the permit system, and indigenous objections to the report are being phrased in terms of an unjust failure to recognise indigenous rights and related United Nations conventions. Inevitably there is political contestation over the nature of what is fair, just and equitable.

Because of the wider public interest in the outcomes of the legislation, consideration of its appropriateness and of that of the associated institutional structures cannot be defined

solely in terms of the best cultural fit with Aboriginal arrangement, nor only in terms of Aboriginal perceptions or evaluations. For the Finke River Mission's position on anthropological appropriateness to be sustained, it would have to argue that the patriclan/estate is not only the most anthropologically appropriate level of recognition but also an appropriate institutional level for articulating Aboriginal people's land interests with the state, facilitating the beneficial consequences expected by the wider community.

Accepting, for the sake of argument, the anthropological appropriateness of identifying the patrilineal clan and estate in this way, there are a number of difficulties with this as the basis of institutional arrangements. These include the costs and problems associated with surveying the several hundred estates and defining and incorporating the membership of each clan. Such a 'codification' would entrench boundaries which derive from a completely different set of economic and social circumstances to those prevailing today, resulting in large tracts of land being divided up into many small inalienable areas. This can become problematic because the number of people with interests in each area, or claiming interests, usually increases over time, in the absence of any willing or market mechanisms for redistributing land, making the reaching of consensual decisions more difficult as time goes on, especially in the absence of any other level of organisation.

Is, then, the recognition of the regional community as proposed by Reeves more anthropologically appropriate? In its First Report the Commission made essentially the same proposal as the Reeves Report is now making. It proposed that the holders of title should be community councils (see 1973: 45–46) but this proposal did not eventuate in the Final Report for the following reasons (1974: 12–13):

- the difficulty of drawing lines between communities;
- the difficulty of providing for small new communities;
- the undervaluation of the clan structure; and
- the unwarranted interference with the Aboriginal authority system if the role of the community councils were to be extended to land holding.

These reasons for rejecting the regional council level of title holding depend primarily on whether the clan level has been correctly identified as the key level of indigenous organisation and authority in relation to land. Although in accepting the clan level the Commission might be seen to have aligned itself with the Finke River Mission, its position was quite different. The Commission recognised that the clan level had to be allowed for because it is central to Aboriginal life, but it was conscious that new institutions were necessary for a new situation, in the absence of any appropriate indigenous institutions. These new institutions had to accommodate the indigenous system and its change over time, but they also had to facilitate the articulation with Australian society at large, provide structures through which people could manage their land and allow scope for a degree of self-determination.

If maximising anthropological fit with indigenous institutions is not, of itself, the only criterion for assessing the Act and the institutions brought into existence by it and if,

indeed, such maximisation is not only inappropriate but impossible where no relevant indigenous institutions exist, then it might be asked why cannot the local level be ignored for the regional level since it does not preclude, in theory, the local level being recognised by the proposed regional councils. After all, at present it is the land councils that have to sign off on agreements after consultation with the traditional owners. So why would not the regional councils defer to the traditional owners in exactly the same way? They might. But there is clearly a major difference between the land councils signing off on agreements but not holding the title and the proposed situation where the title is held by the group that has to sign off on agreements with no avenue of appeal. Since there is no natural community of interest between traditional owners, Aboriginal community residents and Aboriginal councils, this scenario is likely to aggravate internal conflict.

Although anthropology does not have to, and cannot logically, bear the burden placed on it in the Reeves Report, this does not mean that it is irrelevant. It is gratifying that public policy-makers recognise that it has a major contribution to make in some contexts. Clearly it is vital to have as good an anthropological understanding of indigenous practices and customs in relation to land as possible, even if this is not going to be mirrored exactly in legislation. It is also vital that, if anthropological evidence is being misunderstood and used as the grounds for supporting new arrangements that fly in the face of much of the evidence, these misunderstandings should be clarified. This leaves us, however, with a question about the contribution that anthropology can make to the revamping of the Land Rights Act.

### **Anthropology and its contribution to a revamped Land Rights Act**

I believe that anthropological understanding is central to establishing what is most likely to be workable in revamping the Land Rights Act and to helping maximise the various beneficial goals of the legislation. In particular, anthropological knowledge about the organisation and working of communities, the nature of internal social structures and processes, and the impediments within the Aboriginal domain to the functioning of articulating institutions all have a vital role to play in ensuring its success.

The difficulties that face the discipline in making a contribution to this process are those that usually face it in contexts of change in the lives of the people it works with. It is frequently conservative, protective of existing arrangements, concerned about what cannot be done as much as about what can be, supportive of organic development rather than radical change, and lacking in a clear practical vision of what should happen. Of course Reeves, too, has to steer a course between a social vision, historical and political constraints, and cultural considerations that cannot be ignored. These factors can make a coherent position difficult and result in such apparent paradoxes as that of many anthropologists arguing for the recognition of indigenous arrangements that foster inequality while Reeves argues for collective ownership and redistribution.

On the grounds of fairness, justice and equity, I think there is an apparently good case for community title and regional bodies of the kind proposed by Reeves. This is because it would be a great deal more equitable among people who are all equally poor and

disadvantaged if they could all be treated as having exactly the same property rights in community land and benefit from it equally. However, in judging whether it is possible to easily ride over the notion of traditional owner, everything we know anthropologically and from the on-the-ground experience of land councils and other bodies makes it seem that this is unlikely. Indeed, it has not even been achieved in settled Australia where the distinction between people with historical and traditional connection to place remains crucial even after a hundred years or more of colonisation.

A second difficulty with the idea of regional councils in the form suggested, from an anthropological perspective, is that local-level structures tend to be captured by particular interests, reflecting the intense localism that pervades Aboriginal life. Local councils are thus, paradoxically, more likely to be unrepresentative than large central ones and can generate a great deal of conflict. The two land councils, with their large professional staff, are not only a much more efficient use of resources but they provide checks and balances within the Aboriginal domain because of the professional culture of their staff and because of the Act's requirement that they deal directly with traditional owners.

The clear absence from the Reeves Report is a substantive anthropologically based analysis of the obstacles in the way of economic transformation. Had there been such an analysis, many of the questionable assumptions on which the report is based would have had to be examined and rejected. For instance, it is quite clear that it is not the statutory definition of traditional owner that has posed problems to economic development (see Reeves 1998: Synopsis, 1) but a complex of factors, including location, that get no substantive discussion at all.

## **Conclusion**

Beneficial legislation raises issues that are particularly difficult for us as anthropologists because of our general commitment to a cultural relativist position. Nevertheless, parliament will make choices about structures and arrangements that have far-reaching social consequences based on broad considerations such as equity, development, workability, accountability, efficiency and cost. Those of us who wish to have an impact on the outcome of this review have to grasp the moral and existential nettle this poses and, having offered our critique, provide positive and concrete suggestions about process, structures and/or solutions to perceived problems.

The most important fact about Aboriginal people in the Northern Territory is that they make up more than a quarter of the population. There is, therefore, more than a moral imperative behind meeting the reasonable aspirations of Aboriginal people in relation to land and the need to meet their legitimate grievances. The future well-being of the Territory depends on legal, economic, social and, importantly, political arrangements relating to Aboriginal people that are morally just, workable and good public policy.

Good public policy has always been forged in the complex crucible of commissioned inquiries, parliamentary reviews, public debate, interest group representations, adversarial politics and academic forums. The Reeves Report provides a challenging rethink of the

Land Rights Act. It is now up to us to do our bit by turning up the heat to test its metal, to find the strengths and flaws and to help refine the quality of the outcome.

## References

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### 3. The Reeves Report and the idea of the 'region'

#### **Howard Morphy**

*Building on Land Rights for the Next Generation* (the Reeves Report) relies on evidence from anthropology to support a number of its conclusions. Reeves uses anthropological evidence to argue that changes are needed in the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act) to:

- provide for Aboriginal representative bodies at the regional level to make decisions about the use of their lands;
- allow the representative bodies to adopt decision-making processes that accord with their traditions, as they interpret them; and
- provide a system of dispute resolution that accommodates Aboriginal traditional practices and processes and is accessible, inexpensive and effective.

In order to facilitate these changes, Reeves argues, a system of regional land councils should be set up in place of the Northern and Central Land Councils. These regional bodies would be contained within an umbrella organisation called the Northern Territory Aboriginal Council.

Reeves states that his conclusions are based on his review of the operation of the Land Rights Act and on anthropological evidence. He argues that the definition of 'traditional owner' under the Land Rights Act has caused difficulties in the subsequent operation of the Act. He also argues that recent developments in anthropology have emphasised the importance of regional levels of group organisation. He argues further that disputes have arisen because of problems with the definition of traditional owner under the Act and because the Act has not facilitated the resolution of conflict at a regional level. However, his concern to amend the Land Rights Act is motivated partly by his belief that the Act should be changed to take on additional functions. These new objectives, which are primarily concerned with development, centre on the control of land and the receipt of benefits. It is difficult to see at times whether the recommended changes to the Land Rights Act are motivated by difficulties experienced in the operation of the existing Act or by the intention to make the Act fulfil quite different objectives. This contradiction is highlighted by Reeves's recommendation that, as far as land claims are concerned, the definition under the Act should not be changed, since it appears to have operated flexibly and effectively in granting 'traditional Aboriginal land in the Northern Territory to and for the benefit of Aboriginals', which was the primary purpose of the original Act (Reeves 1998: iv, 171).

In this paper I will focus on the issue of regionalism.

My criticism of the use of anthropology in the Reeves Report is as much concerned with how it is used as with the substantive arguments that are presented (for a more detailed consideration of these issues see Morphy 1999a, 1999b). The debates that the Reeves Report

emphases are largely ones that occurred in the decades before the land rights legislation was enacted and were taken into account in the drafting of the Land Rights Act. By concentrating on them the Reeves Report appears to push the definition of traditional owner back in time and associate it with the patrilineal, patrilocal hunter-gatherer band. A great deal of attention is given to the theories of Fison and Howitt, current at the end of the last century, and to Radcliffe-Brown's model of Australian social organisation. Yet Fison and Howitt have hardly figured at all in contemporary debates over Aboriginal territorial organisation, and Radcliffe-Brown's writings on the subject have long been acknowledged to be contradictory, flawed and lacking ethnographic support.

The debates of the 1960s involving Stanner (1965), Meggitt (1962) and Hiatt (1962) over Aboriginal social organisation were concerned with the relationship between land ownership and land use, and the relationship between groups which exist on the ground and groups which exist in the head. All participants adopted a regional perspective and, crucially, one which in the majority of cases separated land ownership from land use (though there is considerable ambiguity in Meggitt over this point). By the 1970s the idea that the basic unit of Aboriginal society was a self-sufficient patrilineal, patrilocal land-owning band had few supporters. The arguments against the existence of such groups combine logic from Aboriginal social organisation with logic from ecology. A patrilineal clan group is exogamous – people must marry outside the group. The group must then contain members who belong to other clans who marry into it. This entails the development of relationships between bands and such relationships are likely to mean that, at any one time, bands comprise members of a number of different clans. It is impossible to envisage a situation otherwise, except through the imagination of nineteenth century evolutionary theorists, with groups of brothers forcibly capturing the women of neighbouring groups.

The ecological argument is equally convincing. In any given environment, resources are going to be geographically dispersed and only available seasonally. Some resources are going to be very localised, for example, ochre and axe quarries, others such as shell fish or water chestnuts occur in particular environments and are often available on a seasonal basis. Some resources enable large groups of people to congregate for periods of weeks at a time, other resources support only a handful of people. The uneven distribution of resources is accommodated in two major ways: by the existence of systems of trade and exchange and by the regulation of the size of the group according to the time of year and the abundance of resources. The management of resources cannot be undertaken by the local group alone, but has to be the result of a regional system of organisation. The regional system of organisation operates both to recognise the rights that people and groups hold in resources and to regulate social relations, and to organise the distribution of people in relation to resources.

In many parts of Australia the complex nature of the system of regional organisation is reflected in Aboriginal naming systems. Names can be applied to groups that are formed on a variety of very different bases, from patrilineal descent groups, to people whose mothers, or mothers' mothers, belong to a particular group, to people who are linked by ceremonial ties, to people who gather together at a certain time of year to utilise a particular

resource, even to groups that form together to defend themselves against outsiders. These complexities were brought out for the Yolngu languages in the Gove case without being fully understood and have been discussed in detail by Williams (1986). She has shown how there are sets of names which can be applied to groups that are formed on a number of different principles: through descent, according to the season and purpose for which people gather together, according to sacred relationships between groups and so on. These naming systems articulate well with the levels of group organisation discussed by Stanner (1965), Peterson (1976), Morphy (1990), Keen (1995) and others and form a part of the internal process of maintaining relations between people and land. The fact that there are a multiplicity of groups recognised by different names does not mean that all groups are formed on the same basis or have equivalent rights in a given area of land, nor is it a sign that everything is subject to individual negotiation. Systematic principles are involved in the formation of groups over time and predict who is likely to be a member of that group and the basis on which their membership is established. In north-east Arnhem Land, for example, the list of clan names recorded by Thomson at the beginning of European colonisation in the 1930s (fieldnotes in the National Museum of Victoria, Donald Thomson collection) overlaps almost entirely with the clans people identify with today and the genealogies of today fit directly those of 50 years ago. Not all groups are going to show the same continuity of membership over time, but the underlying principles of formation should still be identifiable.

What is the extent of the regional system? How do we identify the regions? There are no simple answers to these questions. The basis upon which the regional nature of Aboriginal social organisation has been identified so far does not require there to be regions, rather that local systems of social organisation and land ownership have to be seen in a regional context. The region in this case is an abstract concept that varies according to the particular groups or land focused on. Indeed, some archaeologists and anthropologists have argued that Australia as a whole is a regional system. Such an argument is based on the fact that Aboriginal people belong to networks of interconnection that stretch across Australia, which is reflected in the fact that some ancestral tracks and trade routes extend across the continent.

A number of studies have attempted to identify regional units across Australia, though again it is more correct in most cases to characterise those studies as looking at regional variation rather than attempting to define regions *per se*. Studies have plotted regional variations in the distribution of types of artefacts, ceremonial practices, kinship organisation, language families and so on. Such studies are potentially of interest in the reconstruction of Aboriginal cultural history, but each variable is usually shown to have its own unique distribution rather than contributing to the definition of a regional cultural type. Certainly there has been no attempt to argue that such regional entities are land-owning groups. Reeves refers to Peterson's cultural areas theory in support of the idea of regional land councils, but it does not really fit his arguments. Peterson (1976) has put forward a proposition that ecological boundaries, in particular drainage basins, may be one factor in influencing regional cultural history. The regions identified, however, were often large in scale and there was no implication that they contained tightly bounded

systems. Indeed, the idea that it is possible to identify precise and impermeable boundaries goes against the theoretical framework developed by Peterson elsewhere (for example, Peterson 1972). Indeed, much research has been directed towards deconstructing regional concepts such as tribe or language group or showing them to be of limited application. While it is possible to define broad regional differences in forms of social organisation and land ownership across Australia, it is important to recognise that those systems are not bounded and discrete but merge at the edges with neighbouring systems. People living on the boundaries between different systems are able to accommodate to both systems. Regional systems of social organisation are abstract concepts which neither reflect named indigenous units nor define a social field.

By definition, the existing land councils take account of the regional nature of land ownership. Reeves's intention to break up these regional bodies into smaller entities makes no sense in terms of his own presentation of the anthropological evidence. The smaller bodies would themselves be in part an artefact of colonial history, being focused in many cases on populations centred around government settlements and mission stations. While such regions may be useful subdivisions for administrative purposes and for ensuring a breadth of representation within the existing land councils, they do not reflect traditional levels of regional organisation. Even in cases such as eastern Arnhem Land where there is an anthropological case to be made for a degree of regional coherence in terms of the kinship system and the relatedness of the languages of the Yolngu-speaking bloc, the boundaries rapidly disappear on closer analysis. People of the western part of the Yolngu region interact with non-Yolngu groups centred in the Maningrida region, and southerly Yolngu groups such as the Ritharrngu have close links with people in Ngukurr and Numbulwar. In both cases these links with non-Yolngu are probably closer than the links to the Yolngu communities at Yirrkala or Galiwinku. In the region of Ramangining and Maningrida, it would be quite arbitrary to say where one region begins and another ends. While it is possible to identify differences in environment, language, kinship system and artistic practice, it is usually arbitrary to define precise boundaries between adjacent groups or to detect any relationship between such regional variables and land ownership. The regional differences that seem so clear at a distance dissolve at the boundaries between regions. Inter-marriage and shared ceremonial and economic activity are continuous across linguistic boundaries, across different kinship systems and ecological zones.

Moreover, two of the cases Reeves puts forward to justify the development of regional land councils concern groups which are in dispute with other groups *within* the eastern Arnhem Land region: the North East Arnhem Ringgitj Land Council and the Marthakal Land Council. Far from solving such disputes, the creation of a separate Eastern Arnhem Land Council might well exacerbate them, resulting in an increasing Balkanisation of Aboriginal land councils and increasing legal and political complexities and costs.

It is clear, nonetheless, that regions are developing. The regions that are emerging are a result of both indigenous and historical factors, such as where missions or government settlements were built, the extent of dislocation by invasion and disease, and the nature of the local economy, including proximity to European settlements and the existence of mining royalties. Many of these factors may only have a short-term effect, which is another

reason why it is desirable to allow the regions to develop within the ambit of a larger Aboriginal organisation that allows time for readjustment. This may, for example, involve the development of regional centres that are geographically away from present settlements. The larger councils will grant Aboriginal people the autonomy that will enable them to reorganise communications over time to fit in with traditional structures and alliances as well as taking account of new opportunities.

The top-down approach recommended by the Reeves Report is not the right way forward for the development of regional organisation. The existing structure of large regional land councils enables Aboriginal political organisations and systems of ownership to continue at the local level in the context of regional dynamics. The proposed smaller land councils, with a criterion for membership being residence and people only being able to belong to one council, would not reflect existing systems of land ownership. Hard boundaries between regions would be a recipe for endless disputes, precisely because as many people would live on the boundaries as in the centre. It might be possible to get around some of these problems by developing joint structures, but this is likely to be much more bureaucratic than the present system. What the present system allows for is the development and identification of groups of traditional owners at the local level which will be able to flexibly develop a structure and system of representation that responds to the particular need. Indeed, my conclusion on this point would be entirely opposite to those drawn by Reeves; 'the Land Rights Act, in the operations of the large Land Councils, *does* accord Aboriginal people self-determination with respect to the control of lands according to Aboriginal tradition at the regional level' (*pace* Reeves 1998: 591).

In the long term, local Aboriginal political structures are likely to develop which, while cognisant of the spread of interests beyond their boundaries, are able to combine a number of different roles, from administering government funds directed towards health, education or employment generation to taking on local responsibilities for matters to do with the Land Rights Act. In the long term, this is likely to result in the development of regional structures, but these will develop from the bottom up rather than the top down. The Land Rights Act allows for this evolution.

There is no question that regional structures will develop within Aboriginal-owned land as they do across Australia and the Reeves Report contains some excellent suggestions that might facilitate this process. In particular, I refer to the suggestion that money directed towards Aboriginal communities via the Aboriginal and Torres Strait Islander Commission and the Northern Territory Government should become part of the budget administered by Aboriginal people. Reeves (1998: chapter 28) suggests that this budget should be administered by the newly created Northern Territory Aboriginal Council, however, this would merely replace one centralised body with another and not respond to regional interests. I think it would be equally inappropriate for the existing land councils to administer this part of the budget as it does not fall within their existing functions and the money is not directly related to land ownership. However, it would be entirely appropriate if those funds were allocated to regional Aboriginal bodies which would be able to utilise them in the best interests of their constituencies. Money for education, health, welfare and employment generation is rightly directed towards people who are

resident in particular communities, irrespective of what property rights they may have. Local political structures such as councils, which are independent of land councils, would ensure the accountability of the regional organisations. There is already much evidence that such regional organisations are developing in the area of health and the provision of services.

Resources that derive from Aboriginal ownership of land, such as royalties, returns from leasing and so on, would remain within the domain of the land councils under the Land Rights Act. This situation would then accord both with traditional Aboriginal practice of a relative separation between land ownership and land use and with the fact that in Australian society in general there is a separation between government and the private sector, including property owners. It is likely that in the regions that develop there will be collaboration between the 'local authorities' and the traditional owners, but the actions of the traditional owners will relate to their interests according to traditional Aboriginal polity, and will not be constrained by local authority areas.

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## 4. The Reeves Report and the idea of the 'community'

**Peter Sutton**

### **Background**

This paper is a shortened and amended version of a submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into the Reeves Review of the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act). The submission was commissioned by the Australian Anthropological Society, the professional body of anthropologists in Australia. It contains my own opinions, which are not necessarily those of the society's membership.

My brief was to provide the Standing Committee with specifically anthropological commentary. I have to say that on many occasions while reading the Reeves Review's excursions into matters anthropological I had some difficulty following the thread of reasoning across breaks in the arguments. Nor was it easy to see why some published sources had been called on rather than others, or what implications the reader was meant to draw from them. I came across what I regard as a number of errors of fact or interpretation, particularly in chapters 7 and 8.

In particular, I believe that Reeves's use of anthropological sources to support, or appear to support, the claim that the regional land council 'community-based' model is consonant with Aboriginal traditions of land rights and authority structures was misguided. So also was the use of those sources to justify the removal of what have been called local descent groups from any special recognition in the new decision-making structures that are proposed.

I address the following Standing Committee terms of reference in this paper:

1. The proposed system of regional land councils including:
  - the extent to which they would provide a greater level of self-management for Aboriginal people, and
  - the role of traditional owners in decision-making in relation to Aboriginal land under that system.
2. The proposed structure and functions of the Northern Territory Aboriginal Council.
3. Proposals concerning access to Aboriginal land, including the removal of the permit system and access to such land by the Northern Territory Government.

## The proposed regional land council system

### The Reeves Review's critique of the present system

The Reeves Review argues that the present system privileges small 'traditional owner' groups and gives insufficient acknowledgment to the wider regional populations within which such groups are reproduced culturally and socially. While the Land Rights Act does give a place to people who are not traditional owners but are entitled by tradition to use or occupy Aboriginal land, ultimate control of what happens on that land is said to lie in the consultative relationship between the traditional owners and the land councils. The fundamental criticism that is advanced deals with both parts of this relationship. The criticism essentially is that:

- the power of traditional owners within the scheme of the Act is excessive, and the powers of members of the resident Aboriginal community are insufficient;
- the large land councils, while politically successful at a Territory and national level, are defective in a number of practical and regionally local ways, unlike the two smaller land councils.

The fundamental solutions to each main criticism offered by the Reeves Review are, respectively, to:

- collapse the owner/resident categories into one for the purpose of decision-making; and
- get rid of the larger land councils and break up the Northern Territory into 18 regional land councils overseen by a single Northern Territory Aboriginal Council (NTAC).

The critique here proceeds on two main fronts.

Firstly, it argues that the current definition of 'traditional owner' rests on inadequate and outdated anthropological advice. While this definition should be retained for the purposes of clearing up outstanding land claims, it should not in future drive the definition of who makes decisions about Aboriginal land. Instead, the Northern Territory should be divided into 18 areas controlled by regional land councils with wide-ranging localised powers, overseen strategically, financially and in other ways by a single territory-wide council – NTAC. The regional land councils would both make decisions about land and hold the land legally in trust.

Secondly, the Reeves Review argues that the two large land councils are substantial bureaucracies with responsibilities for regions that are far too large for them to manage properly, as they are perceived to be remote from local issues, slow to act and inflexible. The review does not propose a level of organisation between the regional land councils and NTAC. It does not address the problems of bureaucracy and remoteness that might be the burden of such a single territory-wide body located administratively in a single centre, presumably Darwin.

## Self-management, decision-making and regional land councils

Aboriginal tradition usually makes a clear and quite profound distinction between traditional affiliations to countries and residential associations with settlements or districts. While there are complex actual and potential relationships between the two, they do not, separately, grant equivalent rights and interests in land. Long term-residence, particularly that of a family over more than a generation, may lead to the acquisition of local traditional affiliations, but this is neither universal nor generally encouraged other than on a customary-lawful basis such as succession or formal incorporation. Attempts to merge the two or to blur the distinction by Aboriginal people are rare and, in my experience, they are typically met with fierce opposition. Of all the cases brought before the Queensland Land Tribunal under the *Aboriginal Land Act 1991* (Qld), none have been on the basis of historical affiliation alone, which the Act allows for. Those who have claimed historical affiliation in that jurisdiction have come exclusively from those who claim traditional affiliation to the claim areas.

The experience of the New South Wales land rights regime, which assigns membership of local and regional land councils on the basis of residence, has been fraught with conflict. One major cause of this conflict is the relationship between those who regard themselves as having ancient and traditional ancestral identification with an area and those who live in that area because they or their ancestors moved there in the period following colonisation. The *Aboriginal Land Rights (NSW) Act 1983* did not seek a balance of such interests. Pursuit of legal recognition of native title in the same State has raised the temperature, highlighting claims based on 'way back' deep connections as against those formed in historical time through migration and deportation. Claims of cultural integrity struggle with claims of equity (see Macdonald 1997). Peterson (Peterson and Long 1986: 72) said, of residence-based models of land rights, that 'it needs to be recognised that [they are] an interference in the traditional system since [they are] likely to result in advantaging those with weaker interests by equating them with the strongest if litigation takes place'.

In the present case the Reeves Review proposes that in order to be a member of a regional land council one must either have a traditional affiliation to an area of land within it or one must be a permanent resident of it (Reeves 1998: 595). This provision would create conditions in which people may fall into the following categories, although not all that neatly at times:

- having traditional affiliations within the area and also being resident;
- having traditional affiliations within the area but residing elsewhere;
- being a resident of the area but having (few or) no traditional affiliations within the area.

Under the review's proposals, all such people in the same regional land council would be of equal standing in making decisions about land use. This would normally be contrary to Aboriginal customary law in a quite profound way, granting by government fiat a strength of voice to those in the third category which customary procedures would not tolerate.

In my view this proposal would particularly sow the seeds of serious conflict in cases where, for example, a number of residents had no strong local traditional affiliations but sought to share in or dominate the power, patronage or benefits available through the regional land council of which they were members. The alternative would probably be that such 'historical people', as they are often called, would have to play at best a secondary role, in the shadow of those with traditional affiliations. Unless regional land councils were legally obliged to take their views into account, their views may well be omitted from deliberations. Under such circumstances they would thus be worse off, or no better off, than under the present regime.

The Reeves Review also proposes that 'no person may be a member of more than one regional land council at a time' (Reeves 1998: 595). There are manifold problems with this.

For example, some Aboriginal residential communities in the Northern Territory practise quite high levels of settlement community exogamy (out-marriage). Perhaps most pronouncedly in the smaller settlements and those with strong Western Desert populations, people may be encouraged to find a spouse in a settlement community different from their own. Whether by choice or by rule, this results in a number of people moving to take up residence in the community of their spouse some distance away. Many of those who move are women, but both men and women are involved. Are such people likely to opt for membership of the regional land council that includes their spouse's country (if that is in the regional land council area of the spouse's residence) or their own? Assuming the latter, they would be residents of a regional land council area in which they lacked membership and therefore, under the review's proposals as I understand them, would have no well-defined decision-making role in land affairs even as a member of a community likely to be affected by development. If they were members of the regional land council for their area of residence and not their area of origin, they would be unlikely to attain much prominence, or any say at all, in the regional land council's affairs. On both choices they would be arguably worse off than under the present scheme.

The following pairs of settlement communities are currently located in different but adjoining land council sub-regions of the Northern Territory: Ngukurr and Borroloola, Maningrida and Ramingining, Yuendumu and Ti Tree, Finke and Santa Teresa, and Elliott and each of Daly Waters, Tennant Creek and Daguragu. These examples could no doubt be multiplied many times, especially at the scale of smaller settlements.

Were the regional land council system introduced, I would predict that most people would opt to be members of the regional land council for the country where they had their strongest traditional affiliations. In a number of cases this is not likely to result in any very neat alignment between the regional community population and the membership of the regional land council. The regional land council system may, however, help those who have a tradition of acquiring traditional rights through relatively shallow residential histories (that is, Western Desert people) to establish a powerful presence, if not a dominance, in the affairs of country which is normally associated with their neighbours. In such a case the state may be interpreted as interfering with Aboriginal law by lending

comfort and support to immigrant groups whose territorial ambitions are not welcomed by host groups.

A problem with restricting each person to membership of one regional land council is that of enabling them to continue to exercise their actual customary responsibilities for their primary country. Countries which straddle regional land council boundaries, giving their principal spokespersons customary responsibilities in two regional land council areas, could thus be governed officially by those spokespersons and others on one side of the border and by people who lacked any such standing, or sufficient standing, on the other. One cannot leave such bureaucratically engineered situations to be managed by local goodwill. It is always conceivable that someone with little customary authority but plenty of political clout could use the opportunities offered by such an official system to ride roughshod over those with customary authority, essentially depriving customary land owners of an effective say over the whole of their countries. A great advantage of the pre-colonial systems, and their current descendants, is that they distribute a 'member of landed group' standing to everyone in the society. Even the 'little people', those who stand in the back row politically, all have country and the standing that flows from that.

Furthermore, it is widely documented in the Northern Territory that people often have key customary responsibilities for sites and lands in two, sometimes several, different areas separated by some distance. No amount of adjustment of regional land council boundaries could overcome all such cases. Where these sets of countries fall into different regional land council areas, the present proposal would require that the people responsible for them relinquish all except one set of traditional responsibilities relating to decision-making. This would make the situation quite unworkable, for example, where *kirda* (patrilineal and so on) refuse to make a decision about country without the presence and concurrence of their *kurdungurlu* (matrilineal and so on) as co-decision makers, but where such *kurdungurlu* have opted for membership in an adjacent regional land council in which they themselves are *kirda* for a certain country.

Under the proposed scheme, the possibility that long-term Aboriginal immigrant residents from Townsville, say, could be members of a regional land council while some of those actually responsible for the regional land council's lands under Aboriginal law were excluded in the ways mentioned above, is one that could cause great bitterness and conflict. Such tensions would be exacerbated over time by chain-migration based on economic opportunity. Regional land council areas which yielded substantial royalties for regional land council members could easily become targets for such migrations, not only by small numbers of people from remote and unconnected places such as Townsville and Adelaide but, with much more dire consequences, by larger numbers of people from nearby areas. The proposed regional land council membership rules would offer official sanction for small population groups to be challenged by immigrant newcomers, especially in some of the proposed regions that have small populations of only a few hundred to a thousand or so. Of these smaller populations only a few hundred would be adults, given the low age of the populations generally.

There is an apparent contradiction between this provision for permanent residence *per se* to be a membership criterion (Reeves 1998: 595) and the proposal that regional land councils 'hold in trust all Aboriginal land in its region for the benefit of all Aboriginal people who are entitled by tradition to use or occupy that land' (Reeves 1998: 597). On the face of it, this would suggest that someone who was not a beneficiary of the regional land council's land trust could still be a member of the regional land council and its board of directors. If this seems fanciful, consider the fact that in recent years the remote Aboriginal community of Aurukun in Cape York Peninsula, which has a residential qualification for shire council elections, has had a German immigrant as a member of the council.

### **Placing people in a dilemma over regional land council membership**

Reeves's regional land councils as presently defined would potentially join together in the same political and administrative unit two sets of people who have quite different customary standing in relation to the same area of country. To take the Cox Peninsula as an example, both the Belyuen residents – who are mainly people of Daly River immigrant stock living on traditional Larrakia country – and the mainly Darwin-resident Larrakia would potentially be in the same regional land council and competing for control of it. But instead of two groups with similar ties to the region potentially engaging in conflict, here we would have groups with different kinds of ties having to share political space. I think this is a recipe for more conflict than is strictly to be expected.

The Larrakia greatly outnumber the Belyuen community and this, if not other considerations such as those of customary law and kin-based solidarity, may persuade the Belyuen people to opt instead for membership of the proposed Daly River – Port Keats region. One alternative for them would be some kind of physical 'return' to the south by the Belyuen people, many of whom now have been born and raised close to Darwin. If this were to occur as a result of pressure, it is the very kind of forced move they are seeking to resist.

Either way, the proposed amendments would place the Belyuen people in a difficult if not impossible position. They could stay resident in the Darwin regional land council and belong electorally to a different regional land council region that includes their patrilineal clan estates (Daly River – Port Keats). But in that case their normal physical absence would probably marginalise them politically and they would not benefit from their local regional land council's disbursements in infrastructure and employment terms. Meanwhile, in their regional land council region of residence (but not of membership) they would have no official influence on land council matters.

As a third alternative they could, I suppose, split their own polity, having some Belyuen residents as members of the Darwin regional land council and others members of the neighbouring one to the south-west. Given the different lengths of time families at Belyuen have been resident there, this is conceivable, but it has a cost in terms of their being able to sustain support and influence politically in either regional land council zone, and in any case a split may be unlikely to happen as the settlement community in this case is tight-knit.

There are at least 10 areas of the Northern Territory where three (in one case, four) of the present land council sub-regions have adjacent boundaries. Under the Reeves proposals, decision-making about land use in such areas could be a nightmare. Aside from the problem of traditional owners having to opt for membership of just one of the regional land councils involved, even if they have customary rights in the three or four adjacent and abutting regional land council areas, there is the administrative problem for industry and government of having to conduct dealings with three or four different bureaucracies at once. Many of these areas of multiple adjacent land council sub-regions are on or close to the major transport corridors of the Northern Territory.

There should be no assumption that regional land councils will be particularly motivated to cooperate with each other rather than to compete, especially where organisational boundaries, resource allocation and political standing are placed in the same mixture. If anything, one would expect them to compete with each other and, at times, to engage in vigorous conflict. Settlement communities already compete with each other, even in terms of ritual performances (see Holcombe 1998).

In sum, the Reeves Review's membership proposals for land councils, while arising from matters of real concern that have to be addressed, seem to me to be capable of causing more problems than we have at present.

### **Security of tenure for settlement populations**

The Land Rights Act alone, as it stands, is clearly inadequate to the task of dealing with the security concerns of long-term residents whose ancestral countries lie somewhere other than where they are living. Anxieties about being 'kicked off' or 'sent back' by those who have ancient connections to the land are real. The native title system, with its explicit capacity to cover such concerns by formal agreements made at the point of the determination of native titles, offers a much better regime in this regard.

I therefore support the Reeves Review's recommendation (1998: 500) that rent-free sub-leases should be negotiated, where possible, so that settlement communities may have security of tenure. But what I have in mind here is some kind of municipal areas, not large tracts of country lacking in permanent dwellings. The review's recommendations on sub-leases would help to relieve the tensions between parties in situations such as the *Kenbi* case (Cox Peninsula and nearby islands), but only as far as the town areas are concerned. In the *Kenbi* case the legal struggle is not itself over use of the town, which is on a separate tenure not subject to the current claim process, but over the recognition of traditional owners of the rest of the Cox Peninsula and nearby islands.

### **The proposed relationship between NTAC and the regional land councils**

The Reeves Review proposes the abolition of the two large land councils and the creation of a single NTAC plus 18 regional land councils. Given that the two small land councils (Tiwi and Anindilyakwa) have an average of 14 staff, 18 similar regional land councils would have a notional total staff of 252. It is hard to imagine that NTAC itself would not

require a substantial staff of at least 100, given that its proposed responsibilities would be extended into areas of economic and social development currently performed by other agencies (Reeves 1998: 605). On the above assumptions, the review's proposals would result in an increase in the total size of the bureaucracy to more than 350. The current staffing levels of all combined land councils as described in the review is only 229. The outcome would thus be far more bureaucrats rather than fewer. Therefore if a staffing increase is contemplated, consideration should be given to addressing the 'bureaucratic remoteness' issue by boosting the existing support services at the regional level instead.

## Permits and access

On the grounds of anthropological advice, Reeves (Reeves 1998: 305) concluded that access to land under Aboriginal tradition was not controlled by maintaining geographical boundaries for travel but by reference to social relationships with the groups occupying the land. I do not regard the two as in contrast. They are aspects of the same process. The anthropological literature is clear on the point that, under classical conditions, the limits on people's social networks had geographic correlates, and their normal geographical range was limited by the point at which they would become a 'stranger' to local people they might encounter. Historical accounts quite often contain stories of Aboriginal guides declining to accompany the first explorers past a certain point into areas where they would be venturing beyond their social range and safe knowledge of the country. One has to conclude that such geographic limits were in place before colonisation. The freedom with which people travelled over each others' highly localised estates within small regions was more a matter of a standing licence, which under certain conditions of conflict or mourning, for example, could be withdrawn, than either a full freedom or a mobility dependent on the granting of specific permissions. The web of kinship normally meant that individuals could access several countries as of right, rather than by licence or permission.

The assertion that 'strangers or visitors were not required to obtain permission before entering land' (Reeves 1998: 305) is not quite accurate. Often quite elaborate protocols were required of visitors by those receiving them, but for distant visitors to pass on beyond the physical presence of their hosts, and to travel unaccompanied further into the country of those hosts, would normally have required some kind of concurrence from the latter. This would have applied especially to far-travelling groups such as revenge parties or, for example, those engaged in the red ochre expeditions between Coopers Creek and the southern Flinders Ranges (see Jones 1984: Part I, 8).

In stating that 'Aboriginal custom did not appear to include a commonly acknowledged right to exclude others from lands, except sacred sites' (Reeves 1998: 305), the Reeves Review omits mention of the formal closure of camp sites and areas of country by those in authority, owing to recent deaths or ceremonial activities. In the Wik area my data (Sutton 1978) indicate that these closures may be carried out at the level of the clan estate by clan heads. Here the review also omits mention of traditional resistance to the overstaying of visits, especially by large numbers of people, and restrictions on visitor

access to specific resources at particular places, resources that were reserved for the control of a smallish set of people with localised rights in them at the 'local descent group' level.

However, many of those who currently seek permission to enter Aboriginal land are not members of neighbouring Aboriginal groups but may be geologists from Perth or tourists from Sweden. If one were looking for classical foundations for current arrangements, such people would, in the early colonial era, have met with a range of responses, some of which would now be unacceptable. While the present arrangement for permits is clearly problematic and in need of reform, some kind of regulated intervention is arguably necessary, beyond merely applying the laws of trespass.

One reason I say this is because being in favour of getting rid of permits and merely applying the laws of trespass might rest on an assumption that those seeking permission to enter land, and those granting permission, are more or less equally well-informed as to their legal rights, and more or less equal in terms of the power to say no to each other. But there are considerable inequalities on both fronts, inequalities which potentially lend themselves to the kinds of pressure and blandishments that may on occasion result in corruption or exploitation. Assuming that some very unjust outcomes are likely to arise under a laissez-faire approach to land access, is it the state's business to intervene? Given that the state is responsible for producing the conditions under which older and more distributive forms of power have been eroded in this case, and powerful strangers legitimised, some would argue that the state now also has a fiduciary duty to protect citizens from the exploitative potential of those who have more resources and power than others, the latter including some who achieve local political success in remote places. At this point the intervention/non-intervention argument probably becomes one between contrasting political philosophies so I will not pursue it further.

Even if the permit system were abolished, many intending visitors to Aboriginal land will still need, somehow or other, to engage in the courtesy of requesting permission to enter. One of the practical difficulties of obtaining entirely localised permission to enter Aboriginal land lies in the unpredictability of the capacity of small, remote-area offices to process correspondence within certain time frames or, on occasion, at all. This is compounded when the people in the office receiving the request are not the people whose permission is required. On a per capita constituency basis, the two existing smaller land councils have vast numbers of office staff by comparison with the two large land councils, and this may be one of several reasons why they are able to process permit applications relatively efficiently. Short of turning up in person from what is sometimes a great distance, it can be impossible to get a reply to an application to visit an area from a local community-level mini-bureaucracy. I suggest this be kept in mind in relation to assessing the regional land council proposal. It may be that industry, for example, would prefer greater predictability to a theoretically more direct relationship with people at the local level during the process of gaining permission to enter.

Should the recommendations of the Reeves Review on land access be adopted in principle, provisions relating to dwelling houses and yards in towns (Reeves 1998: 307) should be expanded to include open camps and day-shades. From time to time one sees strangers

offensively wandering among these domestic spaces on the edge of an Aboriginal town, apparently on the false assumption that because they are out of doors they are not in someone's home.

## Conclusion

As several anthropological sources used in the Reeves Report have said, it is a false dichotomy to pit ritually focused groups primarily responsible for particular sites and areas against wider sets of regional land-using populations in order to find some mythical single true locus of land tenure. One cannot even make such a distinction in order to simply divide 'economic' from 'non-economic' interests in land.

It is also a false pursuit to consider that there is one 'level' at which Aboriginal people hold rights and interests in land under their traditions. Such a single level is perhaps suggested in the Reeves Review (1998: 131) when it says that:

An exclusive focus on relationships between a clan and clan areas does not adequately identify the level at which Aborigines may be said to own land. Rather, in Justice Blackburn's view [in the Gove decision], the relevant land-owning group was comprised of all Aboriginal people who legitimately occupied land under Aboriginal tradition.

This must be read as a judgment from within European legal traditions of notions of 'owning', rather than an attempt to reflect Aboriginal traditions. If someone says 'I'm living here with my in-laws, but it's not my country, no way. My country is elsewhere', it is not helpful to ignore what they say and baldly conclude that, because they are living there with the blessing of the traditional system, they must be an 'owner' of the land.

A little later, Reeves (1998: 140) put his views as follows:

In the same process [ie. the current Land Rights Act's identification of traditional owners], it has overlooked the group that best represents the complex, dynamic and multi-faceted facts of Aboriginal traditional practices and processes in relation to the control of land: the regional community.

While Reeves (1998: 144–45) quotes with apparent approval Professor Merlan's words to the effect that there are no set levels to which one can peg legal definitions of traditional owners which will be appropriate for all purposes, he effectively proceeds to ignore the principle she propounds.

An assumption underlying the Reeves Review's approach seems to be that the legislation needs to continue to single out one 'level' of landed group interests, or a single kind of grouping, which offers the 'best fit' with tradition and real practice. I do not agree. There is no point in replacing undue emphasis on one level of responsibility for land with undue emphasis on another. The review's proposed amendments would tend to suppress what is a very real and active level of rights, obligations and authority in the lives of most Aboriginal people of the Northern Territory, rather than complement it. In any case, rights and responsibilities in country, under Aboriginal tradition and in current practice, are

not vested in or derived from any single 'level' of grouping but are rooted in a complex machinery that coordinates different kinds of persons and groups of different types and sizes, and calls on different sets of people to deal with different kinds and scales of decisions about land as they arise. This is not to say that there are no enduring structures of prominence that are brought into play on these occasions, just that no one of them is universally applied.

There are some parallels in non-Aboriginal tenures in Australia. The individual may have a freehold but owes both informal and legal duties to consult neighbours about certain uses of it. If it is a shop, members of the general public have every right to enter and make economic use of it, even though their occupation rights are qualified and temporary. Municipal and other local government bodies both recognise and restrain the land holder's interests in the freehold block. Widely cast catchment authorities or environmental planning bodies also have certain powers over it, in terms of the owner's freedom to decide its use. The state may have a similar role and may tax it or, in the case of some tenures, may extract a benefit from it in the form of a royalty. Ultimately the Crown holds the root of the block's title. It is the articulation of all these levels of rights and powers that constitutes the legal tenure and land use system. Which 'level' comes into play depends on the matter at hand. So it is with customary tenures.

The legislation should therefore create conditions in which the appropriate 'catchment' of decision-makers in relation to Aboriginal land can best be determined case by case, rather than sticking to a rigid formula which concentrates power in the hands of those who happen to rise to the control of fixed Aboriginal boroughs. The promotion of structural conditions under which we could expect to see a proliferation of regional fiefdoms and inequalities of the kind alluded to in the Reeves Review is obviously to be avoided, and I agree with the review's concern about the concentration of wealth in the hands of the few clans on whose immediate estates developments have occurred, when the interests of the regional polity have been downplayed.

But basic aspects of the Reeves Review's alternative model could lead to even greater and more widespread degrees of unequal distribution of resources than occurs at present. This is partly because the numbers of people in each of the 18 proposed regions is very small, and the emphasis is on a permanent concentration of decision-makers rather than on an event-specific approach. A struggle for dominance of these regional structures is thus more or less inevitable, and one of the prizes targeted would have to be the local administrative apparatus in each case. On the basis of experience elsewhere, one could expect dominance of the local apparatus to be keenly pursued, including by those who have, ironically, localised 'traditional owner' claims on the country that includes the main office. If they have sufficient numbers and talent, they can be expected to win this struggle and thence may have a tendency to look after their own families before others. Is this an outcome likely to be palatable to the wider liberal-democratic public whose members hold culturally different views of duty, accountability, and the imperative to integrate family with politics?

I assume that the Land Rights Act should continue to attempt a reflection of Aboriginal cultural practices, not to impose a radical change which ignores them. In my view, the

Reeves Review's proposal for long-term residence to be a stand-alone qualification for regional land council membership represents such a change of direction.

If amended legislation were to avoid a fictional 'single-level of traditional owners' model and instead create a space in which people can be recruited to decisions in ways that are tailored to the events that are happening on the ground, as I suggest, there would be no single committees of 'traditional owners' for all seasons. However, under modern conditions, I do not see any practical way of doing this without a fairly sophisticated mechanism for negotiations and consultations run out of land council offices and regional branch offices, where the duty to consult, legally advise and report at a professional level is kept distinct from the power to decide and to represent. This requires a certain critical mass of able staff.

Whatever reforms might be made to the current scheme, both it and its successors will depend heavily on the quality and motivation of the staff of the land councils for any hopes of reasonable success. Much land council work, especially the research, briefing sessions and consultations done in the field, is carried out under arduous conditions, both physical and psychological. My own observation of the two large land councils, after an association going back 20 years or so, is that by and large they are heavily reliant on having at least a core of staff, especially professional and field staff, who believe in what they do, and who commonly perform with a dedication that is beyond the strict call of duty. I frankly do not see how they can perform their complex and difficult functions at a high level without this element of dedication. Having had first-hand experience of the opposite kind of bureaucracy which ran Queensland Aboriginal affairs and controlled most reserve lands there in the 1970s, I see great danger in failing to take advantage of the energy and performance standards of staff who are committed to the support of Aboriginal interests and aspirations.

The downside of this commitment can be its contribution to the political temperature in a Territory where the party of long-term power is not the main party of choice of the substantial Aboriginal minority, and where populations are so small that politics is easily personalised. It is probably no secret to say that gung-ho approaches to negotiations and political issues, on both sides, have been a problem. A more conciliatory spirit is needed, but that is not to say that it will fix things without structural reforms.

However, if 'self-determination' means locating power over land in a single type of 'representative' sub-regional body, reproduced 18 times, I believe that this would be no advance on the present system, and it would offer official sanction for the erosion of one of the prime sources of stability and predictability in the Aboriginal land rights domain, namely, the recognition of an intensely local, typically descent-based (but also otherwise-based) group with a primary and theoretically 'eternal' identification with particular sites in a specific small area (see Sutton 1999). As the first entry point for individuals into the system, the local group, while it does not stand alone in the realm of authority, remains critical to the composition and stability of many of the wider groupings to which people belong.

Given Northern Territory Aboriginal people's legendary distaste for legal changes and their equally legendary preference for stability in the law, one should only seek to promote legislative reforms of a far-reaching administrative kind when fully convinced that the effects will be unambiguously beneficial. While I agree with the Reeves Review's assertion that greater devolution of administrative attention to the local level is needed, and the regional character of traditional rights and interests needs better representation in the decision-making and resource allocation processes, I have serious misgivings about the review's proposed method of achieving this, and about its use of anthropological writings in seeking to justify that method.

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## 5. The nature of 'permission'

*Nancy Williams*

### Introduction

In considering the nature of permission, immediately to the fore are issues of boundaries and resources, but also of authority and relevant procedures for seeking and granting permission: the exercise of individual and collective rights in the process, how boundaries are conceptualised and realised, the grounds for crossing boundaries (or not crossing boundaries), and the specific procedures for seeking and granting permission. All these issues invoke the question of ownership, that is, of a proprietary interest that entails exclusive possession.

Aboriginal people in the Northern Territory are owners of land and sea in terms of their own law; some are also owners of those lands and seas in terms of Australian statute. For the latter, the issue of permission is, *inter alia*, dealt with in terms of the statutes and regulations that govern the issue of permits to enter and be on Aboriginal freehold land – the so-called 'permit system' – as well as in terms of Aboriginal law. Aboriginal law, in general and in its various local manifestations, governs procedures for seeking and granting permission. I discuss these procedures and then examine the implications of the imposition of the permit system.

The questions that have been raised in the Reeves Report reflect the dissatisfaction of some people with the manner in which the procedures of Aboriginal law and the permit system have been articulated. Such 'problems' with the permit system to some extent reflect genuine issues or difficulties; others are spurious.

### Property and the distribution of rights in property

John Reeves's treatment of Aboriginal ownership of land relies on his interpretation of Blackburn's findings on the nature of Yolngu proprietary interest in land in the *Milirrpum* case. (He also relies on some anthropologists' interpretations written many years before land rights became a legislative possibility and, in my view, misinterpretations of more recent research.) This is curious since Blackburn's findings can no longer be regarded as adequate or indeed accurate, nor are they legally binding, having been superseded by statutes such as the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act), which defines Aboriginal ownership in the Northern Territory, the Native Title Act and judicial findings of the High Court (*Mabo 2* and *Wik*). I am pleased that I am thus in good company when I find that Reeves (1998: 141) remarks in the report that 'In her submission to the Review, Professor Nancy Williams maintained, contrary to Justice Blackburn's judgement in the Gove Land Rights case, that among the Yolngu of north-east Arnhem Land, local descent groups have proprietary interests in land'. Moreover, Morphy (1999) correctly observes that Reeves improperly interprets Blackburn as implying that,

had the Yolngu made the basis of their claim individual ownership of land, they would have succeeded. Morphy says, 'In the passage concerned it is clear that Blackburn is citing this possibility to demonstrate its absurdity'. My submission to the review referred to the title-holding group and to related groups that exercised checks and balances in the management of the title-holding group's land. Rather than impair the right of exclusive possession, as the review incorrectly implies, the exercise of the related groups' functions explicitly affirms the right of the owners to exclusive possession of their land. The checks and balances inherent in Aboriginal systems of land tenure, not just in the Northern Territory but throughout Australia, are now widely known (by such terms, for example, as *kirda-kurdungurlu*, *yothu-yindi*, and owner-manager). They continue in force and are essential to the orderly regulation of tenure and the management of resources.

### **Distribution of rights in property**

With increasing understanding of Aboriginal systems of land tenure based on land claims research and determinations of Aboriginal Land Commissioners during the operation of the Land Rights Act has come increasing understanding of the variation among the systems. Certain features nevertheless appear to be fundamental to each: a principle or principles of descent defines a group of people as corporate with respect to an estate in land and/or sea in which each member of the group is a joint title holder. In addition, a structure of authority exists which allocates rights in decision-making with respect to land/seas and resources. In the matter of permission, senior members of the title-holding group are generally those with the authority to make (or confirm) a decision to grant permission.

Although Aboriginal property rights are held jointly, they are exercised individually or by groups smaller than the title-holding group as a whole (often by groups that include members of other title-holding groups). That may seem a trivial observation, yet failure to comprehend it has been the basis for judicial findings – notably that of Blackburn – for the absence of a criterial feature of property (individual ownership) that continue to have implications not only for issues of proprietary rights in land but also for issues of permission.

In the *Milirrpum* case Blackburn (1971: 183, emphasis added) found that '... The evidence shows that members of the clans named in the list [of eleven in the Statement of Claim] did use the Rirratjingu and Gumatj land, but the *evidence does not show that such use was by clans as such (except perhaps for ritual purposes) but by individuals*'. Blackburn's finding that use rights pertain to individuals rather than groups was a significant element in his reasoning on Yolngu proprietary interests in land. There is some difficulty interpreting Blackburn's distinction between the rights of 'clans as such' and the rights of 'all individual members' of the clans (see Baxi 1972: 31–33ff). This distinction and his finding that the *clans* did not have the right to exclude others led him to conclude that, 'It makes little sense to say that the clan has the right to use or enjoy the land. Its members have a right, and so do members of other clans, to use and enjoy the land of their own clan and other land also ... The clan's right to exclude others is not apparent' (1971: 200). (He went on

to say that the existence of claimants other than Rirratjingu and Gumatj amounted to a denial of the clan's right to exclude others.)

In a comprehensive analysis of exclusivity, it will no doubt without significant exception be the case, as Ray Wood (1986) found for the southern Arrernte, that 'rights in any given estate form a continuum, diffused through consanguineal layers and individuals recruited on a variety of bases surrounding the agnatic core'. Nevertheless, it will also be found that the principle of exclusive right to use inheres in the agnatic core who are recognised to be the licit holders of title to an estate.

The logic of Blackburn's reasoning appears to be based on the assumption that property is something that is held for a reason, that reason is use, and – most importantly – the right to use inheres in *individuals*, who thereby have the right to exclude others from using it; that is, private property is property owned by individuals. A recent work on 'the idea of property' locates the right of exclusivity in the duty that individuals have to exclude themselves from the property of others (Penner 1997: for example, 71). The presupposition of the common law that only individuals own property thus precludes the existence of communal title. The exceptions, of course, are recent statutes enacted to recognise Aboriginal title. Reeves relies on Blackburn's findings in the *Milirrpum* case for his interpretation of current Aboriginal law because they are congenial to his recommendations, including those relating to the permit system. Thus he quotes Blackburn's (1971: 273–74) finding that 'Upon the whole of this aspect of the matter, my conclusion is that the evidence shows a recognisable system of law which did not provide for any proprietary interest in the plaintiffs in any part of the subject land'. Reeves's (1998: 26) summary of the conclusion is that 'The plaintiffs therefore failed to prove that their well-proved spiritual relationship to their lands amounted to a proprietary interest in those lands'. Because of the train of Reeves's (1998: 31–32) reasoning from ownership to benefit (via needs) to permits, it is useful to quote at length:

In part, the Land Rights Act was a statutory response to the failure of the Gove [*sic*] Land Rights case. Contrary to popular belief, the Gove Land Rights case was not lost solely because of the *terra nullius* doctrine [in fact, *terra nullius* was not mentioned in the judgment], but because the Aboriginal plaintiffs failed to establish that their traditional relationships to their land constituted a proprietary interest in that land.

In his reports arising out of the Aboriginal Land Rights Commission, Justice Woodward recommended a statutory scheme whereby Aboriginal people would be granted land based on both their traditional relationship to land and their needs for land.

The significant difference between the Whitlam Government's Bill and the Fraser Government's Bill was that the former contained provisions for both traditional and needs-based claims, whereas the latter only allowed for traditional claims. Thus the Land Rights Act only provides for claims by, and grants of land to, Aboriginal people based on traditional affiliations. Conversely, the Land Rights Act does not provide Aboriginal people with a right to claim land based on their needs for land for 'residential, employment, or other purposes', for example, economic advancement.

As the balance of this Report will demonstrate, this distinction between the traditional and needs bases for claims has tended to blur over the years that the Land Rights Act has been in operation. One of the many consequences of this blurring is exemplified by recent attempts to gain control over the Northern Territory's commercial fishery for commercial purposes through traditional-based claims over the intertidal zone and the sea bed off the Northern Territory's coastline ...

Further, while the Land Rights Act was a unique and far-sighted piece of legislation, it still contained some carry-over from the social and political approaches to Aboriginal affairs earlier this century, when most Aboriginal people were segregated on reserves, settlements, or missions, which they could not leave without permission and which other Australians could not visit without permission. In my view, the permit system under the Land Rights Act and complementary legislation is one such carry-over from that period.

It is misleading to imply that section 70 of the Land Rights Act is a carry-over from earlier legislation. (Elsewhere, Reeves indicates that the earlier legislation is the 1918 Aboriginals Ordinance and the 1953 Welfare Ordinance – why he passes over the 1964 Social Welfare Ordinance is not explained.) Although the 1918 ordinance did prevent Aboriginal people from leaving reserves (and other prescribed areas and institutions) without permission from the person in charge, the 1953 ordinance did not prevent Aboriginal people from leaving such reserves and other areas. That is not to say that that ordinance (nor indeed the 1964 ordinance) did not endow the person in charge with draconian powers – it did, along with other reprehensible provisions. But Reeves implies that section 70 works to the same effect. Moreover, his use of the term 'visit' to refer to permission is patently intended to imply a completely benign intent with none of the consequences that would follow 'other Australians' entering a reserve or such area, say, to explore for minerals, to conduct anthropological research or to do some bio-prospecting.

To imply that section 70 is racially discriminatory is, I believe, also at least misleading. Not being a lawyer, I cannot comment on whether it is more than that, except to note that section 71 states that '... an Aboriginal or a group of Aboriginals is entitled to enter upon Aboriginal land and use or occupy that land to the extent that that entry, occupation or use is in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals with respect to that land, whether or not those rights are qualified as to place, time, circumstances, purpose, permission or any other matter'. As I explain shortly, 'Aboriginal tradition' – in the phrasing of the Act – includes a substantial corpus of regulations governing the 'entry, occupation or use' of other people's land. And 'others' is not a category limited to non-Aboriginal people. The regulations govern procedures for seeking and granting permission to 'enter and use' as well as for excluding. Dhimurru Land Management Aboriginal Corporation, responsible for the management of recreation areas on Aboriginal land in the Gove Peninsula area, has had a great deal of experience with the issue of permits (thus 'the permit issue'). Kelvin Leitch, Executive Officer of Dhimurru, has suggested that non-Aboriginal people's 'appropriately framed' requests for permission would probably be dealt with in much the same way as those of Aboriginal people. He goes on to observe that 'taking into account the multiplicity and diversity of

[non-Aborigines'] requests in contemporary circumstances, and the fact that the parties involved often have no personal knowledge of each other, indigenous representative bodies such as the Northern Land Council provide an avenue for obtaining responses to "appropriately framed" requests for access' (unpaginated submission to the Reeves Review).

Section 70 of the Land Rights Act may also be seen as redressing an imbalance of rights created by other sections of the Act (for example, the rights of holders of Aboriginal freehold land to less than those of other owners of freehold land) – a point made by Marcia Langton (personal communication).

### **Procedures for seeking and granting permission**

It is perhaps stating the obvious to say that people rarely seek permission simply to cross a boundary. Boundaries are crossed for reasons that are broadly social or economic, and often the two are combined. In any case, the use of resources is involved, and the question of proprietary interest in flora and fauna arises. Aboriginal interests in flora and fauna ultimately derive from cosmology. The spirit beings/ancestral beings/creator beings vested land in particular groups of people in a time long past. Both the beings and the time are locally distinctive, as are the acts of vesting. They all, however, include descriptions of flora and fauna as well as topographic features of the particular land and sea, and – most important of all – they gave names to them. Usually the language in which these acts are done is also distinctive and pertains to the specific locale. All names convey particular relationships and those given to the features of the landscape, including flora and fauna, convey ownership. It has a name *ergo* it is owned.

Ownership of land and sea and resources pertaining to them arises from the manner in which the spirit/ancestral/creator beings vested land and resources in their human owners and the continuing significance of those acts for Aboriginal owners. The spiritual relatedness of Aboriginal human beings to their country and to its flora and fauna is directly related to permission to use them.

The acts of the spirit/ancestral/creator beings were transformative. Their acts of transforming the landscape, including leaving parts of themselves, imprints of themselves, procreative powers, languages – and names – imbued the human beings with their essence. Thus all conceivable aspects of the landscape (or known and knowable universe), both materially perceptible and immaterial (phenomenal and noumenal), are imbued with and share the same essence. The spirits that animate human beings share spirit with both ancestors and with the landscape; this is an ontology that embodies both animism and consubstantiation. It is, as Munn (1970: 144, 150) notes, and as Ray Wood (1986) agrees, an ontology 'that carries considerable ideological power [in] asserting the integration of ancestors and humans with each other and, with "country", and thus the inalienability of human rights in respect of land'. It is an inalienability that encompasses the physical landscape, including flora and fauna. These features, under the cumbersome rubrics of animism, consubstantiation, cosmology and ontology, have to be understood in order to understand Aboriginal ideas of ownership and use of resources.

The Aboriginal ownership of land (including waters) and sea appear to be generally understood (*pace* Reeves). Likewise, the ownership of flora is reasonably well attested and uncontroversial. The same cannot be said for the ownership of fauna because it appears that the question has not been explicitly explored with Aboriginal people (but see Williams, forthcoming). Yet much evidence exists from which proprietary interest, that is, ownership, of fauna can be inferred. (It may be that the presupposition of such ownership is embedded in the unexamined background knowledge of Aboriginal people and thus is not given explicit form; as such, it does not provide easy tags for interrogating.) The evidence may be taken as beginning with the equation of being named with being owned. Strong evidence is derived from the many kinds of control that are exercised on access to, and the taking of, fauna. Some controls are in the form of access limitations based on kinship or totemic affiliation; some are seasonal (and none is mutually exclusive of the others). Others exist in the form of responsibility for conducting what have been called species maintenance rites – in earlier times called ‘increase ceremonies’.

Evidence from the Yanyuwa people has been recorded by Richard Baker (1999: 49–50) in relation to their continuing practices of sustainable resource use which include ‘Prohibitions against hunting on a dead person’s country [which] allow animals to breed up in hunt-free havens’; and ‘... a total prohibition on some species and, typically, these are attributed with the power to preserve particular resources. For example, the survival of the “quiet” water snake is thought to maintain waterholes.’ Further evidence from the Yanyuwa comes from John Bradley (personal communication), who in discussion with senior Yanyuwa women about proprietary interest in fauna was told by Annie Karrakayn, ‘We own (this word was in English) the fish, the birds, animals, everything, we have feelings for them, they are Law, they all have Law; if we did not “own” them, why would we bother to get upset when things go wrong?’ Another senior woman said (Bradley’s translation), ‘Yes, I went to my country and the country of my mother and the country (she used a word that can also mean sea) was full of the stench of rotting fish, of dugong. I was crying. I saw all those stinking fish and dugong and was crying. These fish, these dugong – we have to care for them. This care has been handed down to us from our foremothers and forefathers. All of us have to care for them; that is our job. We have to keep them safe. They are ours. The whiteman is ignorant about these things. These things are ours – the birds, the fish, the dugong, and sea turtle, the kangaroos. It is like when a whiteman has lots of bullocks: he is jealous for them; he holds them tight in the same way we hold all the things on our country tight. That is the way it is from long ago to today.’

Current issues related to the ownership of native fauna are complex, and some of those dealing with financial benefit are contentious. It is here that claims based on proprietary interest in land (or sea) may in some cases be at odds with those based on totemic affiliation (although, for obvious reasons, these interests may coincide). But whatever the basis, it is clear that fauna (*ferae naturae*) is property; that is, in the terms of Aboriginal land tenure, fauna is owned. (If there is a hierarchy of property rights, as Peter Sutton (personal communication) suggests, it may exist along the following lines: immovable resources may be most clearly and strongly held under possessory right (trees and certain intertidal species), and the most movable resources (kangaroos, wallabies) the least. The distribution

of rights will probably occur along a continuum, and the exceptions will be most telling, for example, Groper which the Yanyuwa own.)

During the year that the focus of my study at Yirrkala (1969–1970) was on dispute management, I was aware of 73 ‘grievances’ that I was able to investigate and analyse; 16 arose from ‘failure to acknowledge specific rights of control by securing requisite permission’ (Williams 1987: 68). I described them in general terms as follows (1987: 71):

Failure to respect rights regarding land, the use of resources, control over people (especially women), and failure to obtain permission from those responsible are grounds for a dispute. Frequently the procedures Yolngu refer to when they use the English term ‘permission’ can involve the mediation of time, and thus they are not always directly observable. For example, a man who wants to hunt kangaroo on land belonging to another clan may announce his plan either within the hearing of a senior member of the landowning clan, or of an affine who can convey the information to an appropriate senior member. After allowing sufficient time for a [possible] negative response, the man may go to the hunt assuming he has permission. If his assumption is, in fact, incorrect, he has at least a defensible position in any ensuing dispute. Permission can also be sought directly and thus of course directly granted or denied, but Yolngu generally prefer indirect approaches ...

During that period, failure to seek permission to hunt on an estate was the occasion of several very public and acrimonious disputes.

It is ironic that in the *Milirrpum* case Blackburn received a good deal of evidence about permission – procedures for seeking it and granting it. In the judgment, his interpretation of that evidence went to his finding on proprietary interest in land.

One part of Blackburn’s analysis of the nature of the relationship of clans to their estates was in the form of a series of questions he called ‘the permissive use of land’ (Blackburn 1971: 181–83). As I remarked in my analysis (1986: 169–70) of the judgment: ‘Here he found answers that bore directly on his conclusions concerning Yolngu proprietary interests in land. The questions were whether a clan had or exercised the right to exclude others from its land, whether the use of a clan’s lands by others [was] governed by specific rules, and whether the use of rights by others [was] vested in individuals or in clans as corporate entities. The first specific question Blackburn posed in writing his judgment was whether there was any requirement that another clan or an individual member of another clan seek permission before travelling on or using land not its/his own. He prefaced his answer with two reminders: “aboriginals did not cultivate land or practice [sic] animal husbandry; they took what grew naturally”, and (one of his findings about bands), “The evidence shows that bands moved freely about the subject land, and that no permission was required for a band to go anywhere” (Blackburn 1971: 181)’. The following are excerpts of evidence given to Blackburn that relate to permission and his response to them (Williams 1987: 170–72):

Blackburn found only one instance of permission being refused and was inclined to think it perhaps indicated that Yolngu had been influenced by white attitudes about

property (1971: 182). His findings about permission unfortunately reflect the fact that evidence on Yolngu modes of seeking and granting permission was inadequately interpreted as well as [his] apparent refusal to accept at face value a good deal of explicit evidence on the existence of such requirements.

Blackburn was also not made aware that seeking and granting permission is a process that may involve negotiation; and that skilful management of social relationships takes into account the anticipated response to a request – if there is good reason to anticipate a negative response, it is sensible not to make the request. (The same is of course true for other Aboriginal people.)

Although they did not exhaust the possibilities, Yolngu witnesses in fact gave a good deal of evidence bearing on permission. Some of the Yolngu evidence dealt with direct requests for permission to enter other clans' land and use their resources, and some evidence dealt with indirect requests. Dadaynga Marika, a leader of the Rirratjingu clan [later its head], was asked whether he had to ask anyone when he went to the land of other clans. His answer was, 'Yes'. The questions that followed, here taken from the transcript, include the instance that Blackburn cited as the sole case of permission being refused [the one he was inclined to think reflected the influence of white attitudes about property] (transcript pp. 184–85):

Q. Who do you ask?

A. I have to ask the leaders of the clan.

Q. What do they say when you ask them?

A. They might say yes, or no.

Q. Have any of them ever said no to you?

A. Yes.

Q. When did that happen?

A. Last year when I was asking my uncle, Mungurrawuy, he said no.

Q. What did you ask him?

A. Well I was asking, I would like to go to Cape [Arnhem] and get carving wood and he said no ...

Q. What was the last time when you asked some other clan if you could to its land [sic] and the leader said, yes?

A. Last year again I've been trying to get the permission to go at Caledon Bay ...

Q. Permission from whom? Who from; permission who from?

A. From Djapu clan ...

Q. If people from other clans want to come to the Rirratjingu country do they ask before they come?

A. Yes. They can come and ask.

Q. And who do they ask?

A. The leaders of Rirratjingu.

Dadaynga also said that if he had 'special permission from [a] Yirritja clan [he] could go' to hunt on the land of that clan (transcript p. 186). When he was questioned about fishing at a place owned by the Gumatj, he replied, 'Like we can still hunt and fishing if Rirratjingu and Gumatj can make agreement each other – the tribes' (transcript p. 237). Milirrpum, the [then] head of the Rirratjingu clan, was asked if Mungurrawuy, head of the Gumatj clan, asked for permission to go to a place on Rirratjingu land. Milirrpum said, 'The Gumatj ask us if they will go hunting' (transcript p. 380). Milirrpum also mentioned that permission is required for getting bark from trees on another clan's land (transcript p. 393). Daymbalipu Mununggurr, a leader of the Djapu clan [later its head], was also questioned about permission (transcript p. 662):

Q. Do you sometimes hunt or fish on Rirratjingu country?

A. Yes.

Q. Do you do anything before you hunt or fish on Rirratjingu country?

A. I talk to them about it.

Narritjin Maymuru, head of the Manggalili clan, was also questioned on the subject of permission (transcript p. 739):

Q. [B]efore you went hunting kangaroos, did you talk to anyone?

A. Yes, we would talk together.

Q. Who would you talk to?

A. If I was living with the Rirratjingu, I would talk to those Rirratjingu people.

Q. And what did you say to them?

A. I am going to get animals – kangaroos.

Blackburn had received evidence on the relationship between the clan and the band in terms of land use; he concluded that he had found that no rules governed the relationship between clan and band. And he found that 'no permission was required for a band to go anywhere' (1971: 181). Unfortunately, rules governing the use of lands and their resources by individuals or groups other than owners were incompletely explained during the hearing, and – as noted above – the finding that use rights pertain to individuals rather than groups was an important step in Blackburn's reasoning on Yolngu proprietary interests in land.

A further question is raised, one that I asked in analysing Blackburn's judgment, but one that continues to be relevant to issues of permission: why does common law jurisprudence appear to assume that jural rules governing rights in real property can only specify individuals or fixed groups in exclusive possession of bounded lands and that the test of the rules' existence is to be seen in owners actively preventing others from entering the

land they possess? Does failure to exercise a right *ipso facto* extinguish it? The Aboriginal evidence reveals another logic, one in which rights and flexibility can and do co-exist. Rights in land, which are precisely defined and in some contexts entail exclusiveness, and the flexibility necessary to continuing demographic and economic viability are not mutually exclusive. On the contrary, increasingly abundant evidence from Aboriginal societies throughout Australia reveals the existence of jural rules that define categories of interests in land, including some that are 'exclusive', and at the same time define categories of interest that ensure 'flexibility', that is, the means of adapting to changing ecological, social and political circumstances.

In negotiating permission, people may bring to bear many factors, including kin ties, totemic links, shared ritual obligations, affinal duties and outstanding debts. They may assess all pertinent accounts in reaching a decision. All those considerations underlie the processes of seeking, granting or denying permission to use other people's land and resources – and much is often made explicit. That of course implies boundaries and their meanings. For Aboriginal people, as for others, boundaries on land mark discontinuities, changes in ownership. But for Aboriginal people, boundaries do not exist primarily for the purpose of excluding non-owners. Rather, they use boundaries to express varying categories of interest, both of owners and of users. To request permission to enter, camp on or use the resources of a particular area is to acknowledge the right of the owners to accede or to deny permission. To request the long-term use of an area of land is to acknowledge the rights of the title holders. At the same time, a heavy onus lies on owners to grant permission when a request is appropriately framed. One could say that to own is to have the obligation to share, and that strong rights reside in those who express need and a moral claim to a share of the resource. Sharing should proceed according to precisely understood rules that people make contextually specific and so can monitor. Rights and obligations are tightly interwoven in Aboriginal societies, and their behavioural expression subtly played out.

An important function of permission arises from the responsibility that land owners have for the safety and well-being of all persons on their land. Their concerns include being assured that visitors have adequate water and food and that they do not put themselves at risk by being in or near dangerous places or places to which access is restricted. The corollary is that should a visitor suffer a mishap, the land owners will be charged with failure to exercise proper care. This aspect of permission is the basis of land owners' concern about the presence of tourists on their land, a concern that non-Aboriginal people in general and those in the tourism industry in particular either fail to perceive or refuse to believe is 'real'.

The continuing force of Aboriginal protocol governing permission is apparent in a wide range of social contexts of varying seriousness. It was fundamental to the facts that led to Magistrate Gilles' decision in the case of *R v Yunupingu* (included in the Reeves Report as Appendix Q). It is also the basis of the now general practice of acknowledging the traditional owners of a place where a public meeting is held – based on an assumed prior grant of permission – and of thanking them for their welcome.

## Permission and the present permit system

Aboriginal people in the Northern Territory have indicated that they want a system of authorising entry onto the lands that they hold as Aboriginal freehold. They made that abundantly clear in the evidence that they gave to Reeves and they have maintained that position in the evidence they are currently giving to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into the Reeves Report. One of the 11 points in the submission made by Aboriginal people who met with John Reeves at Yirrkala in December 1997 was, 'Permits onto Aboriginal land and waters must be tightened and policed'.

The major difficulties experienced with the permit system and the problems that Aboriginal people have expressed are the result of lack of resources, both of personnel and finance, at the disposal of the bodies responsible for implementing the system. There is no short or easy course to solving the problems created by an external legislative regime that seriously attempts to embody the Aboriginal rights and responsibilities for making decisions about access to Aboriginal land. Reeves emphasises the objectives of the Land Rights Act as providing benefit for Aboriginal people. It is surely reasonable to assume that a major benefit of the Act should be to enable Aboriginal people to continue to manage their lands according to their systems of land tenure – importantly, that entails control over access to their lands. It is no more than other freehold title holders expect to be able to do.

## Aboriginal land and non-Aboriginal ideas about access

The Reeves Report is sadly correct in its many implications that non-Aboriginal people resent their inability to access Aboriginal land at will. The resentment is tangible in the graffiti scrawled and spray-painted on signs indicating the presence of sacred sites or boundaries of Aboriginal land, graffiti such as 'apartheid' and 'passport' substituted for 'permit', and racially pejorative terms.

What are the conceptual problems or barriers to non-Aboriginal people dealing with Aboriginal freehold land in the same way as they would with other freehold land?

Is there a clue in the submission of the Nabalco mining company to the House of Representatives Standing Committee Inquiry into the Reeves Report (accessible on the web)? A telling element in the section that deals with 'access and permits' is the sentence 'Freedom of access is part of the Australian ethos'. Is that something the non-Aboriginal inhabitants of the Gove Peninsula have assimilated from the Yolngu? W. Lloyd Warner wrote an account of Yolngu society and culture which he titled *A Black Civilization*. It was based on his study in north-eastern Arnhem Land between 1926 and 1929 (published in 1937, second edition in 1958, and still available throughout Australia, including the Gove Peninsula) The book contains a section on 'Property' in which the following sentence appears: '[Their] ultimate value is freedom of movement' (1958: 148).

The underlying problem with the permit system, it could be said, is that non-Aboriginal Australians do not regard Aboriginal freehold land as private land, the common term used

to refer to land held by individuals. They appear to perceive it as a kind of common, in the sense that the seas are regarded as a common, that is, belonging to no one and therefore open to everyone. It may also be that they regard it as vacant Crown Land. Yet certainly most Australians are aware that public regulation of land use has increased dramatically during the twentieth century, so if they regard it as public land they might consider that access could be restricted – as, for instance, in the case of a public water reserve or a forest reserve. The administration of a permit system is surely no more onerous, restrictive or complex than the systems of licences, approvals and certificates that are familiar to most non-indigenous Australians. An unpalatable alternative is that the inability, or the refusal, to regard Aboriginal land as subject to the same conditions of access as other freehold land is a function of racism.

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## 6. Legal issues in implementation of the Reeves Report

### *Ernst Wilhelm*

The recommendations in the Reeves Report are complex and numerous. Implementation would require very substantial amendment of the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act). From a legal perspective it is necessary to consider:

- whether implementation of the recommendations would give rise to constitutional or other legal problems;
- whether implementation of the recommendations would give rise to breach of Australia's international legal obligations;
- whether implementation of the recommendations would put at risk the constitutional validity of any other laws; and
- whether the legal assumptions on which the recommendations are based are sound.

This paper seeks to analyse the recommendations from these perspectives. It is divided into five parts:

Part I: Acquisition and compensation issues

Part II: Cultural protection, racial discrimination and related issues

Part III: Payments to royalty associations

Part IV: Judicial power issues

Part V: Natural justice and judicial review.

### **Part I: Acquisition and compensation issues**

In Part I of this paper I conclude that, assuming s.51(xxxi) of the Constitution applies and the principles of the *Racial Discrimination Act 1975* (RDA) are applied, implementation of the following recommendations in the Reeves Report would constitute an acquisition requiring the provision of 'just terms' compensation:

- that regional land councils hold all Aboriginal land;
- modification of rights relating to Aboriginal land;
- that a grant under the Land Rights Act should extinguish native title;
- that a grant under the Pastoral Land Act (NT) should extinguish native title;
- taking over the assets of royalty associations;

- reservation of ownership of living fish and native fauna; and
- remedy of the 'error' in relation to the Elliott stockyards.

### **The acquisitions power**

Section 51(xxxi) of the Constitution confers on the Parliament power to make laws with respect to:

The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

Whether and to what extent the acquisitions power would apply to amendment of the Land Rights Act to implement the recommendations in the Reeves Report raises questions of considerable difficulty. (The detailed legal advice, referred to in the note at the end of the paper, includes analysis of relevant authorities.) Until recently it was thought that, because the territories power (s.122) was a plenary power, a Commonwealth acquisition in a territory did not require the payment of just terms compensation. In *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513, three members of the High Court, Gaudron, Gummow, and Kirby JJ, would have overruled previous authority to this effect. A fourth member of the court, Toohey J, while not prepared to overrule previous authority, considered it almost inevitable that any acquisition of property by the Commonwealth will now attract the operation of s.51(xxxi) because it will be in pursuit of a purpose in respect of which the Parliament has power to make laws, even if that acquisition takes place in a territory.

The result is that since the Land Rights Act is a law with respect to a purpose in respect of which the Parliament may make laws under s.51, s.51(xxxi) will apply.

I add that if the Parliament were to act on a narrower view of the application of the acquisition power and implemented Reeves's recommendations without provision for just terms compensation, the legislation would generate uncertainty until the doubt was judicially resolved. In relation to native title issues, a key objective of the Parliament has always been to remove uncertainty. It seems difficult to conceive that the Parliament would now choose to create new uncertainty in relation to Aboriginal land by amending legislation.

### **Whether the proposal that regional land councils hold all Aboriginal land would constitute an acquisition from land trusts**

Under the Land Rights Act as it stands, an estate in fee simple is granted to a land trust by the Governor-General on receipt of a recommendation by the Minister (ss10, 11 and 12). A land trust is a body corporate (s.4(3)). Its main function is to hold title to land vested in it in accordance with the Act and to exercise its power *as owner* for the benefit of the Aboriginals concerned (s.5). I emphasise the words 'as owner' because it is important to appreciate that the land trust is owner of an estate in fee simple.

Reeves proposes a radical change in the way the land is to be held. He recommends the establishment of a system of regional land councils (1998: 594). One of the three main functions of a regional land council should be 'to hold in trust all Aboriginal land in its region' (1998: 597). Thus land granted under the Land Rights Act would be held by these new regional land councils instead of by the land trusts (1998: chapter 21, 482).

Implementation of this recommendation would, in my view, amount to acquisition of the title of the land trust and conferral of title on the regional land council. The land trust, the current owner of the fee simple, would cease to be owner. The regional land council would become the new owner. Whether this be effected by some form of statutory transfer of title from the land trust to the regional land council or by extinguishment of the title of the land trust and fresh grant to the regional land council, the outcome would be the same. In substance, there would be an acquisition from the land trust requiring provision of 'just terms'. Bearing in mind that Reeves (1998: 597) also recommends changed decision-making arrangements and changes to the class of persons for whose benefit the land is held, it cannot be said that the quantum of 'just terms' would be negligible.

### **Whether proposals for modification of rights relating to Aboriginal Land would constitute an acquisition**

Reeves recommends numerous statutory modifications of the statutory regime now applying to Aboriginal land. These proposed modifications include:

- repeal of s.67, removing the current protection against compulsory acquisition (1998: 383);
- repeal of s.70, removing the current prohibition of entry onto Aboriginal land;
- repeal of s.74 (which prevents application to Aboriginal land of Northern Territory laws that are incapable of operating concurrently with the Act) and wider application of Northern Territory laws, including the Local Government Act, to Aboriginal land in the Northern Territory (1998: 410, 412–13); and
- new provision for licences to enter Aboriginal land to carry out low-level exploration activities. The proposed regional land councils would not have any power to veto an application or to require any payment (1998: 529, 540).

In relation to conventional title, changes of this kind, or at least many of them, would probably be characterised as regulatory, or as adjustment of competing rights, and therefore as not constituting an acquisition. The question for consideration is whether, in the case of the Land Rights Act, a different characterisation is required. In my view, the answer to that question is 'yes' because the Land Rights Act establishes a new and unique form of statutory title. The effect of the proposed modifications, either individually or collectively, would be so to diminish essential elements of that title as to constitute an acquisition. 'Property, in relation to land, is a bundle of rights exercisable with respect to land' (*Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 285). In relation to conventional fee simple, that bundle of rights is to be found primarily in the common law of real property. In relation to Aboriginal land granted under the Land Rights Act, the

relevant 'bundle of rights' is to be found not only in the fee simple title but also in the special statutory regime established by that Act, including the statutory rights and the protection of those rights. In the same way as the acquisition of less than the fee simple was in *Dalziel* found to be an acquisition of property, so may be the extinguishment of significant aspects of the bundle of statutory rights relating to Aboriginal land.

Key purposes of the Land Rights Act are to grant to Aboriginal people their traditional land in a form that consistently with modern legal structures reflects the systems and attributes of traditional ownership, and to protect those interests. In part, these objectives are achieved through the vesting of fee simple in land trusts. In part, they are achieved through special statutory provision reflecting in a contemporary way other attributes of traditional ownership. These other provisions include communal ownership and control through the device of land trusts. They include also the statutory protection of Aboriginal land. Collectively, the proposed changes would substantially alter the rights attaching to Aboriginal land. In my view, removal of the current protection against compulsory acquisition by the Northern Territory, removal of the prohibition of entry onto Aboriginal land, removal of the protection against application of incompatible Northern Territory laws together with provision enabling application to Aboriginal land of Northern Territory laws that are incompatible with traditional use and occupation of that land and provision for exploration licences over Aboriginal land without Aboriginal consent and without compensation would, together, constitute so significant a diminution of the 'bundle of rights' attaching to Aboriginal land as to constitute an acquisition. Aboriginal people would no longer be able fully to use and manage their lands 'in such a way as to allow their traditional relationship with their country to be enjoyed and their traditional obligations in respect of their country to be fulfilled' (cf *Gerhardy v Brown* (1985) 159 CLR 70, 116 per Brennan J).

#### **Whether the proposal that a grant under the Land Rights Act should extinguish native title would constitute an acquisition**

Reeves (1998: 461) recommends that the *Native Title Act 1993* be amended to provide that 'A past or future grant of land under the Land Rights Act extinguishes all native title rights and interests in that land'. The intention is legislatively to overrule the decision of the Full Court of the Federal Court in *Pareroultja v Tickner* (1993) 42 FCR 32 that a grant under the Land Rights Act is not inconsistent with the continued existence of native title and that native title is not extinguished (42 FCR, 40).

That native title may be extinguished by inconsistent grant was clearly established by *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 15, 64, 69, 110–111, 195–196. The majority did not address the application of s.51(xxxi) of the Constitution. It seems reasonably clear that native title rights are legal rights, legislative extinguishment of which by the Commonwealth would constitute an acquisition for the purposes of s.51(xxxi). This was the view of Gummow J in *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513, citing Deane and Gaudron JJ in *Mabo (No. 2)* as authority for the proposition that 'legislation ... which is otherwise within power but is directed to the extinguishment of what otherwise would continue as surviving native title (or which creates a "circuitous

device” to acquire indirectly the substance of that title), may attract the operation of s.51(xxxi) (190 CLR, 613).

The unanimous decision of the Federal Court in *Pareroultja* was reached in a fully reasoned judgment after careful consideration of *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, including consideration of the nature of native title, the circumstances in which native title may be extinguished and examples given in *Mabo* of legislative and executive acts which would be consistent with the preservation of native title. The Federal Court (42 FCR, 44) concluded:

Native titles may be extinguished by grants of freehold because such grants are inconsistent with the continued preservation of native title. A grant of an estate in fee simple to a Land Trust under the Land Rights Act is not however a grant that extinguishes native title; indeed the two co-exist harmoniously. Land is granted to Land Trusts under the Land Rights Act to preserve native titles and Aboriginal interests and is not inconsistent with the continued enjoyment of native title.

In my view, that conclusion (and the detailed reasoning that preceded it) is correct.

Reeves notes that the High Court refused special leave to appeal from the decision of the Full Court of the Federal Court, but the majority said they were not to be taken as necessarily agreeing with the conclusion of the Full Court that the grant of an estate in fee simple to a land trust under the Land Rights Act is consistent with the preservation of native title to the land which is the subject of the grant. He casts doubt on the decision. This doubt is not supported by authority.

French J, sitting as President of the National Native Title Tribunal, has relied ‘(O)n the authority of *Pareroultja v Tickner*’ (*Re Gurubana – Gunggandji Peoples* (1995) 123 FLR 462). In *Ben Ward v State of Western Australia* (1998) 1478 FCA (24 November 1998), Lee J applied *Fejo* and held that freehold grants extinguished native title (at 83–85, the page reference is to the Austlii print which does not show paragraph numbers). In the same case, Lee J also applied *Pareroultja* to hold that grants of statutory freehold under the *Miscellaneous Acts Amendment (Aboriginal Community Living Areas) Act 1989* (NT) to two Aboriginal corporations and an Aboriginal association did not extinguish native title (at 86 of the Austlii print). Lee J referred to the purpose of the Act and its long title. The ‘form of freehold interest was a statutory creation for a specific purpose’. He held that ‘it must be concluded that the grant of a statutory freehold interest described in [the Act] was not intended to have the effect of extinguishing native title’. Neither French J nor Lee J made any reference to what was said in the High Court when refusing special leave in *Pareroultja*.

As already indicated, I consider the decision and the detailed reasoning in *Pareroultja* to be correct. I also consider that, special leave to appeal having been refused, and having regard also to subsequent citation of the case and the fact that the High Court did not take the opportunity to express disapproval, the decision remains authoritative. A grant of an estate in fee simple to a land trust under the Land Rights Act does not give rise to the inconsistency necessary for extinguishment of native title. New provision for legislative

extinguishment would, it seems, confer a benefit through the expansion of radical title (*Mabo (No. 2)* 175 CLR, 60, 69). Implementation of the Reeves recommendation for legislative extinguishment would constitute an acquisition requiring provision for compensation. Quantification of the compensation, having regard to the cause of extinguishment, would raise questions of some difficulty. On the basis that Aboriginal people place special value on native title (which is held as of right rather than in consequence of grant), it would not be safe to assume that compensation would be nominal.

### **Whether the proposal that a grant under the Pastoral Land Act (NT) should extinguish native title would constitute an acquisition**

Reeves (1998: 470) recommends that the Native Title Act be amended to provide that ‘The grant of a Community Living Area in favour of an incorporated association of Aboriginal people pursuant to the Pastoral Lands [sic] Act (NT) ... be deemed to extinguish any existing native title rights and interests in that land’.

The reference to a grant pursuant to the ‘Pastoral Lands Act’ appears to be an error. While Part 8 of the Pastoral Land Act establishes the procedures for applications for grants of community living areas and for the processing of those applications, the grant of the fee simple to the relevant association takes effect ‘by virtue of’ s.46(1A) of the Lands Acquisition Act.

The considerations relating to grants of community living areas are similar but not identical to those relating to grants under the Land Rights Act.

Having regard to the need for a clear and plain intention, to the examples given in *Mabo (No. 2)* of legislative and executive acts which would be consistent with the preservation of native title and to the decisions of the Federal Court in *Pareroultja* and particularly in *Ward* ((1998) 1478 FCA (24 November 1998) 86), I consider that these provisions do not exhibit the necessary intention to extinguish native title. Implementation of the Reeves recommendation for legislative extinguishment would require provision of compensation.

### **Whether the proposals for taking over the assets of royalty associations would constitute an acquisition**

In chapter 28 Reeves (1998: 609) recommends that ‘The existing assets and liabilities of the Royalty Associations will be taken over and rationalised’.

In chapter 16 Reeves (1998: 368) recommends that ‘... all other income from activities on Aboriginal land should be applied by the proposed Northern Territory Aboriginal Council (NTAC) or the RLCs to particular purposes ...’ The identified purposes include ‘scholarships, housing, health etc’. These are purposes that would ordinarily be seen as within the responsibilities of government.

Reeves (1998: 312–13) explains that he includes within the expression ‘royalty association’ any of the following incorporated Aboriginal associations:

- an association whose members live in an area affected by mining operations and which receive mining royalty equivalents from a land council;
- an association that receives moneys paid under an agreement in relation to exploration and mining pursuant to the provisions of the Land Rights Act – such an agreement may include, for example, provision for payment of compensation for damage or disturbance to Aboriginal land (Land Rights Act, s.44A(1), and see generally ss35(3), 42, 43, 44, 46, 48A, 48B, 48D); and
- an association of traditional Aboriginal owners that receives moneys payable under other provisions of the Land Rights Act, including fees received in relation to the operations of national parks and lease or licence payments made pursuant to other provisions of the Act (these include, for example, rent for use of Aboriginal land).

Reeves (1998: 313) goes on to note that royalty associations have many other income sources, including ‘income received from commercial enterprises and investments’. The recommendation in chapter 16 (1998: 368) is expressed to apply to ‘all other income from activities on Aboriginal land’. It would therefore apply also to all these other income sources, including the many successful business enterprises. Some of the relevant payments would, as I understand it, be paid in the first instance to land councils, sometimes pursuant to commercial agreements, and distributed by the land councils to the royalty associations.

Reeves (1998: 336) notes also that some of the royalty associations are incorporated under the *Aboriginal Councils and Associations Act 1976* (Cth), while others are incorporated under the *Associations Incorporation Act 1978* (NT).

I understand these recommendations to mean the acquisition from the relevant incorporated associations of all existing assets, including business assets, and the acquisition from the land councils of contractual rights to the wide range of payments referred to above. The assets and contractual rights would be transferred to regional land councils and perhaps, in some cases, to the proposed NTAC. They would be applied, at least in large part, for governmental purposes.

In my view, the acquisition from associations incorporated under the relevant Commonwealth and Northern Territory laws of their assets and from the land councils of contractual and other rights, as proposed, would constitute acquisition of property for the purposes of s.51(xxxi).

### **Whether the proposals relating to ownership of living fish and native fauna would constitute an acquisition**

Reeves (1998: 247) recommends that ‘The common law position regarding the ownership of living fish and native fauna on Aboriginal land be confirmed in the Land Rights Act’. He suggests (1998: 232) that ‘This confirmation could be achieved by including a reservation to the Crown of the ownership of all living fish and native fauna on Aboriginal land in the Northern Territory similar to the reservations contained in s.12(2) of the Act’. Section 12(2) is in the form ‘A deed of grant under this section shall be expressed to be subject to the reservation that ...’ (followed by a reservation of the right to minerals). Reeves

appears to have in mind, however, a 'reservation' that would apply to past grants as well as to future grants.

Provided that the proposed reservation is not expressed in a form that purports to extinguish common law native title rights, there is no legal difficulty in implementation of the recommendation in so far as future grants are concerned. The making of a grant is itself discretionary. Amendment of the legislation so that future grants confer fewer rights than have been granted in the past does not constitute an acquisition.

Insofar as the recommendation is intended to apply also to existing grants, different considerations apply. The recommendation would require the 'reservation' out of the existing title of 'ownership of all living fish and native fauna'. This recommendation appears to be based on a proposition in an earlier paragraph that '(A)t common law, fish, like other living wild animals, are incapable of being owned until they are killed or caught' (1998: 232). The problem with this analysis is that it fails to take account of the usufructuary nature of native title (*Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 51–52). It also fails to take account of relevant Australian authority. Directly relevant is the judgment of Kirby P in *Mason v Triton* (1994) 34 NSWLR 572 that 'a "right to fish" based upon traditional laws and customs is a recognisable form of native title defended by the common law of Australia' (579 per Kirby J, see also 580–82, see also 600 per Priestley JA). This passage was adopted by Franklyn J in *Derschaw v R* (1996) 90 A Crim R 9, 12, with whom Murray J agreed (90 A Crim R, 36). In *Dillon v Davies* (1998) 156 ALR 142, Underwood J appears to proceed on the same basis (see especially at 146), as does Lee J in *Ben Ward v State of Western Australia* (1998) (1478 FCA, 122). In *Fejo v Northern Territory of Australia* (1998) HCA 58 (10 September 1998), the High Court was prepared to assume 'that those rights may encompass a right to hunt, to gather or to fish' (47 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne, Callinan JJ). A similar view has been taken in Canadian authorities (*R v Sparrow* (1990) 1 SCR 1075; *Van der Peet v R* (1996) 2 SCR 507). It is also the assumption on which ss211(3) and 223(2) of the *Native Title Act 1993* are based. Olney J, in *Yarmirr v Northern Territory of Australia* (1998) 156 ALR 370, notes that s.223(2) may preserve a right to fish in a case in which native title to possess or occupy land has been extinguished (156 ALR, 406). The proposed determination in *Yarmirr* included a determination that '(T)he native title rights and interests which the court considers to be of importance are the rights of the common law holders ... (b) to fish ...' (156 ALR, 439).

I therefore consider the recommendation to be based on a legally incorrect premise. Implementation of the recommendation would constitute acquisition of valuable common law native title rights.

### **Whether the proposal to remedy the 'error' in relation to the Elliott stockyards would constitute an acquisition**

Reeves (1998: 267) says the Elliott 'stockyards were apparently included, in error, in the land grant made to the Gurungu Aboriginal Land Trust on 12 December 1991. It was always the intention of the authorities, when making this grant, to exclude the Elliott stockyards'. He (1998: 267, also 270) goes on to recommend 'that this obvious error be

remedied'. Reeves does not cite any authority for his assertion as to 'the intention of the authorities, when making this grant'. Nor does he refer to the relevant legislation.

I am not in a position to express a view as to 'the intention of the authorities, when making this grant' other than to assume that the intention was to make a grant in accordance with the Act. I have therefore examined the relevant provisions of the Land Rights Act. Section 10 of the Land Rights Act makes provision for the Minister to recommend, and s.12 makes provision for the Governor-General to grant, to a land trust, an estate in fee simple in respect of land described in Schedule 1. The 'ELLIOTT LOCALITY' is described in Schedule 1. I understand the terms of the grant made to the Gurungu Aboriginal Land Trust are in accordance with that description. A grant made in accordance with the Act would not ordinarily be described as having been made in error. (It may, of course, be the case that an error was made in the legislation itself.)

Reeves does not explain what he has in mind when he proposes that 'this obvious error be remedied'. On the basis that, if an error was made, the relevant error occurred in the 1991 amendment to the Act, that the grant was in accordance with the Act, and that the grant was made over seven years ago, I do not see any scope for application of 'the slip rule'. Any rectification can now be effected only by voluntary surrender, under s.19(4) of the Land Rights Act, or by acquisition. An acquisition would require provision for compensation.

## **Part II: Cultural protection, racial discrimination and related issues**

In Part II of this paper I conclude that, having regard to the history of Aboriginal disadvantage:

- (i) Implementation of the following recommendations, either individually or cumulatively, could give rise to breach of Australia's obligations under the International Covenant on Civil and Political Rights:
- Repeal of s.70 of the Land Rights Act together with repeal of Part II of the Aboriginal Land Act (NT) (the prohibition of entry onto Aboriginal land and the permit system) (paragraphs 34–38).
  - Repeal of s.74 and amendment of s.71 of the Land Rights Act to remove the current protection against application to Aboriginal land of inconsistent Northern Territory laws and instead to enable application of a wide range of Northern Territory laws to Aboriginal land, notwithstanding negative effects on the use and occupation of that land (paragraphs 39–40).
  - Repeal of ss67 and 68 of the Land Rights Act (which protects Aboriginal land against resumption by the Northern Territory and against construction of roads without Aboriginal consent) and insertion of new provisions, with the result that Aboriginal land may be compulsorily acquired by the Northern Territory and roads may be constructed over Aboriginal land without Aboriginal consent (paragraphs 41–42).

- Reservation to the crown of ownership of all living fish and native fauna on Aboriginal land, together with a joint management regime in which conservation and other interests would override Aboriginal interests (paragraph 43).
  - Amendment of the Land Rights Act and the Mining Act (NT) to make provision for licences to enter Aboriginal land for reconnaissance exploration without Aboriginal consent (paragraphs 44–48).
  - Transfer of all Aboriginal land into 18 separate regions with 18 new regional land councils becoming the trustees and carrying out the trustee duties presently carried out by the land trusts, together with provision for the Northern Territory Aboriginal Council to be able to intervene in the affairs of the regional land councils (paragraphs 49–57).
- (ii) Implementation of the following recommendations would be inconsistent with the principles of the *Racial Discrimination Act 1975*, would give rise to breach of Australia’s obligations under the International Convention on the Elimination of All Forms of Racial Discrimination and would put at risk the constitutional validity of the *Racial Discrimination Act 1975* (paragraphs 59–111):
- Dissolution of the land trusts and the vesting of Aboriginal land in regional land councils subject to intervention by the Northern Territory Aboriginal Council, the members of which are appointed by the Commonwealth and Northern Territory governments.
  - Taking over the assets of royalty associations and all other income from activities on Aboriginal land.

### **Preliminary**

Implementation of the Reeves recommendations requires consideration of Australia’s obligations under international law, including general principles of international law and treaties to which Australia is a party. International law imposes constraints on states in relation to treatment of ethnic and indigenous minorities. International law also imposes positive obligations on states to protect the rights of ethnic and indigenous minorities. Aboriginal people are a minority indigenous people with their own culture.

Particularly relevant to implementation of the Reeves recommendations are the International Covenant on Civil and Political Rights (the Covenant) and the International Convention on the Elimination of All Forms of Racial Discrimination (the Racial Discrimination Convention).

Australia is a party to both the Covenant and the Racial Discrimination Convention. It follows that Australia is bound by the obligations established by these instruments. Australia is also a party to the First Optional Protocol to the Covenant (enabling individual complaints of violations to be made to the Human Rights Committee established by the Covenant).

## The International Covenant on Civil and Political Rights

Articles 2 and 26 of the Covenant set out a series of fundamental principles relating to equality and non-discrimination. Article 17 provides, *inter alia*, that no-one shall be subject to arbitrary or unlawful interference with his privacy. Article 27 provides special additional protection for minority cultures. For present purposes, it is the key provision. Article 28 establishes the Human Rights Committee, the main functions of which are to consider country reports made under Article 40 and individual complaints made under the Optional Protocol.

Article 27 of the Covenant provides as follows:

### Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Authorities on Article 27 establish the following principles. (The detailed legal advice referred to in the note at the end of this paper includes analysis of relevant authorities.)

- Article 27 imposes on states specific obligations to take positive measures to ensure that the existence and the exercise of Article 27 rights are protected against denial or violation, including protection against the acts of private individuals.
- Culture as protected by Article 27 includes a particular way of life and may include traditional activities such as hunting and fishing.
- The Article 27 right may include the right to live in reserves protected by law.
- The enjoyment of Article 27 rights requires legal measures to ensure effective participation of members of minority communities in decisions which affect them.
- Not every restriction or interference will constitute a violation of Article 27.
- Restrictions or interference must have a reasonable and objective justification and be consistent with the Covenant as a whole.
- It may also be relevant to consider whether the restriction is necessary for the continued viability and welfare of the minority as a whole.
- Whether an interference with rights constitutes a violation of Article 27 raises questions of fact and degree.
- The scale of the activities (for example, whether the impact is so substantial as to deny the right to enjoy cultural rights) and the cumulative effect of different activities will be relevant.
- States are under a duty to weigh the interests of minorities and to consider future effects on Article 27 rights when taking relevant decisions. This duty includes the duty to consider the cumulative effect of different activities.

- Privacy is protected.
- If a breach of privacy is established, it is for the state to establish that the breach is reasonable.

Before examining the individual recommendations made by Reeves, I note that many of the recommendations would remove or diminish existing protection. Aboriginal people have suffered historical inequity and disadvantage. That disadvantage has not been overcome. I would expect that any complaint to the Human Rights Committee would draw attention to that historical and continuing disadvantage. So far as the Northern Territory is concerned, I would expect also that any complaint would draw attention to the long history of hostility between the Northern Territory Government and the land councils, including the many administrative and legal attempts by the Northern Territory Government to limit the operation of the land rights legislation. I would expect the Committee, in its consideration of the Reeves recommendations, to have regard to both the obligation to redress that historical disadvantage and to the possible consequences of removal of the current protection from Northern Territory law. The conclusions I draw in relation to individual recommendations take into account not only the specific considerations set out in relation to each recommendation, but also the broader relevance of the matters set out in this paragraph and the cumulative effect of these matters and the recommendations as a whole.

#### **Repeal of s.70 of the Land Rights Act – access and permits**

The proposed repeal of s.70 of the Land Rights Act (the current prohibition of entry onto Aboriginal land), together with the proposed repeal of the permit system (Reeves 1998: 309), would substantially weaken the existing capacity to close Aboriginal land for ceremonies, leading to risk of entry onto Aboriginal land contrary to cultural constraints, including interference with ceremonies and interference with privacy. Special protection may be necessary to ensure the enjoyment of Aboriginal culture (non-Aboriginal culture does not have the same emphasis on private ceremonies and sacred sites). Protection is consistent also with the positive obligation of states to provide protection for minorities against private individuals, the right of Aboriginal people to live on their own land protected by law, and the right of Aboriginal people to protection of their culture.

Trespass law does not, in my view, offer comparable protection. Although the Trespass Act (NT) creates criminal offences, prosecutions for criminal trespass are extremely rare. In practice, trespass is a civil remedy. Reeves contemplates the possibility – ‘it may be advisable’ (1998: 307) – of a provision in the Trespass Act allowing an Aboriginal community occupying an area of Aboriginal land to post a notice on the roadway at the entry to their land stating that the entry to that land is a trespass. Enforcement would in practice be a matter for the land trust (or the proposed new regional land council) by way of institution of civil proceedings. In relation to very large tracts of open land, the land trust may well be faced with a defence of implied licence. Further, damages may be nominal.

In any event, the effectiveness of the proposal is substantially undermined by the proposed limitations. Reeves (1998: 307) takes the view that the facilities available in townships should be freely available to all. Accordingly, the 'measure' described in the preceding paragraph (posting a notice that entry is a trespass) should not be available to prevent access to any town. Towns, Aboriginal and non-Aboriginal, may be in remote areas. Nhulunbuy is an example. If, as Reeves appears to envisage, there were to be free access to towns such as Nhulunbuy, the result would be to open up lengthy stretches of roadway passing through a number of Aboriginal communities. Further, it appears that many former mining towns on what is now Aboriginal land are still formally proclaimed as towns. The right to keep Aboriginal communities closed to protect the privacy of ceremonies would in practice be lost, or at least severely curtailed.

For these reasons, the Reeves proposals would not provide the protection afforded by the current law.

I add that I think it unlikely that the Human Rights Committee would uphold as reasonable a general decision to open all roads to towns, notwithstanding interference with the privacy of Aboriginal communities. The grounds that might in particular circumstances justify an interference with Aboriginal culture are not made out.

#### **Application of Northern Territory laws**

Section 74 of the Land Rights Act enables the application of Northern Territory laws to Aboriginal land *provided that the law is capable of operating concurrently with the Land Rights Act*. In the event of conflict, the rights of Aboriginal people to use their land, including the rights conferred by s.71 to use that land in accordance with Aboriginal tradition, take precedence over Northern Territory law. The proposed repeal of s.74 and the proposed amendments to s.71, to enable the 'general application of Northern Territory laws' to Aboriginal land notwithstanding negative effects on the use and occupation of that land and notwithstanding (in the case of a wide range of laws in categories specifically identified by Reeves) direct inconsistency between the Northern Territory law and traditional use under s.71(1) (1998: 412, 413), would reverse the current protection of traditional rights of usage and subject those rights to Northern Territory law. Far from continuing the present positive protection, the proposals would in substance remove that special protection.

While specific application of particular Northern Territory laws to Aboriginal land may in certain circumstances be sustainable (for example, where there is reasonable and objective justification for the application of that law and the restriction or interference is consistent with the Covenant as a whole), the proposed general removal of the current protection (that is, repeal of s.74) together with the application of wide categories of Northern Territory laws *notwithstanding negative effects on traditional use* would, in my view, give rise to breach of Article 27. I note in this context that in relation to those laws that come within the identified categories, they are applied on a class basis. There is no provision for prior determination in relation to each law or category of laws of the magnitude of any adverse effect on Aboriginal culture, nor is there provision for weighing

any such adverse effect against other public interests in the application of the law before the decision is taken whether the law is to apply. I add that the proposed new s.74(4) (requiring any negative effects to be minimised) does not require a contrary view. That provision would not, in my view, have the effect of preventing the application of a Northern Territory law that would otherwise apply.

### **Removal of protection against Northern Territory acquisition**

Sections 67 and 68 of the Land Rights Act protect Aboriginal land against resumption by the Northern Territory and against construction of roads without Aboriginal consent. These provisions are part of the special statutory scheme of protection of Aboriginal land. Reeves (1998: 83) recommends repeal of these provisions and the insertion of new provisions enabling the acquisition of interests in Aboriginal land for public purposes, subject to a special statutory procedure requiring notification to the land council and an Act of Parliament. No special protection (in the sense of a requirement for special reasons or a requirement that special weight to be given in the decision-making process to preservation of Aboriginal culture) would remain. The current protection would therefore be removed. What would be put in its place would require a special procedure, but no substantive weight would be required to be given to Aboriginal interests.

No power to acquire interests in Aboriginal land is necessary to enable the provision of services to Aboriginal people in accordance with arrangements with which Aboriginal people agree. Compulsory acquisition is necessary only in the absence of agreement. It follows that the proposed power is necessary only to enable acquisitions contrary to Aboriginal wishes. I add that mere existence of the power may serve to coerce Aboriginal people into agreement. Nevertheless, conferral of the power to acquire interests in Aboriginal land may not itself constitute a breach of Article 27. The detriment, or risk of detriment, may not be sufficiently substantial, at least until the exercise of the power (or threatened exercise of the power) in a manner adverse to Aboriginal rights. Nevertheless, I think that the Human Rights Committee would consider this proposal, involving the removal of an existing protection and the creation of the means for future interference with cultural rights without any need to satisfy an overriding 'national interest' requirement, seen in context and together with the other adverse proposals, to be part of a package of proposals that cumulatively would give rise to breach of Article 27.

### **Reservation of living fish and native fauna on Aboriginal land**

Reeves (1998: 232, 247) recommends reservation to the Crown of the ownership of all living fish and native fauna. A joint management regime should be established. Conservation and certain other 'identifiable overriding interests' would have priority over traditional hunting and fishing. I have previously (in relation to acquisition issues) examined Australian authorities that establish that a right to fish is a recognised form of native title defended by the common law of Australia. Hunting and fishing rights are cultural rights protected by Article 27. The proposed reservation to the Crown of ownership of all living fish and native fauna, together with a joint management regime in which priority is to be given to non-Aboriginal interests (1998: 232, 247), would appear to create a significant

risk of interference with, or at least reduction in the current protection of, traditional hunting and fishing rights and therefore risk, either alone or in combination with other recommendations, breach of Article 27.

### **Low-level exploration licences**

The Land Rights Act enables Aboriginal people to withhold consent to, that is, to veto, mineral exploration activities on Aboriginal land (subject to a 'national interest' exception). The right of Aboriginal people to reject mineral exploration activities on their land is clearly a major aspect of the current scheme of protection of Aboriginal cultural rights.

Reeves (1998: 540) would, in part, remove this protection. He recommends amendment of the Land Rights Act and the Mining Act (NT) to make provision for low-level exploration licences over Aboriginal land without Aboriginal consent. Licences would be granted by the relevant Northern Territory authority. Applicants for licences would not need to satisfy any 'national interest' or other special criteria. These licences would be subject to terms and conditions, in particular, they would be confined to what Reeves (1998: 529) describes as low-level exploration activities, they would not allow a person to enter any community or go within a specified distance of a living area and would require the holder to ensure that they do not enter or remain on a sacred site.

I understand the reference to sacred sites to be a reference to sites that are registered with the Aboriginal Areas Protection Authority (from whom Reeves envisages details of sites would be obtained). I understand also that relatively few sacred sites *on Aboriginal land* are registered with the Protection Authority. The reason appears to be that, in consequence of the current requirement for the consent of Aboriginal owners to mineral exploration and other activities on Aboriginal land, Aboriginal people have not seen a need to register with the Authority sites that are on Aboriginal land. The Reeves recommendations do not make provision for protection of sites on Aboriginal land that are not registered with the Authority. One consequence of the recommendations would therefore be to impose a new practical need to register sites on Aboriginal land with the Authority. Aboriginal people may see this as lessening the ability of traditional owners to protect spiritual information.

The proposed terms and conditions undoubtedly reduce what would otherwise be a significant risk of serious cultural infringement. On the other hand, no provision is recommended for consultation with Aboriginal land holders or for Aboriginal land holders to negotiate further conditions. To the contrary, the recommendation is that 'Notice should be given to the RLC for the area that such a licence *has been granted*' (1998: 529, emphasis added). The regional land council should not be able to require that any payment be made. The protection provided by the current right of veto in respect of mineral exploration activities on Aboriginal land would be removed. Entry of miners onto Aboriginal land without Aboriginal consent may itself constitute cultural infringement. Moreover, the risk of breach of the proposed terms and conditions may be high. Denial of the opportunity to negotiate for payments means that Aboriginal people are denied the possibility of a compensating benefit.

I conclude that this recommendation would remove current protection against unwanted mineral exploration activities on Aboriginal land and would give rise to a new risk of infringement of cultural rights. In the absence of a consequential actual infringement, these consequences may not be sufficient, seen in isolation, to give rise to a breach of Article 27. In the context of the recommendations as a whole, and bearing in mind that applicants for licences would not need to satisfy any 'national interest' or similar criteria, the lack of Aboriginal involvement in the licensing process, the limited protection of Aboriginal sacred sites and the absence of any compensating benefit for Aboriginal people, this recommendation is likely to be seen as part of a package of unfavourable developments that cumulatively give rise to breach of Article 27.

### **Abolition of land trusts**

Reeves (1998: 486) recommends transfer of all Aboriginal land into 18 separate regions with 18 new regional land councils becoming the trustees and carrying out the trustee duties presently carried out by the land trusts. A new body, the Northern Territory Aboriginal Council, appointed by the Commonwealth Minister and the Northern Territory Chief Minister, would be able to intervene in the affairs of the regional land councils (1998: 608, 616). These recommendations would radically alter current decision-making arrangements.

That the cultural rights protected by Article 27 include the right of Aboriginal people to effective participation in decisions concerning their land is beyond doubt.

The current land trust system was intended to be, and is widely seen to be, a reflection in modern statutory form of traditional ownership. Reeves disputes that analysis and considers that the manner in which Aboriginal land is currently held does not correctly reflect Aboriginal tradition. He considers that Aboriginal tradition would more correctly be reflected by the regional land council structure he recommends. A key feature of the structure Reeves proposes is to add residence as a sufficient qualification for participation in decision-making (that is, Aboriginal persons who were resident in the area of a regional land council would be able to be members of regional land councils and to participate in decision-making, notwithstanding that they had no traditional affiliation with the land).

If Reeves is correct in his understanding of Aboriginal tradition, it necessarily follows that his regional land council recommendations would not give rise to breach of Article 27.

The Reeves analysis is strongly disputed by expert anthropologists. The prevailing view appears to be that the land trust system correctly reflects Aboriginal tradition and that the Reeves proposals for participation in regional land council decision-making on the basis of residence would be inconsistent with Aboriginal tradition.

Clearly, intervention by a government-appointed Northern Territory Aboriginal Council is not part of Aboriginal tradition.

I am not in a position to express a view on the anthropological debate. From a legal perspective, if Reeves is wrong in his anthropological analysis, the effect of his recommendations would be to remove a system that ensures participation by Aboriginal

people, in accordance with Aboriginal tradition, in decisions relating to their land and to put in its place a system where such participation was otherwise than in accordance with Aboriginal tradition. Aboriginal land would be managed in part by persons who under Aboriginal tradition had no relevant management rights. Breach of Article 27 would result.

Further, the proposed Northern Territory Aboriginal Council has no foundation in Aboriginal tradition. The proposed powers of the council in relation to Aboriginal land are clearly intended to introduce outside influence into traditional Aboriginal decision-making processes. While the proposal, seen in isolation, may not breach Article 27 unless and until it gives rise to measures adverse to Aboriginal interests, it is likely to be viewed by the Human Rights Committee as part of a package of measures that remove current protection and cumulatively give rise to breach of Article 27.

I add that I would expect the Human Rights Committee to view this proposal against the background of adverse and often hostile relations between the Northern Territory Government and Aboriginal people and their organisations.

### **Summary of Article 27 issues**

The Human Rights Committee would assess implementation of the recommendations against the historical inequity and disadvantage suffered by Aboriginal people. It would have regard also to the long-standing hostility between the Northern Territory Government and the land councils. The Committee would give weight to the positive obligation to redress that historical disadvantage, to the generally regressive effect of the recommendations, and to the possible consequences of removal of the current protection from the operation of Northern Territory law. It would apply Article 27 on the basis that it imposes on states specific obligations to take positive measures to ensure the protection of the existence and exercise of Article 27 rights. It would find that many of the Reeves recommendations would remove existing positive protection measures. Some individual recommendations would give rise to direct breach of Article 27 obligations. Other individual recommendations considered above may not on their own constitute violation of Article 27. Taken together, the cumulative effect is, however, so substantially to erode the rights of Aboriginal people as to give rise to violation of Article 27. I add that the reasonable and objective justification that would be necessary to ensure that such substantial erosion of Aboriginal rights did not constitute violation is not made out.

### **The International Convention on the Elimination of All Forms of Racial Discrimination and the *Racial Discrimination Act 1975***

The Racial Discrimination Convention requires State parties to prohibit racial discrimination *in all its forms* (Article 2). Rights specifically protected include 'the right to own property alone as well as in association with others' (Article 5). The Convention is

notable for its unqualified language. A party cannot, for example, implement the Convention except in relation to members of a particular race or except in relation to a particular human right.

The Racial Discrimination Convention is implemented in Australia by the *Racial Discrimination Act 1975* (the RDA). The relevant head of power supporting the validity of the RDA is the external affairs power. Although the RDA is widely seen as giving effect to fundamental values, its legal status is that of an ordinary Act of the Parliament. Inconsistency with the RDA does not give rise to invalidity. A later Act that is inconsistent with the RDA will prevail. If the later legislation so significantly amends the RDA that the RDA no longer implements Australia's obligations under the Convention, the constitutional validity of the RDA may be in doubt.

The following recommendations would, in my view, be inconsistent with the Racial Discrimination Convention and with the principles in the RDA:

- Dissolution of the land trusts and the vesting of Aboriginal land in regional land councils subject to intervention by the Northern Territory Aboriginal Council, the members of which are appointed by the Commonwealth and Northern Territory governments (1998: 482, 597).
- Taking over the assets of royalty associations (1998: 609) and all other income from activities on Aboriginal land (1998: 368).

On face value, these provisions are discriminatory: Aboriginal land, held as fee simple, Aboriginal assets and Aboriginal income are to be expropriated and transferred without Aboriginal consent. The right to own property is one of the rights protected by the Racial Discrimination Convention and by the RDA. Aboriginal people, and Aboriginal people alone, would be deprived of their rights to land, other assets and income. Land, other assets and income of non-Aboriginals are not subject to similar expropriation or transfer.

In reaching that view, I am not unmindful of the fact that, in relation to modification of the 'right to negotiate' in the *Native Title Act 1993*, the government's legal advisers have relied on a 'formal equality' argument to conclude that those modifications are not discriminatory. The argument is based primarily on the judgment of Brennan J in *Gerhardy v Brown* (1985) 159 CLR 70 – which proponents of the argument claim to be authoritative. Whatever the merits of that argument in relation to the right to negotiate, I consider it has little to commend it, either morally or legally, in relation to the proposed discriminatory expropriation of Aboriginal land, other assets and income.

In any event, in light of more recent consideration of the issue by the High Court, Brennan J's analysis appears difficult to sustain.

In its reasons for judgment in the challenge to the *Native Title Act 1993*, the High Court, in *Western Australia v The Commonwealth* (1995) 183 CLR 373, had the opportunity simply to follow *Gerhardy v Brown* and hold the Act to be a 'special measure'. Instead, the Court said 'the *Native Title Act* can be regarded either as a special measure under s.8 of the *Racial Discrimination Act*' (citing *Gerhardy v Brown*) 'or as a law which, although it makes racial

distinctions, is not racially discriminatory so as to offend the *Racial Discrimination Act* or the International Convention on the Elimination of All Forms of Discrimination’ [sic] (183 CLR 483–484), citing a series of authorities that all support a substantive equality approach, that is, that benign discrimination does not constitute discrimination.

Had the High Court been content to follow *Gerhardy v Brown*, one would have expected it merely to refer to the Native Title Act as a special measure and to cite its earlier decision as authority. Characterisation of the Native Title Act in the alternative, together with citation by the Court of extensive authorities that directly criticise *Gerhardy v Brown* and support the alternative analysis, must surely indicate recognition on the part of the Court that the international law of discrimination recognises that in appropriate circumstances a law which makes racial distinctions may not be discriminatory and that if the issue were to arise for decision again, the Court would be disposed to reconsider the reasoning in *Gerhardy v Brown* and to construe ss9 and 10 of the RDA in conformity with international law.

In light of the clear indication in *Western Australia v The Commonwealth* that an alternative approach to that adopted by Brennan J in *Gerhardy v Brown* is open, the internationally prevailing view, and the increased weight now given to international law in the development and interpretation of Australian law, I expect that if the point were in issue the High Court would now adopt a ‘substantive equality’ approach.

In any event, several significant considerations take the Reeves recommendations beyond those considerations that were viewed by the government as ‘saving’ the modification of the right to negotiate:

- A grant of inalienable fee simple to traditional Aboriginal owners under the Land Rights Act is not, in my view, the kind of temporary measure contemplated by the special measures provision. Only Aboriginal people have the necessary traditional link with the land. This is a benign distinction that is not discriminatory.
- The criteria for cessation of a special measure are not satisfied.
- The fee simple title of the land trusts and the assets of the royalty associations are property rights of the kind protected by Article 5.
- Even if ‘formal equality’ be the test, expropriation and transfer of land and a wide range of other assets as proposed are not, in my view, consistent with ‘formal equality’.
- A law for the dissolution of the land trusts, the vesting of Aboriginal land in regional land councils in which residence is a qualification for participation in decision-making authority (notwithstanding absence of traditional affiliation) and subjection of the regional land councils to intervention by the Northern Territory Aboriginal Council, the members of which are appointed by the Commonwealth and Northern Territory governments, would be a law to which s.10(3) of the RDA applies and therefore not a law to which the special measures exception has any application.

In its consideration of application of the Racial Discrimination Convention, the Committee on the Elimination of Racial Discrimination (established under Article 8) has given

particular attention to its application to indigenous people. General Recommendation XXIII on the rights of indigenous peoples (Fifty-first session, 1997) included the following recommendation:

The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.

Attention has also focused on Australia's treatment of its indigenous people. In its consideration of Australia's ninth periodic report (made under Article 9 of the Convention), at its 1067th meeting on 18 August 1994, the Committee (A/49/18, paragraphs 543 and 547) said:

The situation of the Aboriginal and Torres Islander people remains a subject of concern, despite efforts aimed at remedying the injustices inherited from the past. The Committee recommends that Australia pursue an energetic policy of recognizing Aboriginal rights and furnishing adequate compensation for the discrimination and injustice of the past. The Commonwealth Government should undertake appropriate measures to ensure a harmonious application of the provisions of the Convention at the federal and State or Territory levels.

More recently, in relation to the 1998 amendments to the *Native Title Act 1993*, the Committee (CERD/C/54/Misc. 40/Rev. 2, 18 March 1999, paragraph 6) in its recent decision:

expresses concern over the compatibility of the Native Title Act, as currently amended, with the State Party's international obligations under the Convention. While the original Native Title Act recognizes and seeks to protect indigenous title, provisions that extinguish or impair the exercise of indigenous rights and interests pervade the amended Act. While the original 1993 Native Title Act was delicately balanced between the rights of indigenous and non-indigenous title holders, the amended Act appears to create legal certainty for governments and third parties at the expense of indigenous title.

The analogy with the regressive recommendations in the Reeves Report is plain. After referring to four specific provisions in the 1998 amendments that the Committee notes discriminate against indigenous title holders (paragraph 7), the Committee continues:

8. These provisions raise concerns that the amended Act appears to wind back the protections of indigenous title offered in the *Mabo* decision of the High Court of Australia and the 1993 Native Title Act. As such, the amended Act cannot be considered to be a special measure within the meaning of Articles 1(4) and 2(2) of the Convention and raises concerns about the State Party's compliance with Articles 2 and 5 of the Convention.

The importance of this decision can scarcely be underestimated. The Committee consists of experts elected by the States Parties to the Racial Discrimination Convention. Members

of the Committee serve in their personal capacity. By its ratification of the Convention, Australia has recognised and accepted the competence of the Committee. In the present context, the decision is a clear warning that the question of compatibility of the recommendations made by Reeves with Australia's obligations under the Racial Discrimination Convention will not escape international scrutiny, that the Committee is unlikely to accept the Government's formalistic justification of regressive legislation and that the outcome of international scrutiny is likely to be adverse.

For all these reasons, implementation of the recommendations relating to expropriation and transfer of Aboriginal assets would, in my view, give rise to breach of Australia's obligations under the Racial Discrimination Convention and would be contrary to the principles in the RDA.

### **Validity of the *Racial Discrimination Act (1975)***

The RDA is supported by, and only by, the external affairs power (because the RDA applies equally to persons of every race it is not supported by the race power) (*Koowarta v Bjelke-Petersen* (1982) 153 CLR 169). While it may not be a condition of validity that the Commonwealth implement all the obligations of the treaty (*Commonwealth v Tasmania* (1983) 158 CLR 1, 172 per Murphy J, 233–4 per Brennan J, 268 per Deane J), validity requires that the law conform to the treaty (*Commonwealth v Tasmania* (1983) 158 CLR 1, 131 per Mason J) or be 'appropriate and adapted to' the carrying into effect of the treaty (158 CLR 259 per Deane J). 'Deficiency in implementation of a supporting convention is not necessarily fatal to the validity of a law; but a law will be held invalid if the deficiency is so substantial as to deny the law the character of a measure implementing the Convention or it is a deficiency which, when coupled with other provisions of the law, make it substantially inconsistent with the Convention' (*Victoria v The Commonwealth* (1996) 187 CLR 416, 489 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ; see also *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 74–75 per McHugh J).

Amendment of the RDA (either directly or by subsequent inconsistent legislation that prevails) so as to discriminate against persons of the Aboriginal race, contrary to Australia's obligations under the Racial Discrimination Convention would put at risk the constitutional validity of the RDA. That risk would arise because Australian law would no longer conform with, or be appropriate and adapted to giving effect to, Australia's obligations under the Convention. The High Court would undoubtedly be reluctant to conclude that the RDA had become invalid. Nevertheless, having regard to the unqualified language of the Convention, discriminatory expropriation of Aboriginal property giving rise to a clear and substantial breach of Australia's obligations under the Convention would appear to be within the circumstances contemplated by the High Court in *Victoria v The Commonwealth*. The RDA, as amended by the subsequent law, would no longer give effect to Australia's obligations under the Racial Discrimination Convention.

### **Part III: Payments to royalty associations**

Reeves contends that the mining royalty equivalents paid to royalty associations are public moneys. Therefore the royalty associations should be accountable for them.

The analysis is legally flawed. Reeves gives insufficient weight to the legal and policy consequences of the interposition of the land councils between the Aboriginals Benefit Reserve and the royalty associations.

In consequence of that interposition, the moneys cease to be public moneys for the purposes of the *Financial Management and Accountability Act 1997*.

An entirely different legal and accounting regime applies – the *Commonwealth Authorities and Companies Act 1997*.

In determining appropriate accountability arrangements regard should be had to:

- the historical background, in particular the historical explanation of the payments as compensation; and
- the reasons for and the consequences of interposition of the land councils between the public money account (the Aboriginals Benefit Reserve) and payments to royalty associations.

### **Part IV: Judicial power issues**

Implementation of the following recommendations is likely to give rise to invalidity by reason of infringement of the requirements of chapter 111 of the Constitution:

- the recommendation that the Aboriginal Land Commissioner have regard to detriment; and
- the recommendation that dispute resolution functions be conferred on regional land councils with a right of appeal on a question of law to the Aboriginal Land Commissioner.

### **Part V: Natural justice and judicial review**

The recommendations relating to decision-making processes exclude application of the principles of natural justice and exclude the normal judicial review processes.

#### **Note**

This paper draws on legal advice provided to the Aboriginal and Torres Strait Islander Commission and made available by the Commission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs. For reasons of space,

legal analysis of constitutional law authorities relating to the acquisitions power and international legal jurisprudence relating to Article 27 of the International Covenant on Civil and Political Rights have been omitted. In Parts III, IV and V only the conclusions are reproduced. The full analysis is included in the legal advice which is accessible on the Standing Committee's website ([www.aph.gov.au/house/committee/atsia/index/htm](http://www.aph.gov.au/house/committee/atsia/index/htm)).

## Reference

Reeves, J. 1998. *Building on Land Rights for the Next Generation: Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, two volumes, Australian Government Publishing Service, Canberra.



## 7. Statehood, land rights and Aboriginal law

### **Garth Nettheim**

We gotta find out from our culture country and you got to find out from your law. See? That's the Land Rights Act: your law and my law is standing as one. Two different, different laws standing as one (Wenten Rubuntja, quoted in McEvoy and Lyon 1994: 12).

Given the legislative novelty of the subject matter of the Act and the need to marry complex notions of traditional Aboriginal law and culture with European institutions and administrative procedures, the Act has worked surprisingly well (Toohey 1984: paragraph 880).

### **The statehood agenda**

How does the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the Land Rights Act) relate to the political agenda of statehood for the Northern Territory? The ambition of statehood is not new, but it has gained added impetus since the commencement of the *Northern Territory (Self-Government) Act 1978* (Cth), enacted soon after the commencement of the Land Rights Act. That ambition stands not only as the perceived logical development of the status of the Territory within the federation. It has also been supported by claims that, compared with the States, self-government in the Territory is incomplete as long as the Commonwealth retains control over:

- Aboriginal land rights;
- uranium; and
- major national parks.

Issues surrounding these three topics – sometimes in combination – have been used to potent political effect by successive Country Liberal Party (CLP) governments in the Territory. In particular, it has been said that every election campaign but one since self-government has been conducted largely on the basis of opposition to Aboriginal rights and aspirations. The political lesson seems to be that as long as the CLP continues to oppose Aboriginal rights and aspirations in the Territory, it can be assured of re-election. It would be a 'one party state', if it were a state! The only notable electoral defeat which a CLP government has experienced occurred, remarkably enough, in the referendum on statehood on 3 October 1998, to which I will return.

### **The land rights issue**

The Land Rights Act has been a particular focus for opposition from successive governments of the Territory.

Justice Woodward's version of a simple beneficial land claim process was not to be. Instead land claims became legalistic battlefields.

For many years the Northern Territory Government employed anthropologists and lawyers to represent it at land claim hearings and consistently, although always unsuccessfully, challenged the Aboriginal Land Commissioner's recommendations, and decisions of the Federal Minister for Aboriginal Affairs in the Federal and High Courts. It is estimated that over \$10 million has been spent by the Northern Territory Government in (unsuccessful) legal challenges designed to limit the amount of Aboriginal land granted. It has also used its own legislative and administrative powers to undermine the smooth functioning of the Act (CLC and NLC 1995: 7).

(I have argued elsewhere (Nettheim 1998: 274) that, by taking so many issues arising under the Land Rights Act on appeal, the Northern Territory Government helped to 'educate' the High Court about Aboriginal land rights and thus contributed to the landmark decision in *Mabo v Queensland (Mabo (No. 2))* (1992) 175 CLR 1. That decision recognised the survival of native title in Australian common law on terms which are very similar to the legislation and the jurisprudence under the Land Rights Act.)

One particular theme in the opposition by Territory governments to the Land Rights Act is that it 'has always opposed the right of Aboriginal people to refuse consent to exploration and mining proposals on Aboriginal land' (CLC and NLC 1995: 32). This issue, of course, was a theme in the Reeves Review of the Land Rights Act, and the Northern Land Council (NLC), the Aboriginal and Torres Strait Islander Commission (ATSIC) and the Central Land Council (CLC) set out to refute 'misinformation' on the mining issue (CLC 1998).

It is worth repeating what Woodward (1974: paragraph 568) had to say in his Second Report: 'I believe that to deny to Aborigines the right to prevent mining on their land is to deny the reality of their land rights'. Galarrwuy Yunupingu (1997: 9), Chairman of the NLC, comments:

Numerous reports and reviews since 1974 have echoed Woodward's findings, and the current government in its pre-election policy document explicitly promised to 'maintain the one-off veto at the exploration stage to protect Aboriginal interests'. It is hard to understand why there is so much concern about the so-called veto when it is on the public record that more Aboriginal land than non-Aboriginal land is currently under exploration in the Northern Territory. To me, it is not about money and mining but more a direct attack on our fundamental and intrinsic rights as Aboriginal land owners.

In his report, Reeves (1998: ii) makes reference to the 'strident, oppositional political culture' which has developed in the Northern Territory with respect to Aboriginal land rights and which has been 'to the detriment of the people of the Northern Territory, and especially, of Aboriginal Territorians'. He has no substantial proposals in this regard directed to the Territory Government, but he does recommend the breakup of the CLC and the NLC into 16 weaker regional land councils, overseen, together with the existing two smaller land councils, by an (initially) appointed Northern Territory Aboriginal Council.

Such a recommendation is likely to have strong appeal to both the Northern Territory Government and the Commonwealth Government.

My point is that the Land Rights Act has become inextricably embedded in the politics of the Northern Territory. There is a long legacy of profound distrust of the Territory Government by Aboriginal Territorians. There is an even longer legacy of hostility by that government towards Aboriginal peoples' organisations and, in particular, towards the CLC and the NLC.

Inevitably, the politics of the Land Rights Act have found their way into the debate about statehood.

## **Constitutional development**

Statehood for the Northern Territory would require action by the Commonwealth Parliament under section 121 of the Constitution to admit or establish the Territory as a new state, on such terms and conditions as the Parliament thinks fit (Loveday and McNab 1988; Heatley 1990).

Since 1985 a Sessional Committee of the Northern Territory Legislative Assembly had developed carefully considered proposals for a constitution as a basis for statehood. It produced a final draft Constitution in its final report in 1996 (Parliament of the Northern Territory 1996: appendix 8). In March 1996 the election of a Coalition Commonwealth Government provided a window of opportunity for the achievement of CLP aspirations for the Territory, particularly the move to statehood and amendment of the Land Rights Act.

On the issue of land rights, the Commonwealth established the Reeves Review of the Land Rights Act in October 1997. In regard to statehood, the Sessional Committee's draft was used as the starting point for discussion at the (non-elected) Northern Territory Constitutional Convention held in Darwin from 27 March to 9 April 1998. The draft was subject to substantial revision on various matters, including issues of particular concern to Aboriginal Territorians (Heatley and McNab 1998: 155). Pritchard (1998a: 12) summarises those matters of concern as follows:

[T]he Revised Draft Constitution's weak preambular acknowledgment of the prior occupation of Aboriginal people, its provisions anticipating the codification of Aboriginal customary law, and its elimination of some of the more interesting provisions contained in the Sessional Committee's draft. These included provisions conferring upon the [Land Rights Act] the status of an organic law with particular amendment procedures, a constitutional regime for the protection of land rights and sacred sites, and an act of Parliament entrenching Aboriginal self-determination. The Convention also rejected the following proposals: that the [Land Rights Act] remain within the federal jurisdiction; the inclusion of a bill of rights; the codification of the powers of Premier and Cabinet in order to temper executive power; mechanisms to ensure free and fair elections.

## Aboriginal constitutional conventions

Over the years, Aboriginal Territorians have convened their own constitutional conventions (Northern Territory Aboriginal Constitutional Convention 1993). They did so again, with renewed urgency, in 1998, in light of the Territory Government's push towards a constitutional convention and the Howard Government's general support for the statehood ambition.

In the Top End there was a series of meetings in the several NLC regions. In the Centre, more than 800 people from communities and organisations came together as the Combined Aboriginal Nations of Central Australia in a single convention held at Kalkaringi in August 1998. This convention produced the Kalkaringi Statement, and it selected delegates to attend a Territory-wide Aboriginal Constitutional Convention, scheduled to take place at Batchelor in the first week of October 1998 (Pritchard 1998a: 12–13).

The Batchelor meeting was postponed when Prime Minister Howard set 3 October 1998 as the date for the federal election, and also as the date for a Northern Territory referendum on statehood. The Northern Territory Constitutional Convention had recommended that three questions be put to the voters: whether they were in favour of statehood; what should be the name of the new State; and whether they favoured the draft Constitution. The Northern Territory Government decided, however, that the referendum should relate only to the issue of statehood.

Aboriginal peoples' organisations set out to inform their own constituencies about the issues, armed, in particular, with the Kalkaringi Statement. They also sought to establish common cause with non-indigenous Territorians, many of whom had their own concerns with the draft Constitution, particularly on issues of the process by which it had been developed, and its perceived inadequacies on issues of good governance.

In the result, 51.3 per cent of those who participated voted 'no'. The 'no' vote was over 70 per cent in remote areas where, of course, Aboriginal people are a majority. Overall, polling indicated that 80 per cent of the voters favoured the move to statehood, but objected to the draft Constitution.

The Batchelor Convention was eventually held between 30 November and 4 December 1998. It adopted and endorsed the Kalkaringi Statement and developed supplementary Resolutions of the Northern Territory Aboriginal Nations on Standards for Constitutional Development. The convention also provided for its continuation, and for a committee of its delegates to oversee research, to negotiate and to perform other functions (*Indigenous Law Bulletin* 1999: 2).

The Kalkaringi Statement and the Batchelor Resolutions are of very considerable interest on a range of matters and, in particular, in their strong assertions that the Aboriginal Nations of the Northern Territory must be regarded as essential participants in the constitutional development of the Northern Territory.

For present purposes, however, I focus on the statements directly relevant to land rights (including native title).

The Kalkaringi Statement included the following paragraphs:

#### Aboriginal Land Rights and Other Rights

1. That the [Land Rights Act] must remain Commonwealth legislation administered by the Commonwealth.
2. That the rights of Aboriginal peoples in relation to land (including land subject to current or historic pastoral leases, reserves and national parks) must be respected and afforded effective Constitutional protection.
3. That the rights of Aboriginal peoples as owners of land which is currently (or in future) national park must be recognised by the implementation of co-operative management structures that give them effective control.
4. That our common law and statutory rights (including those currently contained in the [Land Rights Act]), as well as those recognised or negotiated in coming years, must be recognised and afforded Constitutional protection.
5. That arbitrary time limits on the capacity of Aboriginal land owners to assert their rights over land and waters must be removed.
6. That any changes to a Northern Territory Constitution which concern Aboriginal rights must be approved not only by a majority of electors at a referendum, but also by a majority of people of the Aboriginal Nations of the Northern Territory.
7. That there must also be recognition and protection of the rights of all Indigenous peoples of Australia in the Commonwealth Constitution.

#### Sacred Sites and Significant Areas

That a Northern Territory Constitution must provide for Aboriginal control in relation to, and the effective protection of, Aboriginal sacred sites and significant areas.

The Reeves Report was not available at the Kalkaringi Convention, and was tabled in the Senate on 21 August 1998. It was available at the time of the Batchelor Convention. The convention rejected the findings and recommendations of the report 'which diminish or destroy the inherent rights of Indigenous peoples in the NT to their traditional lands, and to the control and management of their lands'.

The Batchelor Convention also added to the Kalkaringi Statement with reference to Aboriginal rights in relation to land and waters; their right to give or withhold consent to any projects affecting their lands, territories, waters and other resources; environmental protection; and cultural and intellectual property.

#### **International scrutiny**

On 14 August 1998, one week before the tabling of the Reeves Report, the Committee on the Elimination of Racial Discrimination (CERD) adopted a resolution (CERD 1998). CERD is the committee of 18 independent experts established under the International Convention

on the Elimination of All Forms of Racial Discrimination which Australia has ratified. The particular resolution was an unusual exercise of CERD's early warning/urgent action procedure, and requested the Australian Government to provide information on 'the changes recently projected or introduced to the 1993 Native Title Act, on any changes of policy ... as to Aboriginal land rights, and of the functions of the Aboriginal and Torres Strait Islander Social Justice Commissioner' (Pritchard 1998b: 17).

Australia provided its own document in response to the request. So did indigenous peoples' organisations such as ATSIC and the National Indigenous Working Group on Native Title. The Acting Aboriginal and Torres Strait Islander Social Justice Commissioner in the Human Rights and Equal Opportunity Commission (HREOC) also lodged a report. CERD met in March and published its views in March 1999. The Howard Government responded by saying, in effect, that it disagrees with the committee's views.

For present purposes, I will largely pass over what has been said about the 1998 Native Title Act amendments and the position of Aboriginal and Torres Strait Islander Social Justice Commissioner. I will concentrate on what has been said about changes to Commonwealth government policy on land rights, which is directly relevant to the Reeves Report.

### **The ATSIC submission**

ATSIC submitted a 132-page report, prepared by the Indigenous Law Centre. It went beyond the three topics referred to in the CERD resolution of August 1998, and dealt also with heritage protection, the recognition of indigenous laws, implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody, juvenile justice issues, the 'stolen generations' report, economic and social indicators, the Hindmarsh Island Bridge affair, and several other matters. The submission dealt with the Reeves Review and Report on pages 57–67. On page 57 it indicated the matters which it considered of relevance to CERD:

The Reviewer made numerous findings and recommendations. If implemented a significant number of these recommendations would be detrimental to the principles of self-determination, non-discrimination and equality before the law. Of particular concern are proposals:

- that the NLC and CLC be replaced by 18 Regional Land Councils ('RLCs') and that the RLCs be administered by one umbrella body, the Northern Territory Aboriginal Council ('NTAC'), to be made up initially of Government appointees;
- to remove the permit system which allows Aboriginal land owners to regulate access to Aboriginal land;
- to change the critical mining and exploration provisions of the ALRA;
- to empower the Northern Territory Government to acquire Aboriginal land compulsorily for public purposes;

- to revise the Aboriginal Benefits [sic] Reserve ('ABR') (formerly the Aboriginal Benefits [sic] Trust Account) in accordance with a more commercial orientation;
- to apply Northern Territory laws which protect the rights and interests of the broader community on Aboriginal land, even where these affect the rights of Aboriginal people to use their land in accordance with Aboriginal tradition; and
- to extinguish native title on Aboriginal land and Community Living Areas.

### **The HREOC submission**

The 40-page submission by the Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, dated 3 March 1999, concentrated on the three matters which the CERD resolution had flagged. The larger part of the submission related to the amendments to the *Native Title Act 1993* (Cth). It devoted one page to the topic of policy on Aboriginal land rights, but did not offer any appraisal of the Reeves Report and recommendations, presumably on the basis that 'The Federal Government has yet to formulate its response to the Report's recommendations ...' (paragraph 131).

### **The CERD response**

The CERD resolution of 18 March (CERD 1999) begins by referring to its August 1998 resolution, and 'welcomes the full and thorough reply of the Commonwealth Government of Australia' to its request for information. The committee 'also appreciates the dialogue' with Australia's delegation at its meetings to 'respond to additional questions posed by the Committee in regard to' its submission.

CERD notes that it also received 'similarly detailed and useful comments' from the Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, from ATSIC, and from 'members of the Parliament and Senate of Australia'. Paragraphs 3 and 4 are as follows:

3. The Committee recognizes that within the broad range of discriminatory practices that have long been directed against Australia's Aboriginal and Torres Strait Islander peoples, the effects of Australia's racially discriminatory land practices have endured as an acute impairment of the rights of Australia's indigenous communities.

4. In its last Concluding Observations on the previous report of Australia, the Committee welcomed the attention paid by the Australian judiciary to the implementation of the Convention. (A/49/18, para. 540) The Committee also welcomed the decision of the High Court of Australia in the case of *Mabo v. Queensland*, noting that in recognizing the survival of indigenous title to land where such title had not otherwise been validly extinguished, the High Court case constituted a significant development in the recognition of Indigenous rights under the Convention. The Committee welcomed, further, the Native Title Act of 1993, which provided a framework for the continued recognition of indigenous land rights following the precedent established in the *Mabo* case.

CERD went on to express its concern over the compatibility of the 1998 amendments to the Native Title Act with Australia's international obligations under the convention, noting that 'provisions that extinguish or impair the exercise of indigenous title rights pervade the amended Act', and 'the amended Act appears to create legal certainty for governments and third parties at the expense of indigenous title' (paragraph 6). CERD focused its critique on the new 'validation' provisions for Acts by governments between 1 January 1994 and 23 December 1996; the new 'confirmation of extinguishment' provisions; the primary production upgrade provisions; and restrictions on the 'right to negotiate' non-indigenous land uses (paragraph 7). It also criticised 'the lack of effective participation by indigenous communities in the formulation of the amendments' (paragraph 9).

CERD also 'notes with concern' Australia's proposed changes to the structure of the Human Rights and Equal Opportunity Commission (paragraph 10). It 'calls on the State Party to address these concerns as a matter of utmost urgency' (paragraph 11), and 'decides to keep this matter on its agenda under its early warning and urgent action procedures to be reviewed again at its fifty-fifth session' (paragraph 12).

No mention was made, in the decision of the committee, of the Reeves Report and recommendations, or on the broader issue of 'changes of policy as to Aboriginal land rights' apart from the amendments to the *Native Title Act 1993* (Cth). Presumably, this was because the Reeves Report and its recommendations are still under consideration by the Australian Government and by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs. And any further developments on this issue will remain within CERD's purview when it resumes consideration of Australia under its early warning and urgent action procedure.

In addition, Australia is finally at the stage of completing for submission to CERD its long-delayed tenth, eleventh and twelfth periodic reports on its compliance with the entire range of obligations under the convention. CERD's consideration of those reports will provide it with another opportunity to look at any development on the Reeves Report.

In the meantime, it would be open to indigenous Australians and their organisations to file a communication with CERD under Article 14 of the convention when and if legislation is enacted to implement Reeves's recommendations. It is generally a requirement that 'domestic remedies' be exhausted before such a communication is accepted (Pritchard, Sharp and Rodrigues 1998).

## **Domestic responses**

The response of the Howard Government was, not surprisingly, dismissive. It simply denied that its native title amendments breached Australia's treaty obligations.

Responses to the CERD decision from indigenous peoples' organisations were very positive, with press releases from ATSIC Commissioner, Geoff Clark, and Deputy Chair of the National Indigenous Working Group on Native Title, Les Malezer, on 18 March, and from ATSIC Commissioner, Inspector Colin Dillon, on 19 March.

On the specific issue of the Reeves recommendations, much work needs to be done within Australia, notably in the form of submissions to the current inquiry by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, and other forms of political persuasion.

## Conclusion

In this paper I have attempted to consider the constitutional dimensions to the Reeves Report and recommendations, and to add a note on the international dimensions. Amendments to the Land Rights Act – and, indeed, its ‘patriation’ as Northern Territory law – have been long-held ambitions of successive Northern Territory governments. Those ambitions have been inextricably linked to the statehood ambition. Aboriginal Territorians have responded by assertions of their own constitutional status as the First Nations of the Territory whose consent is necessary to developments in both areas. And they have articulated their deep distrust of Northern Territory governments by insisting on constitutional protection to their land rights, a proposition which had found favour with the Northern Territory Legislative Assembly’s Sessional Committee.

The referendum result on 3 October 1998 was a severe setback to the Northern Territory Government, but the statehood agenda will, undoubtedly, be resumed. The ultimate decision on that project, and on the future of the Reeves recommendations, is in the hands of the Commonwealth Government and the Parliament.

Interesting times lie ahead.

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## 8. The social, cultural and economic costs and benefits of land rights: an assessment of the Reeves analysis

**John Taylor**

The second term of reference for the Review of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Reeves 1998) was to assess the impact of the legislation in terms of its social, cultural and economic costs and benefits. While consideration of such matters is not explicitly required of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into the Reeves Report, an essential interest in this is implied by the pivotal role that social and economic arguments play in rationalising the proposals made by Reeves for radical institutional change. This being so, the purpose of this paper is to draw attention to methodological flaws in Reeves's assessment of social and economic impacts. These, it is argued, detract from the capacity of the review to adequately address this second term of reference and no doubt go some way to explaining why the review itself concluded that it was unable to establish the role played by the Land Rights Act in the continuing relative economic disadvantage of Aboriginal people in the Northern Territory (Reeves 1998: 91). On the basis of this alone – a failure to establish any link between the operations of the Act and socioeconomic outcomes – it is difficult to see how a case for radical restructuring of institutional arrangements as the panacea for social and economic disadvantage could have been mounted, let alone sustained.

Because the initial primary purpose of the Land Rights Act to grant land to Aboriginal people and to recognise traditional Aboriginal interests in land is viewed by Reeves (1998: 65) as having been largely accomplished, the review turns its focus towards areas of the Act which it considers to have been less effective to date. These it proposes as imperatives or new purposes of a new era of land rights – to obtain better outcomes for the next generation of Aboriginal people in terms of what it describes as economic and social advancement (Reeves 1998: 74). Thus it is recommended that a preamble and purposes clause be inserted in the Act expressing the future purposes of the Act *inter alia* to provide opportunities for the social and economic advancement of Aboriginal peoples in the Northern Territory (Reeves 1998: 77).

Reeves argues that these opportunities can only be provided by reforming the institutional arrangements that have emerged to administer the Land Rights Act. This conclusion is based on an implicit assertion of linkage between the operations of the Act to date and poor social and economic outcomes for Aboriginal people in the Northern Territory. Thus enhancement of social and economic status, so the argument goes, requires significant departures from the way things have been done so far in terms of controlling and directing the flow of moneys generated by the Land Rights Act.

## Methodological flaws in the Reeves analysis

The most basic methodological flaw in the Reeves Review's assessment of the second term of reference is the lack of any conceptual framework to explain at the outset why an association between the institutional arrangements surrounding the Land Rights Act and social, cultural and economic outcomes for Aboriginal people in the Territory should be expected. To the extent that this might be demonstrated, the specific form and character of any such association should have been specified, together with the means by which the impact of land rights institutional arrangements might be isolated and measured separately from any other factors that may have had a bearing on social, cultural and economic outcomes. If the keystone of the Reeves recommendations is the need for institutional change in order to enhance socioeconomic outcomes, it is essential that the precise linkage involved be established – and this is not done.

Furthermore, to the extent that an organising framework for addressing issues of social and economic impact is evident in the Reeves Review, this appears contradictory and confused as to intent. For example, harking back to Woodward (1974: 138) who foreshadowed that there would be no immediate and dramatic change in living standards as a consequence of the legislation and that the road to social and economic equality would be long, the Reeves Review (1998: 11) also appears guided by a long-term (decades?) perspective on benefits from the Act. More emphatically, the considered view is that improving the economic lot of Aboriginal people was not an initial purpose of the Land Rights Act (Reeves 1998: 544).

Despite this stance, the most explicit hypothesis advanced in response to the review's second term of reference is that because the Northern Territory stands out as having gone farthest in terms of granting land to Aboriginal people, then Aboriginal people in the Northern Territory may also be expected to stand out as relatively socioeconomically advantaged compared with their less land-endowed counterparts in the rest of Australia (Reeves 1998: 78). Implicit in this hypothesis is an understanding that the legislation would (should) have served to enhance social and economic outcomes for Aboriginal people. While these contrary positions lead to confusion regarding expectations of the impact of the Land Rights Act, the use of social indicators data to infer that land rights has not impacted on socioeconomic disadvantage appears telling – the current institutional arrangements have failed to raise the socioeconomic profile of Aboriginal people, therefore they must change (Reeves 1998: ii–iii).

Whether by design, or whether in acknowledgment of Justice Gray's comments regarding a lack of necessary and appropriate information upon which to develop a response to the second term of reference (Reeves 1998: 543), the Reeves Review relies heavily on analyses of cross-sectional social indicators data to draw conclusions, by way of inference, about the impact of the legislation. At best, and especially in the absence of baseline data, this provides only an indirect measure of impacts and, at worst, no measure at all. There are several reasons for this.

### **Lack of a statistical baseline**

A simple, but crucial, methodological failing is the absence of a social, cultural and economic baseline for Aboriginal people in the Northern Territory against which to measure change in these factors post-land rights. Because of this it is difficult to see how the impact of land rights can be properly assessed. For example, it could be that, despite having relatively low socioeconomic status according to current social indicators, the Aboriginal population in the Northern Territory is now much better off than in the 1970s. Indeed, a number of specific case studies of employment, income, health and housing conditions on Aboriginal land prior to and following the granting of land rights are presented in submissions to the review (though not cited) and these suggest that such improvement did indeed occur (Central Land Council 1997: 51–9; Jawoyn Association 1997).

### **Time frames for measuring impact**

It is implied with observations such as ‘owning over 40 per cent of the Northern Territory does not seem to have done much for Aboriginal Territorians in terms of health, housing, education and workforce skills’ (Reeves 1998: 81) that the social, cultural and economic impacts sought by the Reeves Review were in respect of the full 42 per cent of the land mass of the Northern Territory as held at the time of the review. This is notwithstanding a recognition by Reeves (1998: 61) that only 19 per cent of the land mass has been in Aboriginal ownership for the full 20 years, while the remaining 23 per cent has been allocated progressively up to the present. This highlights the lack of another conceptual foundation for the analysis of impacts which echoes Woodward – what length of time might reasonably be required for impacts to emerge? Without such a frame of reference, how can the effectiveness of the legislation in this regard be adequately tested? There is an added complication here to do with the issue of in-migration to the Northern Territory over the past 20 years, as well as to and from Aboriginal lands, and the related fact that populations have been augmented over time to varying degrees and at varying rates. How does this affect the analysis of impacts – in short, impacts on who? This is not considered.

### **The role of the Act in socioeconomic development**

Another inconsistency in the Reeves assessment of social and economic impact is evident in the discussion on the effectiveness of the Land Rights Act in achieving its purposes to date. Reeves (1998: 60) interprets and summarises these purposes as follows: to grant traditional Aboriginal land to, and for the benefit of, Aboriginals; to recognise traditional Aboriginal interests in, and relationships to, land; and to provide Aboriginal people with effective control over activities on the land so granted. This is what Reeves conceptualises as the first generation of land rights, in which the acquisition of land and other rights and entitlements was paramount. To emphasise this focus in the purpose of the Land Rights Act to date, Reeves (1998: 544) also expresses a personal view that improving the economic lot of Aboriginal people was not an initial purpose of the Act.

Using this interpretation of the purpose of the Land Rights Act, it is therefore not surprising to observe that the use of funds generated by the Act has so far been devoted largely to administering the claims process, to legally defending land claims against opposition, and to acquiring land through purchase for the purpose of subsequent claim. That is, the use of moneys for economic and social advancement has, quite legitimately in terms of Reeves's own assessment of the overriding purpose of the Act to date, been of secondary concern. In seeking to emphasise this, Reeves (1998: 75-6) concludes that Aboriginal land rights in the Northern Territory is now about to pass into a new era – one focused on social and economic advancement via institutional change. But to advance this case for institutional change on an implicit argument that land rights has so far failed to enhance social and economic status (Reeves 1998: 81) is, on Reeves' own logic, to base it on something that was not primarily intended, nor wholly attempted.

Even if one were to argue that section 64(4) moneys have been available for the social and economic betterment of Aboriginal people generally in the Northern Territory, it is questionable whether the funds available in this way were ever sufficient to effect a transformation in economic status, as was pointed out in the 1984 review of the Aboriginals Benefit Trust Account (Altman 1985: 158). Given the theoretical maximum 30 per cent share of Aboriginals Benefit Reserve moneys under section 64(4) of the Act, a limit on potential impacts of such moneys has always been in place, especially when considered against growth in the Aboriginal population from a count of 23,751 in 1976 to an estimate of 51,876 in 1996. Surely, in a public policy context, if one were really concerned to uncover the root causes of ongoing Aboriginal socioeconomic disadvantage, the focus would, perforce, be much more on the role of those agencies, viz. the Northern Territory Government, the Aboriginal and Torres Strait Islander Commission (ATSIC) and other Commonwealth departments, that have specific policies, responsibilities and capacities to overcome such disadvantage. The institutions that have emerged under the Land Rights Act have had far less intent and carriage in this area.

### **Socioeconomic disadvantage – the national context**

The analysis in the Reeves Report that compares the socioeconomic status of Aboriginal people in the Northern Territory with that of their counterparts in the rest of the country is conducted ahistorically. If Aboriginal people in the Northern Territory are found to be currently socioeconomically disadvantaged vis-à-vis the rest of the country, how is this to be attributed to land rights alone in the absence of any analysis of other, and arguably far more influential, factors in affecting such relativities? At the very least, this comparison should have included an assessment of the much more extensive and historically longer incorporation of Aboriginal people into the mainstream economy in areas outside of the Northern Territory, including their greater access over time to education, training, health services and mainstream employment opportunities. This is aside from the sheer weight of geography that clearly favours the rest of Australia in socioeconomic terms against Aboriginal lands in the Northern Territory, which are some of the remotest parts of the continent and, up to the commencement of the granting of land rights, were universally among the least developed, with an enormous backlog of social and economic

infrastructure. In short, benchmarked against mainstream social indicators, there is every reason to expect that Aboriginal people in the Northern Territory would be declared socioeconomically disadvantaged in the national context, with or without land rights.

### **Remote location – disadvantage or advantage?**

With regard to the analysis of Territory-specific social indicators, there is no argument with the observation made by Reeves that against mainstream measures of socioeconomic standing, Aboriginal people in remote rural parts of the Northern Territory show up as clearly disadvantaged. To explain this, Reeves focuses mostly on the constraints imposed by locational disadvantage. These are unequivocal. However, this focus overlooks the extent to which human capital deficits are independent of location and simply reflect lifestyle choices made by Aboriginal people, choices that have been legitimately enabled (in Reeves's own view) by land rights.

This is not just a point about cultural invigoration, not least because social, cultural and economic factors are difficult to separate as the Northern Land Council submission to the Reeves Review points out (Reeves 1998: 545). It is also because there is a very real sense in which economic activity has been stimulated by land rights but in ways that are not amenable to measurement by mainstream social indicators. Examples of this abound in the literature and include subsistence activities (hunting, fishing and gathering), art and craft manufacture, land management and ceremonial business (Altman 1987, 1989a; Altman and Taylor 1989; Altman and Allen 1992; Altman, Bek and Roach 1996; Bomford and Caughley 1996). To underline the economic importance of this informal activity one study has estimated that, by Australian standards, Aboriginal people on some Aboriginal lands are fully employed in the informal sector (Altman and Allen 1992: 142).

In this context, the conclusion drawn by the Reeves Review (1998: 91) that living on Aboriginal land has an adverse impact on economic and social standing is disingenuous. On the one hand, living in a rural area need not compromise formal employment prospects – after all, more than 11,000 non-indigenous people in rural parts of the Northern Territory have officially defined jobs, as do over 5,000 indigenous people. One study (Taylor 1995), not cited by Reeves, also shows that the Australian Bureau of Statistics industry classification masks a good deal of diversity in economic activity conducted by employees in Community Development Employment Project schemes. More importantly, however, the fact that mainstream measures of work and income do not accommodate particular lifestyle priorities of individuals living in different places is as crucial in understanding socioeconomic differentials as any constraints imposed by geography. This reflects a conundrum for those advocating simple solutions to ongoing disadvantage – land rights bestow a legitimate interest in remote residence away from the mainstream economy, but access to the mainstream is considered the key to better socioeconomic outcomes. Thus in the Miller Report (1985: 5–6) we find the following observation:

The option [of salaried employment] is not ... open to them [many Aboriginal people] and ... many of them reject it. In the more remote areas which were not colonised to the extent of others and where Aboriginal custom and law remain strong, people have

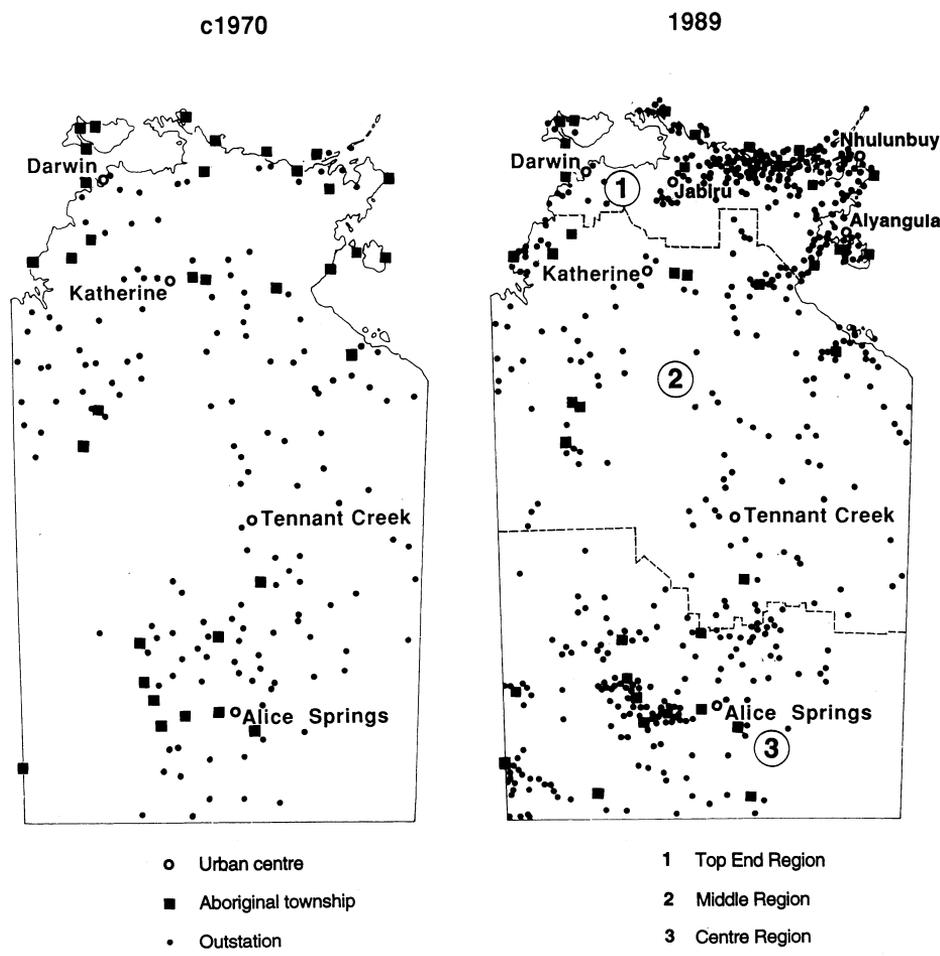
removed themselves from the enforced change of life-style encompassed by a western-style economy ... and have chosen to maintain a life-style compatible with their traditional culture using a mix of components from their own traditional hunter-gatherer subsistence economy together with components of the wider market-based economy ... Not all Aboriginal people have the same concept of the mix of traditional Aboriginal and non-Aboriginal components in their life-style. Many of them who have chosen, or have felt compelled to live in an urban context, accept the employment for wage or salary basis for their livelihood to a greater extent than those who have remained in an isolated rural environment.

The negative consequences of locational disadvantage for Australians generally living in non-metropolitan regions has been of growing policy concern over the past 20 years or so (Logan et al. 1975; Holmes 1988a, 1988b). From this macro-perspective, the populations resident on Aboriginal lands in the Northern Territory have been and still are manifestly among the most locationally disadvantaged in Australia (Faulkner and French 1983). Not only do they fall firmly within the definition of remote Australia as determined by the Commonwealth Grants Commission, they are physically detached even within this area. On any objective statistical measure of accessibility, these localities excel in their separation from employment and training opportunities and from social infrastructure. They are poorly connected to transport networks and often distant from even the smallest rural service centres. They are widely dispersed and small in size, providing, individually at least, a limited market demand for goods and services. From the experience of market economies generally, they would be regarded as economically depressed and are typified by out-migration (particularly of the young and most able), chronic undercapitalisation and economic stagnation (Friedman 1966). This is the view of Aboriginal lands clearly adopted by the Reeves Review.

However, notwithstanding their manifest isolation (some might argue because of it), the evidence of the past 20 years or so of land rights paints another more positive scenario – one that is reflected in a growing population (one recent estimate of the population resident at outstations in North Australia (Altman, Gillespie and Palmer 1998: 58) puts the figure at around 20,000) and associated increase in the number of settlements (Taylor 1993), much greater access to private and public moneys, the development of Aboriginal and non-Aboriginal organisational and governmental structures, expanding provision of infrastructure, and a growth in the level and range of economic activity. Far from representing the stagnant economic areas of conventional economic theory, it would appear that since the establishment of land rights the remotest areas of the Northern Territory have been characterised by an internal dynamism, revitalised by the growing influence of Aboriginal self-determination based on legal access to traditional lands. Figure 1 provides a visual manifestation of this.

From the bureaucratic perspective of those seeking to provide services and achieve social and economic equity and efficiency goals, such a focus by Aboriginal people on utilising and residing on Aboriginal lands may be construed as a retrograde step on the grounds that it serves to reinforce the locational disadvantage of an already severely disadvantaged group. From a more cultural perspective, however, remoteness is very much in the eye of

the beholder. To extend Reeves’s reference to the work of Sen (Reeves 1998: 586–87), a person’s capability to achieve functionings that he or she has reason to value does not just refer to elementary and utilitarian ones, such as income, but includes more sophisticated achievements such as having self-respect and the capacity to participate in community life (Sen 1992: 4–5).



Source: Taylor 1993: 57

**Figure 1: Distribution of Aboriginal settlement in the Northern Territory, 1970 and 1989**

To the extent that such achievements are attainable only by virtue of remote residence on traditional lands, the continuing presence of Aboriginal people on Aboriginal lands and the ongoing dispersion of population across these lands may be seen as a manifestation of Aboriginal perceptions of locational advantage. As such, this represents the spatial optimum in a locational trade-off which is aimed at balancing a range of cultural, economic, social and political considerations. Such a trade-off involves reduced access to urban-based mainstream labour markets, opportunities for education, training and income generation as well as to better housing and other social facilities. Insofar as these are perceived as

losses, they are set against the not insignificant social, cultural and economic gains acquired from residence on Aboriginal lands that are alluded to in academic literature and in many of the submissions to the Reeves Review. Along with the mere importance of living on one's own country, which is acknowledged by Reeves (1998: 575), and the associated capacity to fulfil cultural obligations and assume a degree of autonomous existence in an Aboriginal domain, land rights has enabled the formation of smaller, more socially and politically viable residential units with the associated prospect of productive activity and in-kind income enhanced through traditional pursuits (Altman 1985, 1987; Altman and Taylor 1989). One positive social impact of this population dispersion has been an improvement in health outcomes (Morice 1976; Eastwell 1979; O'Dea, White and Sinclair 1988).

### **Social and economic outcomes – where is the balance sheet?**

While an analysis of the income flows generated by land rights is provided by the Reeves Review (1998: 322–66), crucially there is no assessment of the tangible social and economic outcomes of expenditures. As indicated above, in assessing outcomes there is a heavy reliance on inferences drawn from cross-sectional social indicators data. A far more useful and direct approach to assessing the impacts of land rights legislation would have been to catalogue actual economic activities, infrastructure and assets that have derived from the use of statutory and other moneys. Despite the review, it is still not apparent what precise physical infrastructure and assets are now available to Aboriginal people in the Northern Territory as a consequence of land rights, nor what employment has been generated and what enterprises are supported. Admittedly, Reeves (1998: 337) claims to have been thwarted to some extent by land councils and royalty associations in his search for such information, and while it is generally acknowledged that such issues are difficult to research there is, nonetheless, sufficient material in submissions from the Northern Land Council (1997: 40–75), Central Land Council (1997: 41–50) and Jawoyn Association (1997) as well as in the general literature on Aboriginal economic development (Altman 1985, 1988, 1989a, 1989b; Marshall 1994; O'Faircheallaigh 1986) to establish something of a balance sheet of actual outcomes against expenditures.

### **Why should the Northern Territory Aboriginal Council make a difference?**

This failure to detail the social and economic benefits of land rights leaves no indication of the strategic place of land rights moneys in, for want of a better term, the Aboriginal economy of the Northern Territory. Notwithstanding this, Reeves (1998: 604) is confident in his assertion that by declaring all Aboriginals Benefit Reserve monies as public and by centralising control of these under a proposed Northern Territory Aboriginal Council, a faster rate of social and economic advancement for Aboriginal Territorians will be ensured. But how can this be determined if the impact of Aboriginals Benefit Reserve moneys to date remains unknown? This heralds the key unresolved economic issue left hanging by the Reeves Review, namely, on what basis can it be confidently claimed that by altering the institutional control over \$18 million of Aboriginals Benefit Reserve moneys – the amount estimated that could be available for spending on social and economic

advancement (Reeves 1998: 612) – more rapid social and economic progress will be generated when, on the review's own estimation, the annual allocation of some \$413 million to \$703 million of dedicated ATSIC and Northern Territory government spending on social and economic programs for Aboriginal people has manifestly failed to achieve this?

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## 9. The proposed restructure of the financial framework of the Land Rights Act: a critique of Reeves

**Jon Altman**

This paper sets out to explain the genesis of, and tensions and complexities inherent in, the financial framework of the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act). It then considers the validity of the critique of the operations of this framework made by John Reeves in his review of the Land Rights Act (Reeves 1998). Reeves's proposals for major reform of the framework are examined and rejected for being poorly grounded, historically inappropriate and fundamentally unworkable: in short, they constitute bad public policy. In conclusion, the paper briefly outlines some parts of the financial framework of the Land Rights Act where there is widespread agreement that reform is needed, as evident in government, land council and independent submissions to the Reeves Review.

In the interest of full transparency and accountability, the following prefacing comments are made:

- While I have undertaken research on financial aspects of the Land Rights Act throughout the 1980s and 1990s and have twice been involved in reviews of the Aboriginals Benefit Trust Account (ABTA), in 1984 and in 1989, I have also been highly critical, on several occasions, of what I regard as fundamental ambiguities and shortcomings in the statute with respect to financial matters that have resulted in poor performance. I cannot be labelled an apologist for the status quo.
- Many of my concerns were summarised and published as a separate section of the early Reeves Issues Paper of November 1997 (Reeves 1998: B36–39).
- In March and April 1998 I was commissioned by Reeves to prepare a brief consultancy report, 'Financial Aspects of Aboriginal Land Rights in the Northern Territory'. I retained full intellectual property rights in that research, undertaken with David Pollack, which was subsequently published as *CAEPR Discussion Paper No. 168* (Altman and Pollack 1998). Few of the substantive issues in that report were addressed by the Reeves Review and our recommendations for reform were largely ignored.

### **Understanding the financial framework of the Land Rights Act**

The financial framework of the Land Rights Act is a complex, but conceptually well-considered and constructed model broadly based on largely uncontested recommendations made by the Woodward Land Rights Inquiry (Woodward 1974). The model accepted and accommodated historical precedent, and then addressed some interrelated issues in Aboriginal public policy that were highly contested even at that time.

Just as Reeves was not reviewing the Land Rights Act in a policy and political vacuum, so Woodward in 1973 and 1974 was constrained by history. Indeed, the architect of linking indigenous property rights in land (then reserves) to income generated by that land was then Minister for Territories, the late Paul Hasluck, in 1952. Under the then extremely radical and progressive Hasluck model (or nexus):

- statutory royalties paid for mining on Aboriginal reserves were levied at double the normal rate; and
- these moneys were earmarked for all Northern Territory Aboriginal interests, to be used for their socioeconomic betterment via a new institution called the Aborigines (Benefits from Mining) Trust Fund (ABTF).

However, even in the early 1950s there were potential problems. Although the argument for levying a double royalty on reserves was couched in compensatory terms for those directly affected, there was no statutory provision to prioritise affected interests. Hence while the rationale was compensatory, in effect the ABTF was primarily a mechanism for socioeconomic advancement created at a time when government was not allocating any discretionary public resources to Aboriginal advancement. The Hasluck model was a form of rent sharing, with the Commonwealth Government forgoing its access to statutory royalties on reserves and the private sector contributing 50 per cent through the payment of a double royalty.

By the time of Woodward there were two fundamental and important changes. First, on Groote Eylandt in the early 1960s the Church Missionary Society had negotiated a private deal with BHP that resulted in the Groote Eylandt Aboriginal Trust receiving substantial non-statutory (that is, private) payments from the mining company. Second, policy shifts based on persuasive Aboriginal representation and an acknowledged shortcoming in the Hasluck model allowed 10 per cent of statutory royalties raised on Aboriginal reserves, in respect of a particular mine, to be paid to groups deemed affected by that mine, but with the remaining 90 per cent being available to the ABTF to make grants or loans to Northern Territory Aboriginal people generally, or to be accumulated. (An additional and somewhat anomalous change driven by broader developmental policy shifts was the levying in 1968 of a royalty well below Hasluck's double rate for bauxite mining at Gove under a special Northern Territory Mining Ordinance.)

Woodward recognised and openly debated some fundamental fiscal tensions that emanated from his desire to accommodate historical precedent (the Hasluck legacy), while also recognising Aboriginal property rights in land. While Woodward's letters patent empowered him to consider the provision of full property rights in minerals to Aboriginal land owners (rights not available to other Australians), he stopped short of such reform. Instead he recommended a weaker form of property in consent provisions (or what is frequently called 'the right of veto'). Consent provisions are a form of property because they can be traded in much the same way as mining leases on Groote Eylandt were traded with BHP in 1963 for a negotiated royalty. Even if additional payments could not be

negotiated, the existence of consent provisions (which did not exist under the Hasluck model) meant that traditional owners of land would require some guaranteed incentive to allow mining of that land.

Woodward recognised three key tensions that would result from the payment of moneys raised from the development of Aboriginal land. These can be summarised as follows:

- Are the diverse range of moneys (from statutory royalties, negotiated commercial deals, rentals and lease payments) raised on Aboriginal land public or private moneys, or both?
- Are these payments intended as compensation (to people affected, to other Aboriginal people without land) or as a form of rent sharing between Aboriginal land owners and mining, tourism and other commercial interests?
- Should these moneys be applied for community purposes or be reserved for the private use of corporate land-holding groups?

Conceptually, and arguably, these three issues can be represented in the following way along a public to private spectrum and this is much the way that Woodward (1974) conceptualised these payments in his second report.

<b>Public</b>	<b>Private</b>
Statutory payments	Negotiated payments
Community purposes	Private purposes
Compensation	Economic rent

Woodward's major focus was on the public moneys and in particular on the statutory royalties paid to Aboriginal interests. Careful consideration of many factors including historical precedent, a desire for balance between regional and wider indigenous interests, a new recognition of traditional ownership of land and a recognition that new indigenous institutions (land councils) needed guaranteed and relatively independent resourcing resulted in the Woodward model, under which:

- 30 per cent of statutory royalties were to be guaranteed to incorporated communities and groups in areas affected by a particular development;
- 40 per cent of statutory royalties were to be available to statutory land councils to meet their administrative expenses; and
- 30 per cent of statutory royalties were to be retained by a new institution, the Aboriginals Benefit Trust Account (ABTA), for investment or wider distribution to Aboriginal people of the Northern Territory.

The Woodward model has a very distinct logic which can be explained as follows. The 30 per cent of royalties paid to areas affected were non-discretionary, intended for community benefit and an increase (after representation from regional Aboriginal interests especially at Gove) from 10 per cent. However, Woodward was conscious that those fortunate enough to own mineral-rich land (despite possible social and other disruptions)

should not be overly compensated, hence the channelling of 70 per cent of royalties away from areas affected. The 40 per cent payable to land councils to meet their administrative expenses was based on estimates of likely costs made in 1974. But these payments were also regarded as broadly compensatory because they would finance the means to claim additional land. The 30 per cent to be retained by the ABTA was a residual, similarly regarded as broadly compensatory; it was not specified how these moneys should be utilised except to or for the benefit of Aboriginal people in the Northern Territory.

The Woodward model was, by and large, incorporated in the Land Rights Act, but with modifications with policy significance, some of which have occurred following later legislative amendments:

- Statutory royalties were never paid to the ABTA but were paid to governments (Commonwealth and Northern Territory), with their equivalents being paid to the ABTA from consolidated revenue.
- From 1979 when royalty equivalents were paid out of the ABTA, they were taxed via a mining withholding tax. This was paradoxically levied on all payments out of the ABTA, including those to land councils.
- Checks and balances resulted in land council budgets being ministerially scrutinised and approved, but a mechanism was introduced in 1978 to ensure that if 40 per cent of royalty equivalents were inadequate to allow land councils to fulfil their statutory functions, then supplementation could occur.
- Thirty per cent was never earmarked for the ABTA; in the Land Rights Act, amounts retained by the ABTA for granting or accumulation are a residual.

### **The Reeves evaluation of the financial framework of the Land Rights Act**

Ignoring Woodward's (1974: 138) warning that land rights will only be a first tentative step along a long road towards eventual social and economic equality for Aborigines, Reeves (1998: ii) expresses disappointment that land rights moneys have not, in his opinion and very arguably, been strategically applied to the social and economic advancement of Aboriginal people of the Northern Territory and have not delivered measurable socioeconomic improvements over a 20-year period, during which time the Aboriginal land base has expanded greatly.

This disappointment overlooks a wide range of historical, political, structural, locational and cultural barriers to rapid economic development. It also overlooks considerable success in many economic, social and cultural areas, be it in the Aboriginal arts and crafts industry; participation in vibrant sectors of the Northern Territory economy such as national parks and tourism; the outstation movement and the growth of sustainable subsistence economies; or the maintenance of Aboriginal cultural traditions.

There are three fundamental problems with the overall linkage Reeves makes between land rights and economic advancement. First, economic development is only one of a number of reasons for land rights. Second, Reeves makes no serious effort to rigorously test whether

land rights has made a difference, for example, by cross-sectionally comparing the socioeconomic status of land owners with non-land owners; or longitudinally comparing the socioeconomic status of a group or community (like the Jawoyn) pre- and post-land rights. Third, Reeves (1998: 614) highlights that an estimated \$448 million to \$738 million per annum is spent on Aboriginal welfare in the Northern Territory, but fails to explain why the \$35 million of mining royalty equivalents (less than 10 per cent of the total) should be required to make a significant difference.

The aim in this paper is not to debate the association between land rights and economic development, an issue that I have dealt with at length elsewhere (see Altman 1991) and that is also addressed by John Taylor (this volume). Rather, my aim is to focus on Reeves's evaluation of the use made under the Land Rights Act of the royalty equivalents, broadly divided between so-called royalty associations (\$116 million received over 19 years or \$6.11 million per annum) and land council administration (\$202 million over 19 years or \$10.63 per annum), with the balance (\$69 million) being granted, saved or used for administrative purposes by the ABTA (now called the Aboriginals Benefit Reserve or ABR). This evaluation is contained in chapters 15 and 16 of the Reeves Report, which are somewhat confusingly called 'Aboriginals Benefit Trust Account (Aboriginals Benefit Reserve) and the Royalty Associations – Operations Described' and 'Aboriginals Benefit Trust Account (Aboriginals Benefit Reserve) and the Royalty Associations – Main Issues'.

Reeves's evaluation of the use made of statutory royalty equivalents is broadly negative, but within the overall context noted above that he defines the aim of the financial framework of the Land Rights Act as being established to deliver socioeconomic betterment. Specifically:

- Reeves criticises royalty associations for making payments to individuals (his words are 'largely dissipated in cash payments to individuals') and for lacking accountability to registrars-general, land councils and their memberships.
- He criticises land councils for expending too much on the land claims process that, while successful in expanding the Aboriginal land base from 19 per cent of the Northern Territory in 1977 to 42 per cent some 20 years later, has done so at a cost beyond the Australian Valuation Office's estimate of the value of that land. This excessive administrative expenditure has resulted in the Woodward 40/30/30 model becoming a 52.5/30/17.5 Land Rights Act model.
- He criticises the ABR for lacking a clear statement of purpose and for not holistically managing all 'its' mining royalty equivalent and investment income.

### **A critique of the Reeves evaluation**

The Reeves evaluation of the financial framework of the Land Rights Act has many shortcomings. At the broadest level, it appears that Reeves fails to differentiate the clearinghouse role of the ABR (which to date has accounted for 82.5 per cent of its royalty equivalent income) from its granting and investment roles. Similarly, Reeves has a poor appreciation of some key differences between land rights law and the Woodward model.

For example, while Woodward recommended that 30 per cent of royalty equivalents be maintained by the ABTA (now ABR), this recommendation was not included in the statute. Consequently, it is unfair to benchmark the working of the financial framework of the Land Rights Act against a recommended formula that predates the Act. As the ABR annual reports consistently indicate, the residual 30 per cent can be expended on grants (subsection 64(4)), ABR administrative expenses (section 64(5)) or supplementary funding of land councils (section 64(7)), where the Minister is satisfied that section 64(1) payments are insufficient to meet their administrative expenses (ABR 1998: 5). Further, while able to describe political conflict (both within the Aboriginal domain and outside it) and its financial cost, Reeves wants to assume that such conflict can somehow be magically dissipated by the creation of new institutions; it is as if history and politics disappear with new institutions. Recent experience with Native Title Representative Bodies provides no indication that conflict dissipates with smaller institutions (ATSIC 1995). Finally, Reeves seems to lack an understanding of both lines of authority and checks and balances in the Land Rights Act.

Critiquing Reeves's evaluation more specifically, it is clear that his concern with royalty associations was primarily their lack of accountability to him when he was seeking information about their operations. In reality, Reeves undertook no in-depth assessment of any royalty association, preferring instead to use secondary information such as the review of the Gagudju Association (Altman 1996b) that was undertaken at one point in time in the association's 18-year history. Reeves makes mistakes in failing to differentiate various incorporation forms (trusts versus Aboriginal associations); in failing to differentiate between private and public moneys (deciding rather idiosyncratically to define all moneys raised on Aboriginal land as public); and in choosing to define payments to individuals as wasteful (irrespective of purposes to which moneys are applied) and failing to recognise important differences like the Ngurratjuta/Pmara Ntjarra Aboriginal Corporation's distribution according to a per capita formula (but for community purposes) as distinct from per capita cash payments (see Ngurratjuta/Pmara Ntjarra Aboriginal Corporation 1998). Having said that, I share some of his concerns about payments of cash to individuals where this occurs (see Altman 1983, 1991, 1996a, 1996b).

Reeves provides no evidence of wholesale lack of compliance by royalty associations with incorporations law and, in fact, found a high rate of compliance by those reporting to the Northern Territory registrar. And even if compliance was a problem, this would suggest that incorporations law might require stricter enforcement rather than amendment of the Land Rights Act. Interestingly, Reeves does not refer to representation from the Northern Land Council (1998) (reiterated in Northern Land Council 1999) that greater royalty association accountability to land councils is required. Indeed, the Northern Land Council sought amendment of the Land Rights Act so that it would be empowered to act effectively on non-compliance.

The Reeves critique of land council expenditures is similarly misdirected and misconstrued. First and foremost, Reeves chooses to overlook that land councils are statutory bodies with statutory functions that are funded from a fundamentally unstable source, namely, mining royalty equivalents. What is also overlooked is that land council

budgets are approved annually by the Minister for Aboriginal and Torres Strait Islander Affairs. Land councils are highly accountable to the Minister, the Aboriginal and Torres Strait Islander Commission (ATSIC), the Australian Parliament and efficiency-monitoring bodies like the Australian National Audit Office.

Reeves highlights that the land claims process has been expensive, although his selective quotation of a rough estimate I have made of the cost of claiming land fails to furnish the proviso that this estimate assumes all land council expenses (including that of the non-claiming Tiwi and Anindilyakwa Land Councils) are used to finance land claims (Altman 1996a: 6). By comparing my highly qualified estimate of \$685 per square kilometre with the Australian Valuation Office's unimproved capital value of pastoral properties of \$154 per square kilometre, Reeves (1998: 559) argues that land council dollars would have been better spent acquiring land. But this observation is fraught with bad economics and a discard of the nature of the land claims process. Unalienated crown land available for claim is not available for sale; the statutory functions of land councils do not extend to using their budgets to purchase land; and there is limited correlation between the Australian Valuation Office's valuation of properties at one point in time and their market price over time. Interestingly, even when the ABR strategically followed the land purchase option, Reeves not only criticises it, but also suggests that it was the land councils that spent this money and that it was not spent for the benefit of Aboriginal Territorians (Reeves 1998: 331, 358).

The cost of the claims process has been largely due to Northern Territory government opposition to almost all claims and a public interest in accurately identifying the correct Aboriginal traditional owners of land before the Aboriginal Land Commissioner. Both political processes have generated costs, but it remains unclear how the claims process might have been undertaken more cheaply under land rights law. Interestingly, the only time Aboriginal people have been able to exercise a choice to allocate resources to supplement land council administrative costs, in 1978–79, they did so via ABTA grants, but this was ruled as an illegal source of funding of land councils and, consequently, supplementary funding was introduced (Altman 1983: 98–99).

Reeves's criticisms of the granting operations of the ABR do not extend to an analysis of the nature of these grants (as was done in some detail in the review of the ABTA in 1984, see Altman 1985). Rather, Reeves is concerned that the ABR does not have an overarching charter guiding its granting operations under section 64(4) of the Land Rights Act. This perspective overlooks the fact that the ABR Advisory Committee considers granting priorities regularly, openly advertises for applications and makes grants after an assessment process. As Reeves notes, in 1997–98 a policy meeting was convened and resources were allocated to ceremonial (cultural), outstation, family, small project and major enterprise purposes. Because the ABR operates under a ministerially imposed, fiscally responsible financial management strategy which limits grants to \$5 million per annum, the \$11 million allocation had to be spread over two years, a point that Reeves (1998: 329–30) fails to appreciate. In practice, over the last 20 years the balance of funding in the ministerially controlled ABR has been used for a diversity of purposes in an increasingly disciplined,

and at times strategic, manner, avoiding the very substitution funding (ABR substituting for government) that Reeves is keen to facilitate.

### **The proposed Reeves model**

Reeves assumes that *all* moneys raised on Aboriginal land are public and, echoing a dominant theme in current government policy, argues that all these moneys should be targeted to improvements in indigenous health, housing, education and so on, as defining parameters within which indigenous prioritisation will be allowed. The Reeves Report proposes a 'radical' restructuring of the financial institutions of the Land Rights Act that has some striking similarities to the now very dated Hasluck model of 1952.

Reeves recommends (1998: 368) that the formula for distribution of ABR funds should be abolished; instead, distributions should occur within a clear statement of purpose defined within the Land Rights Act. The proposed Reeves model has the following features:

- Instead of the existing four land councils, there will be 18 regional land councils and one Northern Territory Aboriginal Council (NTAC). These 19 councils will have much-enhanced functions, but will be run so cost-effectively that they will only require an estimated 29 per cent of statutory royalty equivalents according to Reeves.
- The rights and existing commercial and regional interests of current incorporated organisations in areas affected by mining, irrespective of accountability and performance, are overridden by the allocative discretion provided to NTAC and regional land councils.
- The roles of NTAC and the ABR are to accumulate reserves at the rate of \$7 million per annum (until \$350 million is in a capital fund) and to spend the balance (an estimated \$18 million per annum) on Aboriginal priorities, but largely limited to health, housing, education and so on, and to compensate groups in areas affected if net detriment from development can be demonstrated. However, Reeves provides no comment on the complex issue of how groups are supposed to demonstrate detriment from development, perhaps conveniently overlooking the inevitable political nature of such a process (see Levitus, this volume).

### **A critique of the Reeves model**

The proposed Reeves model is fundamentally flawed, in my view, primarily because it does not address or comprehend the complexity of, and intentional trade-offs in, the financial framework of the current Land Rights Act based on the Woodward model described above. The Reeves model is counter to Aboriginal interests, is inconsistent and is based on speculative assumptions that are unpersuasive. These three broad assertions are supported by the following illustrative examples.

The Reeves model is counter to Aboriginal and wider interests:

- While seeking to maintain right of consent provisions, it strips away any incentive that traditional owners may have to allow commercial development on their land. In short, from a traditional owner's perspective, the *de facto* property rights inherent in the consent provisions are weakened. This is directly counter to recommendations made by the Industry Commission (1991) to strengthen the mineral rights of traditional owners by making them *de jure*. In particular, Reeves recommends that all the economic rent, private negotiated payments described above as being a consequence of the political and economic leverage provided by the right of consent, should be redefined as public moneys payable to the ABR and, with NTAC discretion, to regional land councils. This weakened incentive structure will have potential ramifications not just for Aboriginal interests, but also for the mining industry, other commercial interests and, ultimately, Australia as a whole.
- Thirty per cent of statutory royalty equivalents and all negotiated payments to royalty associations, irrespective of legal agreements, would cease. This would undermine the commercial interests and service delivery functions of existing royalty associations irrespective of performance. The takeover of existing royalty associations by regional land councils will be extremely difficult and potentially liable to legal challenge (see Willheim, this volume).

The Reeves model is inconsistent on at least three grounds:

- While it claims to aim to empower regional interests with the creation of regional land councils, it simultaneously centralises economic power in NTAC, which will have control of the ABR and will be run initially by an unrepresentative board nominated by party-political governments.
- While Reeves articulates a desire for Aboriginal fiscal empowerment and enhanced decision-making powers, he recommends that the ABR's statement of purpose be stipulated in statute.
- While he recommends the abolition of the statutory formula for payments out of the ABR, he then recommends a 29/20/51 formula, with 29 per cent earmarked for NTAC and regional land council administrative costs; 20 per cent earmarked for ABR investment; and 51 per cent earmarked for an economic and social advancement program. Not much mention is made of moneys from a variety of other sources, these being relegated, perhaps, to the too-hard-basket.

The Reeves model is highly speculative. In particular:

- Reeves assumes that the administrative costs of NTAC and regional land councils will be limited to 29 per cent of royalty equivalents received by the ABR, despite the fact that these new institutions will have greatly enhanced statutory functions that will overlap and duplicate those of a number of Commonwealth and Territory agencies. It is instructive that in 1974 Woodward (1974: 69) estimated that the then two land councils would each cost \$300,000 per annum to operate or 20 per cent of royalty

equivalents. By 1997–98 this cost had grown to \$8.7 million for the Northern Land Council and \$6.26 million for the Central Land Council (in current dollars), or 44 per cent of royalty equivalent income (ABR 1998: 6). It is also instructive that the Reeves model overlooks diseconomies of small scale, a factor that has influenced recent Commonwealth government decisions to amalgamate, rather than fragment, Native Title Representative Bodies (see ATSIC 1995).

- Reeves assumes that ultimately the Commonwealth Government and Northern Territory Government will contribute substantial program resources to NTAC, possibly running to hundreds of millions of dollars per annum. The only justification for such a transfer is that it will be important for the ‘partnership’ that is the proposed centrepiece of brand new institutional arrangements, and that it will prove an effective anti-substitution funding mechanism as all funds will be pooled in the ABR under NTAC control.

Ultimately, the Reeves model is bad public policy. It assumes, rather than persuasively demonstrates, that the creation of a new unrepresentative institution, NTAC, will *ipso facto* deliver better outcomes to Northern Territory Aboriginal people, presumably because its Northern Territory and Commonwealth government-appointed members will be better able to work with the Northern Territory Government. Interestingly, while at face value Reeves (1998: iii) states that he seeks to depoliticise the financial framework of the Land Rights Act, in reality he will enhance the politicisation of the proposed peak Aboriginal body.

And Reeves provides no rationale for why the diversity of moneys raised on Aboriginal land should be statutorily earmarked for Aboriginal socioeconomic improvement. Nor does he explain why or how the estimated \$35 million generated in statutory royalty equivalents from Aboriginal land will result in socioeconomic improvement when the combined resources of the Commonwealth Government and Northern Territory Government (estimated at a minimum at over \$400 million per annum) have not (according to Reeves) done so. Is Reeves seriously suggesting that government agencies will transfer their functional responsibilities and resources to NTAC? And is he seriously suggesting that self-determination at the regional land council level will magically result in better service delivery outcomes? It remains my view that the political and economic leverage provided by land rights will be a more effective mechanism for structural socioeconomic change than the equivalents of statutory royalties raised on Aboriginal land (Altman 1996a).

### **Reviewing financial aspects of the Land Rights Act: an opportunity lost?**

Reeves does not provide a convincing case that the financial framework of the Land Rights Act is fundamentally flawed, nor that proposed new institutions will be more efficient, effective, equitable or accountable, either to Aboriginal people or the wider Australian public.

On face value, the Reeves Report appears well intentioned, with its futuristic title, *Building on Land Rights for the Next Generation*, and its concern with Aboriginal socioeconomic disadvantage. But this paper argues that the proposed Reeves model is a dangerous leap

of faith that should not only be opposed for diminishing long-established indigenous property and commercial rights, but should also be opposed for constituting bad public policy that will result in:

- unnecessary institutional duplication, with regional land councils undertaking many of the political and administrative functions of ATSIC regional councils and regional offices, as well as of other government agencies such as the Commonwealth Departments of Education, Training and Youth Affairs; and Employment, Workplace Relations and Small Business;
- likely substitution of legitimate government expenditure by NTAC's economic and social advancement program; and
- lower commercial investment on Aboriginal land owing to highly circumscribed incentives for traditional owners to allow exploration, mining and other development on their land. This effective Aboriginal disempowerment would prove extremely costly to Territorians and to all Australians.

One of Reeves's fundamental critiques of indigenous institutions created by the Land Rights Act is their lack of accountability. But the accountability of the Reeves Review, its expenditure of significant public moneys (and the additional resources that will now be spent in debunking many of its unrealistic or unworkable recommendations), and its overall poor quality must all be challenged. This paper concludes that there is a very high risk in adopting the new, untested, poorly constructed and highly flawed Reeves model. This is not to say that the existing financial framework of the Land Rights Act is faultless. It is not, and there is need for considered and well-balanced reform for improved outcomes in a number of acknowledged areas such as:

- better statutory definition of the role of royalty associations and greater accountability to existing land councils for their operations as highlighted by the Northern Land Council (1998, 1999) and independent commentators (summarised in Altman and Pollack 1998);
- the ABR to strategically plan its granting operations and to have an overarching operational plan, with transparent goals and mechanisms to monitor performance;
- land councils to maintain budgetary discipline as currently required under the ministerially imposed financial management strategy, so that they continue to operate cost-effectively as they switch from a focus on land claims to land management and development; and
- Northern Territory Aboriginal interests to decide if the fiscal base of the ABR should be enhanced; if it should fundamentally change from operating as a clearinghouse; and how its board should be appointed.

Ultimately, while the existing financial framework of the Land Rights Act is not perfect, it has an inherent logic, it balances competing interests, it is bedded down and proven to be highly workable. Good public policy would suggest that the role of review is to negotiate with all interests, indigenous, non-indigenous, private sector and government,

to improve an existing statutory framework. By failing to politically negotiate such a path and instead unilaterally proposing a model that will prove both unworkable and costly, the Reeves Review of the *Aboriginal Land Rights (Northern Territory) Act 1976* represents an important and expensive opportunity lost for Aboriginal and non-Aboriginal Territorians, and for all Australians. It is perhaps incumbent now on the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into the Reeves Report that will report in August 1999 to provide a more realistic set of suggestions for reform that will build on the existing framework.

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## 10. Local organisations and the purpose of money

### **Robert Levitus**

The Reeves Report, not least in its title, marks itself as the moment of recognition of generational change in the history of land rights in the Northern Territory. Reeves judges the first generation to have been a successful exercise in cultural recognition and restoration, following on from what Woodward (1974: 2) called ‘the doing of simple justice to a people who have been deprived of their land without their consent and without compensation’. With the disposal of final land claims (Reeves 1998: chapters 11 and 12), that period can now be packed away. For the new generation, Reeves seeks to provide a new orientation. The priority now, he says, is to address those social statistical problems of depressed living standards that continue to affect the Aboriginal population of the Northern Territory (1998: 74–81, 587–89) and, in so doing, extend the benefits of land rights to those Aboriginal people who have not been able to claim ownership of land (1998: 217). The present task of legislative amendment must therefore be driven by a philosophy of social engineering, in order that land rights be made into a means of effective material uplift for the next generation (1998: 92).

Rethinking the management of moneys is thus central to Reeves’s new vision. His rethinking is broad, moving from the essential policy status of the moneys themselves to a recasting of the structures through which they move. The new understandings that are to govern land rights moneys for the next generation are as follows:

1. All moneys must be seen to be, or be treated as if they are, public moneys to the end-point of final use, including moneys gained by private negotiation (1998: 351–52).
2. As public moneys, their management and use will be made subject to what I will call ‘deep accountability’: accounting practices must be sufficient to demonstrate ordinary financial propriety, and application of moneys must accord with externally prescribed social policy priorities (1998: 589–90, 597–99, 608–11).
3. Distributions of moneys from the Aboriginals Benefit Reserve will be governed by a centralised and discretionary system that responds to the competitive demonstration of social need by the regions, and dispenses with any notion of local-area or traditional entitlement (1998: 361, 368, 591–93, chapter 28).

While certainly of broad coverage, these changes do not always appear well argued in principle, nor their implications well considered, especially at the local level. The purpose of this paper is to point to some of these difficulties.

### **Public moneys and accountability**

There has been a long-standing uncertainty about the status of mining royalty equivalents under the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act). Altman has characterised the disagreement as flowing from alternative interpretations of

the policy origins of the moneys: they are either compensation for disturbance to traditional lands and restriction of amenities, or they are a return in the form of rental for alienation of land that is privately owned. If the former, the moneys are public, with an associated implication that they should be used to remedy the social problems caused by the disturbance. If the latter, they are private income from privately leased land and available for private purposes (Altman 1985: 8–13, this volume; and see Willheim, this volume; see also Toohey 1984: 109, 113–14).

Reeves has no doubts on this issue. With respect to what are now known as ‘area affected’ moneys, that is, the large flow of statutory royalty equivalent payments under section 35(2), he relies on two points – that they flow from a public policy decision of the government and that they come from general revenue – to argue that these are public moneys (1998: 351). That much is consistent with arguments that have been put before in that debate. But Reeves goes further, and begins to reveal the singularity of his thinking about land rights, when he deals with negotiated royalties and all other agreement moneys, that is, all those moneys that currently flow to Aboriginal interests from the bargains that they have struck through direct dealings with mining companies and other agencies. These, he acknowledges, are private moneys: they do not come from general revenue. However, the first of the points that he makes about statutory royalties, that they flow from a public policy decision of the government, also applies to these private agreement moneys, and that for Reeves is sufficient to treat them as if they are public moneys (1998: 352). I leave it to administrative lawyers to assess the defensibility of such official oversight of private funds, but within the Reeves scheme it prepares the ground for the imposition of a unitary regime on the management of land rights moneys.

The next matter is the intended effect of such a regime. Once it is decided that the public policy origin of payments is sufficient grounds for treating them as public moneys to the point of final use, two things follow. Firstly, and Reeves goes to some lengths on this, they must be directed to charitable purposes and must not be payable to individuals outside the rubric of a charitable purpose (1998: 338–42, 361–63). Secondly, they must be fully and transparently accounted for. In adopting these positions, Reeves is placing himself unequivocally on one side of a familiar debate, so that while his views are still arguable, they are not new. What is new is the application of such strictures to those agreement moneys previously understood to be private. Again, however, Reeves goes further. The public policy from whence moneys originate is itself to be changed. The Land Rights Act is to be given new purposes, the one amongst them relevant here being ‘to provide opportunities for the social and economic advancement of Aboriginal peoples in the Northern Territory’ (Reeves 1998: 74–77). Thus all land rights moneys are public moneys, and all are to be devoted to that public purpose.

For Reeves, advancing that purpose requires new structures and new principles of operation. He (1998: 358) cites unsurprising but telling figures showing that moneys from land rights have followed the ownership of land, so that those communities holding little land have received no mining royalty equivalents. He therefore wants to mobilise all forms of land rights moneys for deployment in favour of any Aboriginal group in the Northern Territory. To that end he does a number of things. Firstly, he centralises financial control

in a new institution, the Northern Territory Aboriginal Council (NTAC). This is the organisation at the centre of the unitary financial regime, that will have control of all land rights moneys, and to which, Reeves (1998: 613–14) hopes, the Aboriginal and Torres Strait Islander Commission and the Northern Territory Government will also deliver their Aboriginal servicing and welfare budgets for the Northern Territory. NTAC will decide priorities for social and economic advancement, between both different purposes and different regions, and it is to NTAC that the proposed regional land councils will have to satisfy those requirements of deep accountability by directing project moneys to approved purposes (1998: 610). Secondly, those land rights moneys that are currently committed, either by statute or negotiated agreement, to areas affected by development projects will be freed from that commitment. By removing from the Act any notion of community or traditional entitlement as currently understood via section 35(2), Reeves (1998: 359–61, 597) fundamentally revises the principles governing disbursement of Aboriginals Benefit Reserve funds. Thirdly, he (1998: 359, 361) further weakens the nexus between the location of mining projects and the direction of funding by restricting the application of the compensatory principle in NTAC's funding decisions. It will be for NTAC to decide whether a regional land council has made out a case for a community adversely affected by development within its region and, in doing so, NTAC may set off against that claim two considerations: the proximity and intrusiveness of the mining operation, and any public facilities available in an associated mining town (1998: 361, 368).

Such changes are revealing of Reeves's vision for the next generation of land rights. His intention to press all significant monetary flows from mining on Aboriginal land into the service of a uniform social engineering agenda is a substantial departure from the principles underlying the Woodward Report and the present Act. Among those principles enunciated by Woodward, from which Reeves (1998: 10) claims guidance, are:

there is little point in recognising Aboriginal claims to land unless the Aboriginal people concerned are also provided with the necessary funds to make use of that land in any sensible way which they wish.

Reeves's model for money management operates in the opposite direction. Funding will be substantially disconnected from land ownership and allocated instead according to social need, and it will be spent not according to land owners' priorities for land use, but according to NTAC's priorities for mitigation of social deprivation. It therefore also runs counter to that other new purpose Reeves (1998: 77) wishes to introduce into the Land Rights Act, 'to provide Aboriginal people with effective control over decisions in relation to their lands, their communities and their lives'. His steps in other sections of the report to shift political representation of traditional land interests from the national and Territorian levels to the regional are thus contrasted here by steps to shift control over funding the other way.

### **The determination of local-level beneficiaries**

Moreover, having transferred authority over moneys away from the local level, Reeves leaves behind a vacuum. As there will no longer be any community or traditional

entitlement to compensatory moneys, the arrangements currently in place to determine and manage those entitlements will also be dispensed with. The long-standing vexation of the section 35(2) 'area affected' formula will be purged from the Land Rights Act (1998: 359–61), royalty associations will lose their legal niche in the land rights scheme and hand their assets and liabilities to NTAC (1998: 609), and individual cash payments will be abolished (1998: 361–63, 590–91, 615). Eventually, however, via the decisions of NTAC and the regional land councils, moneys have to reach local areas, and the question there remains 'Who gets what?'

With the proposal for a system of regional land councils, Reeves is announcing the creation of new arenas of Aboriginal politicking across the Northern Territory. He recognises the frequency, cost and intractability of disputes in the land rights era (1998: chapter 9), and sees hope in reducing statutory intervention in such matters. He wants to confine not only processes of dispute resolution, but therefore also the larger question of the determination of rights, within Aboriginal structures that are small enough to relate directly to the traditional processes of their areas of responsibility, and are freed from compulsory resort to any statutory universal standard, such as the definition of traditional ownership (1998: chapter 10). This raises two questions about the operations of regional land councils: how do they receive instructions from their constituents, and how do they determine beneficiaries of funds and social programs?

Reeves recommends having resort to locally determined processes to allocate benefits. This arises, in part, from his concern to avoid that erosion of tradition that inevitably occurs when matters of orally transmitted belief are exposed and adjudicated in legal and bureaucratic forums (1998: 176). He therefore attempts 'to massively reduce statutory prescription concerning the operations of the [Regional] Land Councils and to rely on Aboriginal Territorians to run their own affairs on the basis of their own traditions' (1998: 596). Political process must therefore focus on the members of these councils and the design of the programs they seek to have funded by NTAC. What will be the institutional and procedural channels for this politicking?

Western Arnhem Land experience suggests that the unfettered play of local process can lead to wasteful, incoherent and anomalous outcomes from which resentments emerge. One aspect of the failure of the Kunwinjku Association was the way in which access to benefits seemed to be governed by no principles other than a search for personal patronage and the cultivation and exploitation of strategic political links within a local population (Kesteven 1984: 142; von Sturmer 1984: 279–82). The membership of the Gagudju Association, determined at large public meetings where no-one took on the responsibility of monitoring applicants or vetting claims, led me to argue for 'the imposition of an ethnographically-informed constitutionality' (Levitus 1991: 168): a set of rules intended to protect well-founded indigenous attachments from submersion by momentary contingencies or sectional lobbying.

Most of the competition for membership of royalty associations in western Arnhem Land arose from a desire to gain access to those individual disbursements, especially of cash and motor vehicles, that Reeves wants to end. If that can effectively be ended, it should

reduce the general level of agitation and anxiety that attends the local Aboriginal experience of articulating with large development projects. Among those charitable purposes that Reeves approves, upgraded housing and new outstations appear to be the objects of greatest desire in western Arnhem Land. Less quantifiable, however, is the importance of recognition. Reeves (1998: 349) argues that maintaining the historical link between mining royalties and the Aboriginals Benefit Reserve will help preserve its funding. He does not recognise the flow-on of that relationship into the indigenous domain: the historical continuity of a local and traditionally based sense of entitlement to benefit from mining operations in particular areas. The assessments that senior local Aboriginal people gave in 1987 concerning access to benefits from the Ranger Mine emphasised real attachments to areas in the vicinity of the mine that were in total a small sub-region of Reeves's proposed West Arnhem Region (1998: H6–H7). Moneys from the Ranger Mine were colloquially known as 'land money'.

On what basis will people now need to organise themselves in order to benefit from mining moneys? One might assume that funding for housing, health, education and so on will be distributed to organisations within the respective regional land council areas already charged with those responsibilities, though Reeves does not explicitly say. Is this also true of those extra disbursements of moneys from the Aboriginals Benefit Reserve that he allows where 'a particular Aboriginal community in an area of the Northern Territory where mining is being conducted' is able to persuade NTAC that it 'is deserving of additional ABR funds, to ameliorate the affects [sic] that mining is actually having on the Aboriginal people resident in that community' (1998: 361)? Are private agreement moneys to be disbursed to those same welfare organisations again? He does not say. If extra allocations of Aboriginals Benefit Reserve moneys are made to compensate an adversely affected community, what rules will govern local access to those benefits in a manner that is continuous with that intention to compensate? What should be the relationship between those beneficiaries and the particular group on whose behalf a regional land council negotiates a mining agreement, and on what criteria is the composition of that latter group itself to be determined?

Much of the art of land rights and similar forms of legislation lies in the design of points of articulation between indigenous practice and introduced structures that are at once culturally meaningful and administratively workable. Reeves has taken the risk of leaving that design work incomplete.

### **The future of remote areas**

Though this new model is un-prescriptive as to who benefits, and underdetermined as to the structures through which benefits flow, it prescribes quite narrowly the form that those benefits may take. Reeves wants Northern Territory Aborigines to benefit from land rights moneys in particular ways. Housing, health and education are repeatedly mentioned, jobs and employment much less frequently (1998: chapters 15 and 16). This relative neglect of employment is significant.

Reeves sees no economic future for communities in the development of land, only an economic future for individuals in the development of skills useful in the mainstream economy (1998: 568–75, 578). He allows regional land councils no independent power to invest. He designates NTAC to be the central Aboriginal investment agency (1998: 610), and prescribes only one criterion for its investments: that they are calculated to generate an income stream sufficient to replace income from each mining project by the time it closes (1998: 366, 368). Aboriginal investment, then, is not charged with the responsibility to create Aboriginal employment. While Reeves sees tourism as a significant remote-area employer, all other possible uses of land resources are of minor significance for job creation. While business assistance and training are included as objects of land rights moneys (1998: 611), locally controlled and income-producing capital investment is not regarded as a primary strategy. By default, remote Aboriginal lands seem to be envisioned as passive traditionalist reserves, used as productively as can be expected just by being available for Aboriginal occupation and visiting, their communities seen as objects of service delivery and recipients of training programs (1998: 590–1, 611). An economic future for the people of these lands must be sought elsewhere, by acquiring modern skills and selling them where they are needed. In relation to that modernity, the countries of those people are non-viable (1998: 88, 90).

We can recognise this diagnosis, welcome the recognition of the economic value of Aboriginal satisfaction in land (1998: 544), and acknowledge the frustrations of remote-area Aboriginal employment. But there may be more to life than this. Amartya Sen's measure of 'people's ability to do and be what they have reason to value' (cited in Reeves 1998: 586) is a cultural standard before anything else, and it raises a series of questions about remote-area Aboriginal life for which we have, at best, only partial or emerging answers. Some of those questions might be:

- What is the relationship between welfare payments and the maintenance of personal autonomy free from the demands of waged work (Altman 1988: 307–8), and how can that conception of personal autonomy fit with a policy concept of communal self-determination?
- What mapping of networks over what geographical area do we need to have done to understand the sociology of sport and ceremony across the Aboriginal Northern Territory, and how should that affect our assessment of the health and vitality of regional societies?
- What role are Aboriginal people living in bush camps and on pastoral stations playing in the contemporary environmental history of those areas, where they are the sole human agents? And what significance, if any, does traditionally based land ownership have for the sustenance of all these socio-environmental systems?

With good answers to such questions, notions of quality of life can begin to be filled out. Without them, Amartya Sen's measure can only be made by adding up the social statistics. When the result looks bad, Reeves's solution is to steer the peoples of remote areas into a future that is not spelt out, but appears to have a metropolitan focus. In doing so, Reeves

(1998: 11) turns away from another Woodward principle that he quotes: 'Aborigines should be free to choose their own manner of living'.

In setting out the background to the review, Reeves claims continuity with the principles and concerns that shaped the Land Rights Act. He (1998: xxi) says it is time 'to implement contemporary solutions based upon the ideas underlying the Act and current needs and circumstances'. His proposals for the management of moneys, however, and his clean-slate approach to local structures emerge from a point external to the philosophy of the existing Land Rights Act. Reeves invokes a different conception of land rights in which it serves less as a base for self-determination of local peoples and more as an instrument of formal social equalising and economic merging. And, while not explicit on this, his vision for the future of land rights appears to be for a future away from the land.

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# 11. Delays and uncertainties in the negotiations for mining on Aboriginal land

**John Quiggin**

The report of the review of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Reeves: 1998) contains a number of recommendations for changes in the procedures under which mining can take place on Aboriginal land. A central assumption of the Reeves Report is that uncertainty and delays in the process of negotiating access are so costly as to necessitate urgent reforms. This assumption is based on an analysis reported in Appendix X of the Reeves Report. The purpose of this paper is to show that the analysis in the Reeves Report is erroneous and greatly overstates the cost of delays associated with the negotiation of access to Aboriginal land for exploration and mining.

The error in Reeves's analysis is simple but critical. To estimate the costs of delay, it is necessary to take account of changes in mineral prices and changes in the cost of mining operations over time. In general, these two factors will tend to cancel each other out in the long run, since the price of minerals will be determined by the cost of mining operations.

Reeves correctly observes that the costs of extracting ore *from a given mine* will tend to rise over time, as the grade of ore declines and operations are extended to less accessible parts of the ore-body over time. However, he mistakenly assumes that the costs of mining operations in general will rise at the same rate. That is, Reeves assumes that the later mining is commenced, the higher the real cost of extraction will be. In reality, the real costs of mining are declining over time because of technological progress in mining equipment and techniques. However, whenever mining at a given site is commenced, extraction costs will tend to rise over the life of the mine. The effect of Reeves's erroneous assumption is to greatly overstate the economic costs of delays in exploration and mining.

This paper begins with a survey of the land and mineral rights regime applying to non-Aboriginal Australians. The central feature of this regime is the replacement of the common law rights of land owners to minerals under their land with a system which nominally asserts public ownership of minerals but, in practice, grants extensive rights to the first appropriator, normally a mining company which makes a claim for exploration rights. It is the interaction of this property rights system with the Land Rights Act which generates delays and uncertainty. The critique of Reeves's analysis of costs of delay is developed on the basis of this description of the property rights system and the central error in Reeves's analysis is described in detail.

A corrected calculation shows that the true costs of delay are about one-third of those estimated by Reeves. It is argued that costs associated with uncertainty are likely to be more significant than costs of delay, and that these costs can best be reduced by clarifying property rights. The optimal solution would be to grant ownership of minerals along with

ownership of land to Aboriginal communities. Failing this, the right of Aboriginal land owners to benefit from mining should be recognised more explicitly.

### **Land rights and mineral rights of non-Aboriginal Australians**

In the debate over Aboriginal land rights, relatively little attention is paid to the nature of the system of land rights, and particularly mineral rights, for non-Aboriginal Australians. The Australian system of land rights and mineral rights differs markedly from that prevailing in most other developed countries, and particularly from the British common law system.

One distinctive feature of the Australian system is the fact that large areas of land, particularly grazing land, are held as Crown leasehold. This is similar to the situation prevailing in much of Canada and the western United States, but very different from the British and European case. Much of the difficulty in the policy debate following the Mabo and Wik decisions has arisen from the interaction between leasehold property rights and native title.

Australian land rights differ most dramatically from the international norm with respect to mineral rights. Under British common law, all minerals lying under a piece of land are the property of the land owner, with the exception of gold and silver which are reserved to the Crown. The same situation prevails in most European countries and, with minor variations, in North America. In countries which became independent after 1945, it has been common for the state to claim ownership of all minerals, and to exploit them, either through publicly owned mining enterprises or through the sale of concessions.

Under Australian law, all minerals are nominally owned by the Crown. However, effective property rights over minerals are granted to the first appropriator, who asserts their rights by making, and then acting upon, a claim to enter an area of land and explore it for minerals. The development of this system is described in detail by Lang and Crommelin (1979). They show how the system arose from the special circumstances of the gold rushes in the mid-nineteenth century and the subsequent development of the class of 'free miners'. Mining legislation first gave miners rights over Crown land and gradually extended those rights to privately owned freehold and leasehold land.

The provision of mining rights to 'free miners' may be seen as the analogue of the similar grant of agricultural land rights to free selectors. In both cases the law was seen as promoting the interests of the small-scale independent worker against the large land owners whose claim to land rested on the precarious legacy of the squatting era. The historical circumstances under which the Australian system of minerals law was developed bear no relationship to present-day relationships between mining companies (in many cases, large multinational enterprises) and Aboriginal owners of land.

Economic analysis of property rights shows that, in general, systems of unrestricted freehold title will yield more efficient outcomes than systems based on rights of appropriation, like the Australian system of mineral rights. Systems based on appropriation

typically involve significant expenditure of resources in attempts to secure and maintain ownership of assets over which rights are initially ill-defined.

It is unsurprising that a policy process in which a complex set of Aboriginal land rights is overlaid on an ill-defined and overlapping set of property rights in minerals should produce delays and uncertainty. However, it is important to observe that this situation is as much the result of the anomalous system of non-Aboriginal rights as of the subsequent recognition of Aboriginal rights.

### **Delays and uncertainty in negotiations over mining**

Under the Land Rights Act, the Crown retains ownership of minerals located under Aboriginal land and miners retain their rights to explore and mine land. However, Aboriginal owners of land have the right to negotiate over conditions under which exploration should take place and to receive monetary benefits (effectively, royalties). (The right to royalties predates the Land Rights Act. Under the previous 'Hasluck' system, miners operating on Aboriginal land paid double royalties, which were allocated to a trust fund to be used for the benefit of Aborigines.)

The process of negotiation between Aboriginal land owners and mining companies is characterised by considerable uncertainty and delay, reflecting the ill-defined nature of property rights on both sides. In the absence of any ownership rights over minerals, Aboriginal land owners are, in effect, trading on their ability to be more or less cooperative in negotiations. An unacceptable offer from a mining company will lead land owners to adopt an uncooperative attitude, generating delays and raising the risk of political difficulties for the mining companies. The problem for the mining companies is that it is very difficult to make an effective commitment to a cooperative stance in the future. After making concessions at one stage in negotiations, companies may be faced with new demands for further concessions at some later stage.

On the other hand, since miners hold only rights to explore, it is also difficult for them to make fully effective commitments. It is always possible for governments, as the nominal owners of the minerals, to make demands which may be inconsistent with commitments made by mining companies to Aboriginal land owners. Moreover, because royalty payments are seen as payments derived from publicly owned resources, and not from Aboriginal ownership of land, demands for accountability and restrictions on the use of money may be imposed in a way which restricts miners' capacity to contract with Aboriginal land owners.

The complex interaction between Aboriginal land rights, miners' exploration rights and nominal public ownership has two main effects. First, the process of exploration and mining may be delayed by the need for negotiations between miners and Aboriginal land owners. Second, the outcome of the process of negotiation is uncertain. Miners and Aboriginal communities may commit resources to the process of identifying prospective sites and negotiating over their exploitation, but may fail to reach an agreement or may come to an agreement which is viewed by one or both parties as being unsatisfactory.

Reeves argues that delays in exploration are very costly, and concludes that the process of negotiation should be shortened to reduce delays. This paper will show that Reeves's analysis is wrong. The costs of delays before the exploration stage of mining are modest, particularly when compared to fluctuations in mineral prices and exchange rates. Hence the main concern arising from the system of negotiations must relate to uncertainty, and the main policy response should be to define property rights more clearly and thereby increase certainty for both sides.

### **Delays in mining – the Reeves analysis**

Reeves's analysis is based on two assumptions:

- (i) there is a long-term downward trend in the real price of minerals (the average rate of decline is 1 per cent per year); and
- (ii) over the life of a given mine, the unit costs of extracting and processing ore rise as grades fall and transport distances back to on-site processing facilities become progressively longer.

These assumptions are incorporated in simulations of a hypothetical mine. It is claimed that:

- a one-year delay in commencing exploration reduces the net present value of the mine project by 17 per cent and shortens the economic life of the mine by one year;
- a two-year delay in commencing exploration reduces the net present value of the mine project by 34 per cent and shortens the economic life of the mine by two years; and
- a seven-year delay would render the project non-viable.

Reeves's analysis is based on a fundamental confusion between secular trends in the costs of mining operations in general and the growth in operating costs over the life of a given mine. The analysis is based on the assumption that each year of delay in commencing operations raises costs by 3 per cent. This assumption is completely baseless. Whenever the mine commences, its extraction and processing costs in the second year will be 3 per cent higher than in the first year, and so on. But this does not imply that a mine commenced one year later will cost 3 per cent more. Similarly, and with no motivation, Reeves assumes that mine construction costs will rise in real terms by 1.5 per cent per year, while exploration costs are constant in real terms.

The effect of Reeves's invalid assumptions is that whenever mining is commenced, the cost per tonne of extracting ore exceeds the revenue per tonne from 2034 onwards. Hence each year of delay cuts a year off the economic life of the mine. Reeves's simulation is for an ore-body of average quality and extraction costs. Under Reeves's assumptions, less favourable prospects would become uneconomic before 2034 and more favourable prospects somewhat later. Nevertheless, the core of the argument to be derived from Reeves's assumptions is clear: since mining will soon be uneconomic, any delay in exploring and extracting mineral resources means that those resources will be lost forever.

## Delays in mining – a corrected analysis

To correct the errors in Reeves's analysis, it is necessary to undertake a simulation in which productivity trends for mining operations in general are distinguished from changes in extraction costs over the life of a particular mine. To facilitate comparison, Reeves's assumption of a 3 per cent annual increase in extraction costs will be maintained. It is therefore necessary to consider alternative assumptions about productivity for mining in general.

Contrary to Reeves's assumptions, it is evident that the general productivity of the mining industry is increasing over time. If this were not so, the trend decline in mineral prices would have rendered new mines non-viable, except where the grade of ore was higher than the average for existing mines. In fact, the opposite is true. Not only has the grade of ore for which mining is feasible declined steadily over time but, in some cases, new techniques have permitted the reopening of mines previously abandoned as uneconomic. It seems reasonable to assume that, on average, there has been a trend decline in the real unit costs of mining sufficient to counterbalance the trend decline in real mineral prices, that is, a decline of 1 per cent per year. Similarly, in the alternative analysis presented here it will be assumed that exploration and construction costs move in line with the costs of mining operations in general.

It can easily be seen that, if both output prices and input costs decline by 1 per cent per year, the profit associated with any given output will also decline by 1 per cent per year. It follows that the net present value of the project, calculated from the starting date, will decline by 1 per cent per year of delay. If a discount rate of 5 per cent is used, the net present value of the project, calculated from some fixed date such as the year 2000, will decline by 6 per cent per year of delay. A delay of seven years will reduce the net present value of the project by around 35 per cent. This is a significant loss, but much less than that estimated by Reeves, who suggested that a two-year delay would reduce the net present value by 35 per cent and that a seven-year delay would kill the project altogether.

Under the assumption that mineral prices decline in line with productivity growth in mining, the economic life of the mine is independent of the date at which mining begins (except if delays in the exploration and construction phase are so great as to make the entire project uneconomic under Reeves's assumptions about costs). For simplicity, we will assume a 25-year life, as in the Reeves Report.

Some more detailed results are presented in Table 1, based on the corresponding table in Appendix X of the Reeves Report.

**Table 1: Corrected calculations of the effects of delay on the attractiveness of mining projects**

	Base case	Exploration delay (1 year)	Mining approval delay (1 year)	Exploration and mining approval delay (both 1 year)
Base year	2000	2000	2000	2000
Exploration commences (year)	2001	2002	2001	2002
Mining commences (year)	2009	2010	2010	2011
Economic life of mine (years)	25	25	25	25
IRR (per cent) <sup>1</sup>	17.7	17.6	15.8	15.8
NPV (\$m base year) <sup>2</sup>	171.4	162.6	158.9	151.0
% change IRR	0.0	-0.2	-10.5	-10.8
% change NPV	0.0	-5.1	-7.3	-11.9

Notes:

1. Internal rate of return

2. Net present value

The results from this analysis contrast sharply with those presented in the Reeves Report. First, the economic life of the mine is not affected by delays, but remains at 25 years. More importantly, the costs of delay, measured by the percentage change in net present value, are about one-third of those estimated in the Reeves Report. The costs are greater if delays are incurred after significant expenditure of resources in exploration and construction, but remain considerably less than those estimated by Reeves.

The implications of a range of alternative assumptions and modified scenarios are considered in the appendix (see pp. 139–140). However, the analysis presented above shows that Reeves has greatly overestimated the costs of delays incurred before the commencement of the project. Larger reductions in net present value arise if delays take place after significant costs have been incurred.

## Uncertainty

Although Reeves refers to uncertainty and delays, his analysis deals only with delays. As has been shown here, Reeves greatly overstates the cost of delays. It seems likely that costs associated with uncertainty exceed costs associated with delay. Clearly, the lower the probability of ultimately obtaining agreement on exploration and mining, the less the incentive to invest even modest resources in identifying potentially prospective sites and in negotiating agreements.

Based on the evidence in the Reeves Report, it seems likely that the Land Rights Act initially generated an increase in uncertainty, since it was unclear how the process would work and how much bargaining power the parties possessed, and whether agreements, once reached, would prove enforceable. Because miners were seen as having disregarded Aboriginal rights in the past, there was a legacy of mistrust to overcome, reflected in the high failure rate of negotiations.

However, as Aboriginal owners have become more secure in their rights and the expectations of both parties have become less divergent, the uncertainty associated with the negotiation process has been reduced and the proportion of successful outcomes has increased. Rather than attempting to fast-track the negotiation process at the possible cost of increasing uncertainty, reform should build on the existing process and seek to further reduce uncertainty by confirming the rights of all parties, and particularly those of Aboriginal land holders.

### **Policy implications**

The implications of the analysis presented above are clear. If the policy goal in establishing a mining rights regime is to improve the welfare of Aboriginal land owners as efficiently and equitably as possible, the optimal policy is to attach outright ownership of minerals to ownership of land under the Land Rights Act. In this way, Aboriginal land owners and mining companies would have a joint interest in the successful implementation of mining projects whenever the expected benefits of those projects exceeded the costs. There would be no incentive for either party to create unnecessary delays and the property rights structure would minimise uncertainty.

There are two main objections to this policy. First, there is one of horizontal equity. Since non-Aboriginal Australians operate under the (inefficient) regime of Crown ownership of minerals and free exploration rights, granting Aborigines the common law rights of English land owners may be viewed as unfair. The second argument is one of political practicality. The greater the value of rights granted to successful Aboriginal land claimants, the greater will be the political resistance to land claims.

Nevertheless, the general direction of reform should be to increase the explicit recognition of Aboriginal rights to benefit from mining on Aboriginal land. This would permit reduced reliance on the use of rights to negotiate as a method of extracting benefits. The result would be reduced uncertainty for both Aboriginal land owners and mining companies, and greater net benefits from mining.

### **Concluding comments**

Much has been made of the delays and uncertainty supposedly created by Aboriginal land rights. In fact, the costs of delays incurred prior to exploration are small. The most serious costs are those arising from uncertainty over property rights. This uncertainty is primarily the result of Australia's anomalous system of land rights for miners, and not of Aboriginal land rights.

The policy recommendations in the Reeves Report are aimed at expediting negotiation processes, which may reduce delay but increase uncertainty. A preferable approach would be to increase the explicit recognition of the right of Aborigines to control and benefit from mining on their land.

## References

Lang, A.G. and Crommelin, M. 1979. *Australian Mining and Petroleum Laws: An Introduction*, Butterworth, Sydney.

Reeves, J. 1998. *Building on Land Rights for the Next Generation: Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, two volumes, Australian Government Publishing Service, Canberra.

## Appendix

The analysis in the body of the paper is based on the assumption that the costs of mining decline at a real rate of 1 per cent per year. To examine sensitivity to this assumption, we will consider two alternative assumptions:

- (i) the costs of mining operations in general are constant over time; and
- (ii) the costs of mining decline at a real rate of 2 per cent per year.

The results are reported in Tables 2a and 2b.

As would be expected, the simulation with constant real costs of mining yields costs of delay somewhat higher than those in Table 1, while the simulation where the costs of mining decline at a real rate of 2 per cent per year yields costs of delay that are somewhat lower.

**Table 2a: Corrected calculations of the effects of delay on the attractiveness of mining projects (assuming constant real costs of mining)**

	Base case	Exploration delay (1 year)	Mining approval delay (1 year)	Exploration and mining approval delay (both 1 year)
Base year	2000	2000	2000	2000
Exploration commences (year)	2001	2002	2001	2002
Mining commences (year)	2009	2010	2010	2011
Economic life of mine (years)	25	25	25	25
IRR (per cent) <sup>1</sup>	16.3	16.0	14.4	14.2
NPV (\$m base year) <sup>2</sup>	138.2	129.1	125.9	117.7
% change IRR	0.0	1.6	-11.3	-12.8
% change NPV	0.0	-6.6	-8.9	-14.8

Notes:

- 1. Internal rate of return
- 2. Net present value

**Table 2b: Corrected calculations of the effects of delay on the attractiveness of mining projects (assuming 2 per cent annual decline in costs of mining)**

	Base case	Exploration delay (1 year)	Mining approval delay (1 year)	Exploration and mining approval delay (both 1 year)
Base year	2000	2000	2000	2000
Exploration commences (year)	2001	2002	2001	2002
Mining commences (year)	2009	2010	2010	2011
Economic life of mine (years)	25	25	25	25
IRR (per cent) <sup>1</sup>	18.7	19.1	17.0	17.1
NPV (\$m base year) <sup>2</sup>	198.8	190.2	186.1	178.3
% change IRR	0.0	0.9	-10.1	-9.5
% change NPV	0.0	-4.3	-6.4	-10.3

Notes:

1. Internal rate of return
2. Net present value

## 12. Smaller land councils: value for money?

*David Pollack*

### Introduction

A key recommendation of the Reeves Review is the fragmentation of the existing large land council structure into smaller regional land councils. The idea of smaller land councils is by no means new and has previously been flagged by Coombs (1980), Rowland (1980) and the Industry Commission (1991) amongst others. Altman (1983) also advocated examining the potential of smaller land councils to permit greater input and understanding by traditional owners in negotiations with mining companies. This proposal was advanced under an umbrella of the existing land council structure as a two-tiered model in which the two large land councils fulfilled the role of regional cooperation, maintaining staff with expertise that could be used by smaller bodies, and as the administrative and funding sources of small councils (Altman 1983: 107).

Notwithstanding the logic and policy rationale of previous advocates of a structure of smaller land councils, the Reeves Review is essentially the first time a reviewer has constructed a regional profile of smaller land councils Territory-wide. This paper examines the regions/administrative units proposed in the Reeves Report and assesses the likelihood of regional land councils adequately performing their functions within the financial resources recommended in the report. These resources are estimated at \$400,000 per annum for each regional land council and are based on the current size and operations of the island-based Tiwi and Anindilyakwa Land Councils. This paper aims to demonstrate that to substantiate the allocation of administrative funding to each regional land council based on the size and operations of the two smaller land councils is flawed as not only are there significant differences between the island land councils, both geographically and in the functional requirements of the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act), but the review's recommendations confer additional, rather than fewer, functions upon land councils.

The paper concludes by noting that 'decision-making' regionalisation, as opposed to 'administrative' regionalisation, offers a solution to address many of the operational aspects of the Land Rights Act that appear to have concerned Reeves. It suggests that 'decision-making' regionalisation provides a more cost-effective approach, offering economies of scale and allowing resources to be potentially directed to social and economic betterment rather than being consumed by administration.

### Methodological problems in comparing the financial aspects of the two regimes

This paper is essentially about estimating the administrative moneys and resources required to implement the Reeves recommendations. It is premised on the acceptance of

the Reeves recommendation that the payment to Aboriginal interests in the Northern Territory of mining royalty equivalents derived from Aboriginal land should continue. As Reeves (1998: 349) notes:

... there are good reasons for maintaining the historical link between the ABR's income and mining royalties that flow from mining on Aboriginal land. This link provides a unique and historical rationale for the payments. If this historical link is broken and the income of the ABR is linked to some other factor, it may only be a matter of time before the payments are discontinued because they do not have such a unique and historical underlying rationale.

However, methodological problems in comparing the financial aspects of the Reeves proposal with the current regime need to be noted. Given the additional functions conferred by the Reeves proposal on the Northern Territory Aboriginal Council (NTAC) and 18 regional land councils, and with the prospect that NTAC would fulfil the functional operations of the Aboriginal and Torres Strait Islander Commission (ATSIC), it becomes apparent that the recommendations address much wider issues. If implemented, these proposals would have far-reaching implications for all indigenous land councils, associations and incorporated bodies in the Northern Territory, as well as significant implications for Commonwealth and Northern Territory government agencies that deliver programs to indigenous people.

Reeves *suggests* that almost all current indigenous programs (Commonwealth and Northern Territory government) could be directed to NTAC. Based on estimates of these programs, NTAC's annual budget would range between \$448 million and \$738 million. (This amount does not include the separate appropriation for land claims, Native Title Representative Body funding currently at about \$4 million, gate moneys, or negotiated or upfront royalties.) However, Reeves does not detail any administrative arrangements for the delivery of programs and we are left to ponder how a potentially enormous bureaucracy such as NTAC, with functional responsibility encompassing those of the current land councils, ATSIC and indigenous programs of the Northern Territory Government, could adequately administer such responsibility on a mere \$2 million per annum and \$400,000 to each regional land council. Of particular concern is that there is no explicit statement that ATSIC should be absolved of its role in the Northern Territory, rather it is simply implied. There has been no examination made of the operations of ATSIC, nor was this ever intended, nor was there a specific term of reference to do so.

It becomes evident that in undertaking a comparative analysis of the cost-benefits of the Reeves recommendations with the current regime it is very difficult to establish exactly what regimes are being compared due to the lack of detail in the former. Hence given the lack of explicit recommendations and the lack of details contained in the Reeves Report about the delivery of social and economic advancement programs, this analysis is limited to a comparison specifically within the boundaries of the functions of the current land rights framework.

## The current model

Under the current regime there are four land councils, each of which is funded by way of section 64(1) of the Land Rights Act, that is, the 40 per cent of the mining royalty equivalents for land council administrative purposes. Additional funding may be approved by the Minister pursuant to section 64(7).

Table 1 outlines the total allocation to the four land councils for the four financial years from 1994–95 to 1997–98.

**Table 1: Total allocation to the four land councils, 1994–95 to 1997–98**

Year	Section 64(1)	Section 64(7)	Total
1994–95	11,481,297	5,684,799	17,166,096
1995–96	10,602,283	8,637,902	19,240,885
1996–97	12,106,412	1,081,489	13,187,901
1997–98	13,049,471	2,844,644	15,894,115

Source: Aboriginals Benefit Reserve annual reports

The four land councils have operated with a total average allocation of \$16.4 million for those four years. There are currently 229 staff employed by the four land councils who perform the operations of the Land Rights Act at an average cost of \$80,000 per staff capita. (This estimate, which includes salaries, capital and running costs, is calculated on estimates provided by the Northern Land Council and tested against the total administrative costs of the four land councils per staff capita.)

## The Reeves model – financial aspects

While maintaining the concept that mining royalty equivalents be disbursed to Aboriginal organisations, Reeves recommends a radical restructuring of institutions that facilitate the distribution of mining royalty equivalents under the Land Rights Act. Essentially, the current land council structure is abolished and administration of the Aboriginals Benefit Reserve by ATSIC is replaced by a new regime. Reeves proposes the creation of an institution called the Northern Territory Aboriginal Council (NTAC) which would have functional responsibilities similar to that of ATSIC, incorporate the current Aboriginals Benefit Reserve secretariat, function to facilitate the finalisation of the land claim process, plus have a role of ‘overseeing’ the proposed 18 regional land councils and providing political advocacy for Aboriginal people in the Northern Territory.

NTAC will be funded by several sources. ATSIC will fund NTAC to undertake Native Title Representative Body functions, a special appropriation will be provided by the Commonwealth (although as yet unquantified) to complete the land claims process across the Territory, and \$2 million will be allocated from mining royalty equivalents for NTAC staff, maintenance and overheads. Reeves also *suggests* that funding for indigenous

programs in the Northern Territory, currently undertaken by ATSIC and the Northern Territory Government, could be directed through NTAC. Reeves also recommends that the net flow of negotiated royalties and other income, for example, gate receipts and licence fees, will be required to be passed to NTAC for crediting in the respective regional land council account. These moneys will be expendable by each regional land council, but only on purposes satisfying criteria set down by NTAC. Reeves (1998: 609–10) argues that this system should ensure that all moneys generated under the Act are dedicated to purposes of economic and social advancement of Aboriginal people, as assessed by NTAC.

Reeves proposes that royalty associations will cease receiving 'areas affected' moneys, or any other distributions pursuant to section 35 of the Act. The existing assets and liabilities of the royalty associations will be taken over and rationalised, if necessary, by NTAC. This, it is argued, will be consistent with NTAC's role as the central Aboriginal investment body. Compensation for 'areas affected' will be undertaken in future by NTAC on a case-by-case basis, through the regional land councils. Each regional land council will therefore effectively fill the role in relation to 'areas affected' moneys that was previously undertaken by the royalty associations without any statutory guarantees that mining royalty equivalents will be paid. Since each regional land council will be subject to the usual accountability and reporting requirements of a Commonwealth statutory authority, this will supposedly ensure a more purposeful, accountable and transparent application of these moneys than has occurred in the past.

### **Critique of the Reeves regional land council funding model**

The Reeves model is premised on a contingency that, by increasing the number of land councils and by allocating similar amounts to each council as those received annually by the Tiwi and Anindilyakwa Land Councils, savings against current administrative costs can be achieved. As Reeves (1998: 612) states, 'Each RLC will be about the same size as the present Tiwi and Anindilyakwa Land Council whose administrative costs are about \$400,000 annually'. According to the Reeves formula, the administration of 18 regional land councils will therefore cost about \$7.2 million per annum. However, simplistic suggestions that smaller land councils can operate and function on about \$400,000 per annum are unfounded and fail to appreciate the geographical, logistical and functional diversity within the proposed model (see Table 2 for a comparison of the proposed regions).

By comparison with the proposed mainland regions, the Tiwi and Anindilyakwa Land Councils are unique because:

- both are islands with easily identified borders;
- both have relatively homogeneous social, cultural and language groupings (at least compared to the proposed mainland regions); and
- both are comparatively very small regions, thereby offering administrative and logistical efficiencies.

**Table 2: Analysis of proposed regional land councils by population, area, Aboriginal land, land and sea claims and mining activity**

Region	Population <sup>a</sup>	Area (km <sup>2</sup> )	Aboriginal land (km <sup>2</sup> ) <sup>a</sup>	Proportion Aboriginal land	Mines operating on Aboriginal land	No. of land and sea claims <sup>b</sup>	Exploration licence applications <sup>c</sup>
Darwin–Daly	10,189	43,780 <sup>1</sup>	19,290	44	No	21	33 (33)
West Arnhem	3,442	62,987		77	Yes	10	72 (67)
East Arnhem	4,359	22,977	22,977 <sup>2</sup>	100	Yes	3	34 (30)
Ngukurr	1,790	53,245	31,202	59	No	4	36 (29)
Borroloola–Barkly	1,375	199,108	18,075	9	No	12	21 (19)
Katherine	2,864	48,628 <sup>1</sup>	18,733	39	No	10	23 (20)
Victoria River	658	104,251	8,096	8	No	7	11 (6)
Tennant Creek	2,434	133,310	79,788	60	No	10	38 (33)
Eastern Sandover	1,793	47,573	3,247	7	No	1	2 (1)
Anmatyere	1,078	34,273	28,109	82	No	2	16 (5)
Alice Springs	5,162	50,655 <sup>1</sup>	13,048	26	No	15	15 (13)
South Western	1,329	170,206	58,998	35	No	10	34 (28)
Tanami	2,211	171,272	154,984	90	Yes	0	237 (229)
North Western	557	50,600	8,367	17	No	1	10 (4)
Western	1,049	42,840	36,202	85	No	1	40 (36)
Eastern Plenty	505	75,531	17,921	24	No	4	3 (2)
Tiwi	1,802	7,450	7,450	100	No	0	1 (1)
Anindilyakwa	1,356	2,526	2,526	100	Yes	3	5 (5)
Total	43,953						631 (561)

Notes:

1. This is non-urban land only
2. This area does not include islands such as Elcho and the Wessel Islands

Sources:

- a. Reeves 1998
- b. NT Department of Lands, Planning and Environment, March 1999  
(Actual claims within the regional boundaries – the same claim may overlap into another region.)
- c. NT Department of Mines and Energy, March 1999  
(Actual exploration licence applications within the region – figures in parentheses are those totally enclosed within a region and which do not overlap.)

Notably, the land base of both regions is entirely Aboriginal freehold, granted by way of statute when the Land Rights Act was enacted in January 1977. It has therefore not been necessary for the Tiwi and Anindilyakwa Land Councils to be consumed in the land claim process throughout their respective histories. Furthermore, there has been comparatively little mining exploration activity on the Tiwi Islands and Groote Eylandt in recent years. Of the 561 exploration licence applications active on Aboriginal land in the Northern Territory, only one is located on the Tiwi Islands and five on Groote Eylandt. Compared to the large land councils, the two smaller councils have not needed to commit significant proportions of their budgets to the administration of the mining provisions of the Land Rights Act.

## Regional land council resource requirements

What is evident from the Reeves recommendations is that there is no discernible modification of land council functions and there is an actual increase in functions rather than a decrease.

- There are no identifiable specific recommendations for modification of functions prescribed in section 23 of the Land Rights Act. Indeed, Reeves states that the regional land councils will perform all of the functions outlined in section 23, with a few exceptions. All of these exceptions, for example the land claim process, will be pursued by NTAC (see Reeves 1998: chapters 27 and 28).
- Although it is recommended that the operations of Part IV (Aboriginals Benefit Reserve function) be radically overhauled and functional responsibility be transferred from ATSIC to NTAC, the functional activities are arguably enhanced. For example, regional land councils are required to 'apply' to NTAC for an allocation of administrative moneys and 'areas affected' moneys. This establishes an assessment regime which would require additional staff resources. Under the current regime the proportion of disbursements of administrative moneys and 'areas affected' moneys is prescribed by legislation and is automatically transferred from the Aboriginals Benefit Reserve to the land councils, and in the case of 'areas affected' moneys, later transferred to the relevant royalty association.
- Although Reeves recommends some modification to the mining provisions, these provisions remain potentially staff resource-intensive and will require significant input and decision-making by Aboriginal residents and regional land council staff. As Reeves (1998: 210) comments, 'a decision to allow a large mining project to proceed may involve many meetings with all the Aboriginal people of the region'.

At the same time, additional functions are conferred on NTAC and the regional land councils. NTAC will have the role of overseeing the regional land councils and, as noted previously, could assume responsibilities currently undertaken by ATSIC. The additional functions of regional land councils will include, but not be limited to:

- holding land in trust;
- coordinating and assisting the implementation of social and economic programs of NTAC, the Northern Territory Government and the Commonwealth;
- encouraging young Aboriginal people to acquire skills; and
- identifying skills shortages, infrastructure needs, economic opportunities and fund-raising prospects.

Reeves provides few details of the resources regional land councils will need to undertake these functions and there is no detailed assessment of the staff resources required to perform the functions. Reeves (1998: 595) simply notes that the structure of each regional land council will consist of:

- members;
- board of directors;
- chief executive officer; and
- staff.

*Members.* Based on the current total membership of the four land councils of 228 (Tiwi Land Council – 48, Anindilyakwa Land Council– 19, Northern Land Council – 78, Central Land Council– 83), it is conceivable that up to 30 members would comprise each land council. This would effectively double the current membership and potentially double the running costs when compared to the current regime.

*Board of directors.* Reeves (1998: 596) does not specify the size of each board of directors but states that the membership of a regional land council should decide the number of directors and how they should be chosen. If there were to be seven directors on each board, there would be 126 directors Territory-wide.

*Chief executive officer.* Reeves (1998: 596) does provide some detail about the position of the chief executive officer, who will be responsible to the board. He suggests that the person would have qualifications similar to those of community clerks under the Local Government Act (Northern Territory).

A notable omission in the model is a chairperson. It is unclear whether this is intentional or an oversight. It could be reasonably sustained that a chairperson is an essential authority within a land council structure, given its inherent representative nature and the need to have a spokesperson on day-to-day local and political, rather than administrative, issues.

## **Other staffing requirements**

*Financial staff.* It is important to note that the functional responsibilities of land councils are not limited to the Land Rights Act. Under both the current regime and that proposed by Reeves, land councils are Commonwealth statutory authorities and are therefore subject to the reporting and auditing provisions of *Commonwealth Authorities and Companies Act*

1997. Each land council is, and would continue to be, required to produce financial statements prescribed by the legislation, annual reports which will be tabled in the Commonwealth Parliament, and a corporate plan. Section 14 of the Commonwealth Authorities and Companies Act requires directors of Commonwealth authorities to prepare estimates which must be passed to the responsible minister. These are functions that cannot be avoided and therefore require staff resources to fulfil them.

Besides these prescribed functional responsibilities there would be a need for financial expertise to monitor internal budgets, income from NTAC and resource development, and investments with NTAC, prepare applications to NTAC for funds, and generally to develop sound financial management practices and policies within the regional land council.

*Mining and resource specialists.* Given that a key principle of the Reeves recommendations is that of local decision-making in respect to resource development issues, it follows that regional land councils should be adequately resourced to make informed decisions. The type of specialist required might vary due to the geographical situation. For example, regional land councils in Central Australia may require pastoral expertise while those in the coastal regions may focus on fisheries and pearling. Arguably, such expertise may only be required periodically and consultants could be used.

However, in respect to the administration of the mining provisions of the Land Rights Act, it is evident that it would be necessary to have both specialist and administrative permanent staff. It is also evident that the application of these provisions will consume more resources in some regions than in others. Statistics provided by the Northern Territory Department of Mines and Energy show that 40 per cent of all active exploration licence applications on Aboriginal Land in the Northern Territory are located in the Tanami regional land council area. In order to administer the mining provisions efficiently and to address issues arising from the mines currently in operation in the Tanami region, a small to medium-sized unit would be required. Small units would also be required in most other regions. By contrast, in regions such as the Tiwi Islands where there is only one current exploration licence application, administrative operations of the mining provisions could be undertaken within its current staffing structure.

*Legal staff.* Potentially, legal services could be outsourced. However it may prove to be more cost-effective to employ an in-house lawyer. Furthermore, one would suspect that the chief executive officer of these small statutory authorities would require a lawyer to provide day-to-day advice on the many legal issues that arise under the Land Rights Act. Given the remoteness of some of the regional land councils, an in-house lawyer may be an imperative to get quick and efficient responses on legal issues.

*Anthropologist.* There are a number of reasons an in-house anthropologist would be essential in each regional land council under the Reeves proposal. Firstly, they would be required to establish and maintain a register of residents. The dynamics of mobility of Aboriginal people in the Northern Territory suggest that this would be an intensive ongoing task. An anthropologist would also be required to assist the land council to categorise how local tradition is to be understood. It would also be necessary to provide

advice to NTAC and the regional land council on matters pertaining to land claims, community living areas, native title claims and other related issues.

*Administrative support.* Each regional land council would require a wide range of administrative support functions. This support would include arranging meetings of the land council and the directors, assisting with coordinating meetings of residents to discuss resource development and mining issues, and coordinating other meetings. Administrative support would also be required for salary and recruitment processes, general correspondence, research, information technology matters, procurement requirements of the land council, contract administration, accommodation matters and so on.

*Delivery of economic and social advancement program.* As noted earlier in this paper, there is a lack of detail on how these programs would be delivered and it is therefore difficult to estimate the resources required to undertake these functions. The functions are very similar to those performed by ATSIC, although not exclusively. There are currently 164 permanent and 15 temporary ATSIC staff working in the Northern Territory (ATSIC 1998: 201, 204). It is estimated that if NTAC were to receive Northern Territory government funding also, the staff resources currently administering those programs would be double that of the ATSIC Northern Territory structure.

## **Estimating the cost of regional land councils**

Given the diversity of geographical location and functional operations of each of the regional land councils, an estimate of staff resources to meet the operational requirements of the Land Rights Act can be gauged. This would range from the current Tiwi Land Council size of 7 staff to possibly 20 (this does not include staff required for the delivery of economic and social advancement programs). However, as there are additional functions conferred on regional land councils generally, plus the addition of a layer of administration by NTAC, one would expect that additional resources would be required by the Tiwi Land Council. Sutton (1999: 10) suggests that the average staff required for a regional land council would be 14. This is based on the average size of the two small land councils, so 18 regional land councils would have a notional total staff of 252. Based on a per capita staff cost of \$80,000, the total operating cost of the 18 councils would be \$20.2 million annually.

A more detailed and rigorous assessment of the administrative requirements of a regional land council has been undertaken by the Northern Land Council. It has identified 11 staff as a minimum requirement to operate a regional land council. Based on current prescribed salary rates and conditions, it is estimated that in salaries alone a base amount of \$610,341 would be necessary. A further \$307,000 would be required for running costs. This assessment is reasonably conservative and notes that administrative running costs are calculated only on a 1:2 basis when compared to salaries. These costs do not take into account costs associated with the administration of the board of directors, meetings of the regional land council, a chairperson, nor new accommodation requirements to house the proposed regional land councils in some regions. These estimates are essentially the absolute bottom line and do not analyse geographical and functional diversity across the

Northern Territory. Nevertheless, they suggest that resources in excess of \$1 million would be required for each regional land council to operate.

Besides the costs of the regional land councils, NTAC costs need to be considered. As noted previously, the extent of NTAC's operations and functional responsibility is unclear. Sutton (1999: 10) has commented that it is hard to imagine that NTAC itself would not require a substantial staff of at least 100, given that its proposed responsibilities would be extended into areas of economic and social development currently performed by other agencies. Based on a staffing level of 100 and the staff per capita as quoted above, additional administrative moneys of \$8 million would be required to finance NTAC's operations annually. The Northern Land Council also provides details on the administration costs of NTAC, although these appear conservative and presumably do not include staff for the delivery of social and economic advancement programs. Nevertheless, the aggregated estimates for administration costs of the 18 regional land councils and NTAC are in excess of \$40 million, which is more than the current income of the Aboriginals Benefit Reserve.

### **Other costs**

There will be other costs associated with implementation and government will accrue further costs in relation to administration, monitoring and accountability. All 19 statutory authorities will be caught under the Commonwealth Authorities and Companies Act and will be subject to parliamentary and committee scrutiny. There will be 19, rather than 4, sets of estimates, financial statements, annual reports and corporate plans.

Although there is a windfall to ATSIC in respect to Aboriginals Benefit Reserve administration costs, which will be absorbed by NTAC, ATSIC will be required to provide the special appropriation for land claims specified by Reeves, as well as potentially funding additional requirements of the Aboriginal Land Commissioner. Under the Reeves recommendations, additional functions are placed on the Aboriginal Land Commissioner which include resolution of disputes over regional land council boundaries, and possibly to act like an appellate jurisdiction for review of decisions by NTAC.

Industry will have the additional burden, in many instances, of negotiating with more than one regional land council over land use issues. Taking mineral exploration as an example, exploration licence applications may cross the boundaries of two, three or even four regional land council areas. Statistics provided by the Northern Territory Department of Mines and Energy show that there are currently 70 exploration licence applications that overlap the proposed regional boundaries.

Further costs to government might arise from just terms compensation. From a very simplistic economic perspective, and based solely on the valuation of the land held by Aboriginal land trusts, a baseline figure can be identified in Reeves at around \$84 million (Reeves 1998: 560). (This figure is based on the actual distribution of Aboriginal land between Central and Northern Land Council areas. Reeves notes that an average value per square kilometre of Aboriginal land can be estimated (using the pastoral land values) of

\$154 per square kilometre, yielding a total value for 545,718 square kilometres of Aboriginal land of \$84 million in 1997.)

This valuation does not take into account special value to the owner(s) nor solatium. (Solatium is a compensation term which can be applied in the valuation of property. Hyam (1995: 264) describes it as a 'sum of money or other compensation given to a person to make up for loss or inconvenience' and more specifically in law 'a sum of money paid over and above the actual damages as solace for injured feelings'.) There are also questions of just terms compensation in respect to the transfer of royalty association assets to regional land councils and the extinguishment of native title over land trust land.

## **Alternative models**

There is a general recognition that land councils should be able to decentralise some of their activities. As Toohey (1984) noted, one solution would be to create more councils. However, he commented that while land claims and mining negotiations are still in progress there is a need for organisations of sufficient size to provide resources for preparing those claims. Unnecessary duplication of activities and an increase in administrative costs may be ultimately counterproductive. There are strong arguments against too much fragmentation of land councils (Toohey 1984: 48).

Nevertheless, in recognition of the need for a form of decentralisation, Toohey (1984: 53) recommended:

The establishment of regional committees of Land Councils with wide ranging powers of decision-making in regard to Aboriginal land in the region of each committee including the identification of traditional owners and the giving or withholding of consent in any matter in connection with land held by a land trust.

Martin's report on the proposed North East Arnhem Ringgitj Land Council made several recommendations to the Minister for Aboriginal and Torres Strait Islander Affairs regarding regionalisation of 'decision-making'. Martin (1995: 84) recommended that the Minister should be empowered under the Act to 'establish RLCs of the existing Land Councils' and that 'there should be some capacity to devolve some or all of the functions and powers of Land Councils under sections such as 23, 35 and 40 to Regional Councils'.

The Northern Land Council (1997: 198) notes that it supports the spirit of Martin's recommendations, with the exception of the concept of the Minister having the power to create regional councils and determine their powers. Its concept of regionalisation, as approved by the Full Council, is that regionalisation is the devolution of decision-making power with regard to Aboriginal land to the region, in a flexible and regionally appropriate manner and time. This does not necessarily imply the devolution of the administrative functions (for example, budget control management and professional staff) to the control of regional councils, nor does it imply that each regional office will have a full complement of professional staff. The overarching concept is that making decisions over land is the basis of a land council, and it is the power to make those decisions which should be devolved to the regional level (see Reeves 1998: 205).

Indeed, both the Northern Land Council and the Central Land Council recognise the need for a form of decentralisation and have taken measures towards evolving forms of regional decision-making entities. Both land councils have a low-key administrative presence in most regions or are anticipating a presence in other regions when funds become available. The regionalisation process is limited not only by financial resources but also by the ability of the land councils to delegate powers to regional committees. If the Land Rights Act were amended to provide for the Full Council to delegate powers to these committees, and the financial resources were made available, regional committees or councils, under the umbrella of the two large land councils, could be established which address the concerns of the need for local decision-making, and maintain economies of scale and expertise in land council administration.

By comparison with the Reeves model, this would be a more cost-effective solution to provide for local decision-making. Most administrative costs of decentralisation are already built into the budgets of the large land councils. For example, the regional services budget in the Northern Land Council region is \$1.27 million for the seven regions within its jurisdiction. Although further costs would be inevitable for the full implementation of the regionalisation program, they would be dramatically less of a drain on Aboriginals Benefit Reserve resources than the implementation of the Reeves recommendations.

## Summary

As this paper demonstrates, the implementation of the Reeves proposals would be less cost-effective than the current regime. The Reeves rationale that all regional land councils across the Northern Territory can operate effectively on \$400,000 per annum, based on the current size and operations of the island-based Tiwi and Anindilyakwa Land Councils, is flawed. This is because there are significant geographical, logistical and functional requirement differences between the island land councils and those of the proposed mainland regional land councils. Furthermore, if the proposals were implemented, the current stream of mining royalty equivalents (currently about \$35 million per annum) could be expended in administrative costs to the 18 regional land councils and NTAC alone. The prospect of utilising all mining royalty equivalents for administrative purposes is not a desirable outcome, nor is it sound public policy. More importantly, such an outcome would not be desirable for the ultimate beneficiaries of these mining royalty equivalents, namely, the Aboriginal people of the Northern Territory.

Notwithstanding that the focus of this paper is upon the Reeves regionalisation model, the findings imply wider policy implications, notably, that the fragmentation of the large land councils into smaller administrative units across the Northern Territory, with separate memberships and staff, would not be cost-effective. The process of decision-making regionalisation, as opposed to administrative regionalisation, requires further examination. Such decision-making regionalisation provides for a comparatively more cost-effective regime, obfuscating duplication and offering economies of scale in administration, staffing and expertise.

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# 13. The Reeves Report's assumptions on regionalism and socioeconomic advancement

**David Martin**

## Introduction

The Reeves Review proposes a radical transformation of the Northern Territory land rights regime, with a new institutional framework for integrating land rights with what it terms 'socioeconomic advancement' for Aboriginal people. It suggests that this can be best achieved by means of effective and responsive Aboriginal institutions through which self-determination based on the control of Aboriginal lands can be exercised at the regional level, and which work in partnership with government in achieving the purposes of the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act). These purposes are:

1. to encourage the formation of a partnership between Aboriginal people in the Northern Territory and the government and the people of the Northern Territory;
2. to provide Aboriginal people with effective control over decisions in relation to their lands, their communities and their lives; and
3. to provide opportunities for the social and economic advancement of Aboriginal peoples in the Northern Territory.

Reeves proposes that an entirely new institutional framework should be established in the Northern Territory as the primary vehicle through which these new purposes are to be realised. At its core would be 18 essentially autonomous regional land councils operating under the strategic oversight of a centralised body, the Northern Territory Aboriginal Council (NTAC). NTAC would also house and support a proposed Congress of Regional Land Councils.

## Self-determination, tradition and regional institutions

The Reeves Report (1998: 200) argues that the Land Rights Act, with its '... focus on traditional Aboriginal owners within a bureaucratic and legalistic framework', results in irreconcilable disputation about traditional Aboriginal ownership. In the current framework as operationalised by the two mainland land councils, it is suggested, the legal construction of traditional ownership takes precedence over the understandings of Aboriginal people themselves. Furthermore, the representative structures of the two larger land councils are separated from the largely expert-driven processes by which traditional Aboriginal owners are identified, and the report argues that it is this factor which exposes these bodies to challenges to their legitimacy in making decisions about proposed developments on Aboriginal lands (Reeves 1998: 200–1).

The Reeves Report contrasts this situation with that of the two existing smaller land councils which, it claims, have developed their own approaches to traditional relationships to land in their regions and have incorporated them into their representative structures. This capacity to exercise self-determination at the regional level, and to adopt decision-making processes in accordance with their own interpretations of what constitutes tradition in their regions, is argued to underlie the capacity of these smaller land councils to avoid the disputation found in other areas (Reeves 1998: 200).

### **The Reeves Report's assumptions on regionalism**

Central to the Reeves scheme is the assertion that '... Aboriginal culture is reproduced and maintained, and Aboriginal lands are used and occupied, within regional populations', and that it is at this *regional* level therefore that Aboriginal people should be able to determine for themselves what constitutes Aboriginal tradition (Reeves 1998: 207). Thus membership of each regional land council would be open to any Aboriginal person who had a 'traditional affiliation' to land within the region or who was a permanent resident of the region, although each individual could be a member of only one regional land council (Reeves 1998: 601). The structure of the board of each regional land council and how directors were chosen would also be decided by the membership.

The Reeves Report would also remove the statutory 'informed consent' provisions under which the existing land councils make decisions on issuing exploration permits and other interests, but cannot do so without ensuring that the relevant traditional owners understand and as a group consent to the action (Toohey 1984: 56; see also Martin 1995b). Each regional land council would determine for itself the decision-making processes which it considered best reflected Aboriginal traditions in its region (Reeves 1998: 210–11). Similarly, mechanisms to deal with disputes arising from the operations of the Act would, in the first instance, be dealt with by the relevant regional land council in accordance with its own procedures.

Such mechanisms would, in Reeves's view, enhance the self-determination of Aboriginal people at the regional level and thus form a necessary prerequisite to economic and social development, necessarily in his view based on such self-determination.

It is my view that the Reeves Report is generally correct in its expressed preference for recognising Aboriginal traditions through 'enabling' rather than 'prescriptive' mechanisms; that is, legislation should not prescribe precisely what those traditions are or, for example, how they should be brought to bear in decision-making processes, but should facilitate a flexible approach which supports the incorporation of tradition where possible and appropriate. This is very broadly the approach adopted in the consent and consultation procedures under the Native Title Act and its Regulations 5–7.

However, the informed consent provisions of the Land Rights Act have, in fact, provided a powerful enabling mechanism through which the rights of those with traditional rights and interests in particular lands are protected, and a significant check against the potential abuse of process by land council boards and staff. The operationalisation of the informed consent procedures, for example through the development of Land Interest Registers by

the Northern Land Council, has arguably enabled the incorporation of relevant Aboriginal traditions in a flexible and appropriate manner which takes account of local and regional diversity. Such protection is very weak under the Reeves proposals and, in my view, the report provides entirely inadequate justification for removing a scheme which has demonstrably ensured the protection of property rights arising under Aboriginal tradition.

This bears on what is a fundamental flaw which manifests itself in a whole range of the Reeves Report's recommendations – its focus upon predetermined regions as the basis on which Aboriginal culture is supposedly reproduced and within which autonomy and self-determination are to be realised. This derives, in my view, from a quite fundamental misunderstanding and misrepresentation in the Reeves Report of the characteristics of Northern Territory Aboriginal societies.

### **The distinction between ownership and residence**

Firstly, the Reeves Report collapses a profound distinction within Aboriginal traditions between rights flowing from *ownership* of lands under those traditions and those associated with *residence* on those lands. While it is true to see traditional connections to country as being more typically characterised by a complex and dynamic layering of rights and interests than by straightforward rights of exclusive possession by clearly bounded groups, Aboriginal systems universally give precedence to rights arising under customary law over those arising from historical occupation.

To varying degrees, all of the proposed regional land council regions have Aboriginal residents whose traditional lands lie elsewhere within the Northern Territory or indeed interstate. Potential problems arising from this conflation of the traditional owner/resident categories lie at the very heart of the proposed regional land council structure. For one thing, while membership of each regional land council is drawn from *both* categories, in its proposed capacity as a land trust it would be holding the Aboriginal lands in its region for the benefit of those Aboriginal people with 'traditional entitlements to use or occupy those lands'.

Also, as discussed above, the Reeves Report proposes that each regional land council will determine the content of Aboriginal relationships to the trust lands in its region, and how to operationalise this in terms of decision-making about the use of those lands. There are two problems here: one relates to the inevitable disparity between the actual membership of the regional land council and the aggregate of adult residents and those with traditional affiliations in the region; the other relates to who actually decides the content of the land-related traditions of a region.

With respect to the former problem, will it be the formal membership of a regional land council who will determine these matters (following the general procedures within bodies incorporated under the Aboriginal Councils and Associations Act) or will wider input from the regional constituency be sought? Results could be profoundly different in each case if a membership whose composition is not broadly representative of the wider constituency's structure puts a particular cast on what constitutes the 'regional tradition'. With respect to the latter problem, under the Aboriginal traditions common in most areas

of the Northern Territory (and wider), those with mere residential or historical links to a region have no legitimate say in what constitutes those traditions. That is, Aboriginal tradition is typically characterised by rights based on *entitlement*, not on principles of equity. Is it to be the traditions of those for whom the lands are held in trust by the regional land council under the Reeves scheme which are to apply, or those of the wider regional population, including those who may not have rights under those traditions?

### **The reproduction of Aboriginal culture at the regional level**

Secondly, this conflation of traditional ownership and residence compounds the problems in the Reeves Report's assertion that Aboriginal culture is reproduced at the regional level. There are certainly good contemporary anthropological arguments that local landed interests (for example, those of a particular patrilineal clan) should be understood as deriving from regional Aboriginal land tenure systems (see, for example, Sutton 1996), but this is not to be conflated with the contemporary regional *residential* population.

A clear distinction needs to be drawn here between aspects of contemporary Aboriginal societies which clearly are being reproduced at the regional or wider residential community levels – such as adaptation to the welfare-based cash economy – and those which continue to be grounded in particular groupings arising from within Aboriginal tradition itself. While Aboriginal societies have demonstrated a remarkable capacity to adapt to changing circumstances, the evidence would seem to indicate that the broad principles underlying Aboriginal relationships to land have been maintained with relative conservatism (for example, Sutton 1999). The unit of reproduction of traditional land relationships is the *regional land tenure system* underpinned by religious ideology, not the regional residential community.

### **Increased autonomy through regional organisations**

Thirdly, the Reeves Report argues that by breaking up the existing large land council administrative regions, greater autonomy and self-determination will be realised. There are a number of fundamental issues here which make the report's policy recommendations in this regard largely invalid.

The report ignores the crucial fact that it is not so much at the regional level that Aboriginal groups seek autonomy but almost always the *local* level. Aboriginal societies are typically highly segmented, and characterised by the complex and often cross-cutting allegiances which people have to groupings based on families, clans, ancestral lands and so forth, as well as to contemporary forms such as Aboriginal organisations.

A defining characteristic of this domain lies in its *localism*, in which the political, economic and social imperatives lie pre-eminently in more restricted forms and institutions rather than in broader and more encompassing ones. Localism is characterised by such features as a strong emphasis on autonomy at the individual or local group level, and by priority being accorded to values and issues which are grounded in the particular and local, rather than in the general and regional. It is related to the tendency of Aboriginal societies and

groups towards 'fission' and disaggregation rather than aggregation and corporateness (for example, Martin 1995a; Sutton 1995; Martin and Finlayson 1996).

This is not to deny the reality of, for example, regional cultural blocs, such as that forming the basis of the Yolngu move several years ago towards a 'breakaway' land council in north-east Arnhem Land (Martin 1995b). Nor is it to deny the capacity of Aboriginal people to overcome the force of localism in moves towards more regional approaches to deal with contemporary issues, for example in negotiating Indigenous Land Use Agreements under the Native Title Act. However, the strength of localism and the absence of truly indigenous overarching governance mechanisms means that artificial regions imposed upon the Aboriginal polity are likely to remain just that – artificial, and without real internal legitimacy. Policy predicated upon such assumptions is highly likely to fail.

Additionally, such imposed regional boundaries within which Aboriginal society is notionally maintained and reproduced, as Reeves would have it, may arguably change the *scale* of the issues confronted by the current two large land councils, but they will not change their *underlying dynamics*. For societies such as these, based on and emphasising intensely particularistic and locally based interests, the politics of differentiation are played just as intensely within regions and residential communities as they are between them (see, for example, Stead 1990; Morton 1994; Martin 1995b). Smaller, autonomous regional land councils would be highly prone to destabilisation by this intense local-level and regional politics.

### **Reducing disputation over land-related issues**

Fourthly, the Reeves Report suggests that intra-Aboriginal disputation over traditional ownership and entitlements can be essentially attributed to the legalistic and bureaucratic framework within which the Land Rights Act is implemented, and that this will be reduced by a system in which the regional land councils themselves interpret regional traditions and incorporate it into decision-making and conflict resolution. This is highly unlikely for a number of reasons.

For a start, the report ignores the considerable body of evidence that disputation over such matters is a core and omnipresent dimension of the politics of identity within the fluid, highly factionalised and competitive Aboriginal polity (see contributors in Finlayson and Smith 1997). In such circumstances, the task of identifying those with rights and interests in specific lands will inevitably be seen by Aboriginal people of a region as a political, not a technical, exercise.

That irresolvable disputes are not simply a feature of the scheme of the Land Rights Act but have deeper causes can be seen most clearly in the native title arena where the relevant legislation, the Native Title Act, not only does not define the nature of traditional rights and interests (following Mabo, treating it as a matter whose facts are to be established in each case) but also contains extensive provisions for mediation of disputes by the National Native Title Tribunal. The difficulties the tribunal is having in mediating the large number of overlapping or competing claims lodged suggest that disputation cannot be attributed solely to the factors raised by Reeves.

Furthermore, as argued above, the conflation of two distinct categories of Aboriginal people, residential populations and those with traditional connections to lands in a region, contrary to the Aboriginal traditions of almost all regions, is likely to exacerbate rather than reduce conflict as the report would suggest, since it potentially disenfranchises traditional owners from the control of their own lands.

## **An alternative proposal for greater regional autonomy**

### **Land councils and Aboriginal tradition**

It should be accepted that the pressures towards increased autonomy at local and regional levels have legitimate origins, in part at least, within the Aboriginal polity itself. Centralised organisations such as the existing land councils will always be viewed with suspicion in a society whose imperatives lie so firmly at the local level. At the same time it must also be recognised that organisations such as land councils *of necessity* must operate in the ambiguous and fraught zone between the two political systems, the indigenous one and that of the wider society (Sullivan 1988; Rowse 1992).

In this interstitial arena the fundamental questions of effectiveness, legitimacy, representativeness and accountability are constantly contested in terms of the often incommensurate principles of each of the two political domains. In the case of accountability, in particular, there are often quite incompatible demands on personnel in such organisations to discharge their obligations to the wider system (usually framed in terms of financial accountability) and those arising from within the indigenous polity (Queensland Parliamentary Committee of Public Accounts 1991; Martin and Finlayson 1996).

In north-eastern Arnhem Land, for example, the proponents of the move for a breakaway land council were challenging these four aspects of the operations of the Northern Land Council, essentially from the principles of the indigenous political system. The *effectiveness* of the Northern Land Council was disputed, both because of its being a large remote bureaucracy and because its staff, as mostly non-Yolngu, were seen as not able to 'listen' properly; its *legitimacy* in exercising management and control of Yolngu lands was challenged; it was seen as *unrepresentative* because it did not encompass the full range of Yolngu land interests and, furthermore, its council included non-Yolngu people; and it was not *accountable* to Yolngu since the principles of their law were not recognised by it, as manifested by the problems over issues such as royalty distributions (Martin 1995b).

The Land Rights Act attempts to establish structures and processes whereby these incommensurabilities are addressed in terms of the principles of each political domain. In essence, effectiveness, legitimacy, representativeness and accountability within the wider political system are established by setting up an organisation with the resources, including funding, to undertake its statutory roles in a professional manner, under the general direction of a council which is broadly 'representative' in at least regional terms. Effectiveness, legitimacy and accountability within the Aboriginal domain are established essentially by means of the 'informed consent' provisions in the Act. Thus, in essence,

the council makes the decisions on issuing exploration permits and other interests, but cannot do so without the consent of the traditional owners. In the words of Justice Toohey (1984: 56):

The Act seeks to implement two principles. One is to ensure that the traditional owners understand and consent to any action that may affect the land. The other is to interpose a Land Council between the traditional owners and those who wish to deal in some way with Aboriginal land. The Council is a body which is identifiable and with which others may deal more readily than with the traditional owners, who may be scattered over a substantial area and whose precise identity may not be easily ascertainable.

It should be noted at this point that the Act does not provide this accountability within the Aboriginal domain in an arena of major dispute in north-eastern Arnhem Land and elsewhere – the distribution of royalty equivalents – which the informed consent provisions provide for development proposals.

A common argument, and one adopted uncritically in the Reeves Report, is that smaller, regionally based Aboriginal organisations are more accountable to their constituents. However, such arguments paradoxically ignore the defining feature of the Aboriginal polity – its intense emphasis on localism. Ultimately, with such an emphasis, any notion of ‘representativeness’ itself (in a western democratic sense) becomes problematic, and small regionally based organisations can be just as unrepresentative as larger ones and far more prone to capture by particular sectional interests. The crucial factors underlying accountability relate to the organisational processes established for service delivery, rather than the size of the organisation as such.

### **Devolution of powers to regions**

Both the Northern and the Central Land Councils have for some years been involved in a process of regionalisation, as the Reeves Report itself acknowledges. Nevertheless, while *regionalisation* of offices and of staff and meetings of regional representatives are important steps towards greater accountability and effectiveness of regional constituencies and are to be applauded, they fall short of full *devolution* of power to regions. One problem is that *de jure* and in the perceptions of its Aboriginal constituency, political power will still lie in the central organisation and all but smaller scale decisions still have to be ratified by the full councils of each body. Such devolution, if it were to be consistent with the demands which many Aboriginal people have been making, would have to at least countenance the possibility of most or all of the powers and functions presently the province of the relevant full council being held by a regional land council.

However, the capacity of land councils to themselves either partially or fully devolve functions and powers to regional land councils is constrained by section 28 of the Act. While section 29A enables land councils to form committees to assist them in performing any of their functions, section 28 specifically prohibits their delegating crucial powers which are at the core of the disputation in the east Arnhem Land area – for instance, those of making determinations under section 35 (which include the distribution of royalty

equivalents) and of giving or withholding consent to the issuing of mining interests on Aboriginal lands.

In his 1984 review of the land rights legislation Toohey (1984: 48) suggested that while there was a general recognition that land councils should be able to decentralise, there were strong arguments against fragmenting them too much. He argued that the day-to-day administration of these bodies did not require the consent of traditional owners, and that any such requirement would become unworkable. Nonetheless, he proposed that the operations of the councils in relation to gaining consent of traditional owners for any actions that affected their lands could appropriately be devolved to what he termed 'regional committees'. This would require amendments to the Act to empower a land council to form such committees, and delegate relevant powers to them (Toohey 1984: 49).

Toohey's proposal goes part of the way towards recognising the devolution of powers to a regional land council. A critical policy issue here is the need for flexibility to allow for different circumstances and situations across the various regions of the Northern Territory. In some areas – arguably eastern Arnhem Land, for example – there would appear to be the necessary political maturity and social capacity for a regional land council to be formed which has all or most of the powers and functions of the present full council of the NLC. In other areas – such as that for which the Anmatjere Land Council was proposed (Morton 1994) – it may be appropriate to have only certain functions and powers delegated, in that case from the Central Land Council.

Devolved regional land councils operating under the organisational umbrella of the existing larger land councils would arguably have distinct advantages over the completely separate and autonomous land councils presently available under section 21(3) of the Act and over the regional land councils proposed under the Reeves Report. Such advantages would include flexibility in terms of what functions and powers the devolved regional land councils would hold in particular cases; economies of scale and the capacity to share expertise such as that of lawyers and other specialist staff with their parent land councils; maintenance of the capacity to negotiate with developers and government which comes with a certain 'critical mass' of organisational size and expertise; and increased financial accountability.

Moreover, the logistical and political difficulties of having separate and autonomous regional land councils coordinating consultations with traditional owners of lands who are living in areas served by more than one land council would be considerable and require a high degree of cooperation. As well, the wider interests of government and industry in having a degree of certainty and efficiency in the processes by which mining and other development applications are considered by land councils would not be well served by having entirely separate bodies potentially dealing with different geographical areas of the same applications. Such matters are far more likely to be successfully dealt with in a coordinated fashion through devolved regional land councils operating under the umbrella of the existing larger land councils than through the essentially autonomous ones proposed by Reeves.

For these and other reasons, regional land councils devolved from but operating under the umbrella of the existing organisations would have distinct advantages over the concept of the autonomous regional land councils operating under the strategic oversight of NTAC in the Reeves scheme. While NTAC could assist in the development of consistent policies between independent regional land councils across the Territory, and conceivably make agreements regarding the sharing of staff and other such resources as Reeves suggests, the realities are that organisational politics and performance are grounded in mundane day-to-day activities rather than in occasional peak body meetings. There would be a great risk that such small land councils would become isolated and mired in local politics, at the expense of serving the interests of their full constituencies. Such locally or sub-regionally based indigenous bodies frequently have chronic management and financial accountability problems. Moreover, having the capacity to devolve a range of functions to regional land councils depending on regional factors would have more flexibility than simply being able to establish autonomous land councils with the full range of functions and powers given by the Act.

If there were to be the capacity for devolution of land council functions and powers, two crucial policy questions are raised: who would actually make the decision for a particular regional land council to be formed, and how would the boundaries be established?

It could be argued that the most appropriate locus for deciding whether to devolve in a particular region, and what powers and functions would be appropriately held by the resulting regional land council, would lie within the relevant land council. There is merit in this proposal. However, the nature of organisational politics and imperatives being what they are, I believe that this should be a responsibility which lies with the Minister responsible for the Act.

The same arguments apply with regard to establishing the boundaries of regional land councils which may be formed. I believe there are a number of factors which militate against defining boundaries *a priori* in the manner of those for ATSIC regional councils or as proposed by Reeves, and then establishing regional land councils within them. Most importantly, this would pre-empt and constrain the *organic growth of regional political forms which is a critical element of self-determination*, and the eventual political legitimacy and success of these organisations within the Aboriginal domain. The indigenous recognition of mutual interests on a regional basis and a consequent application for the formation of a regional land council is, in my view, far preferable to the more or less arbitrary definition of regional structures based on bureaucratic imperatives.

### **Possible amendments to the Land Rights Act**

I turn now to a brief consideration of the implications of the principles outlined above for the Land Rights Act. In essence, section 21(3) allows for the establishment of separate land councils by the Minister if a substantial majority of the residents of the relevant areas support it. The requirement in section 21(3) for a majority sits uneasily with the 'informed group consent' provisions in the Act pertaining to proposed developments on Aboriginal lands. It can also be argued that it is incompatible with the principles of traditional land

ownership and decision-making within Aboriginal societies, since it conflates the categories of those with traditional rights in the region and those who may only be residents in it. I would further argue that the potential establishment of a new body to deal with such proposals is itself a development of fundamental importance and should be brought in line with other provisions of the Act.

In summarising these arguments I would propose that section 21(3) be amended as follows:

1. The power of the Minister to establish separate land councils should be replaced by that to establish regional land councils of the existing land councils.
2. The process should be initiated by application to the Minister, as it is at present.
3. There should be the capacity to devolve all or some of the functions and powers of land councils under sections such as 23, 35 and 40 to regional land councils, and arguably the capacity to revoke them in the event that the regional land council becomes dysfunctional.
4. This capacity should not be achieved by amending section 28, relating to the delegation of powers by land councils themselves, but by giving the Minister the discretion to determine which functions and powers are to be held by a regional land council.
5. In deciding which functions and powers would be appropriately held by a particular regional land council, the Act could require that the Minister 'have regard' to such factors as:
  - the degree of support demonstrated for the establishment of the regional land council by those with traditional affiliations to the region;
  - the number of Aboriginal people affected by the proposal;
  - the appropriateness of the region in terms of Aboriginal traditions;
  - the capacity of the Aboriginal people concerned to undertake the relevant responsibilities; and
  - the financial and organisational implications of the proposed devolution to a regional land council, including any additional funding required, and the implications for the effectiveness or otherwise of the functions undertaken by the current land council for that region.

I believe that a non-prescriptive approach would be more flexible and likely to achieve sound outcomes. It should allow for the gradual devolution of powers as a regional body gains in competence and legitimacy within its region.

6. The requirement for a 'substantial majority' to be in favour of a proposal to establish a regional land council should be removed and replaced by one based more on 'informed group consent' of those with traditional rights in the region in accordance with other sections of the Act.

7. Amendment of section 21 to allow for the establishment of regional land councils with the potential for different functions in particular cases would require consequential amendments to other sections of the Act. This is clearly a matter for legal advice, but it would appear, for example, that section 23 relating to functions of land councils, and section 35 relating to the use and distribution of moneys received by a land council under section 64, would require amendment to refer to land councils or their regional land councils.

## Conclusions

In conclusion, the system proposed by Reeves of 18 autonomous regional land councils operating over predetermined regions would reduce rather than enhance control by Aboriginal local groups over their lands. A more effective option would be to have a flexible and region-dependent capacity to devolve a range of core functions to regional land councils which would operate under the umbrella of the existing land councils, while being essentially autonomous in terms of decision-making over the lands in their region.

It may prove fruitful to also consider strengthening the roles of the land trusts in this regard, by requiring their memberships to be more clearly representative of the traditional land-holding groupings in their region, and perhaps giving them the power to sign off on agreements, while still preserving the roles of the land councils as agents of the traditional owners through operating the informed consent provisions.

Such a scheme has the advantage of relative simplicity. It would go a long way towards meeting the demands for the existing large land councils to become more responsive to the demands of their constituents across the various regions, and would not suffer from the problems inherent in the Reeves proposals. Combined with a policy of outsourcing non-core services of the existing land councils, it would produce lean, efficient and accountable organisational structures which protect the rights of Aboriginal traditional land owners, while delivering the certainty that the wider system demands.

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## 14. Municipalising land councils: land rights and local governance

**Martin Mowbray**

In October 1997 John Herron, Minister for Aboriginal Affairs, announced the appointment of John Reeves to review the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act). Reeves's report, *Building on Land Rights for the Next Generation*, was presented in August 1998. A central feature of the proposed transformation of land rights in the Northern Territory is to bring the operation of the Act within the effective jurisdiction of the Northern Territory Government. To accomplish this, Reeves has proposed a range of reforms that will make the proposed 18 regional land councils replacing the existing land councils into types of local governments, primarily responsible for public services delivery at the local level.

The Northern Territory Government has welcomed the Reeves Report, as it welcomed the appointment of the reviewer. The former Chief Minister, Shane Stone, vigorously defended the selection of Reeves (Northern Territory Parliamentary Record, 1.12.97: 3), having previously described him as 'a very close personal friend' (ABC Radio, 10.10.97). After the report was published, Stone told the Legislative Assembly that it was 'comprehensive', 'profound' and 'far reaching' and proposed a motion calling on the Commonwealth to prepare amendments to the Land Rights Act following Reeves's recommendations. This was to be after negotiations with his government. In passing the resolution, the government rejected an opposition amendment that Aboriginal people should be included in the process (Northern Territory Parliamentary Record, 13.10.98).

### Concurrent developments

In a media release of 12 November 1998, the then Minister for Local Government announced a commitment to a major reform in the Northern Territory's local government system. Amongst 'highlights of the reform agenda' were amalgamations and greater resource sharing and 'greater emphasis on recognition, where appropriate, of the role of traditional Aboriginal decision making structures'.

In a subsequent ministerial statement ('Reform and development of local government', Parliamentary Record, 17.2.99) the new Minister confirmed planned changes to the Territory's local government arrangements, particularly for rural and remote areas. The Minister suggested that populations of over 2,000 people are necessary to enable councils to achieve 'adequate levels of administration' (p. 4). This move is significant because, having spent 20 years establishing 32 community government councils, the Northern Territory Government now wants to dismantle them, along with the 29 community councils which are not incorporated under the Local Government Act. Instead of 61 small local councils, some with populations under 200, the government now wants many fewer regional councils.

Some simple calculations are instructive. By starting with the total population of all Northern Territory local government areas (176,863), subtracting the population of the six municipalities (140,555) and then the two 'Special Purpose Towns' (5,425) (Northern Territory Grants Commission, 1998: 25–27), we are left with 30,883 people for all community councils. Divide this number by 18, the number of proposed regional land councils, and we get an average population of 1,715. However, due to some under-enumeration in remote communities, Reeves (1998: Appendix H, 2) suggests that a higher total population may be more accurate, perhaps around 36,000. This figure was cited by the Northern Territory Government as the population served by the 61 community-based councils (promotional overheads for the Next Step campaign, Alice Springs, 12.3.99). This would yield an average population of 2,000 – the Minister's ideal for remote local government. Such figures emerge as pretty much in line with the populations of the projected regional land councils. A population of 1,800 happens to divide the 18 proposed regional land councils, half on either side. The average population of the projected regional land councils, including the major municipal centres, is 2,417 (Reeves 1998: 208).

Without necessarily inferring any collusion in this confluence of developments, it is clear that, at the least, the Northern Territory Government has in mind some sort of integrated regionalised service delivery system that would replace present community government councils and the land councils, and the Aboriginal and Torres Strait Islander Commission's (ATSIC) regional councils.

Specific detail about the kind of model the government has in mind occurs in a recent briefing document (Department of Housing and Local Government, Division of Local Government 1999) which picks up and brandishes 'a proposal to the 1997 review of the *Aboriginal and Torres Strait Islander Commission Act 1989* submitted by the Tiwi Land Council'. In this, the three community government councils (with a total population of 2,175) on Bathurst and Melville Islands would be collapsed into a single Tiwi Community Government Council. The new council would receive funds currently used by ATSIC and the Tiwi Land Council, and would envelop functions of ATSIC (health services and housing) and the 'land functions under the *Aboriginal Land Rights (Northern Territory) Act 1976*'. Along with the land council, the Land Rights Act would disappear in favour of some other legislative regime. It is explicitly suggested that this could be the Local Government Act. A government variation on this proposal entails calling the new council a 'regional council' and instituting an associated 'council of elders, based on a property/traditional authority franchise, which would form a body of review, with a power of veto on matters encroaching on the Aboriginal domain, i.e. land, culture and tradition'.

## Hypothesis

The Land Rights Act has embodied 'landmark' provisions for Aboriginal people to obtain, retain and manage their traditional lands. It has provided a reasonably independent means for the advocacy of Aboriginal interests in the hostile political context of the Northern Territory. In this paper I pursue the hypothesis that there is a very thinly veiled aim to severely degrade the existing land rights provisions to a scheme based on a rationalised

system of local government under the firm control of the Territory Government. There is strong evidence that there is a well-developed strategy for reassertion of a colonialist system for the superintendence of Aboriginal affairs in the Northern Territory.

## Background

The use of local government schemes to try to manage colonisation processes has a considerable history. Between 1946 and 1975 the Australian Government administered Papua New Guinea under a United Nations Trusteeship Agreement. Its responsibility was to prepare the country for independence. The Australian *Papua New Guinea Act 1949* provided for the establishment by ordinance of village councils and the Native Village Councils Ordinance was approved the same year. The official local government policy was written by D.M. Fenbury, the Senior Native Affairs Officer who, in *Native Local Government Memorandum No. 1* (1952), enunciated four main objectives. Allowing for a few differences in expression for their colonialist sentiment and programmatic focus, these would not have been entirely out of place in the Reeves Report (see, for example, Reeves 1998: 580–83):

- to provide a medium for teaching natives to assume a measure of responsibility for their local affairs in accordance with democratic procedure;
- to provide area machinery and local funds for extending and co-ordinating social etc. services at village level and hence to enlist active native support in endeavours to raise native living standards;
- to face the native population squarely with the facts that progress is inseparable from good order and industrious habits, and that social services have to be paid for;
- to prepare the way for ultimately fitting the native people, in a way they can understand, into the Territory's political system (Fenbury 1978: 195; Downs 1980: 103).

It is instructive to note that in drafting the local government regulations, Fenbury attributed much of the Native Village Councils Ordinance to borrowings from the Tanganyika Territory Native Authorities Ordinance (Fenbury 1951: 185). With equal frankness, Australia's Minister for Territories Hasluck saw local councils as a means 'to contain and divert indigenous political action' (Fitzpatrick 1980: 106). Fenbury was also keenly interested in obviating the possibility of the kind of unrest experienced in other colonial situations (Waddell 1979: 191). Other key motives included the need to introduce a framework for collecting local taxes and building and maintaining local public infrastructure and services.

The same Minister for Territories presided over such developments in both Papua New Guinea and the Northern Territory. The Department of Territories had responsibility for the introduction of local government in Papua New Guinea and oversaw the introduction of the earliest forms of local government in the remote Aboriginal settlements of the Northern Territory in the 1960s. Many of its staff became officers of the Department of

Aboriginal Affairs and of the Northern Territory Government. Old Papua New Guinea hands were especially noticeable in the Territory's former Department of Community Development and Office of Local Government.

## **Self-government and community government**

The Northern Territory became self-governing in July 1978. Within months its Legislative Assembly included provisions for community government in its Local Government Ordinance. This has been continued in its successive Local Government Acts (1979, 1985, 1993). Since the first Aboriginal community converted to community government, the Territory Government has cited its community government option as primary evidence of its commitment to Aboriginal self-determination.

The Territory Government has pressured communities to incorporate as community government councils through such means as promoting propaganda that is often misleading, badgering by government officers, offering financial inducements that are sometimes overstated and commonly misunderstood, denigrating alternative forms of incorporation, and offering inferior conditions of funding to communities incorporated as associations. Government officers dealing with Aboriginal communities simply refused to take 'no' as an answer. Under the Northern Territory Local Government Grants Program, the formula for allocating operational subsidies to communities incorporates 'a status weighting of 30 per cent which recognises formal community government incorporation under the LGA' (1997–98 *Annual Report*: 10). Complementing this relatively substantial monetary inducement, the Northern Territory Government amended its Associations Incorporation Act (Part IIIB) in 1995 to subject incorporated associations performing local government functions to provisions of the Local Government Act.

With Commonwealth collusion, the Territory Government has successfully opposed various moves by communities to incorporate under the, albeit problematic, Commonwealth *Aboriginal Councils and Associations Act 1976*. Though this Act was developed as complementary national legislation to the *Aboriginal Land Rights (Northern Territory) Act 1976* to allow culturally appropriate incorporation, governance and management of Aboriginal communities, it was not considered by Reeves. In his First Report (1973: paragraph 168, 51), Woodward had proposed a special system to allow the incorporation of 'local and regional land-owning bodies', 'town councils having a local government role, and various enterprises'. The councils provision in the Act has never been used. A report by the Australian Institute of Aboriginal and Torres Strait Islander Studies on the Act for ATSIC, commending vitalisation of the provision, has been with the Minister since 1997 (ATSIC advice, 4.3.99).

## **Territory motives**

At first the Northern Territory Government's enthusiasm for converting Aboriginal organisations to community governments could be understood in significant measure as a wish to reduce financial support to Aboriginal communities (Mowbray 1986). Reductions

in the level of its grants from the Federal Government in the 1980s inspired the Territory Government to pass on these cuts to Aboriginal councils. The government proposed that communities were to help make up the shortfalls through collection of rates, service charges or rent. This theme of local self-reliance continues, but it has been supplemented by the motive of bringing Aboriginal land under Territory control. It has not suited the government that under the Land Rights Act decisions about land use, including development, have to be made with the informed consent of the traditional owners.

At the same time, the Territory Government has been clearly interested in expanding its sphere of jurisdiction at the expense of the Central and Northern Land Councils. The latter have been rightly seen as a major obstacle to the government's complete political domination of the Territory. Community government has been a potential alternative to land councils, as well as an organisational base for the promotion of breakaway land council movements. In its submission to the review (Reeves 1998: 73), the Territory Government acknowledged that it supported people opposed to the mainland land councils. It provided 'financial assistance of up to \$50,000 to groups seeking to establish new land councils'.

### **Legislative conflict and deficiencies in the Local Government Act**

A lingering obstacle to the promotion of community government in Aboriginal communities, particularly the 25 or so on Aboriginal land, has been the conflict between the Land Rights and Local Government Acts. The purpose of the Local Government Act is defined in its preamble as 'to continue to provide for the constitution of municipalities and community government areas and for the election of self-governing authorities to control municipalities and community government areas'.

Given the terms of the Land Rights Act, this statement, referring as it does to the control of land, is manifestly problematic. This is reinforced by other contents of the Local Government Act. Section 97(2) sets out allowable functions of community government schemes. These functions include physical infrastructure such as roads, electricity, water, sewerage and community amenities. They also include services such as commercial development, communications, health, education, welfare, housing, animal control and so on. In addition, the functions make provision for rates and charges.

In shaping the Local Government Act the Northern Territory Government has consistently failed to consult the land councils or Aboriginal people in general. Nor has the government proved amenable to accommodating proposals for amendment of the Local Government Act to render it consistent with the Land Rights Act. In administering the Local Government Act the Northern Territory Government has almost invariably failed to consult land councils about its plans or dealings in relation to setting up and designing individual community government schemes. The Local Government Act does not even recognise the Land Rights Act or its provisions for administration of Aboriginal land.

Overall, the Northern Territory Government has used its Local Government Act to undermine the Land Rights Act and bypass land councils. Instead of recognising the authority and rights of traditional owners, the Local Government Act provides for election

of councils by and from persons on the relevant electoral roll. This means that Aboriginal and non-Aboriginal people who have no particular affiliation with the land in question other than current residence may vote and be elected to the council. The council may, in turn, make decisions that are inimical to the interests of traditional owners of the land.

The Local Government Act fails to meet the standards of consultation with and accountability to Aboriginal owners and interests built into the Land Rights Act. Under the Land Rights Act the land councils have explicit obligations to seek and reflect the informed views of their Aboriginal constituents (for example, section 23(3)).

In failing to meet or reflect such criteria, the Local Government Act is at odds with the Land Rights Act. The Local Government Act does not require any particular consideration for Aboriginal people and their land. Community government constituencies are made up of electors of any race, cultural affiliation or background. A number of other problems are also evident in the Local Government Act, including the following:

- Section 119 purports to allow members and officers or employees of councils to enter any land in the council area 'for the purpose of making an inspection or for carrying out any work required or authorised to be done' under the Local Government Act. No provision is made for obtaining the consent from owners of the land.
- Council operations are subject to the authority of the Northern Territory Minister for Local Government. For example, under section 181A, the Minister may direct a council to take action in respect of 'an irregularity in the affairs of a council'. Just what constitutes an irregularity is not defined in the Act.
- Councils may make by-laws that are consistent with the Act under section 182. Such by-laws are not bound to have the consent of traditional land owners or reflect the wishes or interests of Aboriginal people. Appropriate consultation is not even necessary.
- Under section 242, the Northern Territory Minister for Local Government may appoint inspectors of local government with powers to investigate the documents of a council and the organisation and management of the council's activities. Inspectors may report on such matters as in their own opinion 'call for special notice' and 'shall inquire into and report on matters which the Minister requires to be investigated'.

These matters give rise to serious conflicts between the Aboriginal Land Rights Act and the Local Government Act. Under the latter Act there is considerable power that can be used to diminish the rights of traditional owners and other Aboriginal people who are provided for through the Land Rights Act.

Where there is inconsistency between the Acts the Land Rights Act, as Commonwealth legislation, prevails. However, the provisions of the Local Government Act that are at odds with the Land Rights Act have an insidious effect. They confuse and mislead. They create ambiguities and uncertainties. They create additional opportunities for individuals hostile to Aboriginal interests to infiltrate Aboriginal communities. In addition, through

disingenuous assurances about self-determination bolstered by one-off financial inducements, false impressions and false hopes are generated.

Cumulatively, such processes reflect the Northern Territory Government's disregard for the established rights of Aboriginal people. More insidiously, the ever-increasing discordant provisions in the Local Government Act suggest or presage government intent to erode Aboriginal rights. Through the Local Government Act the purposes of the Land Rights Act are subverted.

In a few isolated instances, particularly in the Top End of the Territory, individual community governments have displayed preparedness to respect the prerogatives of traditional owners of the land on which the council operates. Land use agreements have been developed and appropriate rental or royalty payments negotiated with assistance from the Northern Land Council.

### **Reeves's responses**

In chapter 18 of his report Reeves (1998) addresses the seventh term of reference for the review, 'the application of NT Laws to Aboriginal land'. He opens a short section concerning the Local Government Act with the assertion that 'There appears to be no reason in principle why the Local Government Act can not operate concurrently with the Land Rights Act'. Reeves (1998: 397) claims that they 'serve quite different purposes'. This assurance is difficult to reconcile with the inconsistencies, or even with Reeves's (1998: 410) subsequent statement that 'it is not clear where the duties of the Land Councils end and those of the Local Government Councils begin'.

Reeves fails to address the numerous criticisms of the Local Government Act and its implementation in the Northern Territory over the years. He dedicates a one-paragraph reply (1998: 399) to the Schedule of 22 'inconsistencies between the Land Rights Act and the Local Government Act' submitted by the Northern Land Council (included as Appendix R). This paragraph (and the short section on local government) is rounded off with the statement that 'many of these difficulties are likely to disappear ... because the Regional Land Councils will be required to address these issues and the role of the local community councils in their region as part of their primary functions'.

Notwithstanding this prospect, Reeves (1998: 412) proposes to resolve any problem of inconsistency by amendments to the Land Rights Act to explicitly apply Northern Territory laws and regulations to Aboriginal land. This is irrespective of any negative effects on the use and occupation of the land. This may well be in breach of the International Covenant on Civil and Political Rights to which Australia is a party. Article 27 carries a positive obligation on states to ensure that minorities have a right to enjoy their own culture.

## **Acknowledging problems with community government**

Apart from the critical issue of compatibility with the Land Rights Act, local government in Aboriginal communities can hardly be seen to be operating well, even in the government's terms, as local administrative and service delivery organisations. Implying blame on remote communities or councils themselves, the Northern Territory Office of Aboriginal Development (*Annual Report 1995–96*: 18) has conceded that:

many Aboriginal communities and their elected councils often appear largely dysfunctional from a service delivery point of view. They have evidently not been empowered by the principles of self-determination, expected as they are to administer themselves and to be accountable to a wider system which, on the basis of outcomes, is still largely incomprehensible to many of them. In some situations, relating to community management, it must be asked whether self-determination, in its implementation, is equivalent to abandonment.

In her statement of 17 February 1999, the Minister for Local Government recognised difficulties in finding enough 'qualified, competent and ethical' staff. Loraine Braham (Northern Territory Parliamentary Record, 17.2.99) said that 'at least 10 councils are in significant financial or management difficulty' and that 'small councils receive insufficient funds to undertake significant projects'. In a following speech, a former Chief Minister, Steve Hatton, acknowledged that community government had been thrust on people who do not understand its nature or role.

## **Current developments**

The Minister for Local Government has noted a national trend towards council mergers and recorded the belief that larger councils increase efficiencies and reduce costs. As if it was self-evident, she suggested that larger councils allowed people in rural and remote areas to exercise more power – the obverse of what Reeves had said about land councils. It was, she said, now time for change (Northern Territory Parliamentary Record, 17.2.99).

As revealing as the aim to regionalise councils and have an ideal size of 2,000 people was the Minister's stress on the need to link 'traditional (Aboriginal) decision-making structures and service delivery structures'. Former Chief Minister Hatton reinforced this in a follow-on speech. Hatton contemplated the possibility of 'a bringing together of the ATSIC structures with the local government structures'. He went on to speculate about land trusts and land councils also being brought into 'some consistent framework' with local government and ATSIC, though he does not say exactly how.

## **Anticipating the future**

The concept of some sort of 'nexus' between community governments and land councils dates back more than a decade. In a 1989 paper a senior Territory government officer canvassed the idea of combined provision for supply of local services and land use administration. The officer observed that 'there appears to be emerging a correlation

between community government and separate land councils' (Phegan 1989: 97). Phegan noted the trend to reducing the number of local governments in the states and alleged 'economies of scale'. He expressed prophetic reservations about how they are multiplying in the Northern Territory. Under the heading 'Models for the Future', Phegan promoted the idea of regional local government councils. He suggested that such prospects would be enhanced by moves to split up the Central and Northern Land Councils. He went on to speculate about 'coincident land and community government administrations' (Phegan 1989: 86, 95, 97). Phegan's prescience is evident in both the Territory Government's intentions to regionalise community governments and John Reeves's proposals to fragment the mainland land councils into regions of commensurate size and to reduce their functions and degree of autonomy to something like those of local government.

### **Reeves's local government scheme**

In many respects Reeves's proposals for regional land councils parallel the structure and activities of local government. At the most basic level there is a considerable coincidence in the proposed population sizes for the respective councils. Though the Northern Territory Government wants larger local councils, and Reeves smaller land councils, they both seem to think that a population in the vicinity of 2,000 is ideal.

It is most interesting that Reeves's regional mapping and profiling was carried out by the Northern Territory Department of Lands, Planning and Environment. The relevant map of the projected regions is titled 'Northern Territory Council's Regions and Land Tenure'. The reference to councils here and on the map itself is very ambiguous. Though the map forms part of the Reeves Report, the Northern Territory Government claims copyright.

There would appear to be some overlap in the discovery of regions as providing the best fit with traditional Aboriginal decision-making structures. Reeves finds that the population group best placed to control land and (regional) land councils is 'the regional community'. The Central and Northern Land Councils, he argues, are unsuited to effective representation of Aboriginal interests (Reeves 1998: 140, 147, 174, 203). Reeves (1998: 139) suggests that this observation is based on 'new anthropological thinking'.

The claim that there is new anthropological evidence supporting a change to smaller regional land councils has drawn careful refutation from senior anthropologists (for example, Morphy 1999; Sutton 1999). Sutton counsels against a search for a "best fit" with tradition and real practice'. He argues that there is 'no point in replacing undue emphasis on one level of responsibility with undue emphasis on another'. The idea of a 'single true locus of land tenure' is 'mythical' (Sutton 1999: 16–17).

Apart from underlying justifications for regionalised responsibilities for service delivery, a number of specific features in Reeves's proposals for regional land councils correspond with typical features of local government systems. Resemblances take the form of there being:

- locally appointed statutory committees meant to undertake only a prescribed range of functions, mostly local services (1998: 597–98);

- responsibility to implement Territory and Commonwealth government determined programs at the local level (1998: 601);
- authorisation for minimal independent entrepreneurial activity (1998: 597);
- heavily regulated revenue raising and borrowing and prerogatives and relatively little discretionary expenditure (1998: 597);
- enfranchisement based on residence or some other interest in land – but not property ownership *per se* (1998: 595);
- boundaries justified on the basis of some sort of notion of ‘regional community’ taking into account geography and affiliation or identification (1998: 140, 209);
- functional subservience to central government and an agency with inspectorial duties (1998: 608);
- ultimate ministerial control, including power to appoint an administrator to take over from a council deemed ‘dysfunctional’ (1998: 609);
- centralised regulation of chief executive officer appointments, where regional land council chief executive officers might have the minimum eligibility requirements of those for ‘Community Clerks under the LGA’ (1998: 596); and
- very limited rights for appeal against intervention (1998: 213).

One of the clearest functional similarities between the proposed regional land councils and local government is that Reeves’s idea of Aboriginal governance and self-determination is really about provision of fairly conventional services within a tightly regulated framework. He (1998: 589) opines:

To be effective, institutions of Aboriginal governance and self-determination must enhance the ability of Aboriginal Territorians ‘to do and be what they have reason to value’ by

- improving their education, health and housing status,
- combating alcohol and substance abuse among Aboriginal Territorians, and
- opening up improved opportunities for their socioeconomic advancement.

Reeves’s proposed regional land councils would have little real local autonomy. Any advocacy role is invisible. He (1998: 591) envisages ‘a central Aboriginal body to develop effective programs for the social and economic advancement of Aboriginal Territorians that can be delivered by regional Aboriginal bodies in a framework of strictly-audited expenditures and outcomes involving both the central and regional bodies’. To counter criticism about the limited extent of Aboriginal control, Reeves (1998: 589) points out that ‘All local government bodies in Australia are self-determining only within the scope of statutory schemes established under their State or Territory Government’s Local Government Acts’. Given the servility of most local governments, this defence is hardly convincing.

A number of other recommendations are geared to force the proposed regional land councils into an association with local government that is increasingly seamless. Reeves proposes that regional land councils:

- address 'the role of local community councils in their region as part of their primary functions' (1998: 399);
- 'join in cooperative arrangements with community government councils' (1998: 597);
- 'share facilities and expenses' with community government councils (1998: 599); and
- be obliged to provide any community council or other suitable body in its region a rent free sub-lease for the whole Aboriginal community (1998: 510).

Reeves (1998: 611) also proposes that a Northern Territory Aboriginal Council provide 'training and support' for staff of community government councils' along with regional land council staff.

Aside from what is officially envisaged, experienced observers of local government could anticipate emergence of strong similarities in the incidence of traditional nepotism and jobbery. Confirming this expectation, Sutton (1999: 18) refers to the proposed regional land councils as 'Aboriginal boroughs', warning of a 'proliferation of regional fiefdoms'. This eventuality would bring the regional land councils into line with what has always been observable in local government.

## Conclusion

A major thrust of the Reeves Report is to politically marginalise land councils. To achieve this the concept of regional land councils has been developed. The envisaged structures appear very much more like local governments than land councils. That is if land councils are to be understood as anything like their present form and in the nature recommended by Woodward, and provided for in the Whitlam Government's initial Bill and in the Act passed by the Fraser Government.

At much the same time as the Reeves Report was released the Territory Government embarked on a process to restructure its community government councils, particularly in terms of populations and regional jurisdictions. The new regional councils are also meant to embrace 'traditional Aboriginal decision-making structures'.

Without inferring a conspiracy, Reeves's recommendations and Territory government policy are clearly on a convergent course. To this point it is evident that, should Reeves's recommendations be adopted, the two types of organisations may share boundaries, Aboriginal constituencies, accommodation and plant, staff and administrative infrastructure or support, as well as service delivery obligations and other programs. They may also share leadership and various responsibilities for decisions about land use, as well as a minister.

If the Northern Territory Government is to attain ownership of the Land Rights Act or the wholesale delegations under the Act that Reeves contemplates (1998: 493), it would

be a short step for it to fuse the Land Rights Act and the Local Government Act, still in the name of self-determination. The process of destroying the Aboriginal Land Rights Act would then be complete.

The simplistic promotion of local government as a self-determining enterprise masks the colonial process. The use of local government to mainstream political participation and services fits Beckett's (1988: 14) elaboration of the notion of welfare colonialism, that is, where liberal democratic institutions are used to solicit or channel the assent of subjects. The political incorporation of an indigenous minority, such as traditional Aborigines in remote settlements, is sought through special structures – in this case, local government or regional councils. The institution of local government is geared to create a political constituency contained by the same political, legal and ideological structures as constrain non-Aborigines. Its assimilationist effects are overlaid by the liberal rhetoric of community, local democracy and administrative rationality and development.

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# 15. The Reeves Review and the prospects of a Northern Territory 'partnership'

**Tim Rowse**

John Reeves argues that the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act) can be amended to bring Northern Territory politics from polarisation to 'partnership'. The intentions and effects of these amendments would be reflected in a preamble which would state as one of the Act's purposes: 'to encourage the formation of a partnership between Aboriginal people in the Northern Territory and the Government and people of the Northern Territory' (Reeves 1998: v, 76, 592).

When the Reeves Report entertains the possibility of a new 'partnership' in Northern Territory politics, the reader can adopt one of two responses.

On the one hand, 'partnership', with its connotations of mutual trust and ready cooperation, may be taken as no more than a loose expression referring to a less polarised political atmosphere. In such a reading of Reeves, it would be futile to submit his use of the term 'partnership' to close scrutiny.

On the other hand, the reader might choose to take the term 'partnership' literally and to subject its use by Reeves to close examination. It would be consistent with some hopeful tendencies in Australian political life to take Reeves at his word. Since 1979, people on both sides of Australian politics have discussed the possibility of a formal agreement between indigenous and non-indigenous interests. In the Northern Territory's constitutional debate, the place of Aboriginal land owners and Aboriginal political institutions in the Territory's political system is inescapably at issue. In this context the idea of a Northern Territory 'partnership' is worth our serious consideration. Accordingly, I will take Reeves at his word and evaluate his use of the notion of 'partnership'.

I see three difficulties in Reeves's elaboration of his 'partnership' proposal.

## 1. Who would be the parties to the partnership?

No partnership can be vague about who are the parties to it. Yet Reeves is not consistent in his formulations on this point. Consider the following six formulations:

... a partnership between Aboriginal people in the Northern Territory and the Government and people of the Northern Territory ... (1998: v, 76, 592);

... a partnership between Aboriginal Territorians and the Northern Territory Government ... (1998: 65);

... between Aboriginal Territorians and other Territorians ... (1998: 71);

... between Aboriginal Territorians, the Northern Territory Government and other Territorians ... (1998: 71);

... a co-operative and mutually beneficial partnership relationship between Aboriginal Territorians and the Northern Territory and Commonwealth Governments, and their agencies (1998: 492);

... a strong partnership between Aboriginal and other Territorians and the Northern Territory and Commonwealth governments ... (1998: 606).

The significant differences between these formulations show that Reeves has not resolved at least two important issues.

**a. Is the Commonwealth a party to the partnership or not?**

As the Land Rights Act is a statute of the Commonwealth, the Commonwealth undeniably has a role in rewriting the Act which is, in effect, the charter of the partnership. As well, certain recommended amendments (for example, those concerning the leadership of the proposed Northern Territory Aboriginal Council) specify a continuing political role for the Commonwealth in the implementation of the amended Act. Both levels of government are to be parties, it would seem, making it a tripartite partnership. Reeves's formulations which present only two parties – the Northern Territory Government and Aboriginal people – should be ignored, as they are merely careless drafting.

**b. Who, in the Northern Territory, are the Aborigines to be in partnership with?**

Reeves's lack of clarity on this point is evident in the inconsistencies among formulations scattered over 12 pages (1998: 65–76).

between 'Aboriginal people in the Northern Territory and the Government and people of the Northern Territory ...' (1998: 76)

or

between 'Aboriginal Territorians and the Northern Territory Government' (1998: 65)

or

'between Aboriginal Territorians and other Territorians' (1998: 71)

or

'between Aboriginal Territorians, the Northern Territory Government and other Territorians' (1998: 71).

The inconsistencies among these formulations betray an unresolved anxiety on Reeves's part about how to refer to 'Territorians' and 'people of the Northern Territory'.

In some formulations the Northern Territory is made up of two kinds of Territorians – 'Aboriginal Territorians and other Territorians'. Presumably, the Northern Territory Government represents both because, together, they comprise 'the people of the Northern Territory'. However, in the first formulation the word 'other' has been left out, making it seem that the partnership would consist of one partner called 'Aboriginal people of the Northern Territory' and another partner called 'the Government and people of the

Northern Territory'. This is an unhappy lapse in drafting as it carries the 'Hansonite' implication that the Aboriginal people of the Northern Territory and the people of the Northern Territory are two distinct entities, with the Northern Territory Government representing the latter, but not the former. Finally, one formulation does not mention the Northern Territory Government at all. If the partnership is to be 'between Aboriginal Territorians and other Territorians', which side does the Northern Territory Government represent? If the Northern Territory Government represents both, then is the partnership a relationship internal to that government?

Reeves is quite clear about who should be the Aboriginal party to the partnership. It is the proposed Northern Territory Aboriginal Council (NTAC). However, NTAC's autonomy within the partnership is substantially compromised. NTAC's composition will initially be determined by the two parties with which it is in partnership. That is, NTAC's council is to be appointed by the Commonwealth Government and the Northern Territory Government 'from a list of nominations of Aboriginal Territorians made by Aboriginal Territorians'. Once chosen in this way, the councillors would elect their chair and select their chief executive officer 'from a list of candidates approved by the relevant Commonwealth and Northern Territory Ministers' (Reeves 1998: 606–7). Although Aboriginal Territorians would be allowed to elect the council within five years, in the formative years of the partnership the leadership of one of the parties to the partnership would be determined, to a significant extent, by the other parties to the partnership.

## **2. What concessions by each antagonist would make them see benefits in a partnership?**

Reeves (1998: 73) suggests that the new partnership could be effected 'with little sacrifice being required by either group'. (In the passage I am about to examine, the drafting lapse which I noted above determines that Reeves fails to consider the 'sacrifice' that the Commonwealth might have to make to join the partnership.) The 'sacrifices' Reeves expects from the Northern Territory Government and from Aboriginal interests are hardly equivalent. As he makes clear, Aboriginal Territorians would enter the partnership only by agreeing to accept changes to the Act which would weaken their title and determine for them the means of their political representation. Reeves plots a much easier path into partnership for the Northern Territory Government.

The Northern Territory Government would have to:

- 'accept and actively support the principle of Aboriginal land rights and the legitimate rights and interests of Aboriginal Territorians' (Reeves 1998: 73).

However, is a government which does this 'sacrificing' anything? These words refer to nothing more than the constitutional obligations of any Northern Territory Government: to uphold in letter and spirit the Commonwealth statutes by which its powers are defined and its actions constrained. And, according to the Northern Territory Government's own statement of its policy, quoted by Reeves (1998: 74), it has adopted already the stance recommended for it by Reeves. Is Reeves asking us to

believe that to maintain that stance should be recognised as a 'little sacrifice' by the Northern Territory Government? I see no 'sacrifice'.

- 'allow Aboriginal Territorians ... to make and implement decisions about ... education and training, housing, health and community initiatives to combat Aboriginal disadvantage'; and 'support Aboriginal Territorians with adequate funds and advice in this new role' (Reeves 1998: 73).

In fulfilling this item of Reeves's partnership charter, the Northern Territory Government would merely be acting consistently with a prior commitment, namely, its 'specific and unqualified' (Reeves 1998: 585) endorsement of recommendation 192 of the Royal Commission into Aboriginal Deaths in Custody. So no adjustment of policy, let alone 'sacrifice', is required here. The word 'adequate' is likely to be a sticking point, however. Its meaning is too open-ended to be considered binding on either party. If its application to concrete cases is ever disputed by the two partners, then there would have to be arbitration. Reeves's proposed partnership is silent on what arbitral process should be set up for such eventualities.

### 3. Facilitating the partnership

To the extent that disagreement among partners is possible, arbitral procedures are desirable features of partnerships. Reeves does not propose any for his Northern Territory partnership. He does see a role for the Commonwealth in facilitating this partnership relationship, but his brief remarks fall short of suggesting an arbitration process. In any case, as I have argued above, the Commonwealth should be regarded as a partner, not as a facilitator of the partnership.

It would be in keeping with Australian traditions of law and government if the task of arbitrating the proposed partnership were entrusted to a judicial authority. However, in remarks he makes elsewhere in his report, Reeves casts doubt on such exercises of judicial authority. In his chapter on 'Statehood' Reeves (1998: 426) warns of the risks of entrenching in a Northern Territory constitution the rights conferred by the Land Rights Act.

The judiciary will be called upon to interpret and apply the entrenched rights. This task involves judges making controversial decisions that often include the reconciliation of competing policy objectives. Judges are not accountable to an electorate. The stature of the courts may be affected by the controversy. Judges are required to follow legal principle. They are not always as well placed as politicians to assess competing policy objectives. The more specific the rights that are entrenched in a constitution, the more likely there will be a disproportionate shift in the distribution of power from the legislature to the judiciary. Community values change over time and any specific entrenched constitutional rights might not continue to enjoy the substantial support of the community.

I see no reason why this warning about the perils of judicial determination would not apply equally to any inscription, in statute or in constitution, of the terms of Reeves's proposed

Northern Territory 'partnership'. That is, Reeves's opinion seems to be that the partnership is of sufficient importance to be proclaimed in the Northern Territory Constitution and in a new preamble to the Land Rights Act, but it is not sufficiently weighty to be spelled out in a form which would make it justiciable. In Reeves's partnership model, one or two of the government partners would arbitrate disputes with their Aboriginal partner. The only possible independent arbitrator, the judiciary, is unacceptable to Reeves.

Let me conclude by summarising my three main points. In Reeves's Northern Territory partnership proposal:

1. It is not clear who Reeves considers to be the parties to the potential partnership.
2. The inducement to join the partnership is unequal: the Aboriginal land owners have to give up a lot, but Reeves is unable to point to anything which the Commonwealth Government and Northern Territory Government would have to give up.
3. There are no proposals for the independent arbitration of unresolved disagreements in the partnership.

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## 16. Land rights at risk

**Ian Viner**

I have lived with land rights since 1976 when, as Minister for Aboriginal Affairs, I introduced the *Aboriginal Land Rights (Northern Territory) Bill* into the Commonwealth Parliament. Even earlier than that, in 1974–75, I was a member of the Coalition Opposition Aboriginal Affairs Committee at the invitation of the late Sir Condor Laucke and the late Senator Neville Bonner. We formulated a policy which was taken to that fateful 1975 election. I was familiar with the April 1974 Second Report of the Woodward Aboriginal Land Rights Commission and the background to it. When I was appointed Minister for Aboriginal Affairs by Malcolm Fraser at the 1975 election and received the inevitable telephone call from journalists asking me what I was going to do as Minister, I said instinctively that the first thing I was going to do was to pass land rights into law. That project dominated my activities as Minister from the time I walked through the doors of the Department of Aboriginal Affairs.

Over the intervening 23 years I have maintained my interest in land rights in the Northern Territory. In commenting on the Reeves Report I have to be careful lest I just have some nostalgic interest in land rights and feel that nobody can tamper with ‘my Act’. I hope that the critical examination I have made of the Reeves Report has no sense of nostalgia about it nor any sense of protecting my work. Rather, I have looked at Reeves’s proposals for what should be done with the Land Rights Act from the point of view of what land rights has achieved for the Aboriginal people of the Northern Territory and what they themselves want for the future. I have tried to elucidate the intellectual underpinning of the Reeves Report as well as the social purposes of its recommendations. I have written a much more extensive comment upon the Reeves Report which is about to be published in the *Indigenous Law Reporter*. I offer these observations in the context of the cross-disciplinary perspectives of this volume and the conference on which it is based.

I must say at the outset that I find the intellectual underpinnings of the Reeves Report extremely unsatisfactory. I am a lawyer. I was quite devastated therefore that Reeves would seek to use Justice Blackburn’s decision in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 to justify his recommendations but ignore the contradictory decision of the High Court in *Mabo v QLD (No. 2)* (1992) 175 CLR 1. I found it mind-boggling, intellectually, that Reeves would do that. Then I find it quite unsatisfactory that Reeves proposes to use ‘reform’ of the Land Rights Act as an instrument of social engineering in such fields as education, health, housing and employment. Those social objectives are the responsibilities of government, not of land rights. It is as if the government would say that because of the property I own it is my responsibility to use that property for such social objectives. Reeves would say to the Aboriginal people of the Northern Territory, ‘you have to use your land rights and the government will direct you to use them’ to replace the responsibilities of government. Land rights is very much at risk, very seriously at risk.

At the conference I was very keen to listen to the advisers to Reeves, Dr John Avery and Professor Richard Blandy, and to Mr John Reeves QC himself to understand both the underpinning and the objectives of their recommendations. A great deal was revealed by each of them; their contributions confirmed the worst fears of many of us that land rights is at risk. Risk management is required. The Aboriginal people of the Northern Territory have to engage in risk management if they are to preserve and protect the land rights achieved under the Land Rights Act over 20 years ago. I sense that the Aboriginal people of the Northern Territory and their supporters are reeling from the frontal attack on land rights which the Reeves Report represents.

When Reeves and his advisers talk about health, education, employment, housing, the gaining of skills, and economic and social advancement for Aboriginal people, their argument is that there has been no advancement in those areas in over 20 years and it is all the fault of land rights. In their view, the institutional structures of land rights have not been successful in achieving desired levels of social and economic advancement and, therefore, the land rights model established by the Land Rights Act is bad; it is ineffective in achieving these social objectives and, therefore, has to be fundamentally changed. In Reeves's analysis, the income derived from the use of traditional Aboriginal land has to be redirected to the purposes of social and economic advancement, as identified by him. To achieve that redirection, Reeves proposes that the land rights structures established by the Land Rights Act (which are under Aboriginal control) should be demolished and replaced by new structures which would be effectively under the control of the Northern Territory and Commonwealth governments.

The new structures and government controls recommended by Reeves must be seen for what they are – non-traditional Aboriginal structures. The proposed new regional land councils and the Northern Territory Aboriginal Council (NTAC) are non-traditional structures, even though they will be manned by Aboriginal people. The fundamental difference between what constitutes land rights under the Land Rights Act and what Reeves proposes is that the traditional owners will no longer have the say over the use of Aboriginal land and the land councils will no longer be independent of government; the Northern Territory and Commonwealth governments will sit on top of the new regional councils and NTAC, with power to ultimately control the social and economic use of Aboriginal traditional land in a way not permitted to them under the Act.

So, with those kinds of intellectual underpinnings and social purpose objectives, how did John Reeves and his advisers go about constructing their recommendations and putting them forward in a way in which they hoped would be persuasive to the Commonwealth Government and, through the Government, to the Commonwealth Parliament? The intellectual processes by which they created their model can be subjected to scrutiny. I elaborate them below.

There are 12 steps by which Reeves and his advisers have pursued their objectives:

- They say that they are following Woodward because he is the person who devised land rights in the first place.

- They assert that the Land Rights Act failed to include key policy objectives, namely, social and economic advancement from the income generated from the use of traditional land.
- They discredit the anthropology which underpinned the Act, target Professor W.E.H. Stanner, use Justice Blackburn in *Milirrpum* and forget about the High Court decision in *Mabo (No. 2)*.
- They use acceptable ‘new anthropological thinking’ which is said to support the arguments and objectives of the report, for example, the work of Dr L.R. Hiatt.
- They call in the aid of the views of anthropologists experienced in land rights, such as those of Dr Nicolas Peterson and Professor Nancy Williams, but distort those views in the process.
- They target and remove traditional owners from the new model (cleanse them from it, even).
- They attack the so-called large land councils with classic political rhetoric – they are ‘bureaucratic’, they are ‘legalistic’, they are ‘remote’, they have become ‘political’.
- They appeal to the politics of reconciliation, by calling for a ‘partnership’ with government to overcome the disadvantage of the Aboriginal people of the Northern Territory. In other words, they appeal to the social purposes to which governments perceive the money received from the use of traditional lands should be put.
- They cast doubt on the accountability of land councils and those who receive money from the use of traditional land, namely, the royalty associations.
- They clear the decks for new social and economic engineering with the creation of new ‘institutions of governance’ – NTAC and new regional land councils – to replace the Northern and Central Land Councils, and subject these new institutions, which become the instruments of political and economic power over the life of the Aboriginal people of the Northern Territory, to the control of the Northern Territory and Commonwealth governments.
- They sell the message to those who have shown their disinterest (to put it kindly) in native title and the rights of indigenous ownership of traditional lands in Australia but who have a fashionable interest in (though national responsibility for) the social and economic advancement of Aboriginal people, namely, the Commonwealth Government.
- Lastly, they pull in the young people by appealing to ‘the next generation’ – and place a lovely photograph of an Aboriginal child on the cover of the Reeves Report.

These seem to me to be the 12 steps by which the Reeves Report has been intellectualised, the arguments constructed and the recommendations put forward; these are the intellectual and political thought processes of Reeves and his advisers. Indeed, we heard these processes expressed with great clarity at the conference by Richard Blandy and John Avery, and by John Reeves himself. When Richard Blandy was talking I was transported

back to Whitehall in 1788 or 1829 and imagined Blandy was a civil servant writing the instructions to Governor Phillip for his landfall at Botany Bay or to Governor Stirling for his journey to the Swan River settlement. I said to myself as I listened:

*these are not instructions to Governor Phillip and Governor Stirling to respect the occupation by the indigenous inhabitants of Australia of the land to be settled and accord to them their common law rights as new subjects of the King of England but, rather, instructions given on the basis that these are uncivilised people, who have no customary laws nor proprietary rights to the land they occupy, who need new institutions of governance established for them for their own social and economic good.*

Displayed in what Blandy said is, I believe, a reversion to the thinking of pre-land rights days, an intention to ignore or a desire to overturn the very basis of *Mabo (No. 2)*; thinking which seeks to ignore completely what anthropologists and others have come to understand, after many painful misunderstandings, about who these people – the indigenous people of Australia – are, what their social systems and customary laws are, and how they live their lives in contrast to the habits of the people who have taken their lands and settled this continent.

Reeves's thinking, and the input of his advisers, reflects a reversion to pre-Woodward days, pre-land rights days. Is this how far Australia has come since the 1967 referendum; since 1974 when Woodward published his Second Report; since 1976 when the Land Rights Act passed through the Commonwealth Parliament and since *Mabo (No. 2)* was decided by the High Court in 1992? I earnestly hope not. I thought that the events of 1967, 1974, 1976 and *Mabo (No. 2)* reflected a fundamental change in attitude but, regrettably, that does not seem to be the case in some quarters. I hesitate to think that the Aboriginal people of the Northern Territory, let alone indigenous people of Australia everywhere, are going to be socially engineered yet again by governments. I would have thought that the lesson of the Stolen Generation experience was that the Aboriginal people have been socially engineered once too often.

We all cry out for improved basic living conditions and improved social statistics for the Aboriginal people of the Northern Territory, and indigenous people right around Australia and in the Torres Strait Islands. But the destruction of traditional ownership of Aboriginal land is not the way to go, and fundamentally it is not overstating the case to say that Reeves's recommendations are built upon the destruction of traditional ownership of Aboriginal land in the Northern Territory. I would think that, sensibly, you would hold on very firmly to what has been achieved by the return of traditional lands to Aboriginal ownership under the Land Rights Act and build on Aboriginal tradition as it is defined in the Land Rights Act. The Native Title Act (as amended in 1998) also supports that traditional ownership.

When I read the Reeves Issues Paper (Reeves 1998: Appendix B), published as a guide to the Review of the Land Rights Act, the alarm bells rang for me because of two propositions Reeves put forward. One was that in my second reading speech (Hansard, 4 June 1976: 3081) one of my main themes had been that the Act was a balancing of interests between 'Aboriginal aspirations and the competing interests of the wider Australian community'

(Reeves 1998: Appendix B, B8, paragraph 38, B9, paragraph 39). I had written the speech, with a special contribution from Professor Stanner and now, 22 years later, somebody was telling me what in truth was going through my mind at the time. So I re-read my second reading speech and my second speech (Hansard, 17 June 1976: 2779) that were given before the Act was passed. I could not find in either speech this theme of a balancing of interests. Rather, what I found was the reaffirmation of what Woodward had said, that the giving of land rights was the doing of simple justice (Woodward 1974, paragraph 3 (i)) to the Aboriginal people of the Northern Territory. That was the 'balancing of interests' expressed in my second reading speech. I was not saying that Parliament had set out to find some sort of a balance on a pendulum between Aboriginal people and the wider community but, rather, that simple justice required giving to the Aboriginal people their land rights within Australian law.

The second proposition put forward by the Reeves Issues Paper was that there was a serious omission from the main themes of my second reading speech: the opportunity to achieve economic development from the land rights about to be granted. But then, having said that, the Reeves Issue Paper went on to discern from the Act an overall purpose of 'providing for a means of economic development of Aboriginal people in the Northern Territory' (Reeves 1998: Appendix B, B9, paragraph 39 and B10, paragraph 44). Now, that was a convenient as well as an incorrect interpretation of the purposes of the Act. Convenient because it then provided the basis for Reeves to argue for the social and economic engineering of land rights; incorrect because the long title to the Act clearly expresses that its principal purpose is to be the grant of land rights itself. I put some submissions to Mr Reeves exploding both propositions but, nevertheless, he pursued his intention to recommend the measures for social and economic engineering that we find in his report.

The Land Rights Act was not and was never seen to be enacted to achieve economic development as an end in itself. It was, as I have said, enacted to bring simple justice to the Aboriginal people. It was also intended to recognise, by the grant of land rights titles to traditional land, what I described in my second reading speech as 'the unique and distinct system of customary law of the Aboriginal people by a bill which deals with the recognition of land rights' (Hansard, 4 June 1976: 3082). So it was that in 1976 the Fraser Government recognised that what we were doing was introducing Aboriginal customary law into Australian law. With my encouragement, that is how Bob Ellicott, as Attorney-General at the time, then made the reference to the Australian Law Reform Commission with respect to the recognition of Aboriginal customary law (Law Reform Commission 1986). That was 15 years before *Mabo (No. 2)*, which recognised the customary laws of the indigenous people of Australia as part of the common law of Australia. In that historical line, one can see the profound importance to the Aboriginal people of the Northern Territory, and to all the indigenous peoples of Australia, of 23 years of land rights ushered in by the Land Rights Act.

There are other telltale signs of the thinking and the purposes underlying the Reeves Report. One is in chapter 7 where Reeves (1998: 144) asks, 'how will Aboriginal people address the problems posed by the inevitable extinction of the small, localised, patrilineal

groupings that ideally hold the highest authority in relation to land?’ The target of that question, of course, is the traditional owners who, under the Act, are the decision-makers for the use of Aboriginal traditional land but whom Reeves would eliminate from that role. I don’t know who it was – Reeves, Avery, Blandy, or some other of Reeves’s advisers – who had the idea that traditional owners will inevitably become extinct within Aboriginal society, but Reeves himself must take responsibility for it. I thought to myself when I read this passage,

*is that not out of the same mould of thinking as the theories of inevitable extinction and government schemes for breeding out the colour practised in the Northern Territory, Queensland, Western Australia and other States of Australia this century to solve what they called the ‘Aboriginal question’?*

When, in a report of this kind, the author talks about ‘inevitable extinction’ of traditional ownership, it seems to me that he thinks no differently from those who were in charge of government administration in the Northern Territory in pre-land rights days. This kind of thinking, as Aboriginal people in the Territory know only too well, existed in force right up until the 1970s.

Now the second telltale sign lies not in the report itself, but in two statements made to the conference by Reeves’s advisers, Richard Blandy and John Avery. Blandy (1999: 18) referred in the first and third points of the summary of his conference paper to the need to change Aboriginal Territorians’ ‘current institutions of governance’. Avery, in comment to the conference, said that under the Land Rights Act ‘there is no plan to maximise the benefits to Aboriginal people from land rights, no policy’ so we ‘have to reorient the machine’. Thus, according to Avery, it is necessary to engage in some social engineering, some re-engineering of the ‘machine’ that was created by the Land Rights Act.

These telltale signs, reflected in the Reeves recommendations, signal the recalibrating of the levers of political, legal and economic power over the use of traditional Aboriginal land, to create a new land rights model by whitefella reform according to Northern Territory whitefella values of the worth of land, with whitefella political structures under whitefella government direction, with whitefella capacity to take away Aboriginal land by compulsory acquisition and whitefellas telling Aboriginal people what is good for them. This is not self-determination by the Aboriginal people, for the Aboriginal people of the Northern Territory – it is whitefella social engineering from which we have moved a long way over the last quarter of a century since Woodward and the Land Rights Act – or so I had thought.

So, land rights is seriously at risk. We should make no mistake about that. Land rights is at risk from the policy-makers, from some intellectuals and from the politicians. This has to be taken very, very seriously.

One of the very fundamentals of Woodward was that the land rights to be granted and the system of Aboriginal land tenure he recommended, established as it was by the Land Rights Act, should not be taken away without Aboriginal consent (1974: paragraphs 4 (a) and (b), 8 and 9). It is a fundamental proposition repeated over and over again by

Woodward and reflected by me in my speeches to Parliament that, with the return of traditional lands to their ownership, the future of Aboriginal people is their choice, not the choice of governments by social engineering. It is their choice what to do with their traditional lands; their traditional ownership and the titles to traditional land which they hold should not be changed except with their consent.

Woodward's recommendations for periodic review of the Land Rights Act contain the same proposition (1974: paragraphs 762 and 777 (x)). He did not recommend a review of the kind which was referred to Reeves. A review was to be a formal conference between the land councils and the government, who would sit down together to look at anomalies that might have arisen, retaining the essential flexibility that was built into the Act to accommodate change. Woodward did not envisage a review which could or would lead to fundamental change to the Act itself or to the system of Aboriginal land title it established. Woodward's recommendations for periodic review were reflective of his stated aim that there should be no change without the consent of the Aboriginal people. There is no sense of that from the Reeves Report nor, so far, from the Parliamentary Committee which is now receiving submissions upon the Reeves Report.

I also ask myself: *'how are the Aboriginal people of the Northern Territory whose land is at risk going to be put in a position where they can make an informed choice about the Reeves changes?'* Are the recommendations, for example, going to be translated into the languages of these people? Woodward saw the need for translation of his main recommendations (1974: paragraph 777 (xi)). How is the Reeves Report to be communicated to them? How are they going to be allowed to make a decision? If they make the decision for themselves by saying 'we don't want this', who will listen? The Parliament of Australia should listen to the Aboriginal people because in the end it is their land, it is their Act and their consent has to be given to any changes to it. The Australian Constitution cannot be changed without the consent of the people. For the Aboriginal people of the Northern Territory, the Land Rights Act has the same quality, is of the same profound importance.

Politicians currently in government have an ear cocked for talk of 'social and economic advancement'. In 1999 they do not have an ear cocked for the cry 'land rights, land rights'. Therefore, great energy must be exerted to save land rights, to save what the Land Rights Act granted.

I feel that the Aboriginal people of the Northern Territory are going to suffer a great deal of heartache, a great deal of pain all over again as they cope with the Reeves Report. They are going to feel a great deal of frustration, and maybe despair, that having successfully fought for land rights and self-determination so many years ago, they have to mount the fight all over again. I am sure that they will do it with great energy. The Aboriginal people are great survivors. I am sure they will succeed.

To the Aboriginal people I would say: never forget you have many friends around Australia in all walks of life. Muster their energies in support of the justness of your cause. Land

rights has come a very long way in 25 years, and the social engineers must not be allowed to take land rights away. Your destiny is yours – not theirs!

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# Index

## A

- Aboriginal & Torres Strait Islander Commission (ATSIC)
  - complaints to CERD, 9, 94–7
  - effect of local council mergers, 174
  - effect of NTAC proposals, 142–4
  - financial assistance for conference, vii
- Aboriginals Benefit Reserve (ABR), 4, 113–21
- Aborigines
  - constitutional conventions, 92–4
    - see also individual headings*
  - accountability, public moneys & accountability, 123–5
  - acquisition & compensation issues, 65–73
    - acquisitions power, 66
    - assets of royalties, 70–1
    - Elliott stockyards, 72–3
    - grants & native title extinguishment, 68–70
    - land trusts & regional land councils, 66
    - modification of rights, 67–8
    - ownership of fish & fauna, 71–2
- Altman, Jon, 10, 109
  - biography, 195
- anthropology
  - aspects of land rights legislation, 25–31
  - concept of regionalism, 34–8
  - contribution to Land Rights Act, 29–30
  - permits & access to land, 46–8
  - public policy, 6–8
  - submission to Parliamentary Standing Committee, 39–51
- Australian Anthropological Society
  - conference, v
  - financial support, vii
  - submission to Parliamentary Standing Committee, 39–51

## Australian National University

- Centre for Aboriginal Economic Policy Research (CAEPR), v
- Department of Archaeology & Anthropology, v

## B

- Batchelor Resolutions, 9

## C

- Centre for Aboriginal Economic Policy Research (CAEPR), v
- Committee on the Elimination of Racial Discrimination *see* United Nations
- consultation with Aboriginal people 22–3
- cultural benefits of land rights *see* social, cultural & economic costs & benefits of land rights
- cultural protection, racial discrimination & related issues, 73–85
  - abolition of land trusts, 80–1
  - application of Northern Territory Laws, 77–8
  - erosion of protection, 81
  - International Covenant on Civil & Political Rights, 75–6
  - international relations, 73–6
  - low-level exploration licences, 79–80
  - protection against Northern Territory acquisition, 78
  - racial discrimination, 81–5
  - reservation of fish & fauna on Aboriginal lands, 78–9
  - validity of the Racial Discrimination Act, 85
  - weakening of access & permits, 76–7

## D

- devolution
  - hazards of localism, 7
  - land councils, 7, 33, 51
  - regions, 161–3

## E

economic costs & benefits of land rights  
*see* social, cultural & economic costs & benefits of land rights  
education & skills, future for Aborigines, 15–6

## F

### Federal Government

potential embarrassment, 9, 74, 84–5, 173  
response to CERD, 97

### finance

financial framework of the Act & Reeves evaluation, 109–18  
financial framework restructure, 109–21  
Reeves model 116–18  
regional land council funding model, 144  
reviewing financial aspects of the Act, 118–20  
*see also* land councils, smaller land councils: value for money  
*see also* local organisations & the purpose of money  
*see also* royalties

## G

Galligan, Brian, 11  
biography, 195

## H

history & overview of the Report, v–viii, 11  
House of Representatives, Standing Committee on Aboriginal & Torres Strait Islander Affairs  
Aboriginal position on authorising entry to lands, 63  
Inquiry into Reeves Review, v–viii  
Nabalco, attitude to land access, 63

necessity for further submissions, 97  
submission by Australian Anthropological Society, 39–51  
terms of reference, 39

Human Rights & Equal Opportunity Commission (HREOC)  
international scrutiny, 94  
submission, 95

## I

indigenous stakeholders, reaction to the report, v

International Convention on the Elimination of All Forms of Racial Discrimination, 9, 74, 81–5

International Covenant on Civil & Political Rights, 9, 73, 75, 173

### international relations

international scrutiny, 94–7  
potential embarrassment for the Government, 9, 74, 84–5, 173  
response of the Federal Government to CERD, 97

## K

Kalkaringi Statement, 9

## L

### Land Rights Act

consultation with Aboriginal people, 22–3  
contribution to the Act, 29–30  
financial framework, 109–12  
legal issues of the Reeves report, 65–87  
possible amendments, 163–5, 173  
purpose, 12–3, 15  
reform, viii, 30–1  
reviewing financial aspects of the Act, 118–20  
role in socioeconomic development, 101–2  
*see also* land rights

- land councils
    - alternative models, 151–2
    - devolution, 7, 33, 51
    - distribution of monies, 38
    - land councils & Aboriginal tradition, 160–1
    - municipalising land councils, 167–78
    - size, 17–22
    - smaller land councils: value for money, 141–52
    - see also* regional land councils
  - land rights
    - history of legislation, 25–31
    - land rights & local governance, 167–78
    - land rights & mineral rights of non-Aboriginal Australians, 132–3
    - land rights at risk, 187–94
    - land rights issue, 90–1
    - politics of reform, 8–10
    - reducing disputation, 159–60
    - social, cultural & economic costs & benefits of land rights, 13–5, 99–108
    - see also Land Rights Act*
    - see also* statehood, land rights & Aboriginal law
  - land
    - decision-making, 7
    - degrees of ownership, 7–8
    - distinction between ownership & residence, 157–8
    - distribution of monies, 2–3
    - financial inequalities, 6
    - ownership versus land use, 2–3
    - permits & access, 46–8, 63–4
    - see also* permission
  - legal issues, 65–87
    - acquisition & compensation issues, 65–73
    - constitutional development, 91–2
    - cultural protection, racial discrimination & related issues, 73–85
    - judicial power issues, 86
    - natural justice & judicial review, 86
    - payments to royalty association, 86
  - legislation
    - appropriateness & benefits, 27–9
    - history, 25–31
  - Levitus, Robert, 123
    - biography, 195
    - local government
      - deficiencies in the Local Government Act, 171–3
      - parallels with regional land councils, 175–7
      - reform in the Northern Territory, 167–78
  - local organisations & the purpose of money, 123–9
    - future of remote areas, 127–9
    - local-level beneficiaries, 125–7
    - public moneys & accountability, 123–5
  - localism & devolution, 7
- M
- Martin, David, 155
    - biography, 195
    - methodological flaws in the Reeves analysis, 100–7
  - mining
    - delays & uncertainty in mining, 134–40
    - land rights & mineral rights of non-Aboriginal Australians, 132–3
    - low-level exploration licences, 79–80
    - mineral ownership, 3–4
    - negotiations for mining, 131–40
    - policy implications, 137
    - royalties, 3–4
  - Morphy, Frances, 10
  - Morphy, Howard, 33
    - biography, 195
  - Mowbray, Martin, 167
    - biography, 195

## N

- Nettheim, Garth, 89
  - biography, 196
- Northern Land Council
  - accountability of royalty
  - associations, 4
  - submission to the Review, v
- Northern Territory Aboriginal Council (NTAC), 2, 21–2, 33, 40, 106–7
  - abolition of land trusts, 80–1
  - distribution of monies, 2–4
  - proposed role, 155
  - relationship with regional land councils, 45–6
  - running costs, 4, 142–4
- Northern Territory
  - distribution of Aboriginal settlement, 105–6
  - local government, reform, 167–78
  - prospects of a partnership, 181–5
  - self-government & community government, 170–1

## P

- partnership, prospects of a partnership with the NT Government, 181–5
- permission
  - access by non-Aboriginal people, 63
  - existing permit system, 63
  - nature of permission, 53–64
  - procedures, 57–63
  - property, distribution & rights, 53–7
  - weakening of access & permits, 76–7
  - see also* land
- Peterson, Nicolas, 25
  - biography, 196
- policy
  - policy implications in mining rights, 137
  - public policy & anthropology, 6–8
  - Reeves Report as public policy, 11–23, 109
- Pollack, David, 141
  - biography, 196
- public moneys & accountability, 123–5

## Q

- Quiggin, John, 131
  - biography, 196

## R

- racism
  - access to land, 64
  - racial discrimination, 81–5
  - validity of the Racial Discrimination Act, 85
  - see also* cultural protection, racial discrimination & related issues
- regional land councils
  - abolition of land trusts, 80–1
  - analysis of proposed regional land council, 145
  - anthropological perspective, 30, 34–8
  - conditions for membership, 41–5, 50
  - disadvantages, 18–22, 50
  - distribution of monies, 2–3, 38
  - estimating costs, 149–51
  - financial aspects of existing & recommended regimes, 141–6
  - parallels with local government, 175–7
  - Reeves critique of the present system, 40
  - regionalism, 33–8
  - relationship with NTAC, 45–6
  - resource requirements, 146–7
  - running costs, 4–5
  - stability, 5
  - staffing requirements, 4, 147–9
  - see also* land councils
- regionalism & socioeconomic advancement, 155–65
  - devolution of powers to regions, 161–3
  - proposal for greater regional autonomy, 160–5
  - role of NTAC, 155
  - self-determination, tradition & regional institutions, 155–60

remote location, 103–6  
    future of remote areas, 127–9  
risks to land rights, 187–94  
Rowse, Tim, 1, 181  
    biography, 196  
royalties  
    assets of royalty associations, 70–1  
    mining royalties, 3–4  
    payments to royalty associations, 86

## S

self-determination, tradition & regional institutions, 155–60  
    assumptions on regionalism, 156–7  
    distinction between ownership & residence, 157–8  
settlements, security of tenure, 45  
social, cultural & economic costs & benefits of land rights, 99–108  
    distribution of Aboriginal settlement in the Northern Territory, 105–6  
    lack of statistical baseline, 101  
    NTAC, 106–7  
    remote location, 103–6  
    role of the Act in socioeconomic development, 101–2  
    social & economic outcomes, 106  
    socioeconomic disadvantage, 102–3  
    time frames for measuring impact, 101  
socioeconomic advancement *see* regionalism & socioeconomic advancement  
statehood, land rights & Aboriginal law, 89–98  
    constitutional conventions, 92–4  
    constitutional development, 91–2  
    international scrutiny, 94  
    land rights issue, 90–1  
    statehood agenda, 89  
Sutton, Peter, 39  
    biography, 196  
    evidence to Standing Committee Inquiry, v

## T

Taylor, John, 99  
    biography, 197  
terms of reference of the Review, 11–12  
tradition *see* self-determination, tradition & regional institutions  
traditional owners  
    anthropology & public policy, 6–8, 26  
    birth of the concept, 25  
    definition, 33, 40, 48  
    status, 5–6

## U

United Nations Committee on the Elimination of Racial Discrimination (CERD), 9, 93  
    ATSIC complaints, 9, 94–7  
United Nations Working Group on Indigenous Rights, Draft Declaration of the Rights of Indigenous Peoples, 17

## V

Viner, Ian, 187  
    biography, 197

## W

Willheim, Ernst, 65  
    biography, 197  
Williams, Nancy, 53  
    biography, 197  
Woodward Commission, background, 25



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Jon Altman	David Pollack
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In *Building on Land Rights for the Next Generation: Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976* (the Reeves Report) John Reeves QC proposes fundamental and controversial changes to land rights law in the Northern Territory. *Land Rights at Risk?* is the published outcome of a conference – ‘Evaluating the Reeves Report: Cross Disciplinary Perspectives’ – convened in response by the department of Archaeology and Anthropology and The Centre for Aboriginal Economic Policy Research, The Australian National University, and held at Fenner Hall, Canberra 26–27 March 1999.

In this monograph the broad scope of the conference is maintained, and the sixteen published papers represent a cross-section of disciplines from the social sciences and humanities including social anthropology, political science, law, economics, public policy, geography and social work. The majority of the contributors have a long-term professional involvement in land rights issues. Taken as a whole this volume provides a comprehensive and informed critique of the Reeves Report, and it will be essential reading for all those concerned with the Reeves recommendations and their implications.