Inquiry into the Reeves Report on the Aboriginal Land Rights (Northern Territory) Act

Submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs

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REVIEWING THE REVIEW

Comments on Some Recommendations Arising from the Review of the *Aboriginal Land Rights (Northern Territory) Act* by John Reeves QC

Introduction

The *Aboriginal Land Rights (Northern Territory) Act 1976* has been the subject of a number of reviews since its inception, most recently that undertaken by John Reeves QC in 1997-98. Reeves' appointment as Review Head was announced by Senator John Herron, Minister of Aboriginal and Torres Strait Islander Affairs, on 8 October 1997. Eight relatively specific Terms of Reference for the Review were provided by the Minister. However, the ninth and final item in the Terms of Reference vested a remarkable degree of discretion in the Review Head. It read as follows:

> In particular the review will consider.....
>
> (ix) any other matters relevant to the operation of the Act.

A measure of public scepticism in the likely impartiality of the Review Head was subsequently created when the Hon. Shane Stone MLA, Chief Minister and Attorney General of the Northern Territory, appointed Mr Reeves a Queen's Counsel.

Some of the most strident criticisms of the current *Aboriginal Land Rights (Northern Territory) Act 1976* contained in the subsequent Report to Minister Herron, "Building on Land Rights for the Next Generation", are those concerned with the permit system for gaining access to Aboriginal land. The major recommendations based on those criticisms are the abolition of the existing permit system and the application of the Northern Territory Trespass Act.

In reviewing the effectiveness of the legislation in achieving its purpose, Reeves notes that:

- The main purpose of the Act was to grant traditional Aboriginal land in the Northern Territory to, and for the benefit of, Aboriginals.
- The other purposes of the Act included:
  - to recognise traditional Aboriginal interests in, and relationships to, land, and;
  - to provide Aboriginal people with effective control over activities on land so granted.
- The Act and associated Northern Territory legislation have been very effective in granting traditional Aboriginal land in the Northern Territory for the benefit of Aboriginal people and in recognising traditional Aboriginal interests in, and relationships with, land.
- The Act has been less effective in providing Aboriginal people with effective control over activities on their land.
- The main purpose of the Act is likely to be achieved in the near future and one of the other purposes has been achieved. As to the remaining purpose, there is a need to reform the Act to provide Aboriginal people with effective control over activities on their land.

The major aim of this review is to provide a critique of some of the findings and recommendations contained in "Building on Land Rights for the Next Generation" which refer particularly to the current permit system for entry onto Aboriginal Land in the Northern Territory.

The following text reviews these findings and recommendations and has been endorsed by the Executive Committee of Dhimurru Land Management Aboriginal Corporation at a meeting conducted 10 March 1999. The Corporation relies heavily upon the existing permit provisions to effect sustainable resource management regimes on specific areas of Aboriginal land in North-East Arnhem Land. These areas are widely acknowledged as being of high conservation value and have been available for conditional recreational use by the general public, through the existing permit provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976* and the Northern Territory *Aboriginal Land Act*, for over 15 years.

Current Permit Provisions

Reeves (1998) provides a summary of the legislative provisions relating to permits and access to Aboriginal land in Chapter 14 of "Building on Land Rights for the Next Generation":

> Section 70 of the Land Rights Act makes it an offence for a person to enter or remain on Aboriginal land except in the performance of a function under the Act, or otherwise in accordance with the Act, or a law of the Northern Territory. Section 71 of the Act provides Aboriginal people with the right to use or occupy Aboriginal land in accordance with Aboriginal tradition.....
>
> Pursuant to s. 73(1)(b), the Northern Territory Legislative Assembly passed the *Aboriginal Land Act (NT)* in 1978. Part II of that Act deals with entry onto Aboriginal land. Section 4 makes it an offence for any person, other than an Aboriginal entitled by Aboriginal tradition, to enter onto or remain on Aboriginal land, or to use a road thereon, unless issued with a permit or otherwise authorised in accordance with the Act. There are four persons or authorities that are authorised to issue permits under the *Aboriginal Land (NT) Act.* They are: the Land Council for the area concerned; the traditional Aboriginal owners for the area concerned; the Administrator of the Northern Territory where a person has applied to a Land Council or traditional Aboriginal owners for a permit to use a road and either the application has been refused or the permit has not been issued within a reasonable time; and the relevant Northern Territory Minister, in relation to certain government employees. It is significant that the Land Councils and the traditional Aboriginal owners have the power to revoke each other's permits.[1]

Why the Review Head considers it significant that the Land Councils and traditional owners should have reciprocal rights to revoke each other's permits is an issue for conjecture, as Reeves fails to elucidate on the point. Plausible reasons for such reciprocal revocation rights, and a discussion of these issues is contained in the later section of this discussion paper titled "Divisive".

In conjunction with other omissions which may have served to present a more accurate depiction of the situation regarding the issue of permits, Reeves fails to note that the relevant sections of the *Aboriginal Land (NT) Act* (5.5 and 5.6) also include provisions for these parties to revoke their own permits.

It is perhaps unsurprising, though more significant in the context of traditional owners exercising effective control over their land, that neither the Land Councils nor the relevant traditional owners have the capacity to revoke permits issued by the Northern Territory Administrator or the responsible Northern Territory Minister.[2]

Summary of Review Head's Findings & Recommendations

Reeves (1998) outlines his perceptions of the current permit system in his "Conclusion" to Chapter 14, "Permits and Access", in "Building on Land Rights for the Next Generation":

> As is noted above, the permit system operating in the Northern Territory in relation to Aboriginal land is costly, ineffective, confusing, divisive and burdensome and, in addition, is a racially discriminatory measure. It is not widely supported by Aboriginals and it is not necessary to ensure an equal enjoyment of human rights and fundamental freedoms of Aboriginal people. The permit system should, therefore, be abolished and in its place amendments should be made to the Trespass Act (NT) to place Aboriginal landowners in a similar position to, and with similar rights to, other landowners in the Northern Territory. Moreover, this new approach will give Aboriginal landowners more control and it will be simpler, less costly, more effective and easier to enforce than the present permit system. This will satisfy all of the NLC's concerns about the present system, i.e. its uncertainty, the lack of Aboriginal control and the difficulties with enforcing it.

Closer scrutiny of the contents of the Report raises questions in regard to a suite of assumptions and assertions contained in the above statement.

"Costly"

Part II of the Synopsis of "Building on Land Rights for the Next Generation" includes the Review Head's analyses of the impact of the legislation in terms of social, cultural and economic costs and benefits in relation to various sectors of the Northern Territory community.[3]

It is in relation to "other Territorians" that Reeves perceives a case whereby the costs of the Land Rights Act have "probably" exceeded the benefits.

> • The main cost imposed on other Territorians by the Land Rights Act has been caused by restrictions on access to Aboriginal land.
>
> • The permit system imposes unnecessary transaction costs on innocent and legitimate interests in access that impose no costs on owners of, or dwellers on, Aboriginal land.
>
> • Attempts to build joint management arrangements to meet the wishes of various legitimately-interested parties (such as the commercial and sports fishing industries, for example) have been supported by the smaller Land Councils but not by the NLC.
>
> • The Government has been faced with unacceptable restrictions and an unacceptable negotiating position on behalf of the public in its ability to gain access to Aboriginal land for important public purposes.
>
> • Reforms to access would not only pay dividends for Territorians at large, but would reduce opposition to Aboriginal land rights because they would no longer impose such heavy costs on non-Aboriginal (and many Aboriginal) Territorians.
>
> • The costs of (the) Land Rights Act have probably exceeded their benefits for other Territorians because of these unnecessary costs that have been imposed on them.

The background justifications for these assertions are provided in Chapter 25 of the Report, "Social, Cultural and Economic Costs and Benefits", where Reeves acknowledges the "daunting proportions" of such an assessment and the "lack of systematic research" to provide the basis for any conclusive findings.

Some of the difficulties experienced by Reeves in undertaking this cost-benefit analysis are highlighted by his statements in assessing the "Costs and benefits of the Land Rights Act for Aboriginal Territorians".[4]

The section of Chapter 25 devoted to "other Territorians" specifically utilises material submitted to the Review by the Northern Territory Government (NTG), the Northern Territory Fishing Industry Council (NTFIC), the Amateur Fisherman's Association of the Northern Territory (AFANT) and the Northern Territory Chamber of Commerce and Industry. All excerpts used by the Review Head in this section of the Report imply a negative view of restrictions that traditional owners and their representative bodies can, and occasionally do, opt to apply in response to legitimate approaches for access to Aboriginal land.

The Review Head identifies 'transaction costs' in gaining access to and use of land for public purposes as being among the principal costs incurred by "other Territorians", primarily the Northern Territory Government one would assume on the basis of the amount of space devoted to case studies from the NTG's submissions in Chapter 25 of the Report. However, the majority of the material presented in relation to public purpose projects and infrastructure appears to be more germane to compulsory acquisition of Aboriginal land, rather than the permit system.

Reeves includes the following excerpt from the NTFIC submission to the Review:

> [However], [t]he NTFIC experience of the NLC has been predominantly one of negativity and hostility to industry based on ideology rather than reality, decision making on political grounds that do not necessarily reflect the wishes of the majority of land owners in certain regions, a bureaucratic approach that sometimes defies description and logic, as well as what can only be described as a racist attitude to non-Aboriginals on some occasions.

The Review Head does not subject these claims to any critical appraisal, nor does he provide any substantiating information that may be contained elsewhere in the NTFIC's submission. They are simply presented in this context as being self-evident facts.

Reeves includes the following excerpts from the AFANT submission to the Review. These excerpts warrant particular comment to highlight his apparent abrogation of any responsibility to provide critical comment or clarification of errors or conjecture contained in the AFANT submission. Points which, again, are presented as being self-evident facts.

> Recreational fishermen are very concerned that 'land claims' now extend along more than 95% of the Northern Territory coast line (including islands) and if granted would enable sea claims over all the waters adjacent to these coastal areas.

In fact, 95% of the coastline is not subject to land claims. Approximately 85% of the coastline (including islands) is already held under inalienable freehold title by the relevant traditional owners, i.e. land claims to these areas have been processed and title granted or included in Schedule 1 of the 1976 Act. The remaining percentage of coastline subject to claim is unknown at the time of preparing this submission.

Any correlation between successful land claims and the likely success of claims to adjacent seas is a matter of conjecture on the part of the AFANT.

> Many of these 'land claims' were lodged just before June 30 1997 ... and appear to be ambit claims blanketing the foreshores of the NT in the hope of being paid compensation for intertidal land and water the claimants have never owned but share with other residents of the NT.

As previously stated, the majority of the coastline, including intertidal land, was already held under title prior to 30 June 1997. The members of Dhimurru Land Management are unaware of any compensation having previously been paid in respect of intertidal land successfully claimed and there is no reason to believe that any such payments might be made in respect of successful claims to the intertidal zone in future.

Previous successful claims to intertidal land have been based upon the capacity of the Aboriginal claimants to demonstrate traditional ownership of the areas in question. This fact makes a mockery of the AFANT's contention that Aboriginal people never owned the areas in question. One might well ask who owned this intertidal land before "other residents of the NT" arrived to press a claim for a share in the ownership?

> If claims are allowed, then at best permits will have to be purchased ... or fishermen and visitors could be excluded all together with no right of appeal.

The question of payments for permits is pure conjecture on the part of the AFANT. However, it is worth noting that marine transit for recreational fishermen is largely unrestricted in NT coastal waters.

> If sea claims/closures are allowed then very few areas of the NT coast will be left for tourists to visit ...

Again, this is a matter of pure conjecture on the part of the AFANT and is apparently contradicted by the Review Head's assessment elsewhere in Chapter 25 that "the benefits flowing from the Land Rights Act for the tourism industry appear to have exceeded costs."

An excerpt from the submission to the Review by the NT Chamber of Commerce and Industry has been included in Chapter 25 and reads in part:

> Members feel that individuals cannot own the sea.

Members of the Chamber of Commerce and Industry are apparently ignorant of the fact that any title vested under the provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976* is in the form of communal title and not individual title.[5]

The NTFIC, the AFANT and the Northern Territory Chamber of Commerce and Industry may take some comfort from the recent Native Title determination by Justice Olney of the Federal Court of Australia in relation to areas of sea and sea-bed in the vicinity of Croker Island.[6]

It is difficult to locate any positive comments regarding the permit system in the Review, despite the fact that the existing provisions were strongly supported by a number of groups.[7]

By selectively quoting from the section of the Northern Land Council's submission to the Review which relates to permit issues, the Review Head has apparently misrepresented that organisation's stated position on permit matters. It is

difficult to conceive how a one-time Barrister at Law, and now Queen's Counsel, could have published such an apparent distortion.

The relevant quotes are in the section of Chapter 14 titled "Criticisms of the permit system".

> The NLC went on to describe the permit system as a source of 'much frustration and divisive influence' within Aboriginal communities and a source of insecurity for employees and contractors working in Aboriginal communities. The NLC pointed to three principal areas of difficulty with the system. They are:
>
> > ... uncertainty and disagreement in any particular instance as to whether a person has been granted a valid permit or had their permit effectively revoked; ... lack of power under the legislation to control access by others to their land, thus putting them in a weaker position than land owners under general law; ... frustratingly difficult to have a permit system enforced including having offenders successfully prosecuted.

Section 7.3 of the NLC's submission, from which these quotes were taken, is titled "Aboriginal Land Act - control of access to Aboriginal land". The following excerpts clarify the context in which the Northern Land Council made the statements. Here the NLC notes that the *Aboriginal Land Rights (Northern Territory) Act 1976* empowers "the NT to make laws regulating access to Aboriginal land" and that the "NT's legislative response is the *Aboriginal Land Act 1978* (ALA)."

> The hub of the ALA is a system of permits authorising access to Aboriginal land (and to closed seas) which it establishes.
>
> Deficiencies in the design and drafting of the ALA have meant that the NLC and its constituents have experienced considerable difficulties in regulating access to Aboriginal land in a satisfactory manner.

The NLC submission then lists what it perceives as the principal deficiencies of the NT's *Aboriginal Land Act 1978.* It is from this section of the NLC's submission that Reeves extracted the majority of the relevant quotes used in the Report, presumably to substantiate the dubious assertion that the permit system "is not widely supported by Aboriginals".

The NLC further states that "this submission examines both of these points and makes some suggestions in broad terms for changes to the legislative scheme." Those suggested changes are obviously directed at the NT's *Aboriginal Land Act 1978*, rather than the *Aboriginal Land Rights (Northern Territory) Act 1976*. This point is made clear in the following passage from the NLC's submission.

> Section 5 of the ALA gives the power to grant and revoke permits to, *inter alia*, the "traditional Aboriginal owners" of the land in question. The term "traditional Aboriginal owners" is defined to have the same meaning as it does in the Land Rights Act. However, whereas the Land Rights Act places this definition into a context which stresses the role of the traditional decision making processes of the traditional owners as a group, the ALA is silent as to how the traditional owners are to make their decision and how they are to evidence their determination.

The NLC proceeds to provide examples of instances where the operation of the NT's *Aboriginal Land Act 1978* can be "a source of much frustration and divisive influence within and Aboriginal community and permit holders may find themselves in situations of insecurity" and concludes that in some circumstances "the ALA operates in a manner which is clearly detrimental to the quiet enjoyment of the land by the traditional owners and other inhabitants and is arguably inconsistent with the Land Rights Act."

> A solution would be to focus legislative amendment on the process of granting and revoking permits with a view to bringing the permit system into line with the scheme of the Land Rights Act. This could include the statutory recognition of delegates empowered to issue and revoke permits on behalf of the traditional owners.
>
> Further, the introduction of a clear and certain mechanism by which permit disputes can be settled quickly and definitively is desirable. In keeping with the policy evident in the Land Rights Act, the final result would be that the decision of the traditional owners as a group,

> made in accordance with traditional decision making processes, should prevail over inconsistent decisions by individual traditional owners.

Despite the Review Head's condemnation of existing permit and access provisions, and the suggestion that those provisions be repealed and replaced by the NT *Trespass Act*, Reeves was only able to surmise that " the costs of (the) Land Rights Act have probably exceeded their benefits for other Territorians". Probability would seem a tenuous justification for these sweeping changes.

In assessing the costs and benefits of the Land Rights Act for the pastoral industry, the mining industry, the tourism industry and other industries in the Northern Territory, Reeves concludes that there has been either negligible detrimental impact or that benefits have exceeded costs.

Ineffective

One of Reeves' principal criticisms, as noted above, of the ALR (NT) Act is that the "Act has been less effective in providing Aboriginal people with effective control over activities on their land". Yet the legislative instruments regarding permit requirements and enforcement rest principally with the Northern Territory's *Aboriginal Land Act 1978*, and not with the Commonwealth legislation.

While it is generally agreed that existing permit provisions could be more effective in facilitating traditional owner's control over their land, there is a clear divergence of opinion between the Review Head and some of the organisations which lodged submissions in the identification of the causes, effects and potential solutions.

The Northern Land Council suggested that in order to facilitate more effective control "the ALA should be amended to give the traditional Aboriginal owners the same power to request a person to produce a valid permit (on pain of a monetary penalty) as is given to police by s.22 of the ALA."

The submission to the Review by Dhimurru Land Management Aboriginal Corporation noted:

> An anomaly would appear to exist in relation to the *Aboriginal Land Act NT 1980*, whereby the title holders appear to have very limited powers to stop and question persons entering onto and remaining on their land. Such powers are vested in external agencies, such as the NT Police, without the informed consent of landowners. This would appear to be a significant disenfranchisement of property rights, and is only partially addressed by such mechanisms as appointing traditional owners as Honorary Conservation Officers under the auspices of the Territory Parks and Wildlife Conservation Act. However, such an appointment is within the ambit of the Minister's discretion and does little to recognise the pre-eminent position of the title holders.

In its submission to the Review the Northern Land Council identified difficulties with enforcement and prosecution as major factors contributing to the ineffectiveness of existing permit and access provisions.

The NLC noted that,

> the police generally do not have the required expertise and knowledge in order to make critical judgements upon which they can confidently rely when enforcing legislation.

Partly as a consequence of this situation,

> the police currently have no way of judging between competing claims as to the existence or validity of a permit and so will tend to do nothing.

Furthermore,

> proof of offences can be very difficult especially in a situation where there has been a conflict of opinions amongst traditional owners. Even in matters which are factually straightforward, proof of the offence is difficult.

The NLC asserts that the low prosecution rate and minor penalties imposed for proven offences "greatly diminishes the deterrent impact of the offence provisions".

The Northern Land Council further asserted that for a combination of reasons "there has typically been a lack of police commitment to and co-operation in enforcing the terms of the ALA" and that:

> there are regrettably reports of local police officers themselves accessing Aboriginal land for purely recreational purposes without proper permits. This contributes to the perception amongst many Aboriginal people that the police are either not interested in or are positively antagonistic towards Aboriginal land issues.

The enforcement issues raised by the Northern Land Council accurately reflect the overall experiences of Dhimurru Land Management Aboriginal Corporation.[8]

Superficially, it would seem that the application of an amended NT *Trespass Act*, and the abolition of current permit provisions, would do little to address the enforcement and prosecution difficulties identified by the NLC. Consequently, the question of whether such changes would in fact enhance the capacity of traditional owners to exercise more effective control over their land remains problematic. This issue is addressed in more detail in later sections of this paper.

In fact, following the release of the Report, the Northern Land Council expressed reservations regarding the proposed use of an amended NT *Trespass Act* , contrary to Reeves' assertion that such changes "will satisfy all of the NLC's concerns about the present system".

"Confusing"

In addressing the matter of confusion arising from the operation of the NT and Commonwealth legislative provisions pertaining to permits and access to Aboriginal land in the Northern Territory, it is useful to ask who is confused, and why.

The contention that a substantial proportion of traditional Aboriginal owners themselves have a limited grasp of some of the relevant legislative provisions is likely accurate. Similarly, "other Territorians" are likely to be found to be equally ignorant of these provisions. This is not to say that the required information and advice isn't readily available, or that the existing permit system is 'unworkable', but it does indicate that neither the Northern Territory Government nor the Land Councils have invested sufficient resources in relevant public awareness initiatives.

The submission by Dhimurru Land Management Aboriginal Corporation noted that:

> The administration of the permit system would appear to be no more complex than the systems of licences, approvals and certificates familiar to the broad Australian community. This issue, along with a number of others raised by the Review Head in the Issues Paper, serve to reiterate a common non-indigenous imperative to simplify engagement with the indigenous community and decision making by them. Perhaps this is a reflection of a common misconception that indigenous cultures are simple societies, perhaps it reflects a desire to expedite access to Aboriginal resources regardless of whether appropriate informed consent is provided by the relevant landowners; or possibly a combination of both.

"Divisive"

There are several contexts, and any number of combinations of contexts, in which division may arise in regard to permits and access.

Divisions may be created between individual Aboriginal landowners, or groups of landowners, regarding decisions to grant, refuse or revoke permits for access. For example, a permit may be issued by an Aboriginal person or group and their authority to take such action in the absence of consultation with other affected landowners is contested.

Divisions may be created between Aboriginal landowners and Land Councils regarding decisions to grant, refuse or revoke permits for access. For example, a Land Council may be called upon by affected Aboriginal landowners to formally revoke a permit in circumstances such as those outlined above. Another scenario is a situation where a permit has been issued in good faith by a Land Council, and in compliance with directions from the relevant traditional owners, but subsequent events lead to a desire on the part of those traditional owner/s to revoke that permit.

The submission to the Review by Dhimurru Land Management Aboriginal Corporation anticipated considerable interest by the Review Head in conflict situations arising from the operation of current permit provisions.

In respect of Aboriginal land it is completely unsurprising that such conflict can and does arise.

> *Since land is the most highly valued resource for Yolngu, it would be surprising indeed if conflict never existed or serious dispute never occurred over land. Disputes over interests in land in fact have occurred, do occur, and will no doubt continue to occur.* Williams, 1986.

This situation, where such a high cultural value is placed on the effective control of land and sea resources, is conducive to conflict. However, mechanisms have always existed for the resolution of such disputes and are still utilised. In a contemporary context these tensions are often fuelled, deliberately or unintentionally, by intense pressure from external groups with a commercial interest in the resources associated with Aboriginal land and sea.

The Review Head appears to present instances of conflict between traditional Aboriginal owners and the Land Councils as substantial evidence of dissatisfaction (by the beneficiaries) with the role of the Land Councils in the administration of the permit system. In respect of this issue, the submission by Dhimurru Land Management Aboriginal Corporation noted that,

> It is not unusual that criticism should from time to time be made in regard to representative bodies, such as land councils, by the people they are established to service. For example, at any given time a substantial proportion of the Northern Territory constituency would vociferously contend that the elected government is not truly representing their interests.

Divisions may be created between Aboriginal landowners and the relevant NT Minister, or between Aboriginal landowners and the Administrator of the Northern Territory, in circumstances where a permit has been issued in good faith by either the Minister or the Administrator, but subsequent events lead to a desire on the part of relevant traditional owner/s to have that permit revoked. In relation to this scenario, the NLC's submission commented that:

> The NLC frequently hears complaints from Aboriginal people about the abuse of the so-called "Chief Minister's permits" including by the very people who should be policing the system.

Divisions also arise within the broader Northern Territory community, and more specifically between Aboriginal landholders and non-Aboriginal residents seeking access to Aboriginal land. This is particularly so when traditional owners exercise their legitimate rights as private landholders to deny access requests. The experiences of the author would indicate that the contexts of such requests, refusals and resulting divisions are not usually a matter of public purpose access relating to the delivery of government services, or legitimate business visits, but rather recreational access. The dissatisfaction of those parties denied approval for entry under this scenario reflects a commonly held, though erroneous, non-indigenous perspective that Aboriginal land is, or should be, public land available for unfettered access.

Scrutiny of past NT electoral campaigns provides ample evidence that some non-indigenous interest groups have quite consciously promoted a sense of dissatisfaction and inequality amongst members of the non-indigenous community regarding existing permit provisions for access to Aboriginal land. These statements can be viewed as actively promoting division. While such tactics continue to be utilised, at times funded from the public purse, it is difficult to foresee the instances of such divisions being reduced.

"Burdensome"

At Chapter 14 of the Report ("Permits and Access") the Review Head states that,

> There are four persons or authorities that are authorised to issue permits under the Aboriginal Land Act (NT). They are: the Land Council for the area concerned; the traditional Aboriginal owners for the area concerned; .....

Yet in later sections of the same Chapter, the Review Head states that,

> some Aboriginal people are quite affronted by the proposition that they have to be 'protected' from ordinary discourse with the broader Northern Territory community by a permit system that effectively prevents the broader community coming near them without a permit issued by someone else.

And that,

> Aboriginal Territorians do not generally have the right to invite non-Aboriginal people into their homes, if they are living on Aboriginal land, without obtaining a permit from a third party.

The implication of these latter statements is that Aboriginal owners do not have the authority to issue such permits themselves, effectively contradicting Reeves' earlier acknowledgement that relevant Aboriginal owners do in fact possess this authority.

Having failed to acknowledge this contradiction, the Review Head proceeds to conclude that,

> If the permit system were removed and Aboriginal landowners provided with similar rights in relation to their land to those held by other Territorians, Aboriginal people would not be disadvantaged in the process. Indeed, in my view, there would be advantages to them in being unburdened of a system they do not support, that is the cause of disputes, that is costly to administer and that apparently does not work effectively in any event.

Very little evidence is presented to substantiate the contention that permit provisions do not have broad support in the indigenous community. The strength of the Review Head's recommendations in relation to permit provisions is further diminished by his earlier observation in the same Chapter of the Report, where he makes reference to the permit system administered by the Anindilyakwa Land Council.

> On Grooote Eylandt, the Anindilyakwa Land Council told the Review that it issues three types of permits: residency, visitor's recreation, and business permits.....
>
> this co-operative arrangement between the Land Council and GEMCO works very effectively.

It seems reasonable to assume that despite the obvious inconsistencies inherent in this statement, the Review Head felt compelled to include the observation in order to substantiate another of his dubious assertions, i.e. that smaller Land Councils, such as Anindilyakwa Land Council, have generally adopted a more accommodating approach to the issue of permit access to Aboriginal land than has been the case with the larger Land Councils, and particularly the Northern Land Council. This contention ignores other information presented in the course of the Review.[9]

"Racially Discriminatory"

The Review Head contends that the traditional Aboriginal owners of land currently subject to permit provisions "would also benefit from the improvement in race relations that would probably follow as a result of the removal of a measure that is racially discriminatory to all other Territorians."

It is worth noting that the Review Head includes here a significant qualification, through the use of the word "probably". Many observers of Northern Territory society and politics would support the notion that the state of race relations is, to a substantial degree, a legacy of the confrontational and inflammatory approach adopted by a range of vested interests ideologically opposed to Aboriginal land rights in totality, rather than the operation of the existing permit provisions.

The Review Head relies upon the findings in *Gerhardy v Brown* and *Pareoultja v Tickner* to support his contention that the permit provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976* - and therefore also the permit provisions of the Northern Territory *Aboriginal Land Act* - are racially discriminatory, though allowable as "a special measure pursuant to s. 8 of the Racial Discrimination Act."

From a non-legal perspective, the assertion that the permit provisions of the above mentioned Acts are racially discriminatory is not as simple as the Review Head implies. S 4. of the Aboriginal Land Act makes it clear that an Aboriginal who is entitled by Aboriginal traditional to enter onto and remain on an area of land may enter onto and remain on that area of land without the requirement for a written permit, as prescribed for other persons under the Act. In effect, on the basis of non-legal interpretation, it could reasonably be assumed that Aboriginals who are not so entitled by Aboriginal tradition are also required to acquire a written permit. Rights to enter onto and remain on particular areas of Aboriginal land would therefore appear to be somewhat more complex than a "simple" matter of race. The permit provisions appear to discriminate not against a race of people as this term is generally understood, but against all persons, including other Aboriginals, who are not entitled by Aboriginal tradition to enter onto and remain on a particular area of Aboriginal land.

The submission to the Review by the Central Land Council, quoted in part in Chapter 14 of the Report, supports this interpretation but is repudiated by the Review Head on the basis of unspecified anthropological advice. In failing to specify the source of this advice, the Review Head has considerably diminished the credibility of this advice, and therefore the related conclusion and recommendations.

Appropriate experts from the anthropological fraternity will no doubt prepare their own critiques of the Report. However, it is worth noting that the Review Head seems content to interpret Aboriginal tradition in the context of those traditions and circumstances which existed, or may have existed, prior to European colonisation. Such an approach disregards the dynamic nature of tradition in all cultures.

On a range of related matters, the Review Head appears to adopt the now largely discredited perceptions and findings of Justice Blackburn, in *Millirrpum v Nabalco and the Commonwealth of Australia* 1971, to support the findings and recommendations contained in the Report.

The Application of an Amended Northern Territory Trespass Act

The Review Head recommends the repeal of existing permit provisions and the adoption of the NT Trespass Act. Amendments to the Act are meant to address particular matters that he perceived as germane to the effective application of the NT Trespass Act to Aboriginal land. Thus, it is suggested that it would be advisable to "include 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 and/or at any airport on their land, stating that entry to that land is a trespass." That the potential effectiveness of such measures in providing adequate warning to potential trespassers is highly questionable must have been apparent to the Review Head at the time he compiled the Report. Established roadways and airports are by no means the only avenues for gaining access to Aboriginal land. Since approximately 85% of the coastline of the Northern Territory, including offshore islands, is held under title by Aboriginal owners, thousands of kilometres of sparsely populated coastline are, in effect, boundaries. How are they to be effectively signposted?

Significantly, the Review Head has not suggested amendments to Sect. 13 of the Trespass Act which relate to defences against a charge of trespass.

> (1) It is a defence to a charge of committing an offence against section 6 if the defendant proves that -
>
> (a) the defendant did not see and could not reasonably be assumed to have seen the notice posted on the land; or
>
> (b) the trespass was not wilful and was done while hunting or in the pursuit of game.

It would clearly be a financial and logistical exercise of mammoth proportions to provide adequate signage along the coastline.

It seems likely that a range of interest groups, including those members of the recreational fishing fraternity whose views were represented in the submission to the Review by the Amateur Fisherman's Association of the NT and referred to in an earlier section, would be comforted to some extent if the Report's recommendations regarding the application of the Trespass Act were adopted. From a practical perspective, the potential for a successful prosecution to a charge of trespass on Aboriginal land would be almost non-existent and therefore the effectiveness of the Act as a deterrent to unauthorised entry is highly questionable.

The Review Head has also suggested that the "penalty for a breach of the Trespass Act should be increased to $10 000 or six months imprisonment and a daily penalty for a continuing breach of $1 000 per day. This level of penalties should act as a clear deterrent to persons who trespass on any land in the Northern Territory, including Aboriginal land."

These suggested amendments are similar to those provisions which already apply to unauthorised entry onto registered Aboriginal Sacred Sites in the Northern Territory, including Sacred Sites on Aboriginal land.

The potential, or lack thereof, for such penalties to act as an effective deterrent to unauthorised entry onto Aboriginal land is amply demonstrated by the experiences of Dhimurru Land Management Aboriginal Corporation. One of the designated recreation areas managed by the Corporation and available for conditional access, }anydjaka (Cape Arnhem), is a registered Aboriginal Sacred Site. Despite the erection of Sacred Sites signage on the access track to }anydjaka and other public awareness initiatives, patrols and permit compliance checks by Dhimurru staff indicate that unauthorised access is a continuing problem. The experience of DLMAC suggests that the most effective deterrent to unauthorised access is not signage and penalties, but rather adequate resourcing to undertake regular monitoring. Few

areas of Aboriginal land in the Northern Territory could be monitored for unauthorised access as effectively as the relatively small areas currently managed on behalf of traditional owners by DLMAC.

Conclusion

The Synopsis contained in the Report, "Building on Land Rights for the Next Generation", includes the following statement.

> If Aboriginal self-determination has any meaning at all, it must apply first and foremost to the processes and practices of Aboriginal tradition and the effective control, by Aboriginal people, of their lands.

Many people will have great difficulty reconciling this premise with the subsequent recommendations contained in the Report in relation to permits and access. Indeed, some might suggest that the specific recommendations in relation to permits and access seek to accommodate a concern in some quarters that the existing permit provisions have been too effective in enabling Aboriginal people to control activities on their land.

John Reeves QC has largely relied upon legislative prescriptions to address matters arising from real or perceived inequality in access to resources on Aboriginal land and the tensions that inevitably arise when a dominant society seeks to accommodate 'minority interests' which sometimes express a radically divergent world view.

Williams (1986:231) makes pertinent observations on matters of permission, access and use in relation to Yolngu land in northeast Arnhem Land. Williams states that:

> for Yolngu, boundaries do not exist primarily for the purpose of excluding non-owners. Rather, Yolngu 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 to 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 the owners to grant permission when a request is appropriately framed. One could say that to own is to have an obligation to share, and strong rights reside in those who express need and a moral claim to a share of the resource.

While this passage was written with specific reference to access protocols within the Yolngu community, in most respects it is equally applicable to "appropriately framed" requests by non-indigenous people for access to Yolngu land. In this context, taking into account the multiplicity and diversity of such 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.

The Review Head contends that while the existing permit and access provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976* and the Northern Territory *Aboriginal Land Act* are racially discriminatory, though allowable under Sect. 8 of the Racial Discrimination Act, the acceptability of this discrimination can only be sustained while those provisions enjoy the support of the beneficiaries. The Review Head repeatedly states in Chapter 14 of the Report that a substantial proportion of those beneficiaries do not in fact support the existing permit provisions. Yet the Report fails to present substantive evidence that this is the case. Indeed, the Review Head's apparent findings in regard to this matter are at extreme variance with oral submissions by traditional owners in northeast Arnhem Land.

There is a pressing need to review the credibility of the Report across a range of issues. An important element of any such exercise should be to revisit those indigenous groups and individuals responsible for submissions to the original Review, in order to ascertain their responses to the findings and recommendations contained in "Building on Land Rights for the Next Generation". Particular attention should be paid to gauging the level of support for existing permit provisions amongst the beneficiaries of these provisions, thereby testing the veracity of related assertions contained in the Report.

Notes

[1] The Review Head fails to note that Part ll of the *Aboriginal Land (NT) Act* also makes provision for a Land Council or the relevant traditional Aboriginal owners to delegate all or part of their authority to issue permits under such conditions as they think fit. It is in accordance with this provision of the Act that Dhimurru Land Management Aboriginal Corporation is authorised to issue permits for conditional recreational access to designated areas in the vicinity of Nhulunbuy.

[2] In the following passage from Section 7.3.2 of the NLC's submission to the Review, concerns regarding permits issued by the NT Minister are outlined:

> One respect in which the power of Aboriginal traditional owners to control human traffic on their land is unacceptably curtailed is that they are unable to have any say in the grant or currency of permits issued by the Minister under s.6 of the ALA. While it is accepted that there is force to the argument in favour of a class of persons falling within the categories defined by s.6 having easy access to secure permits, it is not acceptable that traditional owners have no legal avenue of redress in the instance of an abuse of that provision.

[3] Reeves scrutinised these issues from the parochial perspective of the Northern Territory only, although the *Aboriginal Land Rights (Northern Territory) Act 1976* is Commonwealth legislation. It would have been appropriate to canvass the impact of the legislation from the perspective of other jurisdictions as well.

[4] In the following passages, the Review Head appears to imply an inordinately generous windfall to Aboriginal Territorians, to contradict himself, and to impose an awkward and unconvincing ethnocentric interpretation on key concepts in the following passages:

> • Easily the most important social, cultural and economic outcome arising from the transfer of 537,000 km2-42.3 per cent of the Northern Territory to Aboriginal Territorians is the **huge consumption gain** accrued to them as a result. Since much of the land claimed is of marginal economic value in alternative uses (sic) creating a situation that enables Aboriginal Territorians to own, live on or freely visit their traditional 'countries' is a **highly productive use** of this land.
>
> • The immense satisfaction that Aboriginal Territorians derive from their land rights is the only justification needed to support their ownership of the land, notwithstanding that **no 'productive' use** is made of it. It is **simply their home-and valued as such like anyone else's**.

The emphases are mine.

In respect of the consumption gain accrued by Aboriginal Territorians, a longer term historical analysis of the situation would indicate that Aboriginal Territorians have endured a huge consumption loss as a result of the 'compulsory acquisition' of their land by a dominant foreign society, and that in fact it has been that foreign society which has accrued a "huge consumption gain", albeit somewhat diminished following the passage of the *Aboriginal Land Rights (Northern Territory) Act 1976.* In his submission to the Review, Nicolas Peterson, Reader in Anthropology at the Australian National University, states that "from a purely economic rationalist point of view the kind of property rights Aboriginal people have are inferior to the normal property rights of Territorians. True they have the veto but because their property rights are group rights, with all the constraints that places on the individual, and because the land is inalienable they are not the kind of right that would be freely chosen by most non-Aboriginal people."

The Review Head appears unable to reconcile alternative interpretations of the concept of 'productive use' and ultimately debases Aboriginal use of land held under title by traditional owners in Northern Territory by apparently attributing greater merit to the economic rationalist development model of 'productive use'.

To state that Aboriginal Territorians regard country to which they have title as "simply their home-and valued as such like anyone elses" is to blandly disregard the well-documented fact that Aboriginal Territorians have spiritual affiliations with their ancestral estates and concomitant cultural responsibilities for the management and maintenance of those estates, affiliations and responsibilities that bind Aboriginal Territorians to their country in ways that have no clear parallels in the non-Aboriginal community. Authors such as Williams (1982, 1983 & 1986), Peterson (1976), Peterson and Langton (1983) have written extensively on this matter and both made submissions to the Review which should have served to enlighten the Review Head.

5 Similarities can be seen in the operations of existing NT and Commonwealth legislative instruments relating to the management of marine areas which enable these bodies to hold title or maintain effective control of access and use for the common good of a defined group of people. Significantly, such powers include the capacity to restrict access and use by other groups. Asian fishing boats are an obvious example of such restrictions being applied, as is the regulation of the Northern Prawn Fleet by the Australian Fisheries Management Authority.

6 On September 4 1998, Justice Olney of the Federal Court of Australia handed down his determination in the case between *Mary Yarmirr and Others (Applicants) and The Northern Territory of Australia and Others (Respondents)*. The determination was made in respect of a Native Title Claim to areas of sea and sea-bed in the vicinity of Croker Island in the Northern Territory. The court determined that while native title rights and interests did exist, as claimed by the Applicants, those "rights and interests do not confer possession, occupation, use and enjoyment of the sea and sea-bed within the claimed area to the exclusion of all others.":

7 The 11 point statement of position put to the Review Head during the public meeting at Yirrkala community on 2 December 1997 included explicit endorsement of a permit system:

- Permits onto Aboriginal land and waters must be tightened and policed.

8 The submission by Dhimurru Land Management Aboriginal Corporation included reference to the relatively ineffective nature of current enforcement activities and suggested that opportunities exist to significantly improve the situation.

> While the Review Head has seen fit to raise the issue of permit administration, it would seem reasonable, and more urgent, to raise the matter of enforcement.
>
> A significant feature of the *Aboriginal Land Act*, the *Aboriginal Sacred Sites Act*, the *Territory Parks and Wildlife Conservation Act* and the *Fisheries Act* is the lack of resources committed to enforcement of relevant regulations, particularly in relation to Aboriginal land and adjacent seas. Many of these regulations could be implemented more effectively, and at minimal additional cost, through constructive engagement and collaboration with indigenous agencies and communities, empowering the traditional owners through an active and officially sanctioned role in monitoring, reporting and enforcement.

9 During the course of the Review, Mr Reeves was invited to visit the offices of Dhimurru Land Management Aboriginal Corporation (DLMAC) in Nhulunbuy. The purpose of the invitation to the Review Head was specifically to demonstrate how effectively the existing permit system can be operated. DLMAC was established in 1992 by the traditional owners to undertake natural and cultural resource management tasks associated with designated recreation areas on Aboriginal land in the vicinity of Nhulunbuy. The Corporation was delegated by the traditional owners and the Northern Land Council to assume responsibility for the administration of a related permit system. These areas had been available for conditional recreation access for some fifteen years prior to the establishment of DLMAC, but the range of agencies previously responsible for issuing the relevant permits had lacked the resources to effectively monitor and address the combined cultural and environmental impact of recreation use.

The effectiveness of the permit system as a DLMAC management tool in maintaining the natural and cultural values of the areas concerned was highlighted in discussions with the Review Head during his visit to the Corporation offices and it is surprising that he chose not to include reference to this permit system in the Report. However, it may not be unreasonable to assume that the fact that these permits are issued under the delegation of the NLC, and include Northern Land Council letterhead, did not accord with his overall contention that the larger Land Councils generally do not support mechanisms to accommodate recreational and other access to Aboriginal land.

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