

The Reeves Report's Assumptions on Regionalism, and Socioeconomic Advancement

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

March 1999

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Summary of points

1. Recommendations in the Reeves Report for major institutional change in the current Land Council structures arise from quite fundamental misunderstandings of the characteristics of Northern Territory Aboriginal societies.
2. The system proposed by Reeves of 18 autonomous Regional Land Councils operating over predetermined regions would in fact reduce, rather than enhance, control by Aboriginal local groups over their lands.
3. 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.
4. 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 I suggest would have few of the problems inherent in the Reeves proposals.
5. Combined with a policy of outsourcing non-core services of the existing Land Councils, it would produce lean, efficient and accountable organisational structures.
6. The proposals for utilising the proposed new land-rights based institutions as the cornerstone of delivering socioeconomic advancement for Aboriginal people is misfounded. In particular, the RLCs, based as they will be on the Aboriginal traditions of their regions, would be inappropriate vehicles for socioeconomic changes.
7. The new institutional arrangements provide no demonstrable competitive advantage over existing ones. It would be preferable to maintain land rights and socioeconomic advancement as distinct, albeit linked, policy domains.

Introductory remarks

The Reeves Review report is a complex and discursive document, and its underlying assumptions and themes can at times be rather elusive. However, a core set of policy assumptions and recommendations can be broadly discerned.

The Review argues that the main objective of the current *Land Rights (Northern Territory) Act* in terms of granting traditional lands to Aboriginal people will basically have been achieved with the imminent finalisation of outstanding claims under it. It argues however that the Act has been rather less successful in providing Aboriginal people with effective control over activities on their traditional lands, and further that it has provided a focal point around which relations characterised by distrust, hostility and resentment have developed between Aboriginal people and the Northern Territory Government.

The 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 act.

The Review thus proposes that a preamble set out these new purposes for the revised Act in the following terms:

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.

I wish to focus in particular on the second and third of these new aims, at the assumptions underlying them, and at the suggested links between them. While Reeves’ concern with what is arguably an entrenched policy failure to change the often disastrous circumstances of Aboriginal people’s lives in the Northern Territory is understandable and legitimate, I will argue that his policy recommendations to link new institutions based on land rights with a supposedly new direction in addressing socioeconomic disadvantage are fundamentally misguided.

Self-determination, tradition, and regional institutions

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 (RLCs), 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. I will focus in this section on the RLCs.

The Report argues that the current Act with its ‘... focus on traditional Aboriginal owners within a bureaucratic and legalistic framework’¹ 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.²

The Report contrasts this situation with that of the two existing smaller Land Councils, which it claims have developed their own approaches to traditional relations 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 their capacity to avoid the disputation found in other areas.³

Problems with the Report’s assumptions

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”,⁴ and that it is at this *regional* level therefore that Aboriginal people should be able to determine for themselves what constitutes Aboriginal tradition. Thus, membership of each RLC 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.⁵ The structure of the Board of each RLC and how Directors were chosen would also be decided by the Membership.

The Reeves Report would also remove the current statutory ‘informed consent’ provisions, in which the existing Land Councils make the decisions on issuing exploration permits and other interests, but can not do so without ensuring that the relevant traditional owners understand and as a group consent to the action.⁶ Each Regional Land Council would determine for itself the decision-making processes which it considered best reflected Aboriginal traditions in its region.⁷ Similarly, mechanisms to deal with disputes arising from the operations of the Act would, in the first instance, be dealt with by the relevant RLC in accordance with its own procedures.

Such mechanisms would, in Reeves’ 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 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.⁸

However, the current informed consent provisions of the Land Rights Act have in fact provided a powerful 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 NLC, has arguably enabled the incorporation of relevant Aboriginal traditions in a flexible and appropriate manner. Such protection is very weak under the Reeves proposals, and in my view the Report provides entirely inadequate justification for removing a scheme which ensures the protection of property rights arising under Aboriginal tradition.

This bears on what I consider to be a fundamental flaw which manifests itself in a whole range of its 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.***

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 in my experience always give precedence to rights arising under customary law over those arising from historical occupation.

To varying degrees, all of the proposed RLC 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 structures. For one thing, while membership of each RLC 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 Report proposes that each RLC 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 RLC and the aggregate of adult residents and those with traditional affiliations in the region, and the other relates to who actually decides the content of the land-related traditions of a region.

With respect to the former, will it be the formal membership of an RLC 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, 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 RLC 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?

Secondly, this conflation of traditional ownership and residence compounds the problems in the Report's assertion that Aboriginal culture is reproduced at the regional level. There are certainly good contemporary anthropological arguments that local landed interests (e.g. those of a particular patrilineal clan) should be understood as deriving from regional Aboriginal land tenure systems,⁹ 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.¹⁰ The unit of reproduction of traditional land relationships is the *regional land tenure system* underpinned by religious ideology, not the regional residential community.

Thirdly, the 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 recommendations in this regard largely invalid in my view.

The Report ignores the crucial fact that it is not so much at the regional level that Aboriginal groups seek autonomy, but more typically 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.¹¹ 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.¹²

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.¹³ 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 (ILUAs) 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.

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.¹⁴

Fourthly, the Report suggests that intra-Aboriginal disputation over traditional ownership and entitlements can be essentially attributed to the legalistic and bureaucratic framework within which the current Act is implemented, and that this will be reduced by a system in which the RLCs themselves interpret regional traditions and incorporate it into decision-making and conflict resolution. It is my view that 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. 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. Reeves' scheme will potentially exacerbate, not reduce, this.

An illustration of the fact that irresolvable disputes are not simply a feature of the current Land Rights Act, but have deeper causes can be seen most clearly in the native title arena, in which 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. Such factors as the case load of the Tribunal, and the number of overlapping or competing claims lodged, suggest that disputation can not 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 in fact to exacerbate rather than reduce conflict as the Report would suggest.

Linking land rights-based institutions with socioeconomic advancement

I will now turn briefly to consider a second thrust of the Reeves Report, which proposes that one of the primary purposes of the new Act should be providing opportunities for the social and economic advancement of Aboriginal peoples in the Northern Territory. The Report states that while this had admittedly not been an aim of the original Act, there was strong support in written and oral submissions to the Review to focus on this goal.¹⁵ It argues that a revamped Land Rights Act would provide the best vehicle for forging the new and necessary 'partnership' between the Northern Territory government, the Commonwealth government, and Aboriginal and other Territorians.

This link between land rights institutions and those directed towards socioeconomic advancement is made despite the Report's own conclusion that the development of Aboriginal freehold land is unlikely to be a major source of jobs and income for Aboriginal people, and the focus on developing lands as part of economic development is 'misplaced'.¹⁶ More important, it suggests, is the possession of productive skills, technology and capital.

A number of reasons are advanced to support this proposed link: The Land Rights Act applies to almost a half of the area of the Northern Territory and almost a quarter of its people; it is the source of the mining royalty equivalents paid by the Commonwealth for mining on Aboriginal lands; it is the Act under which the RLCs will be established; it is an Act to which Aboriginal people are committed and which advanced their interests; and finally, that it gives rise to many of the current concerns of the Northern Territory government, and modifying it would offer an opportunity for the government to play a more positive role.

I do not wish here to directly discuss this arguably rather inadequate rationale for such a sweeping policy change. However, I do wish to examine the

appropriateness of using the land-rights based institutions recommended by Reeves (specifically the RLCs under the umbrella of NTAC) as vehicles for what he terms socioeconomic advancement of Aboriginal people.

Reeves argues for a progressive reduction in Aboriginal dependency on welfare and such payments, through involvement in ‘productive’ activities such as employment and businesses. The new policy focus should be on assisting Aboriginal people to become “more productive and self-determining”.¹⁷ The Report further argues that crucial to this goal is the quality of Aboriginal governance institutions, specifically their representative organisations. He argues that ‘self-determination’ is essential to overcome Aboriginal disadvantage and dependence, and that land rights is central to this self-determination, since within Aboriginal traditions land is at the heart of autonomy.¹⁸

Reeves does accept that there is potential incommensurability between maintaining aspects of traditional life on the one hand and improving mainstream economic, health and educational outcomes on the other, although this is couched in the limited sense of ‘individual pecuniary incentives’, whether market or politically driven, not being effective in promoting Aboriginal socioeconomic advancement.¹⁹ The Report acknowledges that ‘trade-offs’ may be necessary in pursuing the goals of maintenance of traditions on the one hand and socioeconomic advancement on the other, but argues that Aboriginal people themselves should take decisions about these matters, through their own institutions of governance.²⁰

This is to be achieved through “... the formation of a number of smaller, more autonomous, and better traditionally-anchored RLCs, and the creation of NTAC, charged with accelerating the economic advancement of Aboriginal Territorians and with the active political representation of Aboriginal interests”.²¹

At the core of Reeves’ proposals then are the assumptions that, firstly, ATSIC as an institutional and regional presence would disappear in the Northern Territory and its programs be undertaken by NTAC, secondly that the Northern Territory government would agree to deliver its specifically Aboriginal programs through NTAC, and thirdly that the annual income flowing into the Aboriginal Benefits Reserve (ABR) would also be administered by NTAC.²² Reeves suggests that NTAC’s funding could amount to between \$448 million and \$738 million, depending on assumptions made about the size of the NT Government’s current budgetary allocation to Aboriginal affairs. Of this, only some \$35 million in fact would derive from the ABR; Reeves’ scheme therefore is highly dependent upon a radical reshaping of both Northern Territory and Federal (ATSIC) institutional arrangements.

Apart from broad generalisations about the importance of a new ‘partnership’ between governments and Aboriginal and other Territorians, there is nothing in the Report’s recommendations for new institutions which suggest that they will have a better capacity than the current ones to deliver improved socioeconomic

outcomes for Aboriginal people. That is, apart from the relationship between NTAC and the Regional Land Councils, and the latter bodies' assumed capacity to further regional self-determination, the Reeves' scheme does not seem to have any competitive advantage over existing arrangements.

Reeves' arguments for these major institutional changes would appear therefore to centre on the partnership between NTAC and the RLCs, as the major 'engine' driving socioeconomic improvements for Aboriginal people. Yet, by the very principles which Reeves proposes should form the basis for their establishment, the Regional Land Councils will be deeply embedded within the local and regional Aboriginal social, cultural and political values – that is, will reflect 'regional' Aboriginal traditions. Their priorities – particularly on such matters as economic development – can be expected to be made on particular Aboriginal principles, rather than on the 'objective' needs-based assessments which supposedly characterise the mainstream bureaucratic culture.²³

As discussed above, this Aboriginal domain is typically highly factionalised, with an emphasis on the primacy of the local over that of the 'community' or the region. Competition for resources within this domain is often intense, but such resources serve particular indigenous social ends, and it is ultimately in social capital rather than other forms that value lies (Martin 1995c, Martin and Finlayson 1996).

The RLC Boards may be construed by Reeves as 'representing' their regional constituencies, but, they will also be embedded within *particular* networks of kin, have attachments to *particular* locales and language or other traditionally-based groupings, be associated with *particular* community organisations, and so forth. They will therefore be embedded within specific matrices of rights, obligations, and shifting allegiances which are crucial constitutive elements of the Aboriginal social and political realm.

Furthermore, there is often within this realm an entirely different culturally located view of the instrumental, of what might be the causal relations between phenomena, in which the kinds of connections which the wider bureaucratic culture might draw from socioeconomic data are of peripheral concern. The complex social calculus upon which decisions are made and social relations negotiated within this realm will not be easily discarded as RLC Board members enter their meetings, to be replaced with one predicated upon data-based analysis, objective assessment of competing demands for scarce resources, and setting aside of individual and local-group interests in favour of those of a broader regional community (Martin 1995d; Martin and Finlayson 1996: 6).

Furthermore, relatively small and essentially autonomous Aboriginal organisations would be highly vulnerable to precisely the kinds of problems that beset so many other similar bodies – for example, becoming enmeshed in local-level politics, problems in maintaining appropriate financial accountability regimes, difficulties in attracting suitably qualified staff, and so forth.

In summary, therefore, I suggest that the Regional Land Councils, based as they are on what the Report sees as the Aboriginal traditions of each region, would be singularly ill equipped to deal with the complex issues involved in trying to improve socioeconomic conditions for Aboriginal people in the Territory. There is, in short, no good argument for directly combining institutions based on land rights with those aimed at socioeconomic advancement, although there clearly need to be strategic linkages built between them, for example through the programs of the Aboriginal Benefits Reserve.

An alternative proposal for greater regional autonomy²⁴

Land councils and Aboriginal tradition

In my 1994 and 1995 field work throughout the north-eastern Arnhem land region concerning the proposal to establish a separate land council, both proponents and opponents of the move to a separate land council, and indeed those who had not yet made a decision, strongly stressed the vitality of Yolngu culture, and the importance of Yolngu Law as the foundation on which the relations between people and land are based. The proponents of the breakaway council spoke with great passion of the centrality of Law to Yolngu life, and argued that the only way to incorporate this into the management of their lands was to have a Yolngu-controlled land council operating under Yolngu Law. A central tenet of this Law was that only those with legitimate rights in land under it had the right to make decisions about it. Thus, it was seen as contrary to this Law to have the Council of the NLC making decisions about Yolngu lands, comprised as it is of Aboriginal people from all over the Top End.

The strength of such views, and the passion with which they are expressed, must be accepted as valid. 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.²⁵ In this interstitial arena, the fundamental questions of effectiveness, legitimacy, representativeness, and of accountability are constantly contested in terms of the often incommensurate principles of each of the two political domains. In the case of accountability for example, 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 within the indigenous polity.²⁶ In east Arnhem land, the proponents of the breakaway land council with whom I met were challenging these four aspects of the operations of the NLC, essentially from the principles of the indigenous political system.

The *effectiveness* of the NLC was disputed, both because of its being a large remote bureaucracy and because its staff, as non-Yolngu, were seen as not able to 'listen' properly; its *legitimacy* in exercising management and control of Yolngu lands was challenged, as previously discussed; 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 royalty distribution.

The *Aboriginal 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, the Council makes the decisions on issuing exploration permits and other interests, but can not do so without the consent of the traditional owners, to put it in the most simplistic terms. In the words of Justice Toohey:

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.²⁷

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 eastern Arnhem land and elsewhere – the distribution of royalty equivalents — which the informed consent provisions provide for development proposals.

A common argument 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. The crucial issue is one of the processes established, rather than the size of the organisation.

Devolution of powers to regions

Both the Northern Land Council and the Central Land Council 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 the NLC to its regional constituency, 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. 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 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 the current 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 s. 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 suggested that while there was a general recognition that Land Councils should be able to decentralise, there were strong arguments against too much fragmentation of them.²⁸ 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.²⁹

Toohey’s proposal goes part of the way towards recognising the devolution of powers to a Regional Land Council. A critical policy issue here, in my view, 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 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 council³⁰ was proposed – it may be appropriate to have only certain functions and powers delegated, in that case from the CLC.

Devolved Regional Land Councils would arguably have distinct advantages over the only option presently available under section 21(3) of the Act, completely separate Land Councils such as those proposed in the various applications to the Minister thus far, 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, the capacity to share expertise such as that of lawyers and other specialist staff, 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 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 in my view, 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 rather than the essentially autonomous ones proposed by Reeves.

Regional Land Councils devolved from but operating under the umbrella of the existing organisations would also have distinct advantages over the concept of the autonomous RLCs operating under the strategic oversight of NTAC in the Reeves scheme. While NTAC could assist in the development of consistent policies between independent RLCs 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 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 the boundaries would be established.

It could be argued that the most appropriate locus for the decision 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 itself. There is merit in this proposal. However, the nature of organisational politics and imperatives being what they are, I am of the view 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. There are in my view a number of factors which militate against defining boundaries *a priori* in the manner of those for ATSIC regions 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 of 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 preferable to the more or less arbitrary definition of regional structures based on bureaucratic imperatives.

Possible amendments to the current Land Rights Act

I turn now to a brief consideration of the implications of the principles outlined above for the current Act.

In essence, the current 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 s. 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. 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.

Thus, summarising these arguments, I would propose that s. 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.
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 to be held by a particular Regional Land Council, the Act could require that Minister 'have regard' to such factors as the capacity of Aboriginal people in the region to undertake the relevant responsibilities, the degree of support demonstrated for the establishment of the Regional Land Council, the size of the Aboriginal population resident in the area, and the appropriateness of that area. A non-prescriptive approach would in my view be more flexible and likely to achieve sound outcomes.

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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 requiring ‘informed group consent’ in accordance with other sections of the Act.
 7. Amendment of s. 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 s. 23 relating to functions of Land Councils, and s. 35 relating to the use and distribution of moneys received by a Land Council under s. 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 in fact 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.

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 I suggest would have few of 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. It would in particular not suffer from the problems in the Reeves Report in linking what I have suggested should be maintained as distinct, albeit linked, policy domains – land rights, and socioeconomic development.

Notes

- 1 Reeves 1998:200
- 2 Reeves 1998:200-1
- 3 Reeves 1998:200
- 4 Reeves 1998:207
- 5 Reeves 1998:601. Each individual however could be a member of only one RLC.
- 6 Toohey (1984: 56). See discussion in Martin (1995b).
- 7 Reeves 1998:210-11
- 8 Native Title Regulations 5-7
- 9 e.g. Sutton 1996

10 e.g. Sutton 1999

11 Localism can take different forms in different Aboriginal societies. For example, in western Cape York Peninsula it may be based upon region-of-origin groupings (particularly descent-based groups such as sibling sets), while in many urban societies it may be based upon what are termed ‘families’ defined through complex historical, region-of-origin and genealogical linkages. Some Aboriginal societies have more emphasis on localism (such as many in Cape York Peninsula), while others are characterised by significant sub-regional and regional political, religious and economic forms which dilute the significance of localism in certain contexts (for example, with ceremony in the central desert regions, and in Arnhem Land).

12 Martin (1995a); Sutton (1995); Martin and Finlayson 1996.

13 See discussion in the report on this proposal in Martin (1995b)

14 For example, see the discussions in many of the reports on ‘breakaway’ land councils referred to in Reeves, such as Martin (1995), Stead (1990), and Morton (1994).

15 Reeves 1998:74

16 Reeves 1998:568, 571

17 Reeves 1998:582

18 Reeves 1998:586-9

19 Reeves 1998:590. Reeves quotes a paper authored by me (Martin 1995c) in support of these views. However, the thrust of this discussion paper, and indeed the synopsis of it provided in the Report, states quite explicitly that social capital, most particularly in the form of culturally-defined systems of Aboriginal relatedness, is valued over material forms of capital. That is, in the terms of the Report, ‘socioeconomic advancement’ may not be valued by Aboriginal people as highly as maintaining sets of culturally significant relationships and other forms of social and cultural capital.

20 Reeves 1998:586

21 Reeves 1998:598

22 Reeves 1998:613-5

23 The following paragraphs are based on my earlier analysis of the use of survey and other such data by ATSIC Regional Councils in their regional planning (Martin 1995d), since there are clear parallels with the Reeves view of the roles of Regional Land Councils.

24 This section is drawn almost entirely from my report on the proposed ‘breakaway’ land council in north-eastern Arnhem land (Martin 1995).

25 see for example the discussions in Sullivan (1988) and Rowse (1992)

26 For a discussion of this contested notion of accountability in Aboriginal organisations, see Queensland Public Accounts Committee (1991) in its report into Aboriginal Community Councils.

27 Toohey (1984: 56)

28 Toohey (1984:48)

29 *op. cit.*: 49

30 Morton (1994)

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