

Summary

Reeves' Review of the Aboriginal Land Rights (Northern Territory) Act 1976 is an ambitious piece of work. As its title indicates, *Building on Land Rights for the Next Generation* (Australian Government Publishing Service, Canberra, 1998) is concerned with recommendations for the future that go beyond the present land rights regime.

My review of the Reeves Report focuses on its quality as a public policy research document. In particular, I am concerned with:

- how adequately the Report responds to its Terms of Reference;
- the methodologies used in developing recommendations and findings;
- the quality of research; and
- the quality of the arguments for the Report's recommendations.

Reeves was asked to examine and report on the operation of the Land Rights Act and make recommendations for possible change. He was given a number of particular areas to examine, the first two of which are the crucial ones for considering the overall structure and quality of his Report. These are the effectiveness of the Act in achieving its purpose and its impact in terms of social, cultural and economic costs and benefits.

Reeves' findings are basically as follows:

- the Act has been highly successful in achieving its main purpose of granting traditional Aboriginal land for the benefit of Aboriginal people, with 42.3 per cent of the land mass of the Northern Territory passing to them;
- Aboriginals have benefited enormously in cultural and spiritual terms and in being able to live on and enjoy their land;
- the supplementary purpose of providing Aboriginal people with effective control over their land has not been so well met;
- there have been avoidable costs in land purchases and in transaction and access costs;
- overall, benefits, including economic benefits, have exceeded costs even when all other Territorians and Territory industries are included.

In short the Act has been a success, but there have been costs and inadequacies that might have been avoided and there are suggestions for improvement in these areas.

Not satisfied with responding to his Terms of Reference, Reeves proposes a new set of purposes for the Land Rights Act:

- the social and economic advancement of Aboriginal people;
- doing this by means of partnerships with government and business enterprises;
- and establishing institutions of Aboriginal governance and self determination.

Reeves' proposed institutional design for this grandiose scheme are modest in the extreme:

- 18 tiny Regional Land Councils in place of the present Northern and Central Land Councils; and
- a supporting umbrella organisation, the Northern Territory Aboriginal Council.

In proposing this new purpose and these replacement institutions, Reeves:

- goes way beyond his terms of reference;
- lacks reliable research and evidence to evaluate the effectiveness of the existing Land Councils, instead relying upon untested hearsay and anecdote;
- compares like with unlike -- large Land Councils with real track records in land claims and political representation against tiny Land Councils with no role or record in either;
- overloads the agenda with noble but too broad and complex goals;
- falls back upon land and re-arranged land-based institutions as the means of economic advancement after dismissing land as an economic *cul de sac*;
- implausibly, proposes a multitude of tiny organisations as primary agents for a giant task -- Lilliputian entities to meet a Brobdingnag agenda;
- supplements these with a weak confederal body as a supporting umbrella organisation;
- fails to consult with Aboriginal people on an issue of fundamental importance to their well being.

Introduction

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

In evaluating the Reeves Report, I focus on what Reeves was asked to do; what he has done; and how well he has done it. What Reeves was asked to do is set out in the Terms of Reference which, because of their significance, I have included as an attachment to this paper. What Reeves did and found is set out at length in the twenty-eight chapters of his 617 page Report and the Appendices in the accompanying volume, especially the Issues Paper, Appendix B, that was circulated in November 1997.

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

Some obvious disclaimers are therefore necessary: I am not concerned with much of the fine detail and judgments about how well the Act is working. I am not qualified to judge such matters, nor do I have first-hand knowledge of the issues. Furthermore, I am not qualified to evaluate the quality of the expert legal, anthropological and economic research that is relied upon or incorporated in the Report -- that is the task for experts in those fields. Rather my concern is with the use of specialised research in

such areas to support the purposes to which it is put in the Report. In this sense, I am concerned with the quality of research in terms of its relevance and adequacy for supporting the case made by the Report. To illustrate, the research cited might not be appropriate or sufficient to support the case that is being made; or the case being made may simply lack relevant research evidence.

Terms of Reference

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

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

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

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

The eighth matter is also fairly specific and points to the future:

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

In this review I focus on the following:

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

- proposals for institutional restructuring; and
- the question of 'Who Chooses?'

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

Purpose of the Act

The first matter, the effectiveness of the legislation in achieving its purpose, is the crucial one. Of course we must know what the purpose of the Act is in order to evaluate its effectiveness. As the Report makes clear, the main purpose of the Act and its effectiveness in achieving that purpose are not in dispute. That purpose is specified in the long title to the Act: 'An Act providing for the granting of traditional Aboriginal land in the Northern Territory for the benefit of Aboriginals, and for other purposes'. Reeves finds that the Act has been 'an unqualified success' in achieving its main purpose of granting traditional land to Aboriginal people. As he says:

The main purpose of the Act was to grant traditional Aboriginal land in the Northern Territory to, and for the benefit of, Aboriginal people. The Act has been an unqualified success in achieving this purpose. (p.61)

According to Reeves, the Act has been less effective in achieving one of its other purposes that he identifies as providing Aboriginal people with effective control over activities on the land granted. (pp.63, 65-7) This is more contentious, but in any case it seems a legitimate extension of the first specified term of reference concerning the effectiveness of the Act in achieving its purpose.

More contentious is Reeves' extension of the rubric of purpose to 'new purposes of a new era of land rights to obtain better outcomes for the next generation of Aboriginal people in the Northern Territory'. (p.65) Reeves does this in Chapter 4 dealing with 'Effectiveness of the Act in Achieving its Purposes'. And he makes no bones about admitting that he is dealing with 'a new purpose of the Act' : namely, 'providing opportunities for the social and economic advancement of Aboriginal peoples in the Northern Territory'. (p.75) Indeed, Reeves sees this as a 'new era' for land rights now that its original purpose has been largely achieved or soon will be. His conclusion in chapter 4 makes this very clear so is worth quoting at length:

Aboriginal land rights in the Northern Territory are about to pass into a new era. Most of the original purposes of the Act have been achieved, or will be achieved in the space of the next few years. There is, however, a need to reform the Act to ensure that one of these original purposes is achieved, i.e. providing aboriginal people with effective control over activities on their land. While it will be important to retain these original purposes of the Act, as a continuing reminder of the original intentions of the Parliament in passing the Act, the Act should be directed to new objects and purposes in the future. Forging a working partnership between Government and the Aboriginal people of the Northern Territory and the attainment of social and economic advancement for Aboriginal people, are the most obvious purposes for the Act in the future. (pp. 75-6)

In going beyond the purpose of the Act to explore possible new purposes for a new era, Reeves is clearly exceeding his terms of reference. In order to do this, both in Chapter 4 and subsequent key Chapters 10 and 25 through 28, Reeves moves from land rights to the more general social and economic condition of Aboriginal people. Rather than restricting his Report to land rights --what has been achieved and how the land rights regime should be reshaped for the future --he launches into an investigation of the social and economic condition of Aboriginal people and how that might be improved in the future by adapting the Land Rights Act. All of this is quite speculative and, not surprisingly, entails major institutional restructuring. Whatever its interest and worth, it is outside the terms of reference. Hence those parts of Reeves' findings that go beyond his terms of reference should be put to one side because they go way beyond what he was asked to do.

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

refining recommendations for novel purposes that the inventive reviewer sets for himself.

This is very much the case with the Reeves Report. In exploring new purposes and recommending new institutional arrangements to serve them, Reeves enters a more speculative world than land rights. To achieve social and economic advancement of Aboriginal people, and secure working partnerships between government and Aboriginal people, new legislation and institutional arrangements are no doubt necessary. But whether they are the ones Reeves proposes through re-jigging the Land Rights Act are highly contentious. Proposing a new purpose of social and economic advancement to be achieved via institutions of Aboriginal governance and self-determination, as Reeves does, is more ambitious than evaluating the effectiveness of the Land Rights Act. As we shall see, however, it is also more problematical. Better to stick with the more limited agenda of the Land Rights Act serving its purpose of 'providing for the granting of traditional Aboriginal land in the Northern Territory for the benefit of Aboriginals'. Reeves should have focused his recommendations on the working of the Act: on improvements to ensure more effective control by Aboriginals over activities on their land, on measures to cope with the current backlog of claims, and on changes for future operation of the Act after the sunset clause when there are no more land claims to be made.

Social, Cultural and Economic Costs and Benefits of Land Rights

A second major finding of the Reeves Report is that the consequences of land rights for Aboriginal Territorians have been highly beneficial -- spiritually, culturally and socially. Moreover, he finds that overall, after taking account of the costs to other Territorians and the scorecard for major industries, benefits have outweighed costs. This is in response to his second specific Term of Reference.

Reeves indicates early on in his Report that it is 'likely that the Land Rights Act has underpinned and strengthened a sense of Aboriginal cultural identity and has fostered respect for traditional Aboriginal values' (p.92). In later discussions he is more categorical:

The possession of traditional lands has been important to Aboriginal Territorians culturally, spiritually, and in the direct satisfactions they have

brought to their Aboriginal spiritual owners and the communities living on or visiting these lands. (p.571)

In concluding his analysis of costs and benefits of the Land Rights Act for Aboriginal Territorians in Chapter 25, Reeves is extremely positive:

Easily the most important social, cultural, and economic outcome arising from the transfer of 573 000 km² -- 42.3 per cent of the Northern Territory to Aboriginal Territorians is the huge consumption gain that has accrued to them as a result. (p.575)

As he points out, that is because much of the land that has been granted is of marginal economic value in alternative uses, thus making Aboriginal use by way of owning, living on, and visiting '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 no 'productive' use is made of it. It is simply their home -- and valued as such like anyone else's. (p. 575)

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

While benefits have 'greatly exceeded' costs for Aboriginal Territorians, Reeves insists that there have been real costs so that the benefits could have been even greater. Too much was paid for land, he claims, and opportunities have been missed to acquire more land or to use funds for other purposes of economic advancement. These are areas for improvement.

There have been other costs, Reeves points out, most notably for other Territorians. Obviously, we should expect some cost to other Territorians in terms of restrictions on ownership and access to Aboriginal lands. It would be highly improbable that acquisition of some 42.3 per cent of the landmass of the Northern Territory by Aboriginal people would not have opportunity costs for other Territorians. Some of these might well be unnecessary and capable of being reduced by more flexible access regimes and better methods of negotiation with the government, as Reeves suggests (pp.552, 568, 576). Such costs should not be overstated, however, because the land involved is pretty marginal economically. In any case, access and transaction costs are

partly amenable to reduction through better understanding and more flexible procedures.

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

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

The Future is Another Country

Back in Chapter 4, Reeves had introduced his idea of a 'new purpose' for the Act, namely securing 'the social and economic advancement of the Aboriginal peoples of the Northern Territory' (p.75). He proposed the forging of partnerships between government and Aboriginal peoples as a subsidiary means of doing this. While strictly beyond his terms of reference, as established earlier, Reeves' pursuit of this new purpose is the most challenging part of his report and the basis for his more sweeping recommendations for restructuring the Land Act. Hence we need to follow his argument carefully.

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

I have concluded that the economic and social advancement of Aboriginal communities is not likely to be accomplished by modest measures and will require significant departures from the way things have been done so far. ... If more rapid social and economic progress is to occur, more representative, responsive and effective Aboriginal institutions of governance must be put in place to support Aboriginal Territorians' employment prospects, in partnership with the Northern Territory and Commonwealth Governments and other Territorians. (p.92)

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

This argument is taken up and embellished in Chapter 25 dealing with the social, cultural and economic costs and benefits of the Land Rights Act that were discussed above. While most of the chapter is concerned with establishing the score card of cost and benefits in relation of the second specific Term of Reference, a section on 'Land Rights and Aboriginal economic advancement in the future' is interspersed (see pp. 568-575).

In this section, Reeves reiterates his claim that 'the development of Aboriginal freehold land is unlikely to be a major source of jobs and income for Aboriginal Territorians'. (p.568) The nub of Reeves' diagnosis is that the future is not in land but in education and skills. Given that Aboriginal land is often marginal in economic terms and in isolated and out-of-the-way places, as Reeves has repeatedly insisted, it is hardly surprising that he takes this negative position regarding Aboriginal land. In so doing he flatly contradicts Jon Altman's claims that Aboriginal land will become

valuable in the 21st century if Aboriginal owners negotiate multiple use deals and joint ventures with mining, tourism other commercial ventures. (p. 568) Such a focus leads to 'an economic *cul de sac*', Reeves insists, appealing to the more general proposition that 'Land ownership is no longer particularly important in making a living in modern societies.' (p. 571) Rather, economic advancement comes from education and skills.

This is well summed up in Reeves' second set of conclusions for Chapter 25 (the first set examined above concerned assessing costs and benefits according to the Terms of Reference). Reeves anti-land conclusions are as follows:

- A focus on directly developing the land granted to Aboriginal Territorians as providing their best economic way forward is misplaced. Such a focus leads to an economic *cul de sac* for Aboriginal Territorians in the face of the shrinking employment opportunities provided by agriculture world-wide.
- Far more important modern sources of economic advancement than the possession of land are the possession of productively useful skills, technology and capital of the kind in demand in the mainstream Australian economy.
- The evidence that education and training has a big payoff to Aboriginal Australians is overwhelming.
- What is needed in future is a stronger and more sustained effort from Aboriginal Territorians, governments, the non-Aboriginal private sector and the broader community to raise the education and skills of Aboriginal Territorians to form strong, genuine partnerships. (p. 578)

This prepares the way for the final chapters that discuss Aboriginal governance through regional land councils and a radical restructuring of the Land Act.

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

The Land Rights Dilemma

The key to any policy solution is a clear articulation of the problem. If we don't know what the problem is it is hard to come up with a right solution. And even if we do know precisely what the problem is we may fail to devise an adequate solution. There are difficulties both in defining the policy problem and in devising the appropriate

policy solution. On the policy problem side, pitfalls include: defining something as a problem when it is simply the state of affairs; or incorrectly defining the problem for which the wrong solution is then sought; or, endemic to complex public policy issues, oversimplifying the problem or selecting only partial aspects of it. Even if the right question is posed, policy solutions are often difficult. Common pitfalls include: working from incomplete knowledge to inappropriate solutions; choosing or devising policy instruments or institutions that are flawed in their design; or, for policy problems that are deeply embedded in specific cultural and economic environments, proposing incompatible policy arrangements that will not work.

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

Following Reeves, we might say that the dilemma with the Land Rights Act is that it has delivered land to Aboriginal people but land is an economic *cul de sac*. The Land Rights Act has been extraordinarily successful in delivering huge tracts of land to Aboriginal, but in terms of economic advancement that has taken them off in the wrong direction.

On the positive side, to sum up the above, the Land Rights Act has been a great success in fulfilling its primary purpose -- granting traditional Aboriginal land for the benefit of Aboriginal people. It has benefited Aboriginal people enormously in human, social and cultural ways. Despite some inefficiencies and shortcomings in its

operation, and real costs to other Territorians, on balance it has been beneficial in terms of *economic* as well as social and cultural costs and benefits. For such a large and complex public policy issue, land rights in the Northern Territory has been a resounding success. I think we can fairly conclude that that is Reeves' overall finding.

But alas Reeves sees this as a pyrrhic victory. Land is a dead end, a *cul de sac*; the economic future is not with land. To be focused on land in this day and age is to be pointed in the wrong direction. The future the world over is with education, skills and partnerships with government and commercial enterprises. That is especially the case for Aboriginal Territorians who are now land rich but, like Aboriginal Australians generally, relatively poor and economically disadvantaged. Land rights has not changed that and nor could it. Aboriginal land, encompassing more than 40 per cent of the Northern Territory, is marginal or virtually worthless in terms of economic value. True, there has been an efficiency gain through restoring traditional land to Aboriginal people but that is because they treasure it for non-economic reasons and alternative economic uses are minimal. So, ironically, land rich Aboriginal Territorians have ended up in a poverty trap. That is essentially the dilemma of land rights.

The way out, according to Reeves, is through economic advancement in other directions: focusing on education, skills and partnership with government and business enterprises that will help take the next generation of Aboriginal Territorians into the mainstream economy. Reeves' policy solution is to re-jig the Land Act by abolishing the two large Land Councils and creating 18 small regional ones. But what sort of a solution is this?

On the face of it, not a very promising one because re-arranging land-based institutions seems an odd recipe for escaping the poverty trap of being land-based. There are pluses and minuses in having many small regional land councils as opposed to a couple of large regional land councils -- for that is precisely what the Northern and Central Land Councils are. There are costs involved in restructuring institutions at peak time in the policy process. And different arrangements can serve different political agendas. Before considering these matters, we need to see why Reeves thinks

that rearranging the land rights regime will resolve the poverty trap of Aboriginal land.

On this crucial issue the Report is very weak. Having stated that the economic future was not in land when he is establishing a new future for the Land Act, Reeves backtracks in the final chapters of the Report to advocate a different means for mixing the usual ingredients of Aboriginal land, Aboriginal culture and outside funds and assistance. At the beginning of Chapter 28 Reeves restates the challenge in these terms: 'To achieve economic and social advancement for Aboriginal people involves a complicated interaction between Aboriginal culture, the use of Aboriginal land and the provision of funds and assistance.' (p. 604) This is not unreasonable given the primacy of land in any equation for Aboriginal Territorians. It is only surprising in light of the anti-land prognosis for economic advancement of earlier chapters.

As if aware of this backsliding, Reeves goes out of his way in Chapter 28 to address the question: Why use the Land Rights Act as the Basis for a new economic partnership? His answer is that the Land Rights Act is the best vehicle for new purposes because it is so centrally important to the key players: it applies to almost half the Northern Territory's land area; it is the source of mining royalty equivalents for Aboriginal people from the Commonwealth; and it has high standing and immediate recognition by Aboriginal Territorians as their Act. (pp. 605-6) There is a curious additional reason: because the Act is a major bugbear to the Northern Territory Government, modifying it provides an opportunity for the government to play 'a more positive, forward-looking role in Aboriginal issues' and thereby win the confidence of Aboriginal people. There is a final circular reason: 'it is the Act under which RLCs will be established.' (p.606)

So if the ingredients are essentially the same, whence comes the magic in the new pudding? It must come from the new institutional arrangements of small regional land councils instead of large regional land councils. A range of reasons are offered for making the switch. One of the weakest is: everything has failed so let's try something new. This is a primer to Chapter 28: 'The choice is, therefore, between giving up in despair and leaving the situation as it is in a cycle of dependency, or trying a new approach.' (p. 604) The idea of reworking the Act for economic advancement

purposes is first floated back in Chapter 4: 'The Act could, therefore, be a very effective means of achieving new goals and purposes, such as the establishment of a partnership between Aboriginal Territorians and the Northern Territory Government, and for the social and economic advancement of the Aboriginal people of the Northern Territory.' (p. 65) But this chapter gives no more than invocations and aspirations about new purposes and partnerships based on trust and cooperation.

The main rationale for a multitude of smaller regional land councils is given in Chapters 9 and 10. On the one hand, they are offered as a solution to the problem of 'irreconcilable disputes' about traditional Aboriginal ownership of land within 'a bureaucratic and legalistic framework' presided over by the large Land Councils. (p. 200). On the other hand, they are invoked as 'an active regional representative organisation' that acknowledges 'the importance of regional populations as the level at which Aboriginal culture is reproduced and at which Aboriginal land is used and occupied'. They are 'to allow Aboriginal people at the regional level to make their own decisions relating to the use of their traditional lands and thus give them a real measure of self-determination'. (p. 204)

Chapter 26 on 'Aboriginal governance and Self-Determination' is Reeves' most ambitious attempt to chart an alternative approach to the current land rights regime. In this Chapter he proposes 'to identify the nature of the core Aboriginal institutions of governance that could be established under the Land Rights Act to provide Aboriginal people with a framework that would more effectively enable them to pursue their own social and economic advancement.' (p. 581) That requires a high order of institutional design, as Reeves acknowledges: 'a key requirement in the design of effective institutions of Aboriginal governance must be quality and reliability in assisting Aboriginal Territorians to become less dependent, more productive and more self-determining.' (p. 583) As if that were not enough, Reeves also loads up the task by including Aboriginal self-determination as well. Drawing upon the Draft Declaration of the Rights of Indigenous Peoples currently before the United Nations Working Group on Indigenous Rights, comparative developments in comparable countries and Australian authorities, Reeves affirms a right to self-determination for Aboriginal people within the larger Australian society. Aboriginal people have 'the right to

determine their own futures according to their own priorities within an institutional framework that comprises Aboriginal governance'. (p. 583)

This is a tall order: to devise institutions of Aboriginal governance and self-determination that facilitate and promote social and economic advancement, all within a revamped Land Rights Act. These are indeed ambitious and noble goals -- providing Aboriginal governance and self-determination as well as social and economic advancement. But are they achievable through establishing a multitude of small regional land councils under the Land Act? Smallness has some virtues. For example, Gulliver could not deal properly with the tiny Lilliputians because he was too large and clumsy. Small regional councils might serve local interests better, as local government does in parts of rural Australia. But smallness has disadvantages. Gulliver was hopelessly unsuited to deal with the Brobdingnag giants. Effective governance even at a local level requires a certain critical mass and scale. For example, Victorian local government has recently been reformed by reducing the number of councils from 210 to 78 and more than doubling their population size.

As we shall see later, the 18 Regional Land Councils proposed by Reeves are tiny bodies, the majority of them having less than 2,000 people, administrative budgets of some \$400,000 and an administrative staff of less than 10. Moreover, they are scattered throughout enormous tracts of marginal land in isolated areas. They seem more like a Lilliputian solution to a Brobdingnag problem.

Before moving on we should note a couple more points. In part, Reeves' advocacy of new institutions is grounded in his criticisms of the existing ones. Reeves has broached these at various places in the Report and draws them together at the end of Chapter 26 (pp. 591-2) In evaluating these criticisms of the existing land rights regime we need to keep in mind that its purpose was granting land rights for the benefit of Aboriginal people, rather than providing for Aboriginal governance and self-determination. Nevertheless, Reeves criticises the Act in these terms: 'The institutions and arrangements that have developed under the Land Rights Act have not provided satisfactory governance and self-determination for Aboriginal Territorians.' In particular, Reeves lists the following problems of governance: the Land Rights Act does not accord with the Aboriginal tradition of self-determination at the regional

level; traditional Aboriginal owners are made a passive group with only spiritual affiliation to land; large Land Councils do not promote 'the more active and purposeful decision-making role' that small councils would; the two large Land Councils have become too dominant in ways that are contrary to the interests of their constituents; the Act provides inadequate dispute resolution mechanisms; funds are dissipated rather than contributing to social and economic advancement; and more generally there is no 'central Aboriginal body responsible for adopting and implementing a program for the social and economic advancement of Aboriginal Territorians'.

While some of these criticisms might have some substance to them, it is unfair to criticise the existing Land Rights Act and the large Land Councils set up under it for not being something rather different and serving other grander purposes. The Land Act might have been designed to serve those purposes of active governance, self-determination and social and economic advancement better. And it could be revised at this point to do so. But the old saws of 'Horses for courses' and 'Sticking to your job' do have a kernel of truth and common sense. It is simply not possible to do all good things at once, especially in the complex field of public policy and even more especially in the difficult area of Aboriginal advancement. Overload is a real constraint. Had the 1976 Land Rights Act tried to give Aboriginal people self-determination and provide for their social and economic advancement as well as granting land rights, would it have worked? In my view, only in the minds of wishful dreamers.

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

Councils would likely be much worse in this regard, and large Land Councils stand a better chance of success.

The nub of Reeves' case is that smaller regional councils will produce greater participation by Aboriginal people who will be more vigorous in pursuing their economic self interest. The Northern Territory Government will cease being antagonistic and instead become cooperative, entering into partnership with more entrepreneurial Aboriginal communities. However, there is no compelling evidence either that this is wanted by Aboriginal people, or that it will work. The argument is carried by rhetorical ploy: using only positive and aspirational language about the proposed smaller regional land councils, and negative critical language about the existing larger regional land councils. In the latter instance there is a real record to attack, but for their proposed replacements there is only an idealised supposition.

Institutional Restructuring

So far I have considered Reeves' argument and analysis about how well the existing institutions of the Land Rights Act have worked and his proposals for alternative small regional land councils. As we have seen, he credits the existing Act with achieving its main purpose of granting land to Aboriginal people, but criticises it for not achieving new purposes of Aboriginal governance and self-determination and delivering social and economic advancement. These larger and nobler goals, Reeves claims, can be achieved by restructuring the institutions of the Land Act. We need to examine his proposed institutional arrangements and assess whether they are likely to achieve these larger goals; if not, whether they are likely to do so more effectively than the existing larger Land Councils; and indeed whether they make sense at all.

But first it is as well to remind ourselves of some of the difficulties and pitfalls in institutional design. A common methodological ploy is to compare like and unlike: actually existing institutions with real records and problems compared to imagined institutions that have the positive attributes selected by their advocate and no recognised problems. To put it another way, we can be all too familiar with the operation and shortcomings inherent in existing institutions but would be foolish indeed if we assumed that alternative ones would be problem free. That is not to say we should not embrace institutional change; only that we should vet new proposals

critically to ensure their shortcomings are properly recognised and taken into account in the decision to adopt them.

A related tendency is impatience with what we have and too hasty grasping at novelty. 'The grass is greener on the other side' is a well know adage that captures a common human propensity, especially when we are confronted with hard issues. Institutional restructuring is often a surrogate for substantive action. This Petronius effect was so named after the shrewd Roman observer who noticed that the standard ploy of Rome's losing generals was to restructure their army rather than defeat Hannibal in Italy. More specifically, there are real costs associated with changing institutions, especially during a period of peak activity. As well, there are usually unforeseen consequences and costs due to incomplete knowledge.

Reeves proposes two main institutional changes: replacing the two large Land Councils with 18 small Regional Land Councils and creating a new umbrella Aboriginal Council. The groundwork for the change is laid back in Chapter 6 where Reeves contrasts the two large Land Councils, the Northern Land Council and the Central Land Council, with the existing two small Land Councils, the Tiwi Land Council and the Anindilyakwa Land Council.

The large Land Councils are credited with being 'almost totally successful' in their main purpose of securing land claims for Aboriginal people. (p. 104) They have also been 'successful in developing a significant political profile' and for providing a training ground for Aboriginal leaders like Pat Dodson, John Ah Kit and Galarrwuy Yunupingu. (p. 101) In fact they have probably been too successful in winning land claims and too powerful politically for the likings of some including the Northern Territory Government. Reeves comments that: 'it must be said that the political activities of the two large Land Councils have put them at odds with the Northern Territory Government on many issues, to the extent that almost all the dealings between the two large Land Councils and the Northern Territory Government are acrimonious'.

More than that, Reeves accuses the two large Land Councils of being 'large bureaucracies' in the pejorative sense. (pp. 97, 105) They have not been so successful in performing 'other aspects of their representative role under the Act', he charges:

They are perceived to be bureaucratic, remote, tardy and uninterested in local Aboriginal problems. They have been accused of duplicity, causing division within Aboriginal communities, disempowering Aboriginal people, ignoring Aboriginal tradition and generally, running their own agendas. (pp. 1117-18)

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

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

Large Councils are performing their functions from the point of view of key stake holders.

Nor is the evidence in favour of small Land Councils that Reeves draws from the experience of the existing two, Tiwi and Anindilyakwa, either adequate or persuasive. The first difficulty is one of comparability: since these two small Councils have not had to concern themselves with land claims, they have avoided the divisiveness associated with it. Nor have they had to develop a political role, so consequently they enjoy better relations with the Northern Territory Government. (p. 100) Nor are they 'large bureaucracies': Tiwi has a sum total of seven staff compared with 116 for the Central Land Council and 85 for the Northern Land Council. (p. 97) In short, these two small Land Councils do not perform the primary function of the Large Councils -- securing land claims and representing the political interests of Aboriginal people -- and so are hardly comparable institutions.

In any case, and this is the second difficulty with Reeves' preference for them, his Report provides no hard evidence that they operate effectively. On all the criteria of performance that he uses he can only say that they '*appear*' to do well. Consider the potent mixture of vacuousness and bias in the conclusion to Chapter 6, that comes immediately after the disclaimer as to the truth or falsity of the twelve pages of reported criticisms of the Large Land Councils:

Nonetheless, it is clear from these accusations that the two large Land Councils now operate within an increasingly acrimonious and polarised constituency. This situation is to be contrasted with the two small Land Councils who *appear to perform* their functions in a more harmonised fashion. The two small Land Councils are much closer to the constituencies they serve. They do not operate with large centralised bureaucracies. They *appear to perform* their functions following their own view of Aboriginal tradition. They *appear to operate* more pragmatically, with less formality and with much more flexibility in performing their functions. (p. 118)

So, apart from appearances, there is no evidence on performance. The statements about having smaller bureaucracies and being closer to their constituencies are tautologically true.

Note finally, the dubious character of the opening statement that 'it is clear from these accusations that the two large Land Councils now operate within an increasingly acrimonious and polarised constituency'. Would that be true if the accusations were false? Reeves has eschewed any judgment about truth. If it were true and the accusations were indeed false, then the appropriate remedy would not be small Land Councils but better public relations on the part of the large Land Councils and improved communication with their customers and client groups to dispel false impressions.

The same flaws are evident in subsequent comparisons of the larger and smaller Land Councils. In Chapter 9 concerning 'Traditional Aboriginal Owners, Disputes and Breakaway Land Councils', Reeves compares like with unlike: tiny Tiwi that has no role in the main game of securing land claims with the larger Northern and Central Land Councils that do. In assessing which has done best in securing 'a balance between community representation and traditional Aboriginal owners', Reeves can only say the smaller Land Councils 'appear' to have done so. (pp. 187, 200) Before changing the system, it would be as well to be sure.

But incomparability and lack of evidence, it seems, are no barrier to restructuring institutions for land rights. In Chapter 27 Reeves proposes 18 Regional Land Councils: sixteen new ones based on the existing regions and regional communities established by the large Land Councils, and the continuation of Tiwi and Anindilyakwa. (pp. 208 ff., Appendix H, Chapter 27) In advocating smaller regional Land Councils, Reeves is extending what is already in place: bolstering the regions already set up by the large Land Councils with larger functions and providing them with fuller institutional arrangements. That was the way things were developing and it might be beneficial to extend and formalise the process. Making smaller regional Land Councils serve as substitutes for the larger regional Land Councils, Northern and Central, however, is rather more contentious. Making these tiny bodies responsible instruments of Aboriginal governance and self-determination for the purposes of social and economic advancement of Aboriginal people is implausible in the extreme.

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

Nor is there any relief to be had from strong administrative backup for the new Councils. The models are the existing Tiwi and Anindilyakwa Councils with some 1650 and 1300 people respectively: 'each RLC will be about the same size' with administrative costs of about \$400,000. (p. 612) Incidentally, it should be obvious that the larger Land Councils are in fact not particularly large by any standard I can think of for institutions with their function and purpose. They are much smaller than any local governments I know of. And as well they are regional as is evident in their names. Nor are they particularly large in terms of their bureaucracies: 85 staff for the Northern Land Council and 116 for the Central Land Council. (p. 96)

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

Nor is the situation saved in the last Chapter by the new Aboriginal Council that is to act as an umbrella organisation to the 18 small Regional Land Councils. This body will have some of the functions of the large Land Councils such as completing the outstanding land claims but mainly a 'strategic oversight' and support role with respect to the Regional Land Councils. Initially its members will be appointed but afterwards they will be elected by Aboriginal Territorians. NTAC's major function is 'to assist the long-term social and economic advancement of Aboriginal Territorians' through various avenues of coordination, encouragement, assistance and support. (pp. 610-11) The hoped for sweetener in all of this is an enormous boost in government funding with hundreds of millions of dollars coming from the Northern Territory and Commonwealth governments and from funnelling of ATSIC business and community development funds via NTAC. If the tiny RLCs are as inappropriate for economic and social development as suggested, governments would be foolhardy indeed to entrust them with so much money.

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

On the other hand, NTAC is charged with banking and investment trust fund responsibilities (p.610). If that means NTAC controls the money then it would likely be a powerful body. Given the tiny size and dispersion of the RLCs, it is also likely

that NTAC would have to take a strong role in providing administrative services and backup. If that is the case, NTAC would need more detailed consideration than is given in this last chapter of the Report.

Who Chooses?

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

Indeed, it should now be accepted as a first principle that no major initiatives affecting Aboriginal people are proposed without their input, and certainly nothing is done without their consent. Aboriginal people have a right of say in their own affairs and in institutional restructuring that affects them in significant ways. That is especially the case when it comes to devising institutions of self-determination and governance. It is quite preposterous that a major Report purports to speak about new institutions of Aboriginal governance and self-determination without the support and consent of Aboriginal people.

Conclusion

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