Northern Land Council Submission

House of Representatives Select Committee on Aboriginal and Torres Strait Islander Affairs

Inquiry into the Reeves Report on the Aboriginal Land Rights (Northern Territory) Act 1976

April 1999

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Executive Summary

This is the submission of the Northern Land Council (NLC) to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs' Inquiry into the Reeves Report on the *Aboriginal Land Rights (NT) Act 1976* (the Land Rights Act). The NLC concurs with Professor Jon Altman's statement to HORSCATSIA (31 March 1999) that:

> The Reeves effort is the worst review report I have seen in over 20 years research in indigenous affairs; it was a second rate effort by a very poor team, its one outstanding feature being its enormous cost. The additional costs that could result from implementation of the review's recommendations are barely worth considering.

The NLC considers that the Reeves Report should be rejected because it fails to substantiate any of its arguments for the radical transformation of the Land Rights Act it proposes. The Report could be argued to have four pillars for its new model of land rights: legal, anthropological, economic and methodological. The NLC shows in this submission that each of those pillars is structurally flawed. Further, the NLC considers that Reeves has fundamentally failed in the execution of his task in this review. As is shown in this submission, he failed to understand the Land Rights Act; failed to identify some genuine workability issues relating to the Act; and failed to come up with reasonable proposals for change.

An Alternative Model

John Reeves has developed a model which will not work. However while the Reeves Report must be rejected because it does not and cannot work, that is not to say that there is no need for change in the way the Land Rights Act operates for the twenty-first century.

As the NLC has maintained since the Land Rights Act Review began, this process is an opportunity to look at how the Land Rights Act can work better.

After 23 years there are some reforms which can make the Act work better for Aboriginal people and other stakeholders, but any changes must be within a clear framework which recognises and protects fundamental Aboriginal rights. The NLC wants to present a constructive alternative model for the Land Rights Act for the future which protects and strengthens land rights, and provides a way forward.

The NLC model is based on the original purpose of the Land Rights Act, with a recognition of the changes which the sunset clause and the move to the land management era bring.

The NLC alternative consists of:

- Facilitating and empowering the regionalisation process already under way at the Northern and Central Land Councils;
- Streamlining the mining provisions to allow for much greater freedom of contract and the simplification or variation of the statutory requirements by agreement;
- Greater accountability to Aboriginal people and transparency in the management of royalty distributions and the Aboriginal Benefits Reserve while maintaining the right of Aboriginal people to make decisions over their money;

- A land claim settlement negotiation meeting between the Land Councils, Land Commissioner and Northern Territory Government to facilitate the settlement of outstanding claims;
- The development of agreements and protocols between Aboriginal land owners and local or regional service delivery organisations to clarify and confirm the rights of all Aboriginal residents on Aboriginal land, while protecting the rights of landowners;
- Further investigation of the most appropriate models for the effective management and delivery of services to Aboriginal people to achieve better outcomes and greater community control.

The Direction of the Reform

The NLC remains committed to progressive reforms to the Land Rights Act. The NLC has welcomed the Review and sought to use the process to bring about genuine improvements in the workability of the Land Rights Act, addressing legitimate difficulties which may be identified whilst maintaining the underlying principles of land rights. The Reeves Review fails to do this.

The NLC rejects the basis of Reeves reforms to the Land Rights Act. The reforms proposed in the Report would destroy Aboriginal land rights and risk turning the hard-won gains of Aboriginal people in the NT into a comparatively worthless commodity. Without proper and effective Aboriginal control based upon traditional law, it would be much more likely that the land would be stripped of its ancient sacred and ceremonial meaning and reduced to its economic value. This is not land rights.

The Reeves land rights model is based on two key policy shifts:

1. the denial of Aboriginal law and of the traditional landowning rights and interests of Aboriginal people, leading to the transfer of the rights of traditional Aboriginal owners as the primary decision-makers about Aboriginal land to other people; and

2. the provision of greater powers to the Northern Territory Government (NTG) to intervene in the operation of the Land Rights Act, and to act outside of the Act.

The changes to traditional ownership are contrary to accepted anthropological and legal orthodoxy; they are contrary to both Aboriginal law and Australian law. The provision of greater powers to the NTG is unnecessary and counter-productive.

The inherent flaws in the model stem from a misunderstanding of the Act and how it works and misrepresentation of the problem, which inevitably leads to erroneous conclusions. The Review was established to inquire into the operation of the Land Rights Act. The conclusions which Reeves draws from this inquiry fail to accurately and objectively analyse the criticisms and the report fails to distil and assess the nature of any perceived or alleged criticisms.

The acquisition and transfer of the current freehold rights, which give effect to traditional rights, is not acceptable, nor is it lawful. The NLC contends that once this crucial point is understood and rejected, the foundation upon which Reeves' other reforms is built will be unsustainable. The abolition of traditional rights, which is what Reeves proposes, would destroy land rights and it seems unlikely that the

Australian Parliament would seriously consider destroying one of its greatest social justice achievements since Federation.

Granting increased powers to the NTG is similarly flawed. The relationship between the NTG and Aboriginal people is problematic. However, the issues will not be resolved through statutory prescription, nor should they be resolved by diminishing Aboriginal rights and increasing the powers of the Northern Territory Government. The NLC wants to see the relationship improve, but contends that Reeves' findings in respect of the extent of the problem are wrong and, in any event, the relationship can only be improved through negotiation, recognition of rights, and mutual respect. The NLC rejects the imposition of increased NTG powers at the expense of Aboriginal people in the name of "partnership".

How the Land Rights Act works

Before considering radical changes to the Land Rights Act, it is important to understand how it actually works.

The Land Rights Act sets up processes and structures to recognise and protect the traditional rights of Aboriginal people to land.

It does this through the establishment of Land Councils to act as representatives of Aboriginals with traditional interests in land as well as Aboriginal communities and groups who live on the land; through the claims regime; and through the requirement for consent and a fair agreement for any use of or access to Aboriginal land. Land Councils must consult with and have regard to the views and interests of all relevant Aboriginals and Aboriginal communities and groups and cannot approve any development without the consent of the traditional Aboriginal owners, given as a group in accordance with traditional decision-making processes.

The Land Rights Act recognises the operation of Aboriginal law and decision-making processes, and is a statutory mechanism to allow those processes to continue to operate and to provide an interface, insofar as land is concerned, between Aboriginal law and Australian law.

Aboriginal law and Aboriginal Landowners

The radical reform of the Land Rights Act proposed in the Reeves Report is based on faulty legal and anthropological theory.

The transfer of decision-making and land-owning to the Regional Land Councils is unconstitutional and contrary to the Racial Discrimination Act. Reeves fails to acknowledge or accept that the beneficial owners of Aboriginal land are all those Aboriginals with traditional interests in the land (s.4(1)) and that traditional decision-making processes should apply (s.77A).

Reeves' arguments for amending the Land Rights Act to take rights and decision-making powers from traditional landowners, including traditional Aboriginal owners, and give such powers to Regional Land Councils is based on fundamentally flawed legal and anthropological analysis.

In his arguments about traditional Aboriginal ownership, Reeves has failed to understand the substance of the Blackburn judgment in the Gove Land Rights Case; failed to take into account the Australian Constitution's protection of property rights;

and distorted or misrepresented anthropological data. His recommendations based on such flawed analysis must be rejected outright.

Regional Land Councils

The NLC rejects the Reeves' model of Regional Land Councils, although it does not reject a more appropriate regionalisation model which protects traditional Aboriginal owners' rights.

The Reeves model is unacceptable and invalid for four reasons:

1. It is contrary to Aboriginal law and Australian statutory, common and Constitutional law;
2. The decision to create new land councils should be made by Aboriginal people themselves, not prescribed by an amendment to the Act;
3. The public hearings conducted by Reeves failed to find even a significant groundswell of support for compulsory fragmentation of the Land Councils;
4. The creation of 16 new, under-resourced and under-budgeted, Regional Land Councils would inevitably lead to inefficiency, a lower standard of services, uncertainty in commercial dealings, increased administration costs and, possibly, corruption.

Northern Territory Aboriginal Council (NTAC)

NTAC is a centralised, politically-appointed body which would effectively control the 18 Regional Land Councils by controlling all ABR monies and overseeing agreements. It would be, in effect, an arm of government and would have significant control over activity on previously privately-owned Aboriginal land.

The NLC considers that the combination of the fragmentation of the Northern and Central Land Councils; the transfer of property rights to Regional Land Councils; and the centralisation of money and strategic powers under NTAC constitute an unacceptable attack on Aboriginal rights. Legal advice demonstrates that it is unconstitutional.

ABR and Royalty Associations

The management of the ABR by the centralised, politically-appointed NTAC is unacceptable, as is the prescription of purposes for which ABR monies can be used. The Reeves proposal would result in the substitution of the ABR compensatory monies for government services.

The abandonment of the distribution formula is similarly opposed; Reeves presents no valid arguments to support his recommendations, and has badly misrepresented the financial data.

The acquisition of the assets of Royalty Associations by NTAC and the RLCs, and the payment of all future monies from Aboriginal land to NTAC or RLCs would clearly be an acquisition of property requiring just terms compensation under the Australian Constitution. Reeves has misunderstood the complexities of the nature of monies paid into and out of the ABR, and the monies resulting from activity on Aboriginal land, and as a result has made recommendations about private monies which would clearly be unlawful.

The NLC proposes a simple amendment to the Land Rights Act to ensure greater accountability of Royalty Associations without compromising their property rights or decision-making. Amending section 35A so that Land Councils can enter into contracts or agreements with Royalty Associations and requiring the availability of financial records to the Land Councils would ensure both accountability to the Aboriginal population and the continued autonomy of the associations.

Mining

Reeves' proposals regarding the mining and exploration provisions of the Land Rights Act are based on the unworkable and unacceptable decision-making model. Under this model, decisions over whether mining or exploration proceeds will be made by the Regional Land Council which is under no obligation to consult with or act on the instructions of the Aboriginal landowners. This is in direct contrast to the current model where Land Councils are required to ensure that Aboriginal landowners and Aboriginal communities and groups have been properly consulted and traditional Aboriginal owners have given or withheld their informed consent as a group and in accordance with traditional decision-making processes.

The Reeves mining model is thus fundamentally flawed, however some of the technical changes he proposes have some value. The NLC supports the simplification of Part IV proposed by Reeves, and the implied reliance on freedom of contract between the parties rather than statutory regulation of the process. The NLC considers that some of these technical changes should be incorporated by HORSCATSIA, once the unworkable NTAC and RLC decision-making model has been rejected.

Permits

The right to control entry is an essential feature of Aboriginal law. It is not, as Reeves suggests, a hangover from the days of Aboriginal reserves. Reeves fails to acknowledge the special nature of traditional land ownership and the different social and cultural characteristics of Aboriginal communities. Aboriginal people told the public hearings on the review that they wanted the permits system to be stronger, not weaker.

Replacing the permits system with the NT Trespass Act would be unworkable and a gross infringement of Aboriginal law and the Aboriginal right to control their land.

NT Laws

The changes proposed by the Reeves Report to the application of NT laws on Aboriginal land are unnecessary and counter-productive. There is no evidence that any significant issues have arisen as a result of the current regime: the NTG has not been refused access to land for public purposes and there has been no problem in enforcing necessary and appropriate criminal and other laws on Aboriginal land. By contrast, the NTG has been extremely reluctant to provide resources to Aboriginal communities when Aboriginal people have been seeking NTG support to enforce NT laws. For example, community calls for additional support for policing have not resulted in an adequate level of funding for police officers in Aboriginal communities.

In relation to sacred sites, the proposed amendments to the Commonwealth Heritage Act 1984 make it even more important that Land Councils retain their role in protecting and managing sacred sites as it is highly possible that the safety net previously provided by the Commonwealth legislation will be removed, and that the NT Act may be downgraded as well.

Methodology and Processes

The methodology and processes followed by Mr Reeves in reviewing the Land Rights Act in 1997/98 were inappropriate and have led to a large number of errors, inaccuracies and flawed findings. Reeves did not give Aboriginal communities adequate time to respond to his Issues Paper; he allowed some (mostly non-Aboriginal) respondents to have lengthy extensions on the deadline for submissions; he failed to translate the oral testimony given to him in Aboriginal languages or to use interpreters; and he inconsistently applied confidentiality provisions.

The Reeves Report is full of *non sequiturs*, flawed logic and inadequate reasoning. He dismisses the views of the majority of people as somehow tainted simply because they have the same views as those expressed by the Land Councils, yet accepts apparently on face value the claims of small groups of people whom he knows to be the proteges of the NTG. Legal, anthropological and economic knowledge is used inaccurately. He provides lists of issues then fails to make any logical judgement about them on some occasions; on others, without evidence or argument, he simply presents his personal opinion.

The NLC contends that the poor quality of the document, and the lack of due process in its preparation and research, means that it should not be the basis for decision on this major public policy issue.

1. An alternative model for land rights for the twenty-first century

John Reeves has developed a model which will not work. The Reeves Report fails on its four fundamental bases: anthropologically, legally, economically and in its methodology. However while the Reeves Report must be rejected because it does not and cannot work, that is not to say that there is no need for change in the way the Land Rights Act operates for the twenty-first century.

As the NLC has maintained since the Land Rights Act Review began, this process is an opportunity to look at how the Land Rights Act can work better.

After 23 years there are some reforms which can make the Act work better for Aboriginal people and other stakeholders, but any changes must be within a clear framework which recognises and protects fundamental Aboriginal rights. The NLC wants to present a constructive alternative model for the Land Rights Act for the future which protects and strengthens land rights, and provides a way forward.

The NLC model is based on the original purpose of the Land Rights Act, with a recognition of the changes which the sunset clause and the move to the land management era bring..

The fundamental things remain

1. Traditional Aboriginal owners must retain the rights they currently have to control the use of their land and its resources;

2. Aboriginal people must be able to control access to their land, and protect their sacred sites on and off Aboriginal land;

3. Aboriginal people must be represented by authoritative, professional and efficient Land Councils which can effectively and appropriately administer the Land Rights Act and act as advocates for land rights issues;

4. Aboriginal compensatory monies or earnings must not be used to substitute for government responsibilities and provision of basic services;

5. The permits system must be retained as an effective and appropriate method which provides security to Aboriginal people and facilitates necessary access to Aboriginal land.

Regionalisation

The Reeves model will not work because it strips traditional Aboriginal owners of their rights and transfers decision-making powers to bodies which have no authority in Aboriginal tradition. Land rights are based on the recognition in non-Aboriginal law of the rights and authority of Aboriginal processes; to break that nexus would be to destroy land rights. The Reeves model, by establishing Regional Councils which can make decisions which may not require the consent of traditional owners, is unworkable and unacceptable to Aboriginal people. Reeves then erroneously

combines decision-making on land use with decisions over services (health, housing, education and economic development.)

Under the Reeves model, decision-making over land and services become the province of a Regional Land Council elected from the region but rather than being accountable to the traditional land owners, the RLC is accountable to NTAC.

The centralised, politically-appointed body NTAC is also unacceptable in Aboriginal law, because it has the power to further subvert decision-making away from those who hold traditional authority.

Currently the Land Rights Act operates on a principle that traditional Aboriginal owners must consent to any use of their land or resources. The Land Council cannot sign off an agreement unless it is satisfied that: (a) the traditional Aboriginal owners have given their informed consent; (b) other affected people and organisations have been consulted; and (c) the agreement is fair and reasonable. These principles provide fundamental protections to Aboriginal people which must remain.

However, the concept of devolving the power to sign off agreements to a level closer to the local people is valuable. The NLC's regionalisation model is based on its seven current Regional Councils, which are subsets of the Full Council. Under our model, full decision-making powers to sign off agreements would be devolved to the Regional Councils as they mature. This would increase efficiency and timeliness, as well as keeping all decisions close to the people concerned.

However, the Regional Councils would only be able to sign off under the same conditions as currently apply to the Full Council: that is, in accordance with Aboriginal tradition, traditional owners consent as a group; affected people and organisations are consulted; people with any traditional interests are informed and the agreement is judged to be reasonable.

The dangers of rapid or inappropriate regionalisation have been well-described by commentators around Australia and it is not the NLC's intention to attempt to implement this model without the appropriate human and other resources, or before the Regional Councils themselves are ready for the pressures and responsibilities. The NLC considers that only some of its current seven regions are ready to take on the full responsibilities proposed.

However it is most important to note that unlike the Reeves model, the NLC model separates the decision-making over land (which is made by the traditional Aboriginal owners) from the execution and administration of agreements (which the Regional Councils will take on). This differs sharply from the NSW model, and avoids the pitfalls of corruption which that experience has seen.

This regional decision-making model is consistent with Aboriginal processes and protects the fundamental land rights which the Act recognises, but provides a greater regional autonomy.

The issue of regional control over citizenship services such as health, housing and education must remain separate from the management of land. More research and policy development is needed to investigate how these services can be better

delivered, without increasing the transaction costs to an unreasonable level or compromising the level of service and efficiency.

Mining

The Reeves mining model is based on the Regional Land Councils' unacceptable decision-making process and NTAC, which the NLC rejects.

The current mining provisions are cumbersome because of the red-tape in the Act. A simple solution is to simplify the procedures so that mining companies and Aboriginal people can enter into any kind of contract they can agree on regarding mining and exploration.

The right of Aboriginal people to withhold consent from any mining or exploration application must be retained. To streamline activity, it would be beneficial to have the resources to identify which people are interested in mining developments. The exploration licence process can be considerably streamlined by appropriately and strategically dealing with applications on a regional basis.

Changes to the mining regime as proposed by the NLC attempt to deal with the problem (for both governments and Aboriginal landowners) of exploration companies "warehousing" mining tenements on Aboriginal land while waiting for market conditions to improve. Further development of a "user pays" system for companies seeking agreements on Aboriginal land would also greatly assist Land Councils to deal with the companies which are genuinely seeking agreements.

Reeves proposed decision-making structures (RLCs and NTAC) exclude the traditional owners and make his proposed changes to the mining provisions unacceptable. However if these unacceptable and unworkable aspects of the RLCs and NTAC were removed, the NLC approach is not very different to the Reeves mining model, which similarly seeks to simplify and free up the negotiation process.

Royalties and ABR

Royalty associations receive money for the benefit of Aboriginal people affected by development. Better procedures can be developed to ensure that the monies received are used effectively for the long-term benefit of Aboriginal people. Rather than following the prescriptive Reeves model which patronises Aboriginal people and tells them what they can and can't do with their money, the NLC proposes a model where, under the Land Rights Act, Royalty Associations negotiate and enter into agreements regarding the investment, management and distribution of royalty monies which satisfy appropriate accountability criteria.

This model would deliver greater accountability to the Aboriginal public and a transparent process to the wider public.

The NLC recommends that the Reeves Model for the management and distribution of ABR monies is rejected by HORSCATSIA as unconstitutional and unworkable, and that the NLC's alternative model, with its emphasis on accountability to Aboriginal stakeholders, enhancing the quality of advise for Aboriginal economic decision-making, and transparency, is adopted.

Land Claims

Reeves rightly identifies the desirability of reducing the time, cost, uncertainty and adversarial nature of the outstanding land claims. The NLC sees opportunities to expedite resolution of these claims, but not through denying Aboriginal rights by dismissing certain types of claims or extinguishing native title rights as Reeves proposes. There are some threshold legal issues which are currently being determined in the courts and the NLC has made these a priority. Resolution of these matters will give the claimants and the NTG greater confidence in negotiating mutually acceptable outcomes to the outstanding claims. In its submissions to Reeves, the NLC proposed a land claim settlement conference with the Northern Territory Government to explore the prospects for resolution of the outstanding claims. Unfortunately this proposal was overlooked in the Reeves Report and instead Reeves proposed seriously flawed options for completing the land claim process within two or three years largely by dismissing a large number of important claims, and pre-empting the courts' decisions of key legal issues.

Nobody will benefit if the land claims process extends for another twenty years. Aboriginal people should not have to wait four decades for their inherent rights to be recognised; nor should Land Council resources continue to be channelled into fighting land claims; the taxpayers of the Northern Territory also should not have their funds used in unnecessary legal challenges to land claims. The solution is not to deny the reality of Aboriginal land rights, but to seek a new way forward on the outstanding claims which recognises and protects rights at the same time as resolving these issues quickly.

The NLC recommends that the HORSCATSIA Inquiry call for a Land Claims Conference between the Land Councils and the Northern Territory Government which is aimed at finding an appropriate process to settle as many claims as possible, and to identify the key legal issues which must be left to the courts.

Aboriginal land rights, communities and local government

As Reeves points out, it is not only traditional Aboriginal owners who live on Aboriginal land; historical forces have brought many non-traditional owners to larger townships where they have now established their families and their lives. The Land Rights Act currently recognises these people by ensuring that they must be consulted about any land use agreements and by including them as "affected people" or people with an interest in the land benefiting from mining projects in their direct area.

The NLC wants to clearly identify and recognise the rights of Aboriginal residents on traditional lands by developing local government agreements which operate in the larger communities. These agreements delineate the roles of local governing bodies and land-owners in decision-making, and provide a clear agreed framework for participation in decisions over local issues and access to lands.

This process is merely a formalisation of the agreements which Aboriginal people in many places have already made through traditional legal processes; in other places it can assist to defuse community tensions and disputes by clarifying roles and decision-making.

Regional Service Delivery

The NLC considers that the Review of the Land Rights Act has raised important issues about the effectiveness and efficiency of the current delivery of government services to Aboriginal people in the Northern Territory, and the socio-economic status of Aboriginal people. While these issues are entirely unrelated to decision-making over land, and must remain so, the Review provides an important opportunity for Aboriginal people and the Federal Parliament to consider innovative changes to service delivery to address the problems currently experienced by Aboriginal people in the NT.

The NLC rejects the implication that the Land Rights Act is or should be the panacea for the problems of service delivery, however as the issue has been raised it is timely to examine better models for the provision, funding and management of services to remote Aboriginal communities. Reeves has tapped into a very real concern among Aboriginal people that they do not have adequate access to services or to decision-making regarding service delivery, and while he is wrong to link this with land rights, it is appropriate to consider how to improve the situation.

The concept of regional authorities for the management and delivery of services has been raised by Aboriginal people for some time, most recently in the Review of ATSIC and the Reeves Report. The NLC considers that separating decisions over land from the management of services is vital to Aboriginal societies and culture and that this is the primary "separation of power" in contemporary Aboriginal societies, and should be reflected in institutional structures.

The assessment of appropriate regionalisation of decision-making over land, in accordance with Aboriginal tradition, should remain distinct from, and not confused with, considerations of regional authorities managing and delivering services.

It must be noted that Reeves' attempts to achieve greater local autonomy through his model of regionalisation of decision-making overlooks the fact that the Land Rights Act currently ensures the most regionalised control of land-use decision-making. Under the Act it is only the traditional Aboriginal owners of the affected land who can and do make decisions. Reeves' regional land council model (and NTAC) serve only to centralise decision-making and take it away from the very local level of the traditional landowners. NLC's proposed refinement of the arrangement is to delegate greater powers to regional councils to implement those decisions of the traditional landowners.

Reeves goes beyond his terms of reference when he enters into consideration of non-land related matters such as the delivery of services to Aboriginal communities. His attempts to address the issues are futile because he fails to recognise and distinguish decision-making over land-related issues from that of service delivery.

However, as these issues have been raised, a constructive outcome of the Review could be the development of an informed debate (and appropriate solutions) for addressing the issue of the management of services to Aboriginal communities. Such an inquiry would be in line with the recommendation of the Batchelor Indigenous Constitutional Convention (December 1998) which called for an investigation of the funding and delivery of services to Aboriginal communities.

Clearly, as Reeves has shown, the socio-economic situation of Aboriginal people in the Northern Territory is unacceptably poor. Currently government services are not being delivered to Aboriginal people in the most effective way to achieve outcomes equal to other Australians. It is worth considering how these services can be better delivered and the money managed to achieve better outcomes for Aboriginal people. Aboriginal people have long argued that regional authorities are a much more appropriate way to manage service delivery. Under this model, regional institutions would manage the delivery of all government services to a particular region, based on the needs and priorities of the region. Such a structure would sit side-by-side with, and have the support of, the traditional structures which govern decision-making over land.

The NLC recommends that the HORSCATSIA commits resources to investigate the efficacy of how services are currently delivered to Aboriginal communities, recognising the fundamental difference between decision-making over land (a decision for traditional landowners) and decision-making over services (a decision for all the community.)

2. The Direction of the Reform

The NLC remains committed to progressive reforms to the Land Rights Act. The NLC has welcomed the Review and sought to use the process to bring about genuine improvements in the workability of the Act, addressing legitimate difficulties which may exist while maintaining the underlying principles of Land Rights. The Reeves Review fails to do this.

Reeves acknowledges that his proposed reforms are "substantial and far-reaching changes" to the Land Rights Act (p.ii). In fact, the amendments recommended by Reeves are so substantial as to change the entire basis of land rights in the Northern Territory and destroy the essence of Aboriginal tradition on which land rights are based.

he Reeves land rights model is based on two key policy shifts:

1. The denial of Aboriginal law and of the traditional landowning rights and interests of Aboriginal people, leading to the transfer of the rights of traditional Aboriginal owners as the primary decision-makers about Aboriginal land to other people; and

2. The provision of greater powers to the Northern Territory Government (NTG) to intervene in the operation of the Land Rights Act, and to act outside of the Act.

These two points are the basis for his radical rewrite of land rights which results in:

- A centralised, politically-appointed Aboriginal council (NTAC) which oversees the management of Aboriginal land directly or via Regional Land Councils;

- Prescription in the Land Rights Act of purposes upon which money from Aboriginal land uses can be spent. The identified purposes, "health, housing, education and ceremonies", indicate that the substitution of Aboriginal monies for government funds is contemplated;

- centralised management and distribution of monies from Aboriginal land through NTAC;

- disempowerment of traditional landowners, and the transfer of their traditional authority to politically-controlled Regional Land Councils;

- considerable increases in the powers of the Northern Territory Government over Aboriginal land, including compulsory acquisition; involvement in appointments to NTAC and Regional Land Councils; delegated powers from Federal Minister; presumption of applicability of all NT laws and imposition of certain laws regardless of consistency with Aboriginal law;

- significant erosion of the private status of Aboriginal freehold through the abolition of the permits system and the normalisation of large Aboriginal population centres;

- change to the purposes of the Land Rights Act so that it is no longer an Act to benefit Aboriginal people but to benefit an undefined "people of the Northern Territory".

It is completely inaccurate to describe the Reeves' model as "regionalisation" or "self-determination". The two key elements in the model are the transfer of powers away from traditional landowners, and the transfer of control of funds and administration to a centralised, politically-appointed body.

2. How the Land Rights Act works -

The ungainly bulk of the Reeves Report suggests that the Land Rights Act itself is in bad shape. In fact, the unnecessarily huge Reeves Report is largely made up of selections from a range of submissions and speakers expressing views on subjects about which Reeves coyly refuses to conclude[1]. In terms of identifying major problems with the Land Rights Act as it currently stands, Reeves is unable to come up with anything conclusive.

The most disappointing aspect of the Reeves Report is that the opportunity for constructive change to the Land Rights Act has been lost. The second disappointment is that throughout the Report, Reeves demonstrates a major lack of understanding of how the Land Rights Act actually operates, and significantly misrepresents its processes before making recommendations which are not supported by any rigorous testing of argument or information. To overcome these flaws, it seems necessary to reiterate in simple terms the way the Land Rights Act actually operates.

2.1 The basic principles

At the core of the Land Rights Act is the recognition that there are Aboriginal people who, through Aboriginal law, have rights to land.

Justice Woodward (1974: 10–11) enunciated some of the main principles for the Act as follows:

1. Any scheme for the recognition of Aboriginal rights to land must be sufficiently flexible to allow for changing ideas and changing needs amongst Aboriginal people over a period of years;

2. Cash compensation in the pockets of this generation is no answer to the legitimate land claims of a people with a distinct past who want to maintain their separate identify in the future;

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

4. It is important that Aboriginal communities should have as much autonomy as possible in running their own affairs.

5. Aborigines should be free to follow their own traditional methods of decision-making;

6. Aborigines should be free to choose their own manner of living.

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[1] The 1000 page Reeves Report contrasts starkly with the slimline Toohey Report of 1984, which despite its economical 143 pages demonstrates a much deeper understanding of the Land Rights Act.

In accordance with these principles, the Act sets up a process (in Part II) where those rights to unalienated crown land can be recognised through the claims process. Claiming land is based on establishing before the Land Commissioner that there are Aboriginal people with such traditional rights.

When land is granted to Aboriginal people, via the claims process or by a schedule to the Act, the title of the land is communal freehold, held by a Land Trust on behalf of all those Aboriginals with traditional interests in the land (s.4(1)). The Land Trust is not a decision-making body, and all decisions about the use and management of the land are only executed by the Land Trust at the direction of the Land Council, which, in turn, acts subject to directions of the traditional Aboriginal owners and after consulting and having regard to the views and interests of all other relevant Aboriginals and Aboriginal communities and groups. The Land Council must also be satisfied that the proposed action is reasonable.

Land Councils are established under Part III of the Act to administer the Act and represent the views and interests of the traditional landowners and their communities. A Land Council is strictly bound by the Act not to deal with any land without meeting the requirements for consultation and consent summarised earlier. The Act sets up mechanisms whereby land use agreements can be entered into to give access to Aboriginal land, and Part IV establishes similar processes for the grant of exploration and mining rights. The Act, in particular, also gives Land Councils, on behalf of Aboriginal landowners, a role in the protection of sacred sites. It gives the Land Councils very broad functions in relation to protecting the interests and expressing the wishes of Aboriginal people[2].

The Act also establishes a financial regime which gives the Land Councils, Aboriginal people affected by mining, and the broader Aboriginal population, a share of royalties[3] raised through mining activity on Aboriginal land.

The foregoing does not by any means convey the complexity of the legislation or its detail. However the important thing to be demonstrated is the absolute centrality of Aboriginal law and Aboriginal decision-making to the core of the Act.

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[2] See section 23 of the Land Rights Act. Judicial decisions have determined that these function are to be interpreted broadly because of the beneficial intent of the Land Rights Act.

[3] In fact, amounts equivalent to the statutory royalties are paid as the actual mining royalties themselves are, except for uranium royalties, paid to the NT Government, while the Commonwealth Govt pays an equivalent amount into the Aboriginal Benefits Reserve, see section 63 (2) of the Land Rights Act.

3. Traditional Landowners and Aboriginal law under the Land Rights Act

3.1 The current model

The current Land Rights Act is based on the recommendations of the Woodward Reports, which had a clear intention of recognising and protecting traditional Aboriginal interests in land and granting land if it can be proved that strong traditional interests continue to exist. The schema behind the Woodward recommendations can be summarised as follows:

First, Woodward sought to encapsulate and translate into the legislation Indigenous concepts of consultation, authority and decision-making operative in traditional land tenure systems;

Second, the legislation was to reflect the Indigenous emphasis on their relationship to land as a spiritual connection;

Third, Woodward saw the importance of defining a key social unit as traditional landholders, while acknowledging the existence of other traditional rights and the capacity to include members wider than the patrician;

Woodward foresaw that change would impact on the mechanisms for the delivery of land rights (Woodward 1974:9) but this was not to be interpreted out of context, or in isolation from the other main principles he saw as integral to the development of the Act (Woodward 1974: 8-10). Similarly, he was aware of differences between Aboriginal groups and the need for sufficient flexibility to accommodate those differences. One way of handling the latter was through the establishment of initially two Land Councils dealing with broadly different geographical and cultural areas.

Finally, Woodward foreshadowed the need for flexibility in any formalised system of recognition of land rights. He alluded to changes in surrounding circumstances, such as in relation to local commercial and economic opportunities. He did not expect Aboriginal tradition to be static.

A central feature of the Land Rights Act is its function to recognise non-Aboriginal interests: mining interests, freehold land, towns, and other interests are protected from claim and from the processes of the Land Rights Act[4].

Woodward intended the Act to establish legal constructs which were congruent with the ethnographic reality of contemporary Aboriginal land practices. Woodward remarked: "Aborigines have waited many years for some practical recognition of their title to land." (Woodward 1973:2).

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[4] Neate, G., *Aboriginal Land Rights Law in the Northern Territory,* Alternative Publishing Cooperate Limited, Sydney 1989 p. 14

Most of the radical changes to the Land Rights Act contemplated by the Reeves Report are based on a rejection by Reeves of the concept and definition of "traditional Aboriginal owners" which has been a linchpin of the Act since 1976.

The great strength of the Land Rights Act currently is expressed in a few key phrases in the Act. Section 77A sets out the concept of "consent" which applies to any use of Aboriginal land as a decision made in accordance with the process of the Aboriginal tradition of those traditional Aboriginal owners. The Act does not say how that decision should be made: it leaves a space for Aboriginal law to operate in accordance with the tradition of the relevant group.

3.2 The Reeves' model

A stark contrast is provided by the Reeves Report. Reeves proposes a provision for decision-making and consent which gives enormous discretionary power to the Regional Land Council at the expense of the traditional Aboriginal owners and other Aboriginals with interests in the relevant land:

> .. a Regional Land Council shall have regard to the best interests of the Aboriginal people of its region and shall consult with, and, if necessary, obtain the consent of, those Aboriginal people whom it believes, in the particular circumstances, it is required to, in accordance with Aboriginal tradition. (Reeves, 1998: 210)

Land Councils, under the current Act, do not have these powers, and cannot act without consulting all Aboriginals with interests in the relevant land and without the consent of traditional Aboriginal owners, given as a group and in accordance with Aboriginal tradition.(s. 23(3)) The essential recognition of Aboriginal tradition will be lost in the Reeves model through a combination of factors.

First, the severing of the essential nexus between the Land Council and the traditional Aboriginal owners in giving consent for land use, and its replacement with a discretionary power, removes the ancient property rights of traditional Aboriginal owners. Second, the Regional Land Councils, like the current Land Councils, can be comprised of both traditional land owners and residents on Aboriginal land. However, with the removal of the mandatory requirement to consult with traditional Aboriginal owners and other Aboriginals who may be affected by a proposed decision, powers over land will quite possibly be in the hands of people who have no traditional affiliation to the country, and who are not necessarily acting on the instructions of the traditional landowners and have not necessarily even consulted them. Lastly, NTAC – an appointed body – has over-arching powers over the Regional Land Councils.

In Reeves' model, the Regional Land Council is under the "strategic oversight" or "strategic supervision" (p. 608) of the Northern Territory Aboriginal Council, a body appointed by the Minister for Aboriginal and Torres Strait Islander Affairs and the Chief Minister of the Northern Territory (p. 616).

3.3 Critique of the Reeves model – legal issues

Despite *Mabo* and the other native title cases and despite the evidence before his eyes in the Northern Territory, Mr Reeves explicitly agreed with Justice Blackburn's

finding in the *Milurrpum* Case that there are "no corporate land-owning groups in Aboriginal tradition" (p. 202) and hence no traditional or native title rights to land. However in an important sense he misunderstood Blackburn's finding. Blackburn in fact found that the Yolgnu people's traditional laws and customs were recognisable as a "system of law":

> The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim and influence. If ever a system could be called "a government of laws, and not of men," it is shown in the evidence before me." *Milirrpum v Nabalco* ALR 65 at 171 per Blackburn J.

Reeves has misrepresented Blackburn's decision, misrepresented current Australian law which clearly recognises native title, and misrepresents the state of anthropological authority on the issue of traditional ownership.

The NLC has obtained legal advice that the proposed changes to the ownership of and decision-making over Aboriginal land are unconstitutional because they would amount to an acquisition of property, which is only allowed under the Australian Constitution if "just terms" requirements are met. Reeves' model makes no mention of the payment of such compensation, and the issue of compensation is almost imponderable given the very special nature of the rights to land which are being acquired.

The Reeves' model proposes a number of major changes to the rights of traditional landowners. The NLC's legal advice is that the Regional Land Councils model proposed by Reeves, if translated into amendments of the Land Rights Act, would be subject both to the *Racial Discrimination Act 1976* and to section 51(xxxi) (acquisition of property) of the Australian Constitution, and would be found to be invalid.

Reeves recommends (pp.597, 601) that Regional Land Councils, rather than Land Trusts, should hold Aboriginal land in trust for the benefit of all Aboriginal people who are entitled by tradition to use or occupy that land. This would result in the transfer of rights from the current Land Trusts to the new Regional Land Councils.

What Reeves does not appear to have considered is that the Land Trusts are bodies corporate who hold land and exercise power under the Act as the owner. In essence, a Land Trust is owner of an estate in fee simple. The transfer of the property rights from a Land Trust to a Regional Land Council would amount to an acquisition of property which would require the provision of just terms. Bearing in mind that Reeves also recommends changed decision-making arrangements and changes to the class of persons for whose benefit the land is held (p. 597) it cannot be said that the quantum of 'just terms' would be negligible.

3.4 Critique of the Reeves model – anthropological issues

Dr Howard Morphy of the Australian National University, Canberra, has provided the NLC with a detailed critique of the anthropological arguments put forward by Reeves. The paper is provided at Appendix 3. The following is a summary and abridgement of some aspects of his paper.

The use made of anthropological evidence in the Reeves report can be criticised on two main grounds:

1. it does not reflect current understandings of Aboriginal land ownership; and

2. the recommendations contained in the report do not flow logically from the analysis of the anthropological evidence.

The report frequently cites the work of anthropologists out of context and draws conclusions that are the opposite of those intended by the writers. He has also misrepresented the anthropological basis of the Land Rights Act. Reeves' implication that the patrilocal-patrilineal corporate group underlies the definition of traditional Aboriginal owner under the Act is quite wrong.

Research undertaken since the Gove case has greatly enlarged understanding of Aboriginal systems of land and in particular it has demonstrated the articulation of the relationship between land ownership and the use of rights entailed by that ownership.

While the issues that Reeves draws attention to, such as the intersecting nature of rights in land, the existence of complementary and secondary rights in land, and the fact that systems of land ownership operate in the context of regional systems are important factors to take into account, it must be recognised that the regional extension of relationships between people and a given area of land are contextually defined with reference to the more local groups. Ultimately these connections extend across Australia.

The existing Land Rights Act allows for this complexity both in the claims procedures and in the management of Aboriginal land.

The Reeves Report begins with an analysis of the early anthropological writings of Fison and Howitt and subsequently Radcliffe-Brown in an attempt to show continuities between the early definitions and the subsequent group-based definition of traditional owner under the Land Rights Act. However, Reeves does not appear to be aware that the early work was not based on detailed first-hand evidence, and that detailed enthnographic studies of the relationship of people to land did not begin in earnest until the 1960s.

Three central themes in the literature which have emerged since the 1960s are relevant to the Reeves Report:

1. the nature of Aboriginal group organisation;

2. the relationship between land ownership and land use;

3. the issue of scale.

The findings of leading anthropologists on these three issues can be summarised as follows.

3.4.1 The nature of Aboriginal group organisation

Early anthropological theory assumed land ownership by a patrilineal group of kin (Fison & Howitt 1888; Radcliffe-Brown 1930) but later work questioned the notion of a rigid structure (Lee & De Vore 1968). Hiatt (1962, 1965) and Meggitt (1962) argued for more flexible models and were an important stage in the development of a more sophisticated analysis of the relationships between Aboriginal people and their land. However, contrary to Reeves' assertions (p. 136-139), they provided no convincing evidence to replace the notion of a band with a community level of organisation.

Professor Stanner (1965) distinguished between two types of group: the clan, a descent group which owned areas of land which he referred to as their estate; and the band which was the group of people who hunted and gathered together and occupied what he called a "range". Stanner also introduced a further level of regional organisation of interacting clans and bands operating within a regional framework.

Stanner's model was the basis of the evidence presented to Blackburn in the Gove Land Rights case, and Reeves places considerable emphasis on Blackburn's rejection of this approach. However, as Nancy Williams has shown (1986), Blackburn's decision was based partly on the fact that he failed to gain a clear understanding of the relationship between Yolgnu land ownership and land use and partly because the relationship presented did not accord with his conception of a proprietary relationship.

3.4.2 The relationship between land ownership and land use

In the decades since the Gove Land Rights case it has been increasingly recognised, including through the Land Rights Act, that unlike non-Aboriginal systems of property (on which Blackburn based his expectations), Aboriginal systems of land ownership do not focus on exclusive use of land but rather on ownership of the land itself and the sacred property associated with the land. Sacred property is directly linked to the management of land since it gives the owning group the right to exclude people from it and provides them with a body of inherited knowledge of land management. There is a strong relationship between land ownership and both short term and long term use of the land.

Peterson's work (1972, 1974, 1975, 1986) has been particularly important in establishing the nature of land ownership. Contrary to Reeves (p. 147), he shows that there is a direct though complex relationship between spiritually defined social units and land-using units.

Reeves misuses Peterson's work extensively in building up the case for his amorphous regional model. He draws on Peterson's work about the influence of ecological factors to support his regional model (p.142) in a way which is completely contrary to Peterson's widely-published findings. Reeves also attempts to argue that Peterson's acknowledgment of the role of regional politics in the ownership of clan estates is proof that clan estates are not land-owning groups. In fact, as Williams (1986:9) pointed out: "disputes over land .. cannot be explained except in terms of the rights that are claimed and contested."

Reeves also grossly distorts the anthropological understandings of secondary, subsidiary and complementary rights to land in an attempt to suggest that land ownership cannot be ascribed. This distortion appears wilful as all leading anthropologists, and Woodward himself (1974:16), acknowledge and account for the important "manager" role played by the mother's clan in ceremony and responsibilities for land management. The existence of such rights and roles is central to the land tenure system and it is ridiculous to suggest, as Reeves appears to, that they call into question the nature of land ownership.

3.4.3 The issue of scale

Reeves attempts to use the complex nature of systems of local and supra-local organisation to undermine the status of local descent groups or clans as a component of the system, and to emphasise other levels of organisation such as the community or the region. He misrepresents (because it does not suit his model) Sutton's finding that members of wider regional groups have an underlying or residual interest in all the smaller estates of the region, "somewhat in the same sense that the Australian State has an underlying interest in all Australian lands" (1995:8). Reeves misuses Sutton's concept to attempt to disprove the role of local descent groups, whereas Sutton is clearly identifying the crucial role of the local group in constituting the larger group.

It is quite wrong to suggest, as Reeves appears to, that the wider regional body is itself the land-owning group. It is, rather, an abstract conceptualisation of what allows land ownership to operate. The structure of Aboriginal society and its articulation at different levels of social organisation can be extended out infinitely to cover a large region. However, the land-owning unit is clearly much more narrowly identified at the local level, with the range of clearly identified primary and secondary interests through a local descent group.

3.5 Who holds regional power?

It should also be pointed out that Reeves' notion of the "region" as expressed in his proposed amendments to the Land Rights Act has no relationship to the kinds of regional organisation identified by anthropologists as existing in Aboriginal society. Reeves proposes that a regional group make decisions over land to which they may have no spiritual, cultural or economic connection at any level without reference to the primary land owners. The membership of the Regional Land Council Reeves proposes is not selected on the basis of direct or even indirect relationships to land. It is simply an administrative unit based on non-Aboriginal notions of "democracy" without reference to Aboriginal law.

As Peter Sutton has pointed out in his submission to the HORSCATSIA, the fragmentation of the Northern and Central Land Councils into the 16 smaller councils would lead to "serious conflict" within Aboriginal communities.(Sutton 1999: 6) Sutton makes the point that the effects of colonisation have meant that the residents on Aboriginal land now comprise several different groups of people: the traditional Aboriginal owners; people with some traditional affiliations; and residents with no affiliations.

Sutton points out:

> it is widely documented in the NT that people often have key customary responsibilities for sites and lands in two, sometimes several, different areas separated by some distance. No amount of adjustment of RLC boundaries could overcome all such cases. Where these sets of countries fall into different RLC areas, the present proposal would require that the people responsible for them relinquish all but one set of traditional responsibilities relating to decision-making. (p.7)

A further damaging problem would arise from this system:

> The possibility, under the proposed scheme, that long-term Aboriginal immigrant residents from Townsville, say, could be members of an RLC, while some of those actually responsible for the RLC's lands under Aboriginal Law were excluded in the ways mentioned above, is one that could cause great bitterness and conflict. Such tensions would be exacerbated over time by chain-migration based on economic opportunity. RLC areas which yielded substantial royalties for RLC members could easily become targets for such migrations, not only by small numbers of people from remote and unconnected places such as Townsville and Adelaide but, with much more dire consequences, larger numbers of people from nearby areas. (p.7)

In the final analysis, Reeves spends an inordinate amount of space developing an argument about "regional" or "community" groupings by distorting leading anthropologists' work to then argue for a decision-making body which bears no resemblance to any kind of Aboriginal structure or relationship but is an arm of non-Aboriginal government. Traditional Aboriginal rights would be transferred to this body which can make decisions without reference to Aboriginal law or ownership rights. The inevitable result of this proposal is conflict and confusion.

4. Regional Land Councils

The Reeves Report proposes that 18 Regional Land Councils should be established, with 16 of them replacing the existing Central and Northern Land Councils. This submission has already discussed in detail why the Reeves proposal that Regional Land Councils become the legal land owners and primary decision-makers over Aboriginal land is unacceptable. The statutory creation of 16 new land councils is also unworkable and unacceptable for three further reasons:

- The decision to create new land councils should be made by Aboriginal people themselves, not prescribed by an amendment to the Act;
- The public hearings conducted by Reeves failed to find even a significant minority supporting the compulsory fragmentation of the Land Councils;
- The creation of 16 new, under-resourced and under-budgeted Regional Land Councils would inevitably lead to inefficiency, a lower standard of services, uncertainty in commercial dealings, increased administration costs and, possibly, corruption.

Little discussion is necessary about the principle of Aboriginal people deciding for themselves how they want their land councils to be structured. Any serious consideration of the issue must start from the basis that Aboriginal people have the right to decide on the nature of their own organisations. The Reeves model does not give Aboriginal people this choice, and should be rejected on this basis.

It is also clear that in the course of the Review public hearings, Reeves did not find a significant number of Aboriginal people who wanted to change the existing system. The transcripts and submissions to the Review are testament to the overwhelming majority of Aboriginal people's desire for the Northern and Central Land Councils to continue to represent them. This is even clear in Reeves Report, although Reeves attempts to cast doubt on the motivation of the majority of his witnesses.

Since the Central and Northern Land Council were gazetted in 1977, two further Land Councils have been established under the processes of s. 21(3) of the Land Rights Act. There has been discussion and debate over the last twenty years about further splintering the Northern and Central Land Councils into smaller local or regional bodies, with a number of requests being made under s.21(3) to the Minister to investigate the need for, and appropriateness of, a new Land Council.

Woodward, in his first report, described the disadvantages of smaller Land Council regions as:

a) the extreme difficulty in drawing satisfactory dividing lines between communities when tribal groups are divided between several different communities, and

b) the difficulty of providing adequate independent advice and support for a number of regions at the same time. (Woodward, First Report, para 262, p. 41.)

The land rights regime in New South Wales is an example of the problems that can arise with fragmented Land Councils. Established under the *Aboriginal Land Rights Act 1983* there is a three tier system of Land Councils, with local and regional Aboriginal Land Councils presided over by an umbrella administrative body - a state

Aboriginal Land Council. There are thirteen (13) regional councils and one hundred and seventeen (117) local Aboriginal Land Councils.

In NSW, powerful families and individuals centralised power and resources under the regional councils. The subsequent problems of inequitable representation and alleged corruption resulted in the Greiner Government amending the powers of the Regional Aboriginal Land Councils, which have now become merely advisory bodies. There have also been allegations of corruption amongst a number of the Local Aboriginal Land Councils (the Independent Commission Against Corruption is presently investigating allegations of corruption). Many of these local councils are under resourced, and ineffectual.

The 1990 amendments centralised more power with the State Land Council (New South Wales Aboriginal Land Council). New South Wales Governments have encouraged it to take on a much stronger and directive presence with regard to local Land Councils. The reformed NSW Aboriginal Land Council structure and the strengthened administrative arrangements facilitate a more cohesive and effective leadership.

The experience in recent years with Native Title Representative Bodies has provided further evidence for the efficacy and efficiency of larger regional bodies. The proposed government amendments to the Representative Bodies provisions of the *Native Title Act 1993* are partly to effect a rationalisation of the many small bodies into larger, more efficient, professional, and cost effective bodies.

The most recent application for a new Land Council in the NLC region dealt with by the Minister for Aboriginal and Torres Strait Islander Affairs was the application from Aboriginal people in the North East Arnhem region for a North East Arnhem Ringgitj Land Council. The Minister commissioned a report on the proposal from Dr David Martin. As discussed above, Martin argued against the formation of separate smaller Land Councils. Recognising however, the growing desire for local decision-making, he recommended the formation of regional committees or regional councils of the full council of the NLC. He also recommended that:

> the Minister should institute a policy review to consider whether separate Land Councils as envisaged in s.21(3) would be able to effectively undertake the core functions of Land Councils to:
>
> - consult with and obtain the informed consent of traditional owners of lands within their areas regarding development proposals for those lands; and
>
> - act as the bodies through which mining companies and others who have development proposals for Aboriginal lands can negotiate for approval to undertake them. (Martin 1995: 84)

The NLC concurs with Martin's implied finding that small Land Councils, with limited resources and expertise, would not be able to carry out these functions effectively. It is of further concern, as discussed in detail elsewhere in this submission, that under the Reeves model obtaining the consent of traditional Aboriginal owners is at the discretion of the Regional Land Council. Given the foregoing evidence and research, the capacity of such bodies to use that discretion appropriately must be questioned.

As Robert Levitus noted in his submission to HORSCATSIA, relying solely on locally determined processes to allocate benefits and determine decision-making is fraught with difficulties. "Western Arnhem Land experience suggests that the unfettered play of local process can lead to wasteful, incoherent and anomalous outcomes from which resentments emerge." (Levitus 1999:4) Levitus also notes that under the Reeves Regional Land Council model, "political processes must therefore focus on the members of these Councils and the design of programs they seek to have funded by NTAC." (4)

The Reeves model of small Regional Land Councils operating on budgets of $400 000 per year under the "strategic supervision" of NTAC is not a serious attempt to provide regional autonomy. With limited resources and access to expertise and advice, the Regional Land Councils could not provide even basic services within the proposed budget, and that despite expanded responsibilities (including full decision-making powers formerly held by traditional owners), the RLCs will be required to operate on budgets smaller than those of the Tiwi Land Council currently. (Pollack 1999: 4) As Pollack noted, the two island-based Land Councils are currently dealing with six exploration licence applications (one on the Tiwi Islands and five on Groote Eylandt.) By comparison, the Western Arnhem or Tanami Regional Land Councils, under the Reeves model, would have hundreds to deal with. (4)

For example, the Tanami Regional Land Council would have 237 applications to deal with; the West Arnhem RLC would have 72 to administer; and the Tennant Creek RLC would have 38.

Pollack's research also identified the extent to which Exploration License Applications would cross the proposed Regional Land Council boundaries. Cross-boundary ELAs would cause considerable logistical and methodological difficulties for RLCs operating under the Reeves model, because they would require the two RLCs (as opposed to the traditional owners) to consent to the proposal. Pollack's analysis of the current ELAs indicates that more than ten percent of current applications would cross RLC boundaries and require more than one RLC to consent[5]. This problem does not arise under the Land Rights Act currently because consent is required from the traditional landowners whose instructions are then followed by the Land Council.

A further, possibly unforseen complexity is that the Regional Land Councils will be placed in the invidious position of competing with each other to access the "areas affected" and other monies raised on Aboriginal land which will be centralised under NTAC. As Levitus notes, "It will be for NTAC to decide whether a Regional Land Council has made out a case for a community adversely affected by development within its region, and in doing so, NTAC may set off against that claim two considerations: the proximity and intrusiveness of the mining operation, and any public facilities available in an associated mining town." (Levitus 1999:3)

The competitive framework will not lead to self-managing units which can deliver the kind of social justice and self-determination outcomes which Reeves imagined. If anything, the weak confederal model will lead to a lesser degree of local accountability (compounded by the entirely inappropriate decision-making structure)

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[5] In fact 11.1% of current ELAs would cross the Reeves RLC boundaries. See table in Pollack (1999).

and a fractured Aboriginal polity which is unable to achieve united goals. As Galligan has pointed out:

> 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 all 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 smaller 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. … 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. (Galligan 1999: 23)

Established with limited resources, competing for other limited resources, the RLCs will effectively be powerless in the face of the centralised resources and overriding authority of NTAC. If anything, the result of the Reeves model is centralisation of power and resources with NTAC, with weak and fragmented Regional Land Councils unable to perform efficiently or professionally.

5. Northern Territory Aboriginal Council (NTAC)

Under the Reeves model, NTAC is a centralised, politically-appointed body which would effectively control the 18 Regional Land Councils by controlling all ABR monies and overseeing agreements. It would be, in effect, an arm of government and would have significant control over activity on previously privately-owned Aboriginal land.

Reeves proposes that the members of NTAC would be "appointed jointly by the Commonwealth Minister and the Chief Minister of the Northern Territory from a list of nominations of Aboriginal Territorians by Aboriginal Territorians… In due course, Government appointment of the members of the Council should be replaced by their election by Aboriginal Territorians … once the land claims process has been , completed, the boundaries of the RLCs have been settled, and a further review of the Act has been undertaken."(p. 616) It would seem reasonable to assume that election would not replace political appointment for at least a decade.

Resources and power are centralised under NTAC far more than under the current Land Council structure. The functions of administering the ABR and making all distributions, funding the RLCs; maintaining "strategic oversight" over the RLCs; housing and supporting the proposed Congress of Regional Land Councils; and acting as the sole native title representative body for the NT (and all the other functions listed on pp 616-617) would give NTAC a broad power base and enormous resources. As the positions would be politically appointed for the foreseeable future, in effect power and resources which currently are disbursed among Aboriginal people by virtue of their traditional rights would be centralised and government-controlled.

The Reeves Report is at its most creative in the chapter on NTAC, and it must be assumed that proposals such as those on pp 613 – 614, which would pay into NTAC all NTG and Commonwealth Aboriginal monies and ATSIC's budget creating a fund of over $700 million, are not seriously intended. As Altman points out:

> Reeves provides no rationale for why the diversity of moneys raised on Aboriginal land should be statutorily earmarked for socioeconomic improvement. Nor does he explain why or how the estimated $35 million generated in statutory royalty equivalents from Aboriginal land will result in socioeconomic improvement when the combined resources of the Commonwealth and NT governments (estimated at minimum at over $400 million per annum have not (according to Reeves.) (Altman 1999: 10)

t seems unlikely that such substantial changes in public policy and financial arrangements could be made on the basis of less than a two pages of reasoning.

It should also be pointed out that the proposal that NTAC act as the sole native title representative body would be contrary to the Native Title Act (as amended) because NTAC would be an appointed, not representative, body.

6. ABR and Royalty Associations

As outlined in section 5, the NLC is opposed to the ABR being taken over by the proposed politically-appointed body, NTAC and rejects Reeves' recommendation that prescribed purposes for ABR and royalties monies should be in the Act. The recommendation that the 40/30/30 formula for distributions from ABR should be abandoned is not based on any valid arguments.

The NLC also rejects as unlawful and discriminatory the Reeves suggestion that all monies from Aboriginal land should be paid either to NTAC or Regional Land Councils, and that NTAC will resume the assets and liabilities of existing royalty associations. Like so many of Mr Reeves' recommendations, this would in fact be unconstitutional and invalid.

6.1 The Aboriginal Benefits Reserve (ABR)

Under the Reeves model, the ABR would be transferred to the control of NTAC and the distributions significantly changed. The NLC's legal advice is that the analysis upon which these proposed changes are based is legally flawed, and further argues that they are unacceptable because of the lack of Aboriginal autonomy in decision-making.

6.1.1 Historical background

Reeves' discussion of the mining royalty equivalent regime begins with an historical perspective to the current arrangements (pp312-16). This historical overview is curious. It cites in some detail the structural administrative arrangements of the ABR's predecessors, but completely neglects the social and political contexts that gave them life. By ignoring this history, Reeves frees his analysis from its burdens. These contexts are crucial, because they frame the contemporary debate over the extent to which these monies are distributed for compensatory purposes.

Altman's (1983) historical research attests that institutional arrangements for the payment of compensatory mining royalty equivalents grew alongside the struggle for land rights. In 1952, an amendment to the *Northern Territory Administration Act* provided for the formation of the ABTF as a body to receive the payment of statutory royalties received for mining on Aboriginal lands. Although the Government never "clarified whether royalties were a form of compensation or a source of economic rent [to Aborigines whose land had been used for mining]" (Altman 1983, 7), the struggle of Yolgnu on the Gove Peninsula brought into focus the need for an explicitly compensatory regime.

In 1963, Yolgnu delivered the bark petition to the House of Representatives, asserting their rights over their traditional lands. The House of Representatives Select Committee on Grievances of Yirrkala Aborigines, formed in response to the bark petition, recommended compensatory payments be made to Yolgnu, for "any loss of traditional occupancy" (Altman 1983, p17). Despite this recommendation, compensatory payments were not included in the 1968 Gove Agreement between the mining company (NABALCO) and the Commonwealth. In response, Yolgnu took various actions and, after considerable pressure being placed on Government, Federal Cabinet agreed in 1971 to pay Yirrkala Aborigines a direct special royalty "to

compensate them for enormous disturbance caused to their lives by the construction of the mine" (ATSIC sub., p25).

This was the structure in existence when Woodward visited Yirrkala in 1973. Evidently, the claims for just compensation made by Yolgnu could not be divorced from their wider aspirations for land rights. No doubt this relationship informed Woodward's thinking that mining royalty equivalent payments are considered most appropriately as a form of compensation:

> I think it important that any such payments should go to the relevant community or communities which would be affected by the exploration activities, and not to individual landowners. Provided the moneys are to be spent on community purposes they appear in their true light as compensation for disturbance and not as an inducement (Woodward 1974, para 589).

Moreover, as Woodward also makes plain, the receipt of mineral royalty equivalent payments would be expected to fulfil simultaneously a number of compensatory functions (Woodward 1974, paras 602-19). Woodward's strong support for the Land Councils being funded via the ABTA ("I also see great merit in the Land Councils having a substantial source of income not dependent on government approval": Woodward 1974, par 608) must be understood in these terms. From Woodward's perspective, the Land Councils' responsibilities to represent traditional owners in pursuing land claims and to administer other aspects of the Land Rights Act were best financed via a process that: (i) de-linked these objectives from the government's budgetary cycle; and (ii) linked them to an overall regime of monetary compensation for activities taking place on Aboriginal lands.

6.1.2 Distributions from ABR

> As is well-known, Woodward recommended a three-way distribution of funds from the Reserve to Land Councils (s. 64(1): 40%); areas affected (s. 64(3): 30%); and the general Aboriginal population (s. 64(4): 30%). This was later modified to create discretionary options in the distribution of the second 30%, including the option of distributing further monies to Land Councils if necessary for their administrative costs (s. 64(7

Reeves places great emphasis on the historical fact that ABR distributions have deviated from the 40:30:30 split recommended by Woodward. He notes that since 1978-79, the distribution of ABR monies has been: 52.5% to Land Councils; 30% to Royalty Associations; and, 17.5% in grants to Aboriginal people and for ABR administration costs (p. 324). This deviation has occurred because of Land Councils' needs for 64(7) payments to supplement their income under 64(1) of the Land Rights Act.)). Jon Altman has pointed out that in his analysis of the ABR, Reeves failed to appreciate some of the key differences between what Woodward recommended and what is actually enshrined in the Land Rights Act.

> For example, while Woodward recommended that 30% of royalty equivalents be maintained by the ABTA (now ABR) this recommendation was not included in the statute. Consequently it is unfair to benchmark the working of the ALRA's financial framework against a recommended formula that predates the ALRA. As the ABR Annual Reports consistently indicate, the residual 30% can be expended on grants (s.64(4)), ABR administrative expenses (s.64(5)) or supplementary funding of land councils (s.64(7)) where the minister is satisfied that s.64(1) payments are insufficient to meet their administrative expenses. (Altman 1999, p. 5)

Reeves implies that the fact that the two major Land Councils have received s64(7) monies (the discretionary funds) indicates a level of inefficiency. However, this implication ignores two important issues. First, the allocation of s64(7) funds must be approved by the Minister. In order for such approval to be received, Land Councils must comply with the procedures outlined in the Financial Management Strategy (which has operated since the 93/94 financial year). The resulting draft estimates developed by the Land Councils are then reviewed by an independent consultant and ABR staff prior to being forwarded/recommended to the Minister. After such a rigorous process, Ministerial approval of amounts in excess of the s64(1) entitlement can therefore be seen as an endorsement that the intended use of the funds is both efficient and consistent with government policy. Secondly, to make a judgement on whether the Land Councils are efficient would necessitate a performance audit based on appropriate public sector benchmarks. Reeves provides no such analysis.

Further to this, however, statistical evidence presented by Reeves is misleading. Table 7 (p. 325) purports to show "Land Council administrative costs". The total figures in this table, however, *include* mining witholding tax (MWT). These monies are levied on the Land Council administrative monies and hence must be *subtracted* from – not added to – 64(1) and 64(7) distributions. From this table, it would appear that Reeves does not understand this fundamental relationship. However, the effect of this misinterpretation is to exaggerate Land Council administration costs, which suits Reeves' argument. Furthermore, Reeves' Table 7 also exaggerates Land Council administrative costs because it is not adjusted for inflation. This same misunderstanding afflicts Table 8 (p.326), purporting to show 64(3) payments. Again, Reeves includes MWT in calculating the total for this table, even though this is deducted from ABR monies.

Reeves concludes that at least $449 million has passed through the ABR and the Royalty Associations since 1978-79, with the following outcomes:

- The acquisition of 42 per cent of the NT, plus a further 10 per cent under claim. Reeves notes that the estimated unimproved capital value (UCV) of Aboriginal land is $84 million.
- Balance sheet assets of $18.5 million in Royalty Associations.

Thus, Reeves suggests that for an expenditure of $449 million, NT Aborigines have received $102.5 million.

Altman has criticised this finding on the grounds that Reeves made selective use of rough estimates provided by the Centre for Aboriginal Economic Policy Research. Altman points out that the figures assume (quite wrongly) that all land councils expenses including those of the Tiwi and Anindilyakwa Land Councils are used to finance land claims. Further the observation that the money would have been better spent buying rather than claiming land is "fraught with bad economics and a discard of the nature of the land claims process. Unalienated Crown land available for claim is not available for sale; the statutory functions of land councils do not extend to using their budgets to purchase land; and there is limited correlation between the AVO's valuation of properties at one point in time and their market price over time." (Altman 1999:7)

On the basis of his findings, it seems that Reeves is entirely unaware of contemporary research on public sector accountability. Since the mid-1980s, governments in Australia and most western democracies have developed sophisticated means to

measure inputs, outputs and outcomes of public sector activities. At the Federal level, the Productivity Commission coordinates research to develop measures of Commonwealth, State and Territory efficiencies and costs. This work dovetails with equally relevant ongoing work by the Commonwealth Grants Commission to identify the disabilities (that is, relative cost differences) of service provision among the States and Territories. At State and Territory level, most jurisdictions have developed a further level of performance analysis seeking to establish how policy goals are met. Community groups on both the right and left of the political spectrum (the Institute of Public Affairs and the Evatt Foundation respectively) have also entered this debate and developed alternative methodologies.

At the very least, there are three fundamental mistakes in Reeves' cost-benefit analysis. First, his estimate of outcomes relies only on a narrow range of financially quantifiable measurements. It is simply wrong to suggest that the benefits of Aboriginal land ownership are equivalent to the UCV of that land. The entire premise of the Land Rights Act, and the Woodward Royal Commission before it, is that Aboriginal people have deep spiritual relationships with their traditional lands. To transmogrify this relationship into simple commercial values negates the whole basis for the existence of the Land Rights Act.

A similar misunderstanding affects Reeves' cost-benefit analysis of Royalty Associations. Reeves makes the incredible assertion that the value of distributions to Royalty Associations should be reflected in the net asset values of their balance sheets. This argument highlights Reeves' incapacity to see these monies as being distributed for purposes of compensation, and thus having the nature of private monies. The net asset position of Royalty Associations reflects a measure of the extent to which these organisations have dedicated funds for investment: it is <u>not</u> a measure of the total sum of monies they have received over time. An appropriate measure of the benefits of monies distributed to Royalty Associations must include the social and cultural outcomes of expenditures (e.g., the extent to which vehicle purchases or school excursion subsidies have assisted social and cultural development), as well as the financial assets listed on Associations' balance sheets. While such an analysis would be difficult if not impossible, the point is that Reeves evidently does not understand the logical necessity of such an approach.

Secondly, Reeves wrongly aggregates sums of monies that have passed through the Land Councils and Royalty Associations. These errors highlight the fact that Reeves' analysis here is not only conceptually weak, but numerically inaccurate. Reeves asserts that Land Council administrative costs are $202 million. As argued above this is wrongly calculated. In any case, it is fallacious to suggest that the entire administrative costs of the Land Councils can be attributed to a single output measure, ie, land acquisition. Under the Land Rights Act, the Land Councils are required to fulfil a range of functions. In the absence of the existing arrangements, these functions would have to be fulfilled by another party, probably funded directly from consolidated revenue. Another example of factual error is Reeves' double-counting of negotiated royalties. On page 346, he claims that negotiated mining royalty payments from the CLC region amount to $36.4 million. But on page 343, he acknowledges that this figure is a composite of monies paid under ss. 35(3) and 35(4). of the Land Rights Act, thus including royalty monies for non-mining purposes.

6.1.3 Prescribed purposes for ABR monies

It is clear from the historical background that the ABR and the monies it holds are intended for the benefit of Aboriginal people to compensate for mining on Aboriginal land. The ABR is not intended to provide funds for citizenship services to Aboriginal people. However, Reeves' recommendation for prescribed purposes in the Land Rights Act for the use of ABR monies would do precisely this. By specifying "ceremonies, scholarships, housing, health etc" (p. 368) as the purposes for which ABR monies can be obtained, Reeves is confirming that ABR monies would be used to substitute for government services because (with the exception of ceremonies) the other purposes he lists are clearly areas in which government have responsibility to provide funding.

Altman has described Reeves' prescribed purposes as inconsistent with his stated desire for Aboriginal fiscal empowerment and enhanced decision making powers. (Altman 1999: 9)

The NLC is opposed to any prescribed purposes because such decisions should be made by Aboriginal people themselves. However, in particular, the proposition that such monies must be spent on citizenship services is completely unacceptable.

6.1.4 Transfer of ABR to NTAC

As discussed in the previous section, the NLC is opposed to the politically-appointed body NTAC taking over the administration of the ABR. The combination of prescribed purposes for ABR monies with control by the government appointees in the proposed NTAC would result in ABR monies becoming a financial windfall for governments and Aboriginal people would lose control and, because of substitution, even the benefits of the funds which were intended to be theirs.

6.2 Royalty Associations

Reeves creates an inclusive definition of royalty associations. He defines royalty associations as being any organisation which: (i) receives s.64(3) ('areas affected') monies; (ii) receives monies under any other mining provision of the Land Rights Act, or (iii) receives monies for any other land-based use (eg, 'gate money' from National Park leaseback agreements) (p.312-3). Generally speaking, it may be legitimate to consider any Aboriginal organisation receiving land-related monies a "royalty association". This is a semantic point that does not bear criticism. However, Reeves makes a critical error in his subsequent analysis of these 'royalty associations'. Because he considers all these organisations under the same heading, he assumes, incorrectly, that all classes of monies that may be payable to these 'royalty associations' have the same status. This is a fundamental error to which Reeves appears oblivious.

The simple point is that s. 64(3) 'areas affected' monies have an entirely different status compared with other monies derived from land-based uses. Although s.64(3) monies are in nature private (a point elaborated upon below), they originate ultimately from the Commonwealth's consolidated revenue fund and are distributed in accordance with the rules and conditions of a Commonwealth Act. To this end, royalty associations in receipt of 64(3) monies play an integral role in fulfilling the aspirations of the Land Rights Act. There are clear obligations for the Land Councils to ensure these monies are distributed to royalty associations in ways that meet

standards of public accountability. These points were made by the major Land Councils in our submissions to Reeves, and are discussed further below.

Monies earned by royalty associations from negotiated royalties or from other land-based sources, such as National Park gate monies, must be treated quite differently. These monies are paid to royalty associations on the basis of commercially negotiated terms and conditions and may be of some sensitivity. Whereas provisions in the Land Rights Act cover the possibility of Aboriginal organisations receiving monies through these sources, these monies are outside the strict ambit of the Land Rights Act and, as such, there is no direct legal or administrative basis for these to be accounted for within public policy. Yet, Reeves explicitly suggests these monies should have the same status as s.64(3) payments. In failing to distinguish between the various sources of monies received potentially by royalty associations, Reeves fundamentally misrepresents this issue.

The NLC does, however, suggest that a clear means should be made available for traditional landowners to make an effective long-term decision about the use of future income, other than s.64(3) and exploration and mining agreement monies. At present the Act requires the NLC to pay such monies "to or for the benefit of the traditional Aboriginal owners" (s.35(4) and there is no means for landowners to make long-term strategic decisions about the use of such monies.

The NLC has legal advice which confirms the arguments presented to Reeves regarding the nature of monies paid to royalty associations through Land Councils. In summary the advice is that:

- Monies paid *into* the Aboriginal Benefits Reserve (the Reserve) out of the Consolidated Revenue Fund (the CRF) under ss 63(2) and 63(4) of the Land Rights Act and held in the Reserve are public money within the meaning of the *Financial Management and Accountability Act 1997* (the FMA Act).

- Monies paid *out of* the Reserve to Land Councils under s.64(3) of the Land Rights Act cease to be public money within the meaning of the FMA Act when received and held by the Land Councils.

- Monies paid by Land Councils to Aboriginal Councils and Incorporated Aboriginal Associations (Royalty Associations) under s.35(2)(b) of the Land Rights Act are not public money within the meaning of the FMA Act.

The error Reeves makes is that he gives insufficient weight to the legal and policy consequences of the interposition of the Land Councils between the Reserve and the Royalty Associations. In consequence of that interposition, the moneys have ceased to be public money for the purposes of the FMA Act at the time they are paid out to Royalty Associations.

6.2.1 Acquisition of Royalty Associations' assets

Reeves makes the recommendation (p. 609) that "the existing assets and liabilities of the Royalty Associations will be taken over and rationalised" and that "all other income from activities on Aboriginal land should be applied by NTAC or the RLCs to particular purposes" (p. 368). The NLC's legal advice is that both of these recommendations amount to an acquisition of property and require just terms compensation.

In his recommendation about taking over Royalty Associations' assets, Reeves appears to fail to take into account the fact that not all the Associations' assets are based on their receipts of s.64(3) "areas affected" monies. The Associations also earn money through investments and through other uses of Aboriginal land and some of their activities and ventures are self-funding. To suggest that all of these can simply be transferred to another owner, in the way that Reeves proposes, is quite absurd.

Reeves may have considered that his proposed changes to the distribution of payments from Aboriginal land would be merely a change of form but not of substance. The NLC's advice is that because of the absence of any consent processes, and the fundamental change in the nature of the ownership, his recommendations would in fact result in the acquisition of property. Not only would there be a new owner. That new owner would hold title for the benefit of a new class of beneficiaries. The legal character of the change can be illustrated by the following analogy. Assume a Minister grants fee simple title in land to a rugby union club, to be held in trust for persons who play rugby union. Subsequently the Minister decides that he has incorrectly identified the sporting habits of the local population and it would be preferable to grant the land to, say, a rugby league club (or for that matter to a hockey club or a cricket club). Any compulsory transfer of the fee simple from the rugby union club to the rugby leagues club (or statutory dissolution of the rugby union club and fresh grant to the rugby league club) would constitute in law an acquisition from the rugby union club. And so it would be in respect of any compulsory transfer from the royalty associations to NTAC or the RLCs.

6.2.2 Management and accountability solutions

The NLC is concerned with the lack of clarity and poor compliance regarding royalty associations. Sections 35(2), 35(3) and 35(4) of the Land Rights Act specify that the various classes of monies payable to royalty associations are to be distributed within six months of their receipt by Land Councils. Improved accountability, however, requires a strengthening of legislative requirements governing payments from Land Councils to royalty associations. This was argued at length by the NLC in its submission to Reeves (pp. 127-9), where it was noted that Walter and Turnbull pointed to weaknesses in the legislation which did not demonstrate adequate accountability mechanisms of the flow of royalty payments to beneficiaries, ie, 'there exists no clear picture of the ultimate use of the distributions… at the end of the day and the success of the application of those funds' (Report on an Internal Audit of the ABTA, Office of Evaluation and Audit, ATSIC, May 1993, p.27). Additionally, the Land Rights Act provides no direction to the Land Councils as to what they should do with the financial statements received, particularly in the event that anomalies are detected.

Research by Altman on the Gagadju Association[6] and by Altman and Smith on the Narbalek Traditional Owners' Association (NTOA)[7] highlights the potential extent of these problems. Altman's report on the Gagadju Association suggests that a more

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[6] Altman, J. (1996) Review of the Gagadju Association (Stage II): structure, statutory, economic and political considerations. CAEPR, ANU.

[7] Altman, J. and Smith, D. (1993) 'The economic impact of mining moneys: the Narbalek case, Western Arnhem Land' *CAEPR Research Paper* 63.

structured relationship between the Association and the NLC would help meet the statutory requirements of the Land Rights Act. Altman and Smith's research on NTOA recommends that attention be given to the provision of stable and consistent financial administration for individual associations. The key point is that current arrangements based solely around the requirement to lodge annual financial statements provide an inadequate platform from which to ensure appropriate accountability for s.64(3) monies.

The NLC submission to Reeves recommended that to fill this void in accountability, royalty associations should be required to lodge any other financial information, for example, investment and business plans, to enable the Land Councils to monitor their ongoing financial responsibilities. This process is seen as an additional measure to end-of-year financial reporting. It would give the Land Councils the flexibility to ensure the full ambit of financial accountability is being met.

In addition, an amendment to the s. 35A Land Rights Act is required so that Land Councils can enter into contracts or agreements, binding Royalty Associations to certain financial strategies or plans and making the further distribution of funds dependent on certain criteria continuing to be met. (And, as noted earlier, a clear means should be made available for traditional landowners to make effective long-term decisions about the use of future income which the NLC must currently pay "to or for the benefit of the traditional Aboriginal owners" (s.35(4).)

Reeves' clumsy solution to these issues must be rejected for legal reasons, as outlined above. The NLC's model to improve accountability and management has no such legal problems and maintains Aboriginal control over decision-making.

7. Exploration and Mining

The chapter on mining in the Reeves Report was not predicated on any analysis of the context of mining in the Northern Territory, nor on the factors which influence the operation of the industry. In essence his mining chapter lacked a context and a realistic assessment of the impact of the Land Rights Act on rates of mining and exploration in the NT.

Recent industry figures from ABARE indicate that the long-term commodity market is unlikely to rise significantly[8]..ABARE economists have predicted that:

> World prices for most mineral and energy commodities (in real terms) are projected to rise between 2000 and 2002, as rates of growth in world demand exceed those of world supply. However, with productivity growth also continuing and new low cost facilities being developed, growth in the production of most minerals and energy commodities is projected to outpace growth in consumption later in the outlook period, and world prices for most commodities are projected to ease[9].
>
> The current down-turn in exploration appears to reflect trends and energy export earnings are projected to fall by 10 per cent to $36.3 billion (in real terms) between 1998-99 and 2000-01, before rising to around $37 billion in 2003-04. The initial forecast fall in export earnings reflects expected lower world prices and an assumed progressive appreciation of the Australian dollar from 1999- 2000 that will more than offset the positive effects of increased export volumes.[10]

However mining will continue to be an important aspect of economic development in the Northern Territory in the absence of other developed industries. Despite the fall in projected expenditure on exploration, it is probable that the demand for access to Aboriginal land will continue, however the continued low mineral prices may mean that companies will be seeking to secure access rather than actively explore for minerals. These observations are important because they show that market conditions are far more relevant to the decisions of companies regarding exploration and mining than the land access regime (in this case the Land Rights Act.) The world prices for minerals is the most significant factor affecting the operation of the industry, and

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[8] Fisher, B.S., Commodity Overview: *Will commodity prices remain low*? In **Commodity Markets and Resource Management, Proceedings of the National Agriculture and Resources Outlook Conference**, Canberra, 17 – 18 March 1999, p. 10. http://www.abare.gov.au/services/outlook/outlook99/commodity.pdf

[9] Waring, T., and J. Hogan , *1999 Minerals and energy : Outlook to 2003-04* In **Commodity Markets and Resource Management, Proceedings of the National Agriculture and Resources Outlook Conference**, Canberra, 17 – 18 March 1999 p 3. http://www.abare.gov.au/services/outlook/outlook99/commodity.pdf

[10] Waring, T., and J. Hogan , 1999 Minerals and energy : Outlook to 2003-04 In Commodity Markets and Resource Management, Proceedings of the National Agriculture and Resources Outlook Conference, Canberra, 17 – 18 March 1999 p 7. http://www.abare.gov.au/services/outlook/outlook99/commodity.pdf

peaks and troughs in mining activity can generally be directly related to the peaks and troughs of minerals prices.

In this context, it is interesting to note that ERA's decision to delay the development of the Jabiluka mine in early 1999 was based on the fall in world prices for uranium.

Any consideration of the mining provisions must be made within the context of continued low minerals prices, and the likelihood that such conditions will potentially lead to exploration companies seeking to secure but not actively explore mining tenements. This is not in the interests of either Aboriginal people or governments.

Reeves has not considered the economic context of mining in the NT, or the likely trends which will impact on the industry over the next few years. Reeves' proposals regarding the mining and exploration provisions of the Land Rights Act are based on the unworkable and unacceptable decision-making model (Regional Land Councils and NTAC discussed elsewhere in this paper) which is based on a particular political agenda rather than any rational analysis of the exploration and mining situation in the NT.

Under the Reeves model, decisions over whether mining or exploration proceeds will be made by the Regional Land Council which is under no obligation to act on the instructions of the traditional Aboriginal owners. This is in direct contrast to the current model where Land Councils are required to ensure that the traditional landowners and Aboriginal communities and groups have been properly consulted and the traditional Aboriginal owners have given or withheld their informed consent as a group and in accordance with traditional decision-making processes. Such a model will significantly weaken the security of agreements signed under the Land Rights Act, and be a major disincentive to companies to invest on Aboriginal land.

A further significant change proposed by Reeves which is totally unworkable and legally invalid is the proposal that all monies from mining on Aboriginal land would flow to NTAC or Regional Land Councils. Under his model, this would include the negotiated royalties which, as allowed under the Land Rights Act, may be paid direct to traditional Aboriginal owners, while the "areas affected" monies go to both the owners and affected people in the region. The change to the distribution of monies would amount to an acquisition of property from the traditional Aboriginal owners and as such requires just terms compensation to be a valid law.

Such a process would also have significant ramifications for the certainty of agreements. While the Reeves amendments would change the basis of decision-making power under the Land Rights Act, traditional landowners would retain their native title rights[11] and would no doubt seek legal remedies for any denial of their right to consent should the RLCs exercise their discretionary powers and not adequately or appropriately consult with them.

Ironically a (probably unintended) consequence of the Reeves model would be the reduction in incentives to RLCs to approve ELAs, as the "areas affected" monies

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[11] The NLC's legal advice is that Reeves' proposal to extinguish native title on Aboriginal land would fail to make a valid law.

would flow to NTAC who will release them to RLC only for approved, prescribed purposes on what appears to be a semi-competitive basis. Local interests are not guaranteed those benefits.

7.1 Delays and uncertainty

Reeves adopted an unsourced and erroneous statistical analysis of mining and exploration in the NT in an attempt to argue that the mining provisions of the Land Rights Act lead to crippling delays. As discussed above, the crucial factor for decisions to invest in exploration and mining is the world price for minerals, not the land access regime. The NLC provided extensive commentary in its March 1998 submission to the Reeves Review that showed that the figures used by the Commonwealth Department of Primary Industries and Energy were wrong. Despite the NLC's advice, Reeves relied on those figures to find that "the record of exploration and mining on Aboriginal land has been poor."(p. 514) The NLC provided evidence which showed there was no appreciable difference between mining on Aboriginal and non-Aboriginal land.

Further, Reeves appear to rely on statistics supplied in Appendix X of his report: "How uncertainty and delays destroy wealth creation." A lay reader of this report will immediately realise its logic and assumptions are faulty. The NLC asked noted economist Professor John Quiggin to examine Appendix X and provide some advice. Professor Quiggin found that "the analysis in the Reeves Report is erroneous and greatly overstates the cost of delays associated with the negotiation of access to Aboriginal land for exploration and mining." (p.1) Professor Quiggin's full report is provided at Appendix 4.

It is a well understood economic precept that uncertainty is far more relevant than delays in affecting the viability of mining projects. Hence risk assessment and management are major functions of companies and crucial to their decisions about investment. The Land Rights Act mining regime has been shown to provide high levels of certainty to companies through its meticulous consultation processes and the statutory guarantee of its agreements.

No exploration or mining agreement entered into by either of the two major Land Councils has been subsequently withdrawn or revoked. Part IV effectively provides a statutory guarantee for agreements entered into under the Land Rights Act which protects the company from any action once the Land Council has given its consent. The certainty provided by Part IV of the Land Rights Act provides arguably a far more secure basis for investment than any other Australian jurisdiction because challenges on environmental, social or other grounds are also rendered extremely unlikely given the breadth of matters covered in the exploration agreement.

Several major mining companies, such as Normandy, Rio Tinto and Cameco have recognised the security and certainty of agreements on Aboriginal land and have made strategic decisions to increase their investments in this area. (See NT News 8 April 1999.)

Reeves failed to understand or take into account the significant benefits provided to companies through the security and certainty of agreements under the Land Rights Act. His analysis of "delays and uncertainty" incorrectly conflates the issue of time

delays with risk to the certainty of projects. The NLC asserts that in fact the delays in achieving exploration agreements (which are much less costly than Reeves asserts, as Quiggin has proved) are more than compensated for by the value of certainty and security of agreements under the Land Rights Act.

Reeves' model, based on his new structure of RLCs and NTAC, in fact threatens the security of the current system by changing the basis of decision-making. It is more than arguable that through removing the mandatory consultation and consent of traditional owners as a group, agreements struck by the Reeves RLCs will be liable to ongoing legal uncertainty as the traditional landowners or native title holders (a group which includes the traditional Aboriginal owners) assert that the RLC has failed to fulfil its responsibilities to the group and to respect the groups' common law native title rights.

The Reeves mining model is thus fundamentally flawed.

The NLC considers that there may be some aspects of the changes to the mining regime which Reeves proposes which may be useful in streamlining the workability of the Act. These proposals are only of value when separated from the completely unworkable NTAC/RLC structure and decision-making processes.

7.2 Reconnaissance Licences

Reeves' Recommendation

The Land Rights Act and the Mining Act (NT) should contain provisions which allow a person to obtain a licence to enter Aboriginal land for a specific period for the purpose of reconnaissance exploration subject to various terms and conditions as outlined in this Chapter.

Reeves' Specific Suggestions

The Land Rights Act and the Mining Act (NT) should contain provisions which allow a person to obtain a licence from the relevant Northern Territory authority, to enter Aboriginal land, for a specific period, for the purpose of reconnaissance exploration, similar to a permit issued under the provisions of the Aboriginal Land Act (NT). Notice should be given to the RLC for the area that such a licence has been granted. The RLC for the area should not have a power to withhold consent to, or veto, an application for such a licence, or require that any payment be made in relation to it . The licence should only allow the holder to carry out low level exploration activities on the land, similar to the rights of a person holding a miner's right mentioned above [ie. using only hand-held devices, but not any other mechanical device, nor any means as may be prescribed in the Mining Act, and nor explosives; p.527]. The licence should not allow the holder to enter any community, or go within a specified distance of a living area and should require the holder to ensure that he or she does not enter or remain on a sacred site. This will require a person applying for such a licence to obtain details of any sacred sites on the land from the Aboriginal Areas Protection Authority. (p.529)

Comments

The NLC is concerned about the impact of this recommendation upon the rights and interests of the traditional landowners and doubts that such a recommendation would have any real practical benefits.

The NLC has approved a limited number of reconnaissance programs. These have universally been conducted subsequent to the NLC receiving instructions to negotiate (or expressions of interest in doing so) from the relevant traditional Aboriginal landowners. In other words, the Land Council had conducted an initial meeting at which the relevant Aboriginals considered the proposal put to them by the proponent Exploration Company. The purposes of reconnaissance were -

- to provide the proponent with an opportunity to undertake some limited ground truthing of existing geological information, by the taking of samples and measurements;
- to provide both parties with improved information upon which to further negotiations;
- to identify sources of water and potential camp sites;
- to provide an opportunity for the proponent to work with the Aboriginal people in a relatively informal way, in order to demonstrate their *bone fide* interest in the land and ability to work with Aboriginal people and on Aboriginal land in culturally appropriate ways; and
- to provide an on-ground and informal opportunity for the proponent to more fully demonstrate and explain exploration techniques to the Aboriginal landowners.

Apart from limitations imposed by the *Mining Act* on reconnaissance, Aboriginal landowners sought and the proponents agreed that -

- the proponent would at all times be accompanied by members or representatives of the Aboriginal landowners, usually being an elder and a younger person;
- the period and dates of reconnaissance would be specified, in all cases being less than one month in total; and
- the results of the reconnaissance would be provided to the Land Council and Aboriginal landowners.

A right to undertake reconnaissance without prior recourse to the Aboriginal landowners would only achieve the ground truthing purpose and even that purpose is unlikely to be of any real assistance to a company which may not be sure whether it wishes to proceed. In none of instances where reconnaissance has been undertaken to date has the company decided that it did not wish to proceed with its exploration licence application.

The recommendation will adversely impact upon landowners in two ways –

1. Although the recommendation suggests that notice should be given to the relevant Land Council, the consent or agreement of neither the Aboriginal landowners nor the Land Council is required before reconnaissance is undertaken.

   This is contrary to Aboriginal customary law (see comments elsewhere in this paper) as well as being disrespectful of landowners, per se, and as people having special responsibilities to look after the land (and their communities) as well as, as is often the case, to ensure that strangers are not hurt and do not interfere with sacred sites or ceremonial activities. If landowners' approval is not required, it will make it very difficult, if not impossible, for them to fulfil their traditional responsibilities. It is usual, for example, for landowners to close the road across Arnhem Land from Gunbalanya to Cobourg for a number of weeks each September whilst ceremonial responsibilities are fulfilled.

2. The Land Council does not agree with the Report's conclusions that "(s)uch low-level exploration activity has little, if any, impact on the land or those occupying it" (p.527) and that "reconnaissance licences should be treated as a simple land access issue" (p.529).

7.2.1 Social Impact

Although the Report at p. 533 finds that "mining companies dealing with Aboriginal people have to appreciate that they are operating in a unique cultural and social environment", it apparently excludes reconnaissance from this requirement because such explorers will not be dealing with Aboriginal people. This is, of course, not likely to be the case.

The recommendation would permit access to people who are not traditional owners and who do not understand, let alone appreciate, the "unique cultural and social environment" in which they are working. They will inevitably interact with traditional landowners and their communities and draw upon the resources of those communities, for stores, fuel and the like, as well as using the roads, airstrips and other infrastructure. Not all of this interaction will, of course, be negative. But the Land Council's concern is not with the interaction, but with the fact that landowners and their communities will not have a choice about whether and, if so, how such interaction should take place.

7.2.2 Sacred Sites

The landowners' rights and responsibilities with respect to sacred sites are, of course, of very special relevance.

The Report simply suggests the explorer "obtain details of any sacred sites on the land from the Aboriginal Areas Protection Authority". This suggestion –

a) fails to acknowledge that the Land Council's statutory functions with respect to the protection of sites (s.23(1)(ba)) and to recognise that it is probably not efficient and not in the best interests of landowners for their traditional interests in sacred sites to be protected by a different regime to that applying to the rest of their traditional interests;

b) incorrectly assumes that the AAPA has, or can readily obtain, full details of all of the sites on Aboriginal land and, in particular, large areas of Aboriginal land (and perhaps also incorrectly assumes that there are not many sites); and

c) incorrectly assumes that the boundaries of sites can be delineated regardless of the nature of the access proposed.

Should the recommendation be adopted, the issuing of any reconnaissance licence would have to wait until the AAPA had conducted a survey for all sacred sites within an area likely to be subject to reconnaissance. Such surveying is very costly and time consuming and, ultimately, is likely to be incomplete. In addition, the applicant for the permit would have to detail precisely the locations and activities to be undertaken, which may be restrictive and counter to the purposes of reconnaissance.

Commonly in practice, agreement is reached about site protection procedures before access which often includes a requirement that the company be accompanied by one or two relevant landowners when access is undertaken. Such agreements have been successful in both protecting sites and in engendering positive interaction between landowners and the staff of exploration companies. The recommendation removes the scope for such agreements.

7.2.3 Flawed rationale for reconnaissance licences

The essential rationale for the recommendation as stated at page 527 is that, in "many cases, it is likely that such low-level exploration activity could determine whether a company is interested in continuing to explore in an area."

It is assumed that the proposed reconnaissance licences would not permit reconnaissance on exploration licences or areas the subject of ELAs by persons other than the person wishing to undertake reconnaissance.

There is no evidence cited for this and, having considered the matter in detail over several years with several exploration companies, it is by no means clear to the Land Council that the reconnaissance would assist a company to decide whether to undertake more substantial exploration or not. On none of the occasions in which the Land Council has approved reconnaissance has the company, after reconnaissance, decided not to proceed with its exploration licence application. That is to say that, if a company has an interest in exploring an area, then it appears most unlikely that reconnaissance will enable it to make a decision not to proceed with further exploration. The reconnaissance may assist to meet a range of other purposes, as noted above, but, as such, it is really only a precursor to subsequent exploration and cannot achieve the benefit which is suggested in the Report.

In the discussion at page 527, reliance is made of statements concerning the (low) success rate of exploration as a basis for concluding that reconnaissance is of use. This, of course, does not provide a logical rationale for recommending reconnaissance, as reconnaissance alone is only of marginal assistance in identifying a focus for more substantial exploration.

The reconnaissance proposed is also unlikely to be of much real use for exploration purposes as almost all Aboriginal land has been already explored, is the subject of an ELA or regional reconnaissance has already been undertaken by the Australian Geological Survey Organisation (formerly the Bureau of Mineral Resources) and the NTDME. This work has entailed airborne surveys and extensive geological mapping and the production of geological and geophysical maps which are publicly available. Investigation of ground-water availability is also undertaken regularly by governments. Much of this regional reconnaissance has been conducted subsequent to consultations with traditional landowners and with their approval. This process could be

enhanced without any legislative amendment of the Land Rights Act. For example, the NTDME could approach all applicants of ELAs in a region to fund a reconnaissance program on the basis of cost recovery. The NTDME could then approach the Land Council. A meeting or meetings could be convened by the Land Council at which landowners could consider giving permission to undertake a proposed reconnaissance program. The conditions of any approved reconnaissance could then be decided. The NTDME could then undertake the reconnaissance program, possibly with the assistance of the ELA applicants. Access to the resulting information would have to be determined and eventually made public, but priority would be given to the applicants and the Aboriginal landowners. Such meetings would also serve to identify those landowners who may be particularly interested in having their traditional land assessed for its exploration and mining development potential so that to the extent reasonably possible particular attention can be given to promoting exploration of that land.

7.2.4 Effect on negotiations

Finally, it must be acknowledged that if, as the recommendation proposes, a company accesses Aboriginal land without respecting the rights and interests of the landowners and, in fact, without even first obtaining their approval, then it is inevitable that there will be a significant likelihood that later negotiations with respect to the grant of an exploration licence would be prejudiced.

7.2.5 Conclusion

The Land Council opposes the recommendation, especially as it deprives landowners of their rights to control access to their lands.

Any arrangements for reconnaissance should be left to be considered, where circumstances permit, in negotiations between the Land Councils, on behalf of the traditional landowners, the exploration companies and the NTDME.

7.3 Existing Mining Leases

Reeves' Recommendation

The Land Rights Act should be amended to provide that the relevant RLC and the holder of an existing mining lease should negotiate the terms and conditions of any renewal of that mining lease, provided that the relevant RLC shall not have a veto over that renewal. If the parties are unable to agree on the terms and conditions, the Act should contain provisions for the appointment of a Mining Commissioner to determine that dispute, following the procedures set out in the existing s. 48F, amended to remove the requirement under s. 48F(2) that a Federal Court Judge has to be appointed as Mining Commissioner.

This recommendation appears to be based on a number of flawed understandings of the current situation and the operation of the Land Rights Act. It appears from the discussion at pages 529-530 of the Report that the recommendation applies to mining leases which existed prior to the date the relevant land became Aboriginal land. This appears to be confirmed by the later recommendations concerning new exploration and mining projects which are intended to allow exploration and mining agreements to include any matters which the exploration or mining company and the Land Council may agree upon including, presumably, issues concerning the term of the

project. (On the other hand, it is possible that there is an inherent contradiction between Reeves' recommendations on these two issues.)

The recommendation would appear to apply to the Nabalco Mining Project at Gove and the GEMCO Mining Project at Groote Eylandt. The recommendation would not affect the Ranger Mining Project, the continuance and term of which is the subject of specific legislative provisions in the Land Rights Act and the *Atomic Energy Act 1953*. However, a further contradiction is suggested by Reeves' use of a quote from the a submission from the Northern Territory Minerals Council that "the life of many projects is less than the period of the initial mineral lease (currently a maximum of 25 years under section 60 of the Mining Act)" and that "several of the Northern Territory's more significant mines will extend beyond the terms of their initial leases and are located on land which will become Aboriginal land after their commencement." (p.529) The mines being referred to have not been identified but would not include the Nabalco and GEMCO Mining Projects as these areas have been Aboriginal land for some considerable time now. In addition, the mining interests in both cases are not for terms of 25 years or less.

It is therefore not clear at all in the Report which land and which mines (if any) would be affected by the recommendation.

Depending upon which mines are to be encompassed, it may well be that the recommendation is flawed as it is based on the assumption that mining leases are limited to 25 years, whereas the relevant mining lease may, as is the case with the Nabalco Project, be well in excess of that period. The Northern Territory Government has demonstrated a willingness to provide security of mining title, and even exploration title, beyond the normal statutory limitations, as evidenced by the *McArthur River Project Agreement Ratification Act 1992* and the *Granites Exploration Agreement Ratification Act 1994*.

Conclusions

The Land Council maintains that any renewal of an existing mining interest (ie. in respect of a mining project which is not already the subject of an agreement with the Land Council which effectively covers the mining project) should be subject to the consent of the Land Council as well as the negotiation of a mining agreement.

The Land Council does not support the recommendation and maintains that any renewal of an existing mining interest (ie. in respect of a mining project which is not already the subject of an agreement with the Land Council which effectively covers the mining project) should be subject to the consent of the Land Council as well as the negotiation of a mining agreement.

The Land Council also urges that special provisions be included in the Act to require the Nabalco Joint Venturers, together with the relevant Government (or both the Commonwealth and Northern Territory Governments), to negotiate a mining agreement with respect to the Nabalco Mining Project, including new leases replacing the existing special purpose leases. If negotiations are unsuccessful, then the arbitration provisions should apply.

7.4 Consent

Reeves' Recommendation

Each of the proposed RLCs should have the existing power to consent to (or veto) any exploration or mining proposals in respect of Aboriginal land within their region, subject only to the existing national interest provisions.

Relevant Findings

- No mining company, mining association, Land Council or Aboriginal organisation proposed the veto on exploration and mining on Aboriginal land should be removed.

- The veto is seen by Aboriginal people as an essential element of their land rights.

NLC Comments

The NLC rejects this recommendation because of the flaws in the Reeves RLC model. However the NLC has proposed an alternative Regional Council model which requires the Regional Council to obtain informed consent of the traditional owners. The Reviewer is referred to the NLC's submissions to Reeves for details of the proposed regionalisation model.

7.5 National Interest

Reeves' Recommendation

The Commonwealth Government should continue to have the power to cause a Proclamation to be issued that an exploration or mining project should proceed in the national interest.

NLC Comments

The Land Council does not disagree with this recommendation for the Commonwealth to continue to have the power to require an exploration or mining project to proceed in the national interest, even though Aboriginal consent may not have been given.

7.6 Agreements

Reeves' Recommendation

Each RLC should be empowered to negotiate legally enforceable agreements directly with any mining company, or number of mining companies, and be free to engage any outside help they need for that purpose, including drawing on the professional resources of the proposed new NTAC.

Relevant Findings and Specific Suggestions

- Mining companies want the security of a binding enforceable agreement in relation to mining before they will invest large sums in exploration. This requires somebody with the authority to make such an agreement on behalf of the Aboriginal people concerned. (Page 539)

- S. 40 should be amended, inter alia, to provide that neither an exploration licence, nor any other mining interest will be issued in relation to Aboriginal land, unless there is a binding agreement to that effect between the relevant RLC and the exploration or mining company concerned. (Page 536)

- S. 40 be amended, inter alia, to refer to the relevant RLC and remove the requirement for the Minister's [consent]. (Page 536)

- Remove ss. 41, 42, 44, 44A, 45, 46, 47, 48, 48B and 48H. (Pages 537-538)

- As they deal with matters that fall outside the province of matters that would normally be covered by an agreement between an exploration or mining company and a RLC, retain (an only consequentially amend) ss. 48AA, 48C, 48D, 48E, 48F, 48G and 48J.

NLC Comments

The Land Council notes that the Report fails to acknowledge that Aboriginal landowners too, like the mining companies, seek certainty and assumes throughout that there are no Aboriginal landowners who actually want exploration to be undertaken on their country.

The Land Council supports the streamlining proposed, subject of course, to the earlier comments rejecting the Reeves model for RLCs, NTAC and decision-making processes. It must also be noted that traditional landowners can and, on occasion, have engaged professional advisers who are not employed by the Land Council or have suggested that the Land Council engage professional advisers nominated by them to assist in the negotiation of agreements for the use of Aboriginal land and related matters.

In addition, s.48J, which is intended to prohibit payments being made and gifts being offered for the purpose of improperly influencing the grant of an exploration or mining interest on Aboriginal land, has produced some difficulties. The section is drafted very broadly and prohibits some payments which may be very legitimate. (It may even prohibit joint venture arrangements between applicants and others who may wish to join in the exploration or mining venture which are made before the grant of the relevant licence or interest.) In one case, the applicant for a mineral lease and the NLC on behalf of the traditional landowners had reached agreement on the terms and conditions of the mining agreement but were unable to sign for many years by Commonwealth Government policy. In this circumstance and as senior landowners may not have lived long enough to receive any benefits from the project, the applicant offered to make special payments to the Land Council for the benefit of the senior landowners. Unfortunately, s.48J prevented such payments being made. The Land Council urges that ss.48J(5) be extended to exclude all payments made to the Land Council, not just consultation and arbitration costs as it currently provides. Such payments made through the Land Council for the express interests of traditional owners would provide necessary protection against "improperly influencing" outcomes.

7.7 Northern Territory Government

Reeves' Recommendation

The Northern Territory Government should be kept informed of which mining companies a RLC is negotiating with.

The Northern Territory Government should accept whatever enforceable agreements are made between a mining company and a RLC (unless it considers the agreement should fail on other grounds) and issue the required exploration licence or mining interest accordingly.

Specific Suggestion

Replace ss.41 and 42 with a requirement for the exploration or mining company and the relevant RLC to inform the Northern Territory Minister that they are entering negotiations about the possible issue of an exploration licence. (Page 537)

NLC Comments

Notwithstanding the objection to the Reeves' RLC model, and whilst welcoming the simplicity of the recommendations, the Land Council suggests that, after being informed of negotiations, the NTG should –

- confirm that the relevant area is available for exploration,
- comment upon the suitability of the exploration company,
- identify any environmental matters which may be of particular concern, and
- provide a draft exploration licence, including details of the minimum exploration expenditure requirements.

7.8 Commonwealth Government : Ministerial Review

Reeves' Recommendation

NTAC should be able to refer any agreement entered into by a RLC, in relation to exploration or mining, which it considers is contrary to the best interests of the Aboriginal people of that region, to the Minister for review.

NLC Comments

Especially in view of the nature of the other recommendations, it is assumed that the proposed referral to the Minister could only be made within a specified period after the agreement is signed. However, the Land Council suggests that, as is proposed in its model for Regional Land Councils, any review take place prior to execution of the agreement.

As explained above, the Land Council does not support the establishment or role of the NTAC.

The Land Council supports the continuing requirement for the relevant Land Council(s) to be satisfied that the terms and conditions of the agreement are reasonable and that the Land Council be so satisfied before, not after, the agreement is signed. Such agreements must be subject to the informed consent of the traditional owners.

The Land Council sees merit in the Minister also, but certainly not instead of the Land Council, continuing to have a role in ensuring that such developments and the manner in which they are to be undertaken are in the best interests of the Aboriginal communities.

7.9 Financial Aspects : Negotiated Payments

Reeves' Recommendation

Mining companies operating on Aboriginal land should be bound by law to pay normal royalties to the Northern Territory Government (as is the case now) and *all* so-called negotiated royalties to the relevant RLC.

NLC Comments

The NLC agrees that mining companies should continue to pay normal royalties to the NTG, however negotiated royalties should not be paid to the RLC. Currently negotiated royalties are paid through the Land Councils and distributed in accordance with the instructions of the traditional owners. These payments are compensation for their loss of use of their traditional/native title rights to land. They should not be paid to an administrative body.

7.10 Financial Aspects : Statutory Royalty Equivalent Monies

Reeves' Recommendation

The Commonwealth Government should continue to pay mining royalty equivalents into the Aboriginals Benefit Reserve for the benefit of all Aboriginal Territorians.

NLC Comments

The Land Council understands this recommendation to mean that there would be no change to the present requirements for the payment of mining royalty equivalents in to the Aboriginals Benefit Reserve and that 30% be distributed by Land Councils to relevant Aboriginals concerned with the relevant mining operation. On this understanding the Land Council supports this recommendation.

However, the NLC rejects Reeves' proposed reform of the ABR which would prescribe statutory purposes for which the ABR monies can be put; the politically-appointed body NTAC would control ABR distributions; and traditional owners would be stripped of their property rights. The NLC therefore only supports the recommendation above if it relates to the current, not the Reeves' proposed, model of the ABR.

7.11 Other Findings

7.11.1 1987 Amendments

Reeves' finding: The 1987 amendments to the Act did not overcome the deficiencies in the system.

The NLC agrees with this finding. In fact the 1987 amendments delayed and increased the costs of processing ELAs by imposing a detailed, and rather artificial, set of consultation and

negotiation requirements and deadlines. It is probably true that wherever Government seeks, in detail, to regulate and prescribe the relations between other people it will take up to 5 years or longer before those affected can operate efficiently according to the new requirements.

7.11.2 The Need for Radical Change

Reeves' finding: The existing arrangements for exploration and mining on Aboriginal land are quite unsatisfactory and should be changed. Continuing the *status quo* (or even skilfully crafted variations of it) is not in the interests of Territorians and, in particular, not in the interests of Aboriginal Territorians. It appears that the complex, prescriptive and regulated system in the Act is the source of many of the problems.

The NLC believes that variations, of a lesser scope than those recommended in the Report, can be made which will significantly improve the arrangements.

7.11.3 Veto demands different approach to exploration and mining

Reeves' finding: If the right to a veto applies, the usual approach to exploration and mining in Australia, will not be appropriate.

The NLC agrees that the regime for exploration and mining on Aboriginal land should be different to other jurisdictions because of the rights of traditional owners to control their land.

7.11.4 Criteria for success

Reeves' finding: Successful commercial dealings between mining companies and Aboriginal people, or any two parties, depend upon the parties being able to establish a relationship of trust.

The NLC agrees.

7.11.5 Unique cultural and social environment

Reeves' finding: Mining companies dealing with Aboriginal people have to appreciate that they are operating in a unique cultural and social environment. For example, many Aboriginal people remain suspicious of mining companies, the Aboriginal decision making process is usually communally oriented and many of the Aboriginal participants in the process will not be able to read or write and will be living in a state of poverty. This is the sort of environment that could give rise to allegations of unconscionable conduct if the mining company is not careful in its dealings.

The NLC agrees and notes the relevance of this finding to issues relating to the proper resourcing of traditional landowners and Land Councils and in particular the inherent problems with the Reeves RLC model.

7.12 An Alternative Model

As noted above, the Land Council sees merit in a number of the Report's recommendations for broad-ranging amendment. However, if such amendments cannot be adopted, varied, of course, to accommodate the Land Council's various concerns noted above, the Land Council

suggests that a series of amendments of Part IV, lesser in scope than those proposed, should be considered and would significantly improve the operation of Part IV and ensure that it better meets its objectives.

The principal matters which the Land Council sees as requiring change are –

1. The rigid and inefficient limitations of the current ELA negotiations timeframes.

2. The limitations on the scope of the negotiations of exploration agreements, which means that some matters must be left uncertain.

3. The lack of any effective means of removing applicants for exploration licences who are unacceptable to traditional landowners.

4. The lack of any requirement for –

   (a) the Nabalco Mining Project, which is of an inordinately long duration, and other similar mining projects, to be undertaken with regard to interests of Aboriginal landowners;

   (b) consent to be given for the grant of any mining interest on the Ranger Project Area which does not relate to the mining, including the treatment, of minerals on that Area.

A number of changes are suggested in order to address each of these principal concerns :-

7.12.1 The Procedural Requirements

(1) Develop more appropriate ELA procedural requirement and negotiation procedures, including allowing timeframes to be mutually agreed between the applicant, Land Council and traditional owners.

(2) Remove the deeming provisions, which deem consent if an answer is not received within a certain timeframe..

(3) Allow that payments of any kind may be made to the Land Council before an agreement is signed, provided such payments are made with the approval of the traditional Aboriginal owners. Also, the penalty for making improper payments should be increased.

7.12.2 The Exploration Agreement

It should be made clear that the exploration agreement can include effective and enforceable provisions which can apply in the event that –

(a) exploration is successful and mining is proposed and undertaken,

(b) the explorer wishes to undertake exploration or mining outside the scope of its original application to the Land Council.

These changes should be deemed to operate to existing exploration agreements.

7.12.3 Changing EL Applicants

Re-establish a process under the Land Rights Act and the NT Mining Act so that, under certain limited and defined circumstances, as previously, traditional owners can ask the Northern Territory Minister to immediately refuse the relevant application so that another applicant can apply. The NT Mining Act may also require amendment to make clear that that Minister has the power to refuse the application.

7.12.4 Existing Mining Projects

(1) Special provisions should be included in the Act to require the Nabalco Joint Venturers, together with the relevant Government (or both the Commonwealth and Northern Territory Governments), negotiate a mining agreement with respect to the Nabalco Mining Project, including the termination of existing special purpose leases and their replacement with new leases. If negotiations are unsuccessful, then the arbitration provisions should apply.

(2) Such requirements should also apply to the GEMCO Mining Project on Groote Eylandt.

(3) It should be made clear that consent to the grant of any mining interest on the Ranger Project Area is required if it relates to the mining, including the treatment, of minerals other than minerals on that Area.

7.12.5 Part IV applies to all mining interests

The Land Rights Act should make clear that no mining interest on Aboriginal land can be granted to any person other than through the Part IV regime.

8. Permits

The recommendation to abolish the permits system for entry to Aboriginal land is a further example of the disempowerment of Aboriginal people and erosion of Aboriginal rights inherent in the entire Report. The right to control access to their land is a fundamental expression of the proprietary rights which Aboriginal people hold. This is recognised extensively in anthropological studies of Aboriginal land tenure. The right is also important in allowing Aboriginals to better control the nature and scope of the cultural and social impact of the dominant non-Aboriginal society.

Leading anthropologist Professor Howard Morphy has pointed out:

> The recommendation in Reeves' report to abolish the permits system follows directly from his failure to understand the role of permission-giving in Aboriginal systems of ownership. His reasoning is not entirely clear. In response to the NLC submission that 'traditional Aboriginal owners of Aboriginal land have as part of their land title the right to admit and exclude persons from land', Reeves (302) writes that 'they incorrectly describe the traditional Aboriginal owners as the owners of Aboriginal land'. He argues that it is the Aboriginal land trusts who hold the land. While the technicalities of ownership are complex the spirit of the legislation is to recognise the rights in land of traditional owners and in an earlier chapter Reeves (148) writes 'Traditional Aboriginal owners have ultimate control of the land (conditional on the co-operation of the land council) and they are even entitled to receive money arising from rents from land. Subsequently he uses the argument that exclusion is race-based, but this is a very narrow interpretation of the act. Aboriginal people can be excluded from access to a particular area of land under the operation of Aboriginal law, and **the permit system is better seen as a means whereby those who are not covered by Aboriginal law can obtain permission to enter Aboriginal land. It provides a point of articulation between Aboriginal and non-Aboriginal law**." (Morphy 1999: 13-14) (emphasis added)

The Reeves Report identifies permits as an issue which has divided the Northern Territory community, by closing off large areas of land to the general public. The Reeves solution is to open them up, despite the fact that this land is now under inalienable private ownership.

Of even greater concern is the fact that Reeves relies on the submissions of Aboriginal people, including the NLC, to argue the case that the permits system does not work and causes division (p. 301). This is a particularly blatant misrepresentation of the evidence put before the Review and has caused outrage in the Aboriginal community of the NT. It is clear to anyone reading the transcripts of Reeves' hearings in Aboriginal communities and the entire text of the NLC submission, that Aboriginal people specifically submitted that the permits system should be made stronger. Richard Gandhawuy, speaking at Yirrkala to John Reeves on 2 December 1997 put the case very clearly:

We want to increase more power, more control whether it's for public servants' permits, permits for tourism, for tourist people or any foreign people.[12]

While there were differing views from Aboriginal people about who should manage the permit system (for example, Land Councils or community councils) and how it should operate, there was no suggestion that it should be abolished or downgraded in the manner proposed by Reeves.

8.1 Using the Trespass Act

The recommendation to use the current NT *Trespass Act* would give traditional landowners a considerably weaker right to control access, as the Trespass Act requires signage, formal notice, and constant monitoring. The vast areas of Aboriginal land in question could not possibly be fully signed and fenced. As a result, traditional landowners will only be able to keep people out once they have actually entered their land and provided appropriate notice is given or appropriate requests are made. In view of the special responsibilities which traditional landowners have for their land, this arrangement is a recipe for dispute and antagonism.

The *Trespass Act* is headed "an Act to amend the law relating to Trespass" and so presumably incorporates the common law definition of Trespass (as Trespass is not itself defined anywhere in the Act).

There are two possible ways in which the *Trespass Act* might apply to Aboriginal land:

1. Aboriginal land and/or specific areas of it may be "prohibited land"; or

2. Aboriginal land may be treated as normal private property.

8.1.1 Prohibited Land:

The definition of prohibited land includes "(c) land occupied by a statutory corporation, upon which is posted a notice in English to the effect that trespassing on the land is prohibited". The question would be whether a land trust occupies the land in the relevant sense. In the event of regional land councils, it may also be possible that they may be occupiers. If a land trust is a statutory corporation occupying the land in question, then it may be possible to have signs in English erected at prominent places on the land thereby making the land "prohibited". Presumably such signs could also make it a condition of lawful entry that the person entering have a permit issued by a specified office.

Interestingly, the defences section of the *Trespass Act* (section 13) forged more defences for people charged with trespassing on prohibited land under section 6 than

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[12] Evidence of Richard Gandhawuy, Northern Territory Land Rights [Act] Review, Yirrkala, Tuesday 2 December 1997, p. 37. See also evidence given by Dean Yibarbuk, Reggie Wuridjal and Ben Pascoe at Maningrida on 1 December 1997 which specifically asks for traditional owners to be given stronger powers to exclude people from their land.

it does in relation to the section 7 offence. It is a defence for a person charged with trespassing on prohibited land if they prove that "the trespass was not wilful and was done while hunting or in the pursuit of game". It is not difficult to see that this would not provide traditional landowners with adequate control over the management of their land and resources.

8.1.2 Private Land

Alternatively and more generally, the general private property trespass sections will apply. Section 7 says that "a person who trespasses on any place and, after being directed to leave that place by an occupier or a member of the police force… fails or refuses to do so forthwith or a terms within twenty-four hours" commits an offence.

It is clear that the person must be proved to have been trespassing on the land before they were directed to leave. A person will only be trespassing on the land to begin with if they have entered the land without authorisation. This is a matter of mixed fact and law but does not, according to the common law involve proof that a person knew or had no honest belief that they were authorised to enter. That is, it will come down to whether their entry was actually authorised or not.

This raises the question of who will be able to authorise access to Aboriginal land. The minimalist approach, which appears to be suggested by the reviewer, would probably leave this in the hands of the traditional Aboriginal owners without further clarification. Presumably this will commonly put at the hub of the defence the question of whether according to Aboriginal tradition any Aboriginal person who may have invited the defendant onto the land was in fact entitled to do so.

In order to confidently prosecute, the police may require to know and have admissible evidence to the effect that:

- no person had authorised entry on to the land. This will be almost impossible for them to investigate and certainly impossible for them to produce evidence in relation to; or

- any purported authorisation was not valid according to Aboriginal tradition.

The first problem with this is that a smart defendant will not reveal (at least before they get in to court) that a certain person gave them authorisation to enter the land.

The second problem is that if they did reveal this then it would be necessary for the police to obtain an expert opinion (presumably from an anthropologist) which will need to be fairly conclusive about whether or not the Aboriginal person was entitled by Aboriginal tradition to authorise the defendant to enter the land. This in turn will require evidence as to more or less precisely where the person was when they were found and an opinion about how that position relates to relevant traditional boundaries.

All of this places a very heavy burden on the prosecution to prove this offence even though the offence may be a regulatory one (ie one not requiring proof of criminal intent). Given that the offence carries a maximum penalty of $2,000 and is therefor in the scheme of things not a "serious offence" it is hard to imagine that the police will

be too enthusiastic about embarking on prosecutions. One could safely similarly expect that they will not be overly keen on taking action to remove people from Aboriginal land under the *Trespass Act*.

In summary, the *Trespass Act* provides extremely limited and uncertain powers to traditional landowners to control access to their land. The onus of proof is reversed to the extent that entry onto Aboriginal land is permissible except when it can be proved to have been specifically withheld by an authorised person.

The practical operation of such a system will exacerbate existing tensions about the entry to Aboriginal land.

9. Application of NT Laws

The changes proposed by the Reeves Report to the application of NT laws on Aboriginal land are unnecessary and counter-productive. There is no evidence that any significant issues have arisen as a result of the current regime: the NT has not been refused access to land for public purposes and there has been no problem in enforcing necessary and appropriate criminal and other laws on Aboriginal land. By contrast, the NTG has been extremely reluctant to provide resources to Aboriginal communities when Aboriginal people have been seeking NTG support to enforce NT laws. For example, community calls for additional support for policing have not resulted in an adequate level of funding for police officers in Aboriginal communities.

In relation to sacred sites, the proposed amendments to the Commonwealth Heritage Act 1984 make it even more important that Land Councils retain their role in protecting and managing sacred sites as it is highly possible that the safety net previously provided by the Commonwealth legislation will be removed, and that the NT Act may be downgraded as well.

9.1 Compulsory acquisition

The proposal to extend to the Northern Territory a power of compulsory acquisition is unnecessary and would exacerbate the tension which exists between Aboriginal people and the NTG.

The NLC is also greatly concerned by the breadth of the proposed power. Reeves recommends that the Land Rights Act be amended to give the NTG power to acquire land "in relation to the supply of essential services, whether by public or private providers… The extension of the power of compulsory acquisition to the provision of essential services by private providers would also meet the concerns expressed in the submissions by NT Gas Pty Ltd and Telstra Corporation." (p. 377) With the increasing privatisation of all public services ("essential" being a rather subjective judgement) such a provision would open the way for a large number of private companies to gain access to Aboriginal land **for profit** through compulsory acquisition. This is clearly unjust and untenable.

While Reeves recommends that the grant should be "short of an estate in fee simple", in practical terms traditional landowners could potentially lose rights to their land to private companies who are extracting large profits from their activities.

There are no examples where essential services have been prevented through the refusal of Aboriginal landowners to allow access to their land. The NTG argued in its first submission to Reeves that the Australasian Railway from Alice Springs to Darwin was one such example. Clearly, it is not: security of tenure for the railway corridor was guaranteed in October 1998 and final deeds and agreements were signed off by the NTG and the Central and Northern Land Councils on 11 February 1999. It should be noted that the negotiations over Aboriginal and native title lands took no longer than negotiations with other private landowners, and resulted in guaranteed access to the majority of the corridor in one agreement.

9.2 Sacred Sites

In his report, Reeves rejects the arguments put forward by the NLC and CLC and agrees with the views of the NTG's Aboriginal Areas Protection Authority. It is clear that there are a number of deeply contested issues at stake in this debate, and Reeves' solution of stripping the Land Councils of their powers in relation to sacred sites is hardly an adequate response.

It is clear that the Act expects Land Councils speak for traditional landowners on these issues, and their views must be taken into account in the management and protection of sacred sites. The real issue is why some traditional land interests, namely those with respect to sacred sites, should be identified and protected under a regime (under the NT legislation) which is substantially different to a regime which applies to all of the traditional land interests (under the Land Rights Act or the Native Title Act). At the very least, this has led, and will continue to lead, to confusion for all concerned.

Amendments to the Heritage Act 1984 are currently before the Commonwealth Parliament and, if passed, would significantly reduce the level of protection afforded by the Federal Government to sacred sites. By adopting a "minimum standards" approach the amended Heritage Act would actually facilitate the downgrading of the provisions of the NT Act. In this scenario it is more important than ever that the Land Councils retain a role – on and off Aboriginal land – to ensure the protection and management of sacred sites.

9.3 NT Laws in general

Reeves proposes a major change to the relationship between NT laws and the Land Rights Act. At the moment, NT laws apply on Aboriginal land "to the extent that that law is capable of operating concurrently with this Act." (s. 74). Under the Reeves model, all NT laws would apply unless they are "directly inconsistent" with the Land Rights Act. (p. 413) Further, some laws would be confirmed as applying on Aboriginal land regardless of their consistency with the Land Rights Act. These laws are those "with respect to environmental protection and conservation, public health and safety, the supply of essential services, the maintenance of law and order, or the administration of justice." (p. 412)

The Reeves amendments are unacceptable on a number of grounds:

1. It is offensive and erroneous to imply that laws dealing with the environment, health, essential services, law and order, and justice need to prevail over the Land Rights Act. Aboriginal people have never prevented the supply of essential services including health; Aboriginal land is probably the most intact in environmental terms of any of the NT; and Aboriginal people have always been subject to the NT justice system to an appropriate extent.

2. The change to the onus of proof from the situation currently where NT laws apply to the extent they can operate concurrently with the Land Rights Act to the Reeves model where "direct inconsistency" must be proved by Aboriginal people is unworkable and would be extremely damaging to Aboriginal culture and law.

3. Neither Reeves nor any of the submissions to the Review have been able to provide any objective evidence that the current section 74 in any way inhibits the day to day operation of NT laws.

The change to the operation of NT laws is thus unnecessary and likely to be very counterproductive.

10 Methodology and processes

10.1 The Review Process

Despite claims in the Reeves Report that this Review of the Land Rights Act has been the "first full public review of the Act since it became law" (p, 6), the processes followed in conducting the Review were extremely unclear, discriminatory and inaccessible. The timelines were at times impossibly short, which restricted the ability of Aboriginal people to participate or even be informed about the Review. Mr Reeves frequently did not stick to his own timetables which caused further delays and confusion for Aboriginal people and their representatives. Last and most importantly, Reeves refused to adopt any guiding principles or guarantees which fuelled Aboriginal fears about the outcomes of the Review, to the extent that the Review was seen as an attack on peoples' rights rather that an opportunity to have a cooperative and constructive assessment towards improving the workability of the Act.

A simple example of the poor processes is the publication and distribution of Mr Reeves' Issues Paper. The Land Councils were asked to contribute suggestions for inclusion in an Issues Paper to be circulated "on or about 31 October 1997"[13] which was to inform written submissions, and presumably the public hearings. A program of public hearings in Aboriginal communities and regional centres was announced on 7 November 1997[14] and written submissions were called for on 8 November 1997, with a closing date of 31 December 1997[15]. On Friday 28 November, 2 days before the first public meeting and less than 20 days before written submissions were due, the NLC received the 18 page Issues Paper. Clearly it was impossible for adequate information about the Issues Paper to be available for the first five public hearings held on consecutive days from the following Monday, nor was there reasonable time for people and organisations making written submissions to consider the Issues Paper before the due date of 31 December.

The NLC and CLC, and numerous Aboriginal organisations and individuals made considerable efforts to submit their responses by the due date of 31 December, only to discover that the Minerals Council of the NT, the Northern Territory Government, the Commonwealth Department of Primary Industry, and ATSIC (among many others) were given a month or more extra time to lodge their submissions. As submissions received by the Office of the Review were circulated soon after being lodged, it is presumed that those who had the advantage of an extension of time also had the advantage of seeing the submissions lodged by those who complied with the timeframe.

Numerous other examples could be given of a lack of due process and equality of treatment in carrying out the Review. Extremely subjective principles were applied to

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[13] Correspondence from Mr John Reeves QC to Mr Norman Fry, CEO of the NLC 10/10/97

[14] Fax from Office of the Northern Territory Land Rights Review to NLC 7/11/97

[15] NT News 8/11/97

determining which submissions were to be kept confidential[16] yet when the NLC specifically refused access to a document which contains extremely confidential information about its clients and which is bound by a confidentiality agreement, Mr Reeves persevered in obtaining a copy of the document and even published details from it as part of his Report.[17]

The lack of transparent processes, timely information and equal treatment in the conduct of the Review is of considerable concern, and casts doubt over the veracity and reliability of its findings.

10.2 The Review Methodology

Reeves' methodology in his report partly reflects the poor processes which were followed in managing the submissions and meetings processes. Submissions, whether written or oral, are treated inconsistently and discriminately. Further, there is a lack of proper analysis and research into substantive issues under Review, and a reliance on anecdotal or hearsay evidence without attempts to contextualise or substantiate positions or claims.

Numerous Aboriginal people at the public hearings gave oral testimony in their own languages, yet Aboriginal language has not been translated in the transcripts of the meetings, therefore Mr Reeves has not listened to the voices of people who cannot speak English[18]. An ATSIC bureaucrat recently told a Senate Committee that despite a budget of $1, 095,000, ATSIC "believes" Mr Reeves did not pay for translation of evidence given to him in Aboriginal languages[19].

Those oral and written submissions in English which are supportive of the Land Rights Act or the Land Councils are dismissed by Reeves with the totally inaccurate statement that "most of the community meetings were organised by the two large Land Councils and they were generally conducted at a time and place of their choosing."(p. 103) This is simply not true. The NLC was presented with a schedule of places Reeves proposed to visit and a timetable which the NLC considered to be highly inappropriate and impractical on 7 November 1997. Reeves' statement that "Land Council staff spoke at length to those who were to attend the meetings about

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[16] see page 7 of Reeves Report; no guidelines or principles to determine confidentiality were developed.

[17] Mr Reeves quite wrongly asserts that the parties to the Wagait dispute and their lawyers "were not bound by any confidentiality agreement with the NLC" (p. 181) as was pointed out to him numerous times in correspondence from the NLC's lawyers.

[18] Answers provided to the Finance and Public Administration Legislation Committee in February 1999 confirmed "there were no costs incurred for intepreters" and "as far as ATSIC is aware, only English language transcripts were made from the tape recordings of the community meetings taped by the Review." Finance and Public Administration Legislation Committee, Answers to questions on notice, February 1999.

[19] Finance and Public Administration Legislation Committee Senate Hansard 8 February 1999, p. 91.

the issues involved with the Review"(103) is accurate but his implication is odious. NLC staff briefed community members before Reeves' hearings because Mr Reeves' Issues Paper was inaccessible to them (see above) and because people wanted information. It is perplexing that the NLC is being criticised for doing its job.

On the other hand, the submissions of small and disgruntled groups are given equal or greater weight than the overwhelming testimony of Aboriginal people to keep the Land Rights Act the way it is. It is telling that Mr Reeves does not make any suggestions at all about the influences which may have been brought to bear on the small groups of people or individuals who spoke against the Land Councils or have been portrayed as having spoken against the Land Councils. This is despite the fact that the transcripts show the direct intervention of the Northern Territory Government in the evidence presented by some groups. See Appendix 2 for a flagrant example of such intervention.

Brian Galligan in his submission to HORSCATSIA points out the serious flaws in Reeves' methodology. After quoting Reeves' much quoted phrase that the Land Councils are "perceived to be bureaucratic, remote, tardy and uninterested in local Aboriginal problems", Galligan notes that "these are only reported perceptions and accusations: they are not the findings of the Review."

> Such a disclaimer is necessary 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 the 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.
>
> Here we have serious problems 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 the 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 12 pages of this stuff? For example, "Hello. I'm Raylene S … the staff of the 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 Land Councils are performing their functions from the point of view of key stakeholders.
>
> 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 have not had to concern themselves with land claims, they have avoided the divisiveness associated with it. Nor have they had to adopt 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 functions 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 problem 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. (Galligan 1999: pp. 20 –21)

Aboriginal submissions have been deliberately taken out of context, such as on the permits issue. The chapter on the permits issue lacks hard analysis, leaves out steps in the argument, omits relevant information, and at critical points chooses qualitative language (with little content) rather than quantitative analysis to support a position. For instance, the report often states that Aboriginal people, or "some" Aboriginal people, support Reeves position. The Report often fails to state the numbers (or the identity) of Aboriginal persons, groups or meetings said to be in support.

Reeves fails to advise that the overwhelming majority of written and oral submissions of Aboriginal people were highly supportive of the permit system. Further, Reeves states that "[d]uring the community meetings Aboriginal people complained about the system being controlled by outsiders, i.e. the Land Councils and the Northern Territory Minister." Reeves fails to advise whether this was a common view expressed at all or many meetings, or simply an isolated viewpoint held by only a few Aboriginal people. Accordingly, it is not possible to form any view as to the accuracy of his position because he has not properly stated the basis for his opinions.

There is no academic or legal rigour in investigating or substantiating the competing claims and evidence of different groups and organisations. The report reads like an awkward summary followed by an inexplicable adjudication or by a refusal to adjudicate.

Reeves refuses to explicitly exercise any judgement over the conflicting mining statistics he is presented with by the two large Land Councils, the NT DME and DPIE. Despite being presented with detailed argument and evidence that the figures provided by DME and DPIE are inaccurate, Reeves simply commented in a footnote that "While this Review is not in a position to decide who is right, it is obvious that *both* sides cannot be."(p. 514) However, totally inconsistently, the Review then proceeds on the basis that "the record of exploration and mining on Aboriginal land has been poor" which is precisely the point at issue on which Reeves considers the Review "is not in a position to decide."(514)

In a similarly flawed way, Reeves deals with the "problems" he identifies with the Land Rights Act by recommending unilateral changes to Aboriginal institutions. After concluding that "the two large Land Councils operate as bureaucracies, discharging their functions within a legalistic and political framework" (a comment which is clearly intended as a negative), Reeves proposes the wholesale fragmentation of these institutions. As Mowbray (1999:12) points out: "Other more or less systemic reforms, such as the reform of Territory government programs or even the management of the present Land Councils are not investigated or considered." The Northern Territory Government is not penalised for its role in the "strident,

oppositional political culture [which] has developed in the Northern Territory with respect to Aboriginal land rights." (p.II) Instead, it is rewarded by achieving its long term political goals of neutering the Land Councils, and gaining the power of compulsory acquisition and control over sacred sites.

Extraordinary recommendations, such as pooling ATSIC, ABR, and NTG monies into the ABR, are made without adequate analysis, argument, or legal /policy consideration. This particular proposal comes on the third last page of the report and is not referred to in the synopsis or in the summary of recommendations.

Reeves proposes that "if the Northern Territory government were willing", up to $536 million could be allocated to the ABR from NT treasury, with a further $167 million from ATSIC thrown in as well. In the space of less than a page (pp 613 – 614), a major re-allocation of resources, responsibility and accountability is proposed which poses complex legal and policy questions about the relations between the Territory and Commonwealth Governments, would require substantial amendment to a number of Commonwealth acts of parliament, and would give the government-appointed NTAC a budget similar to a small Pacific Island nation. ($738 million) The lack of serious analysis on this issue epitomises the shoddy methodology of the Reeves Report.

The language of the Reeves Report alone is telling. Unexpectedly for a lawyer, Reeves does not use terms in a precise way but rather to achieve an effect. As Tim Rowse (1999) has pointed out, one of the central concepts of the Reeves Report – the proposed "partnership" in Northern Territory politics – is extraordinarily vague and largely rhetorical.

> No partnership can be vague about who are the parties to it. Yet Reeves is not consistent in his formulations on this point.
>
> pp. v, 76, 592: "a partnership between Aboriginal people in the Northern Territory and the Government and the people of the Northern Territory".
>
> p. 65: "a partnership between Aboriginal Territorians and the Northern Territory Government."
>
> p. 71: "between Aboriginal Territorians, and other Territorians."
>
> p. 71: "between Aboriginal Territorians, the Northern Territory Government and other Territorians."
>
> p. 492: "a cooperative and mutually beneficial partnership relationship between Aboriginal Territorians and the Northern Territory and Commonwealth Governments and their agencies."
>
> p. 606 "a strong partnership between Aboriginal and other Territorians and the Northern Territory and Commonwealth Governments." (1999:3)

It is certainly not clear from Reeves' various permutations who the parties to the partnership are, and it is even less clear who "Territorians" are. Rowse suggests that the way out of Reeves' "frightful muddle" on the issue of partnership is to assume that he means that the parties to the partnership should be "the Northern Territory Government" and a political entity representing Aboriginal people as landowners.

(1999: 4) However the only Aboriginal entity left standing at the end of the Reeves Report is NTAC, a government-appointed body which is completely unacceptable to Aboriginal people and hence have no authority to enter into such an agreement.

Reeves is also imprecise and misleading in his use of the adjectives "autonomous" and "independent" in relation to the proposed RLCs and NTAC. (Mowbray 1999: 14) It is clear from his description of these bodies' functions and operations that they are far from autonomous or independent, as ultimate control over the RLCs rests with NTAC, and NTAC will be an appointed body for the foreseeable future. Reeves' definition of an independent body appears to be rather broad as he also asserts that the Aboriginal Areas Protection Authority, a statutory agency operating under Territory legislation and responsible to the Minister for Lands, Planning and Environment, is essentially independent. (Mowbray 1999: 14)

Commentators have been uniformly scathing of the Reeves Report's attempt at "social engineering" and unilateral public policy creation and the lack of proper processes and methodologies in the Review. The NLC concurs with such views and regrets the public money wasted in this ill-managed exercise which could have been such a valuable opportunity for constructive change.

> Ultimately the Reeves Model is bad public policy. It assumes rather than persuasively demonstrates, that the creation of a new unrepresentative institution NTAC will, ipso facto, deliver better outcomes to Aboriginal people, presumably because its NT and Commonwealth Government appointed members will be better able to work with the NT Government. (Altman 1999: 9)

> 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 vast tracts of marginal land would be exacerbated by such an extreme diffusion of political and administrative power. In brief, Reeves should have stuck to his Terms of Reference. His ambitious forays beyond them are implausible and should be rejected. Moreover, Aboriginal Territorians have a right to participate in the design and restructuring of institutions that affect them, especially as such institutions purport to be ones of Aboriginal governance and self-determination. (Galligan 1999: 26)

> Good public policy would suggest that the role of the review is to negotiate with all interests, indigenous, non-indigenous, private sector and government, to improve an existing statutory framework. By failing to negotiate such a path and instead unilaterally proposing a model that will prove unworkable and costly, the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976 represents an important and expensive lost opportunity for Aboriginal and non-Aboriginal Territorians and for all Australians. (Altman 1999:11)

Appendix 1 NLC Response to the Reeves Report Recommendations

The Principal Recommendations	**NLC Response**
(I) THE EFFECTIVENESS OF THE LEGISLATION IN ACHIEVING ITS PURPOSES	
Recommendations in Chapter 4 That a preamble and purposes clause be inserted in the Act expressing the future purposes of the Act along the following lines:	
• to encourage the formation of a partnership between Aboriginal people in the Northern Territory and the Government and people of the Northern Territory;	**NO**. This is a completely new purpose and changes the beneficial intent of the Act. The NLC is supportive of an improved relationship being developed between Aboriginal people and the NTG, however, the Land Rights Act should not be weakened in order to achieve it. The onus to develop the new relationship should be on both the NTG and Aboriginal people.
• to provide Aboriginal people with effective control over decisions in relation to their lands, their communities and their lives; and	**Qualified YES**; provided decisions in relation to land continue to be made in accordance with Aboriginal law.

• to provide opportunities for the social and economic advancement of Aboriginal people in the Northern Territory.	**Qualified YES**; but in accordance with Aboriginal law.

The Principal Recommendations	NLC Response
(III) THE OPERATION OF THE EXPLORATION AND MINING PROVISIONS	
Recommendations in Chapter 24 The Land Rights Act and the Mining Act (NT) should contain provisions which allow a person to obtain a licence to enter Aboriginal land for a specific period for the purpose of reconnaissance exploration subject to various terms and conditions (as outlined in this Chapter 24).	**NO**. Especially as it deprives traditional landowners of their rights to control access to their lands.
The Land Rights Act should be amended to provide that the relevant RLC and the holder of an existing mining lease should negotiate the terms and conditions of any renewal of that mining lease, provided that the relevant RLC shall not have a veto over that renewal. If the parties are unable to agree on the terms and conditions, the Act should contain provisions for the appointment of a Mining Commissioner to determine that dispute, following the procedures set out in the existing s. 48F, amended to remove the requirement under s. 48F(2) that a Federal Court Judge has to be	**NO**. • **Reject** Reeves RLC model. • **Reject** renewal without traditional landowners' consent. • Special provisions should be enacted to require a mining agreement to be negotiated between the Nabalco Joint Ventures and the NLC.

appointed as Mining Commissioner.	
Each of the proposed RLCs should have the existing power to consent to (or veto) any exploration or mining proposals in respect of Aboriginal land within their region, subject only to the existing national interest provisions.	**Qualified YES.** • **Reject** Reeves RLC model. However, Land Councils should be able to delegate such decisions to regional councils. But only under the current consultation regime which requires the informed consent of traditional landowners as a group.
Each RLC should be empowered to negotiate legally enforceable agreements directly with any mining company, or number of mining companies, and be free to engage any outside help they need for that purpose, including drawing on the professional resources of the proposed new NTAC.	**Qualified YES.** • **Reject** Reeves RLC and NTAC model. However Land Council model provides for delegation to Regional Land Councils; currently traditional landowners can engage outside help.
The Northern Territory Government should be kept informed which mining companies a RLC is negotiating with.	**Qualified YES**; if RLC is structured on Land Council model. **REJECT** Reeves RLC model.
The Northern Territory Government should accept whatever enforceable agreements are made between a mining company and a RLC (unless it considers the agreement should fail on other grounds) and issue the required exploration licence or mining interest accordingly.	**Qualified YES**.
The Commonwealth Government should continue to have the power to cause a Proclamation to be issued that an exploration or mining project should proceed in the national interest.	
Mining companies operating on Aboriginal land should be bound by law to pay normal royalties to the Northern Territory Government (as is the case now) and *all* so-called	**NO**. Negotiated royalties should continue to be distributed in accordance with the directions of the traditional landowners – usually, as set out in the mining agreement.

negotiated royalties to the relevant RLC.	
The Commonwealth Government should continue to pay mining royalty equivalents into the Aboriginals Benefit Reserve for the benefit of all Aboriginal Territorians.	**Qualified YES**. Reject Reeves prescriptive application of ABR funds. ABR to be managed by Aboriginal people as per Land Council model.

The Principal Recommendations	NLC Response
(IV) THE OPERATIONS OF THE ABORIGINAL BENEFITS RESERVE (ABR) (FORMERLY THE ABTA) INCLUDING THE DISTRIBUTION OF PAYMENTS OUT OF THE TRUST ACCOUNT **and** **(V) THE OPERATIONS OF THE ROYALTY ASSOCIATIONS AND THEIR REPORTING REQUIREMENTS**	
Recommendations in Chapter 16 The link between the ABR's funds and the mining industry should be maintained to underscore the fact that the payment of these funds is based upon a unique and historical factors.	**YES**.
The Act should be amended to include a clear statement of purposes for the distribution of the funds in the ABR.	**NO**. Decisions over the use of monies should be made by Aboriginal people, through accountable and transparent mechanisms.
The ABR should, in future, be administered by the proposed Northern Territory Aboriginal Council (NTAC).	**NO**. Administration to remain as is, (or by Land Councils), with improvements in administration, accountability and application as per Land Council model.

The formula for the distribution of the ABR's funds should be abolished. In its place, NTAC should decide on the distributions within the statement of purposes set for the ABR.	**NO**. The formula is based on a recognition of the need for Land Councils to be independent, for Aborigines affected by mining to be compensated, and for all Aborigines to share in benefits.
In future, 'areas affected' monies should only be paid to the proposed new Regional Land Councils (RLCs) in the region for the benefit of those communities that can establish an actual adverse affect from mining on the community in net terms, i.e. taking into account the receipt of negotiated payments and any countervailing benefits obtained from the mining.	**NO**. Areas affected monies are compensatory and should be payable to traditional landowners and affected people. NLC suggests amendment to make explicit that it is "people affected" not "areas affected" and to allow the NLC and such people to reach effective agreement about how future monies will be allocated.
All expenditure of all ABR funds and all other income from activities on Aboriginal land should be applied by NTAC or the RLCs to particular purposes e.g. ceremonies, scholarships, housing, health etc. Conversely, none of these funds should be paid to an individual without a related purpose. Furthermore, any Association receiving ABR funds should not be able to pay those funds to another Association that makes individual payments. Measures should also be adopted to remove the perception that the practice of substitution is occurring.	**NO**. Decisions over Aboriginal money should be made by Aboriginal people through accountable and transparent mechanisms. It should not be prescribed by Statute. NLC agrees that special care must be taken to best ensure the proper use of this money and, as noted in the previous comment, suggests that the NLC and Aboriginal landowners be given the means to set binding rules on the way in which the money is applied. NLC agrees that substitution is unacceptable. However, Reeves' proposed prescribed purposes suggest substitution.

Mining Withholding Tax should not be applied to the funds paid to the ABR.	**NO**. Mining Withholding Tax should be reduced to 2%.
NTAC should develop an investment strategy, which is aimed at it becoming self-sufficient to the amount of the income from a particular mining resource by the time that resource is estimated to be expended. The balance of the ABR's funds should be expended by NTAC and the RLCs on programs for the cultural, social and economic advancement of Aboriginal Territorians.	**NO**. ABR should have a responsible investment strategy, devised and managed under Aboriginal management with effective accountability mechanisms. **NO**. These decisions should be made by Aboriginal people. **REJECT** Reeves RLC and NTAC model.
NTAC should only invest the investment component of its funds in commercial investments that are likely to provide a satisfactory rate of return for the investment.	**NO**. These decisions should be made by Aboriginal people. REJECT Reeves RLC and NTAC model.
A special system of assistance, accountability and transparency should be adopted for Aboriginal incorporated associations to take account of: • the effect of Aboriginal culture and tradition; • the undesirability of a multiplicity of such associations; and • the general lack of familiarity and experience among Aboriginal people with administering such bodies.	**Qualified YES**. The NLC proposes amendments to s.35A to assist with the management and regulation of royalty associations.

Recommendations in Chapter 28 The establishment of the Northern Territory Aboriginal Council (NTAC) as an authority under the Land Rights Act.	**NO**. NTAC model is contrary to Aboriginal law, and some of its functions are unconstitutional.
The members of the Council of NTAC should be appointed jointly by the Commonwealth Minister and the Chief Minister of the Northern Territory from a list of nominations of Aboriginal Territorians made by Aboriginal Territorians.	**NO**. Political appointment is completely unacceptable.
The Council members should elect their own Chairperson and appoint their own Chief Executive Officer from a list of candidates approved by the relevant Commonwealth and Northern Territory Ministers. The CEO should also be a member of the Council *ex officio*.	**NO**. Political appointment is completely unacceptable.
In due course, Government appointment of the members of the Council should be replaced by their election by Aboriginal Territorians on a basis providing for an appropriate spread of regional representation. This election should take place once the land claims process has been completed, the boundaries of the RLCs have been settled, and a further review of the Act has been undertaken.	**NO**. The time frame for the transition from political appointment to election is unacceptably vague and distant.
The main functions of NTAC will be to: • Assist in the long-term social and economic advancement of Aboriginal Territorians through its social	**NO**. The main function of peak bodies under the Act must be to protect the rights of Aboriginal people.

and economic advancement program.	
• Maintain strategic oversight of the activities of the RLCs relating to major agreements, delegation of their functions, their financial and administrative functions and the appointment of their CEOs.	**NO**. It is unacceptable for a politically appointed body to oversee the RLCs.
• House and support the operations of the Congress of Regional Land Councils.	**NO**. Congress of RLCs and NTAC appear to be duplicating functions.
• Establish an investment trust and act as a 'bank' for the RLCs.	**NO**.
• Complete the outstanding land claims.	**NO**. Land claims should be completed by Land Councils.
• Act as the sole Native Title representative body in the Northern Territory.	**NO**. Contrary to NTA because NTAC is politically appointed.
• Endeavour to resolve disputes between Aboriginal people, or Aboriginal organisations, in relation to land or other matters as discussed in more detail in Chapter 10 of this Report.	**NO**. Contrary to natural justice.
• Provide financial, technological and human resource support (at cost) for the RLCs. On request by a RLC, act on the RLC's behalf in any matter.	**NO**. These functions are better performed by existing Land Councils.

• Maintain a (non-public) register of all agreements entered into by each RLC.	**NO**. Appropriate function of existing Land Councils.
• NTAC will be responsible for receiving and distributing the mining royalty equivalents paid to the ABR by the Commonwealth Government and any other funds allocated to it by the Northern Territory and Commonwealth Governments or ATSIC.	**NO**. Decisions over Aboriginal monies should be made by a representative not appointed body.
• NTAC will be required to fund the administrative costs of the RLCs.	**NO**. Decisions over Aboriginal monies should be made by a representative not appointed body.

The Principal Recommendations	NLC Response
(VI) THE COMPULSORY ACQUISITION POWERS OVER ABORIGINAL LAND	
Recommendations in Chapter 17 The Land Rights Act should be amended by repealing ss. 67 and 68 and by inserting, in Part VII, a new s. 67 along the following lines:	**NO**.
1. Subject to ss. (2) and (3), notwithstanding anything in this Act, including s. 71, or any other Act, save for the Racial Discrimination Act 1975 (Cwlth), the Northern Territory Government may compulsorily acquire an estate or interest in Aboriginal land or in land the subject of an application of the kind referred to in s.50(1)(a), other than the freehold interest, for public purposes provided that the nature and extent of the estate or interest shall be limited to that necessary for the public purpose concerned.	**NO**. There is no need for the NTG to have power of compulsory acquisition. Traditional landowners have never stood in the way of public services.
2. An estate or interest in Aboriginal land or land the subject of an application of the kind referred to in s. 50(1)(a) can not be compulsorily acquired except by an Act	**NO**. There is no need for the NTG to have power of compulsory acquisition. Traditional landowners have never stood in the way of public services.

of the Northern Territory Parliament that expressly provides for that acquisition.	
3. Prior to any compulsory acquisition of an estate or interest in Aboriginal land or land the subject of an application of the kind referred to in s. 50(1)(a), and within the period prescribed by the regulations, the Northern Territory Government shall: a. notify the relevant Regional Land Council in writing as to the area of the land affected, the nature of the estate or interest that is to be compulsorily acquired, the purpose of the acquisition, and the alternative courses which have been considered; and b. allow the relevant Regional Land Council, reasonable access to all documents held and advice received relevant to the proposed acquisition.	**NO**. There is no need for the NTG to have power of compulsory acquisition. Traditional landowners have never stood in the way of public services.
4. In relation to the acquisition of an estate or interest in land the subject of an application of the kind referred to in s. 50(1)(a), any compensation payable shall be held in trust, in accordance with the regulations, pending the final disposition of the claim in accordance with s. 67A(5).	**NO**. There is no need for the NTG to have power of compulsory acquisition. Traditional landowners have never stood in the way of public services.

The Principal Recommendations	NLC Response
(VII) THE APPLICATION OF NT LAWS TO ABORIGINAL LAND	
Recommendations in Chapter 18 • That provision be made for the general application of Northern Territory laws to Aboriginal land. Specifically, that the Act specify the subject areas in relation to which Northern Territory laws will apply to Aboriginal land, with the qualification that every endeavour should be made to ensure that the rights under s. 71 of the Land Rights Act are preserved to the greatest extent possible.	**NO**. Will amount to dramatic reduction in the integrity of Aboriginal law. The current situation should remain. In general NT laws apply and very few problems arise. No case has been established to warrant such change.
• Specifically, I recommend that s. 74 be repealed and s. 71 be amended along the following lines : • Insert a new subsection (3) as follows: Subject to subsections (4) to (6), the laws of the Northern Territory made pursuant to ss. 67 and 73 or laws of the Northern Territory, including delegated laws, with respect to environmental protection and conservation, public health and safety, the supply of essential services, the maintenance of law and order, or	**NO**. It is completely unnecessary to require laws in these categories to overrule Aboriginal law as no evidence exists to suggest that such matters are not adequately dealt with in the current arrangements.

the administration of justice shall apply in relation to Aboriginal land in the Northern Territory.	
• Insert a new subsection (4) as follows: In the application of a law of the Northern Territory described in subsection (3) in relation to Aboriginal land, all reasonable steps shall be taken to minimise any negative effects on the use or occupation of the land pursuant to subsection (1).	**NO**. This is a weak substitute for the current arrangements.
• Insert a new subsection (5) as follows: The application of a law of the Northern Territory described in subsection (3) in relation to Aboriginal land does not affect the right to use or occupy land in accordance with subsection (1), other than to the extent that that use or occupation is *directly inconsistent* with the effective operation of the law of the Northern Territory.	**NO**. Reverses the onus of current Act to create an endless and fruitless task of testing each law.
• Insert a new subsection (6) as follows: Any law of the Northern Territory other than a law of the Northern Territory described in subsection (3) applies to Aboriginal land other than to the extent that that law is *directly inconsistent* with this Act.	**NO**. Reverses the onus of current Act to create an endless and fruitless task of testing each law.

• That provision be made to ensure that the costs of fencing arising under the Fences Act are met by the relevant RLC. Specifically, it is recommended that s. 26 of the Land Rights Act be amended by inserting a new subsection (2) as follows: In this section the term 'charges' includes, but is not limited to, the cost of fencing which is due and payable in relation to Aboriginal land pursuant to a law of the Northern Territory or the Commonwealth.	**NO.** Costs would be prohibitive.
• That the Northern Territory Government be given a limited power to compulsorily acquire Aboriginal land for public purposes, including for the purpose of water supply. A detailed recommendation on compulsory acquisition appears elsewhere in this Report.	**NO**. Unnecessary. See previous comments on Section V.

The Principal Recommendations	NLC Response
(VIII) THE ROLE, STRUCTURE AND RESOURCE NEEDS OF THE LAND COUNCILS FOLLOWING THE COMING INTO EFFECT OF THE SUNSET CLAUSE RELATING TO LAND CLAIMS	
Recommendations in Chapter 10	
• A system of representative regional land councils should be established based on the eighteen existing Land Council regions (including the two small Land Council areas).	**NO**. The current mechanism for the creation of new land councils is more appropriate and allows Aboriginal people to decide. Reeves RLC model is contrary to Aboriginal law and may be unconstitutional.
• These Regional Land Councils (RLCs) should be autonomous, subject to the system of supervision and accountability (detailed in Chapter 27).	**NO**. The system described is neither autonomous nor accountable.
• Each RLC should be required to make its decisions in the best interests of the Aboriginal people of its region and should be entitled to adopt the decision making process that it considers best reflects Aboriginal traditional processes in its region.	**NO**. This would transfer property rights from traditional landowners to RLCs and is illegal – in Aboriginal and non-Aboriginal law and unacceptable.
• All disputes arising out of the Land Rights Act should be dealt with at first instance by the relevant RLC by the	**NO**. **Reject** Reeves model for RLC, however, LC model allows for such dispute resolution process..

methods it considers appropriate.	
• A person aggrieved by a decision of a RLC should have a right of appeal to NTAC, which should deal with the appeal by the methods it considers appropriate.	**NO**. Disputes should be dealt with in accordance with Aboriginal decision-making.
• A person aggrieved by a decision of NTAC should have a right to appeal on a question of law only to the Aboriginal Land Commissioner, or some similar body. No question of Aboriginal tradition should be entertained on such an appeal.	**NO**. Denial of natural justice to limit options of redress.
• An (existing) Ombudsman should receive and deal with non-traditional/ administrative complaints against a RLC or NTAC.	**NO**. Denial of natural justice to limit options of redress.

Recommendations in Chapter 27	
• If any disputes arise about the boundaries of any of the RLC regions the Minister should request the Aboriginal Land Commissioner to inquire into the most appropriate boundaries and report to him pursuant to s. 50(1)(d) of the Land Rights Act.	**NO**. This is unworkable because of the interdependent and inter-related nature of land tenure and Aboriginal relations. Land Council model provides for resolution between RLC and LC and ultimately for Minister to seek advice regarding alternative or new Land Council. LC model proposes that changes to LC or RLC boundaries occur only with traditional decision-making processes and having regard to the views and interests of Aboriginal communities affected.
• Each RLC will be comprised of its: • Membership; • Board of Directors; • Chief Executive Officer; and • Staff.	**Qualified NO**. Regional Councils should comprise the membership and directors (or Executive) only – see LC model.
• The universal rules of membership of each RLC should be that: • any Aboriginal person, who has a traditional affiliation to an area of land within the region, or who is a permanent resident of the region, is entitled to be a member of an RLC; • no person may be a member of more than one RLC at any one time; and	**Qualified YES. Reject** Reeves RLC model but membership rules acceptable for LC RLC model.

• each RLC shall be required to keep a Register of its members.	
• The membership of the RLC should decide the number of Directors on the Board of the RLC and how they will be chosen.	**Qualified YES**. **Reject** Reeves model but LC RLC model would provide guidelines for accountability and consistency.
• The Act should simply prescribe that the system for choosing the Directors of the Board of each RLC should be fair, representative of the region and non-discriminatory.	**Qualified YES**. **Reject** Reeves model but LC RLC model would provide guidelines for accountability and consistency.
• The CEO of each RLC should be appointed by its Board of Directors from a list of candidates acceptable to the Board and approved by NTAC.	**NO**. Political appointment is unacceptable.
• The staff of each RLC should be appointed by the CEO, to whom the staff will be responsible for the proper execution of their duties.	**NO**. Staffing controlled by political appointee is unacceptable.

• The main functions of a RLC should be as follows: • to undertake all the functions of the present Land Councils in its region with the exceptions of completing the land claims process, sacred sites assistance, and assistance with commercial ventures, which functions will be undertaken by NTAC, or other bodies as specified elsewhere in this Report;	**Qualified YES**. **Reject** Reeves model of RLC and NTAC but the NLC supports amendment of the Land Rights Act so that Full Council powers can be delegated to Regional Councils to undertake those functions. The NLC does not see any limit on the range of functions which can be delegated, provided they relate to the region, apart from the power of delegation itself and the power to affix the common seal.
• to make decisions in relation to proposals for the use of Aboriginal land in its region that do not conflict with the functions above, including decisions relating to exploration and mining, tourism, and specialist primary production (horticulture, aquaculture, etc.);	**NO**. This is contrary to Aboriginal laws and Australian law; and amounts to an acquisition of property rights. LC model and functions for RLC provide for appropriate decision-making in accordance with Aboriginal law.
• to hold in trust all Aboriginal land in its region for the benefit of all Aboriginal people who are entitled by tradition to use or occupy that land;	**NO**. Acquisition of property from current land trusts.
• to receive and spend funds made available by NTAC for the administration of the RLC or for public purposes approved by NTAC;	**NO**. The distribution of monies by the politically appointed NTAC is unacceptable.
• to assist in the social and economic advancement of Aboriginals living in its region; and	**Qualified YES**. **Reject** Reeves model for RLC, however LC model for RLC provides for such assistance. Protection of rights must be prioritised.
• to co-ordinate and assist the implementation of the Aboriginal social and economic advancement	**Qualified YES**. **Reject** Reeves model for RLC. Resourcing would be a problem but agree communities are inundated by government agencies.

programs of NTAC, the Northern Territory and Commonwealth Governments and ATSIC, in its region.	
• The annual budget for each RLC should be left to its own discretion. Each RLC will be required to meet its administrative expenses from the annual allocation provided to it by NTAC.	**NO**. **Reject** Reeves model for RLC and NTAC as inappropriate for NTAC to determine funding.
• All agreements made by a RLC will be required to be registered with NTAC.	**NO**.

The Principal Recommendations	NLC Response
(IX) ANY OTHER MATTERS RELEVANT TO THE OPERATION OF THE ACT	
Definition of Traditional Aboriginal owners–Chapter 8	
Recommendations The definition of traditional Aboriginal owners in the Act should be retained for the purposes of the remaining land claims under the Act.	**Qualified YES**. Definition should be retained throughout the Act, not just limited to land claim purposes.

Outstanding Land Claims–Chapter 11	
Recommendations BANKS AND BEDS OF RIVERS • The land claims to the banks and beds of rivers that fall wholly within other land that is claimable, should be granted without further delay and expense.	**YES**.
• The Land Rights Act should be amended to prevent land claims to the banks and beds of rivers that form the boundary between land that is available for claim and that which is not, or that comprise a strip of land between two areas of land that are not available for claim.	**NO**. Such issues should be decided by means of the existing land claim process, involving the ALC and the Minister.
INTERTIDAL ZONE • The Land Rights Act should be amended to provide that the areas of the Northern Territory on the seaward side of the high watermark, that are not already Aboriginal land under the Act, are not available for claim under the Act.	**NO**. Such issues should be decided by Land Community/Commission and Councils.
• The common law position regarding the ownership of living fish and native fauna on Aboriginal land should be confirmed in the Land Rights Act.	**NO**. In current Australian common law Aboriginal people have native title rights to fish and fauna.
• The Northern Territory Legislative Assembly should be given the power to pass legislation to provide for the	**NO**. Such matters must await the outcome of current land claims and litigation. NLC proposes amendment to Act to recognise traditional rights

joint management of the resources in the intertidal zone and the territorial waters of the Northern Territory both on and off Aboriginal land in conjunction with those Aboriginal people who have traditional interests in those resources and areas and other persons and groups with interests in those resources and areas.	to the sea and resources.
• The Northern Territory's power to make laws in this regard should be made sufficiently broad to allow it to permit members of the public, who are lawfully fishing in such waters and commercial fishermen licensed to fish in such waters, to place anchors, nets, fishing lines or other similar items of equipment on the bed or shore of the intertidal zone on Aboriginal land.	**NO**. This is unnecessary and completely fails to recognise the cultural and economic importance, and the size, of intertidal zones. Where it is appropriate, agreements can be reached between fishers and traditional landowners.

• The order of priorities given to the interests of the various groups involved in the joint management regime should be:
  • Conservation and certain other identifiable overriding interests;
  • Traditional hunting and fishing;
  • Commercial and recreational hunting and fishing.
	NO. This priority list is misleading. Traditional rights and conservation are entirely consistent and should not be presented as competing interests.

SEAS AND SEA BEDS • The expression 'low water-mark' should be defined in s. 3 of the Land Rights Act to mean the mean low water-mark.	**NO**. This question is currently before the courts for determination. If an amendment were made contrary to the Court's decision then government may have to pay compensation for the acquisition of property.
• The Land Rights Act should be amended to provide that the areas of the Northern Territory on the seaward side of the (mean) low water-mark on land granted to an Aboriginal Land Trust under the Act, and on the seaward side of the high watermark of all other land in the Northern Territory (including the sea bed under the Northern Territory's territorial waters), should not be available for claim under the Act.	**NO**. Should be decided by the courts.
CONSERVATION LAND CORPORATION/NORTHERN TERRITORY LAND CORPORATION LAND • The Land Rights Act should be amended to put it beyond doubt that lands held by the Conservation Land Corporation or the Northern Territory Land Corporation are not available for claim under the Act.	**NO**. Should be decided by the courts.
• The Northern Territory Government should do all in its power to recognise and protect traditional Aboriginal interests in land held by the Conservation Land Corporation/Northern Territory Land Corporation and, in relation to the former, give those Aboriginal people, with traditional interests in that land, an	**NO**. See above.

effective role in the management of any national park involved.	
OTHER MATTERS • The 'sunset clause', s. 50(2A), should be retained.	**NO**. "Sunset clause" should be removed.
• Encourage the early passage of the Aboriginal Land Rights (Northern Territory) Amendment Bill (No. 2) 1997.	**NO**. The stock routes amendments should not pass until there is some solution found for Aboriginal people dispossessed by the pastoral industry; eg rectify NTG Community Living Areas process.

Land Claims Procedures–Chapter 12	
Settlement of outstanding claims	
The Aboriginal Land Commissioner's functions should be expanded as follows: • to intervene by way of conciliation or mediation to assist in the settlement or disposal of land claims;	**Qualified YES**, only at request of all parties.
• to make findings and recommendations under s.50(1)(a)(ii) of the Act by consent;	**YES**.
• to dismiss a land claim subject to such an order not taking effect under s. 67A(5) until all parties have exercised their right to challenge it; and	**NO**. Denial of natural justice; Aboriginal people have the right to have their claims heard.
• to specify in s. 51 of the Act a range of measures to reduce formalities and improve efficiencies in the land claims process.	**Qualified YES,** so long as "efficiencies" do not detract from rights of Aboriginal claimants.
Sections 50(1)(a)(ii) and 50(3) should be amended to provide that the Aboriginal Land Commissioner shall, in making his report and recommendations to the Minister, have regard to all of the matters set out in s. 50(3).	**NO**. Detriment is a political decision and should be left to the Minister.
A settlement conference should be convened by the Aboriginal Land Commissioner in an attempt to settle as	**NO.** Agree with concept of settlement conference which can (and is occurring) without the need for any amendment. This is also covered by

many of the outstanding land claims as possible (including sea closure applications), with such conference proceeding on the bases that the Aboriginal Land Commissioner will not need to inquire into the question of traditional ownership, the Aboriginal Land Commissioner will be required to report his recommendations on strength of attachment and detriment (see above) and the Aboriginal Land Commissioner will only need to make recommendations on real and immediate detriment (on the assumption the Northern Territory Government will have a limited power of compulsory acquisition in relation to Aboriginal land).	the first recommendation re conciliation and mediation. **Reject** NTG compulsory acquisition model.
If the Minister is minded to entertain an application to amend Schedule 1 to bring further land under the Act, a standard approach should be adopted, involving the Aboriginal Land Commissioner inquiring into any such proposals.	**NO**. If the Minister is so minded then he should not be delayed in acting..
Section 52(3) of the Act should be amended to bring the retiring age for an Aboriginal Land Commissioner into line with the retiring age of Federal Court and Supreme Court judges.	**YES**. Has already occurred in February 1999.

Once the land claims process is complete, the final register of the land claims made under the Act should be placed in the custody of the Registry of the Supreme Court of the Northern Territory, the control of access to archival material under the Act should be a function of that Registry, and the remaining functions of the Aboriginal Land Commissioner under ss. 50(1)(d) and (e) and s. 50(2) of the Land Rights Act should then be conferred on a Northern Territory Supreme Court judge, from time to time, as required.	**NO**. As has been identified in earlier recommendations, it may well be that the ALC will continue to have functions after all land claims have been disposed of. It is, at the very least, premature to make such an amendment.
Other matters As many outstanding land claims as possible should be resolved by legislative intervention or settlement, and the remainder within two to three years.	**NO**. Settlement is appropriate; but legislative amendment denies due process.
The error in relation to the grant made to the Gurungu Aboriginal Land Trust to include the Elliott Stockyards should be remedied without further delay.	**NO**. This would amount to an acquisition of property unless the remedy includes the original undertakings for addressing environmental health and social problems.
The Minister should be required to consider and make his recommendations on a report from the Aboriginal Land Commissioner pursuant to s. 50(1)(a) within six months of the receipt of such a report.	**YES**.

A special allocation of resources should be made to the proposed Northern Territory Aboriginal Council and the Office of the Aboriginal Land Commissioner to ensure that the land claims process is completed within two to three years.	**NO**. NTAC is opposed. 2 years is an impossible target for due process to occur.

Sacred Sites–Chapter 13	
Recommendations The Land Rights Act should be amended by deleting both ss. 23(1)(ba) and 69.	**NO**. Land Councils to retain sacred sites role.
Section 44 of the Northern Territory Aboriginal Sacred Sites Act should be amended to include in it a provision along the lines of s. 28 of the Aboriginal and Torres Strait Islanders Heritage Protection Act.	**YES.**
The Northern Territory Aboriginal Sacred Sites Act should be amended so that a person is not guilty of an offence under that Act in relation to a sacred site on freehold land in a town in the Northern Territory, where that freehold land was purchased without notice that it contained a sacred site.	**NO**.
The Northern Territory Town Planning Act should be amended to include provisions requiring notice to be given to the Aboriginal Areas Protection Authority of all sub-divisional development applications within towns in the Northern Territory.	**YES** and to Land Councils.
The Northern Territory Government should take steps to amend the Heritage Conservation Act and Regulations to make it clear that Aboriginal people may enter and remain	**YES**. (Similar amendment may be required of the Cemeteries Act.

upon ancient Aboriginal sites, may use Aboriginal sacred objects and may otherwise deal with the places or objects referred to in the Act and Regulations, in accordance with Aboriginal tradition.	

Permits and access–Chapter 14	
Recommendations Section 70 of the Land Rights Act should be repealed;	**NO**. Permits are an essential incident of land rights.
Part II of the Aboriginal Land Act (NT) should be repealed;	**NO**. Part II of ALA (NT) should be strengthened.
Amendments should be made to the Trespass Act (NT) (as set out in this Chapter) to make it applicable to Aboriginal land and to allow Aboriginal landowners to make better use of it.	**NO**. Trespass Act provides inadequate protection of Aboriginal rights and laws.

Statehood and related matters–Chapter 19	
Recommendations That the Minister and the Government have regard to the submissions made to the Review on this important issue (see Appendix S to this Report).	**YES**. The Committee should note the overwhelming "no" vote from Aboriginal people at the recent referendum.

Native Title and Community Living Areas–Chapter 20	
Recommendations The Native Title Act should be amended to provide that: • A past or future grant of land under the Land Rights Act extinguishes all native title rights and interests in that land.	**NO**. Contrary to current laws and an acquisition of property.
• A native title claim may not be commenced or continued over any area of land that is the subject of a claim under the Land Rights Act until the Land Rights Act claim is finally disposed of.	**NO**. NTA and ALRA are not inconsistent.
• Any native title rights that may exist in relation to any area of land that is the subject of a claim under the Land Rights Act cannot be asserted or relied upon until the Land Rights Act claim is finally disposed of.	**NO**. See above.
• A grant of an estate or interest in an area of land that is the subject of a claim under the Lands Rights Act is exempted from the future act provisions of the Native Title Act in the same way as land that is granted under the Land Rights Act is exempted.	**Qualified YES**; except in relation to the NTA provision in relation to mining, currently exempt from land under claim under ALRA.
• The grant of a Community Living Area in favour of an incorporated association of Aboriginal people pursuant	**NO**. There is no necessary connection between Community Living Areas and Aboriginal law or the native title holders. NLC has provided mechanisms by which Native Title interests can be reserved in the grant of

to the Pastoral Lands Act (NT) be deemed not to constitute a future act under the Native Title Act, by including the grant of such a Community Living Area within the definition of 'an act that causes land or waters to be held by or for the benefit of Aboriginal peoples or Torres Strait Islanders under a law mentioned in the definition of 'Aboriginal/Torres Strait Islander land or waters' for the purposes of ss. 233(3) and 253 of the Native Title Act.	a Community Living Area (see NLC submission).
• Such a grant of an area of land as a Community Living Area under the Pastoral Land Act(NT) should be deemed to extinguish any existing native title rights and interests in that land.	**NO**. Constitutes acquisition of property. See proposed alternative above.
• Where an area of land is the subject of an application for a Community Living Area under the Pastoral Land Act (NT), a native title determination application may not be commenced or continued in relation to that area of land until such time as the Community Living Area application has been finally determined.	**NO**. CLA process can be protracted, and outcome can be accommodated with native title interests.

• Any native title rights that may exist in relation to any area of land that is the subject of an application for a Community Living Area under the Pastoral Land Act (NT) cannot be asserted or relied upon in relation to that land until such time as the Community Living Area application has been finally determined.	**NO**. Denial of natural justice and contrary to current law.

Inalienable title and Land trusts–Chapter 21	
Recommendations • The provisions of the Act that prevent the sale, transfer, or perpetual lease of Aboriginal land, except to another Aboriginal Land Trust, or the Northern Territory or Commonwealth Governments, should be retained.	**YES**.
• All other restrictions in relation to the Act upon the grant of any estates or interests, including licences, in Aboriginal land, should be removed.	**Qualified YES.** This is only acceptable if the current decision-making arrangements remain.
• The provisions of ss. 11A, 19 and 67A of the Act should be amended to provide that an agreement made pursuant to them can operate to grant an estate or interest in the land under claim before that land is granted under the Act. Any monies payable under such an agreement should be held in trust.	**YES.** Provided the usual decision-making arrangements apply.
• Transfer all Aboriginal land into 18 separate regions with the RLC for each region becoming the trustee of the Land Trust in that region and the members of the council of the RLC carrying out the trustee duties presently carried out by the members of the existing Land Trusts.	**NO**. Current provisions for creation of new land councils are appropriate and based on Aboriginal decision-making. NLC's advice is that transfer of land would be unconstitutional.

• Aboriginal Land Trusts be permitted to hold land under any form of title available in Australia, as well as freehold title under the Land Rights Act.	**YES**.

Role of the Minister–Chapter 22	
Recommendations • That the Land Rights Act should be amended so that all the existing ministerial consents, approvals, permissions and the like are removed.	**YES,** subject to the comments concerning Part IV (Mining) and except for the long term grant of estates or interests in Aboriginal land.
• That consideration should be given to having the Minister delegate some, or all of his functions under the Act, to the relevant Minister in the Northern Territory Government.	**NO**. Aboriginal people are opposed to the Act being transferred to or administered by the NTG.

Sundry other matters–Chapter 23	
Recommendations • That the definition of 'Aboriginal' in the Land Rights Act should be retained and it should be left to each Regional Land Council to give whatever Aboriginal traditional consent is needed to the definition on a case by case basis. Any person aggrieved by a decision of a RLC on this matter should have a right of appeal in accordance with the dispute resolution system recommended elsewhere in this Report.	**NO**. Transfer of property rights from traditional landowners to RLCs.
• That the RLCs should be required to negotiate and cause the relevant Land Trusts to provide to any Aboriginal community in their regions that wishes to obtain it, a rent free sub-lease for a suitable term, of the land upon which that community is situated. In each case, the sub-lease should be provided to the local Community Council, or some other suitable body. That the Community Council, or other body holding such a lease should be permitted to enter into a sub-lease of the land for housing or business purposes.	**NO**. • Terms of lease should not be limited. • RLCs must act on instructions of traditional landowners. • Traditional landowners must be entitled to share in the commercial benefits generated by their land.
• That the Northern Territory Government should consider amending the provisions of the Associations Incorporation Act (NT) to allow the relevant Minister to consent to the grant of a lease or sub-lease of land for a term of 12 months or less, similar to the provisions of s. 26A(1)(b) of that Act.	**YES**.

• That the Commonwealth and Northern Territory Governments should consider drawing up a single Northern Territory scheme to regulate the affairs of incorporated Aboriginal associations in the Northern Territory.	**NO**. Contrary to recommendations of Royal Commission on Aboriginal Deaths in Custody – the form of incorporation should be decided by Aboriginal people.
• The RLCs and NTAC should be given the function to inform and educate the people of the Northern Territory, and particularly Aboriginal Territorians, on the provisions of the Act and how it operates.	**NO**. Land Councils perform this function. If Reeves believes the current function is not being performed adequately he should recommend, and the Minister approve, that LCs devote more resources for this task.
• The following amendments should be made to the Act: • ss. 50(1)(b), 50(4) and 72 of the Act should be repealed.	**NO**. – ss50(1)(b) and 50(4) must be considered in light of the interests of Aboriginals in pastoral leases and sets out important principles for the land claim process – and some of the Act's purposes. **YES** – s72
• ss. 10 and 77C of the Act should be amended such that land can be scheduled under the Act without requiring an amendment to the Act.	**YES**.
• the Act should be amended to ensure that confidential information held by a RLC or NTAC is protected.	**Qualified YES** only if Land Councils are covered instead of RLCs/NTAC.
• ss. 16 and 63 of the Act should be amended to provide that the relevant Government must notify NTAC of payments received and where the Northern Territory is the recipient, it must also notify the Commonwealth Government.	**Qualified YES** only if NTAC is replaced by Land Councils.

• ss. 16 and 63 of the Act should be amended to require that any monies received under those sections must be paid out within 28 days of their receipt. Where a part of the payment is in dispute, the Act should provide that at least the amount not in dispute is paid within 28 days.	**YES**.
• That a comprehensive review of the operations of the Act should be conducted in three to five years time.	**Qualified YES**: depending on the extensiveness of changes to the Act. 5 years is too short a period.

Appendix 2

Extract from Katherine hearing 10 January 1998

DAVID DANIELS: But that's what we are after, we're not wanting, trying to destroy the Land Council at all. We, I said that this morning to our blokes, you know. We just want to establish something that we can administer and make it for ourselves, in our region.

MR REEVES: Right.

NEVILLE JONES: With full autonomy.

DAVID DANIELS: Yes.

MR REEVES: That's what - - -

PHILIP TEITZEL: But, I mean, the - - -

MR REEVES: I'm just picking up on the model that they're putting - - -

DAVID DANIELS: Yes.

MR REEVES: - - - and saying, well, that - - -

DAVID DANIELS: Well, we have presented our model already.

PHILIP TEITZEL: Yes, but we're not exactly denying that second model.

DAVID DANIELS: Yes.

NEVILLE JONES: It's very similar.

PHILIP TEITZEL: That second model we're not denying.

MR REEVES: Yes, it's just picking up on that regional part.

DAVID DANIELS: We're not denying that second model because that's our model, that's what we say, really.

PHILIP TEITZEL: And what we're saying is, they continue with their land claims, but where we would be careful is we would say that each of those separate Land Councils should meet, have their Chairman meet and decide what their issue, if it is an issue that changes the Heritage Protection Law, or whatever - - -

DAVID DANIELS: Yes, yes.

PHILIP TEITZEL: - - - decide what their issue is, they give their instructions to their Chairman, and that Chairman meets, maybe, with all the other Chairman, including the Chairman of the Northern Land Council, if there is such a position - - -

DAVID DANIELS: Yes, yes.

PHILIP TEITZEL: - - - and each of those Chairmen then, like you said earlier, have a Cabinet and they then decide - - -

DAVID DANIELS: Yes, that's - - -

PHILIP TEITZEL: - - - what the overall position is on a State issue.

DAVID DANIELS: Yes, we - - -

PHILIP TEITZEL: We don't - we didn't object to that as an issue - - -

DAVID DANIELS: Nothing, no.

PHILIP TEITZEL: - - - as a method of dealing with State or Federal issues, but what we are very strong on is that we don't want to get any of our views filtered - - -

DAVID DANIELS: Yes.

PHILIP TEITZEL: - - - because, you know, what we use our funding - - -

DAVID DANIELS: Yes.

PHILIP TEITZEL: We may save a lot of money in our administration by not having lawyers and things available, and we can use some of that money to do what it says under the Act.

DAVID DANIELS: Yes.

PHILIP TEITZEL: And that money might actually go back to some of the people that's - if you've got an overflow of money, you can actually give it back to some of the community.

DAVID DANIELS: Yes.

PHILIP TEITZEL: Those are the sort of things that we talked about, we'd want to do. We would also not want to have an oversight on an agreement, and you said like the CRA agreement - - -

DAVID DANIELS: Yes.

PHILIP TEITZEL: - - - you are going to talk about later on, that that was an agreement you reached and you were quite happy with that agreement. Now, what is the objective criteria for anybody analysing that? What are their ideas about what's right and what's wrong, and why should we accept those ideas in Ngukurr community?

DAVID DANIELS: Yes.

PHILIP TEITZEL: So - - -

MR REEVES: Well, it's really a - what the NLC are saying is they'll keep running it, but the power will be moved down to the regions. Now, that's sort of run by the NLC with a regional model. I think what you're saying is that the - all these regions or smaller land councils - - -

DAVID DANIELS: Yes.

MR REEVES: - - - those six or seven in the Top End

DAVID DANIELS: Seven, seven, yes.

MR REEVES: - - - seven, say, in the Top End, they run each of their regions and they run the Northern Land Council, so it's the other way around.

DAVID DANIELS: Yes, that's the way. That's the way we want it.[20]

[20] Northern Territory Land Rights [Act] Review Katherine 10 February 1997 pp 36 – 39. Neville Jones is an officer of the NT Office of Aboriginal Development; Philip Teitzel is a private solicitor whose fees were paid by the Office of Aboriginal Development. The Aboriginal people from Ngukurr who attended the hearing on that day were flown by private charter to Katherine and accommodated at the Frontier Hotel Katherine on 9 February 1998 and provided with all meals, all of which was paid for by the Northern Territory Government. This is despite the fact that Mr Reeves had already visited Numbulwar and all of those present had had the opportunity to speak at that hearing.

Appendix 3:

A review of the anthropological analysis in the Reeves Report and the conclusions drawn from it.

Professor Howard Morphy, Australian National University

February 1999

Summary

The role of anthropology in the area of land rights was, initially, to provide expert advice for the development of mediating structures and institutional frameworks that enshrined the rights and processes of one system of law (Aboriginal Customary law) within the legislative framework of another (Australian law). Anthropological ideas were relevant to such legislation in as much as the application of anthropological understanding resulted in definitions and institutional structures that were broadly compatible with indigenous systems of land tenure, allowing them to continue operating once the rights in land were recognised under Australian law. Subsequently anthropologists have worked as researchers and expert witness to ensure that the determinations the particular cases fit in with local Aboriginal tradition and customary law (Sutton (1995: 4). Anthropological input has been crucial in describing traditional systems of land ownership, in elucidating the rights that different people have in areas of land and showing how land ownership is linked to other aspects of the society.

Reeves uses developments in anthropological understanding to justify a number of proposed changes to the Aboriginal Land Rights (Northern Territory) Act, including the introduction of smaller regional land councils and changes to the permit system, that will 'allow the representative bodies to adopt decision making processes that accord with their traditions, as they interpret them' (Reeves 1998: 201). Reeves implies that current understanding contradicts the definition of traditional owner used in the Act. In effect he proposes the replacement of 'traditional owner' under the Act by a more general concept — 'member of a Regional Land Council' — defined in terms of residence and traditional affiliation to an area of land within the specified region (Reeves1998: 595). Three anthropological issues are central to the Reeves report: the regional context of land ownership, the relationship between land ownership and land use, and the significance of the spiritual relationship between people and land. In each case the Reeves report interprets the evidence in such a way that it supports his recommendations.

Reeves argues that the existence of a regional level of organisation provides support for the development of regional land councils. He devotes considerable space to discussing anthropological literature on Aboriginal group organisation. The nature of group organisation is a complex anthropological problem; however, the debate is less to do with the substantive issue of defining the set of people who own the land than with abstract processes of the reproduction of Aboriginal society. The validation of rights in land, the operation of principles of succession, and the organisation of daily life all require that Aboriginal systems of land tenure be seen to operate in a broadly regional context. There is, however, little evidence for regions with fixed and mutually exclusive boundaries or for the existence of bounded land-owning groups at a "community" or regional level. The region provides the wider frame within which ownership at a more localised level exists and is negotiated (see Sutton 1995: 8). There is no new anthropological evidence that would support a change to smaller land councils. The creation of smaller regional land councils would create inflexibility at

the local level and impose arbitrary limits to effective land ownership. Continuation of Aboriginal politico-legal process would seem best served by the inclusion of local groups within larger entities which allow for changes in the regional foci over time and which avoid drawing rigid boundaries around areas of land.

One of the significant strengths of the original definition of traditional owner under the Act is that, despite the initial concerns of some people (eg Gumbert 1984), it is able to accommodate the diversity of Aboriginal societies in translating ownership of land under Aboriginal law into ownership under Australian Law. It is significant that in the area of land claims, where the definition of traditional owner might be predicted to be most contentious, Reeves has recommended that the definition should remain unchanged. In effect Reeves is proposing one basis for membership of Regional Land Councils and a different one (the original one) for land claims. The main criteria for membership of the proposed Regional Land Councils will be residence and traditional affiliation (Reeves 1998:295), and, since people are only allowed to be members of one Regional Land Council, the members of that Council may include people who are not recognised as traditional owners under Aboriginal law (but fit the residential criterion) and exclude people who are successful claimants under the land claim process, under the Act.

Reeves makes a series of invalid assumptions about Aboriginal regional organisation. His statement that regional populations tend to be linguistically cohesive is wrong. Each of Reeves' proposed regions contains within it great linguistic diversity, reflecting the cross-cutting nature of linguistic and social relationships in Aboriginal Australia, which is turn reflected in high levels of multi-lingualism. Linguistic cohesiveness cannot be used as an argument in favour of Regional Land Councils. The concept of regional cultures is equally problematic as a basis for identifying units of administration. 'Regional cultures' is not a well analysed concept anthropologically and there is no evidence that the proposed Regional Land Councils correspond to recognised culture areas.

The emphasis placed by Reeves on usufruct — foraging rights — does not reflect the place they have in Aboriginal systems of ownership. A key feature of the Aboriginal Land Rights (Northern Territory) Act is that it allows for the separation of land ownership from land use while allowing that some relationship exists between the two. Anthropological research by Peterson (eg Peterson 1984) has demonstrated that land ownership has a central role in regulating the utilisation of resources and in the long term management of land, but that it does not entail the exclusive use of resources by the land-owners. Anthropological evidence continues to confirm the importance of spiritual and social ties to land as integral to Aboriginal conceptions of land ownership. Reeves, by over-emphasising the exploitation of resources rather than caring for, looking after, and managing the land, is imposing a particularly narrow conception of what ownership entails.

Reeves has failed to take account of the central role that permission has in Aboriginal systems of land management, in linking land use to land ownership (eg Williams 1982). The resources of the environment are managed and protected by the land owners through a system of permission which ensures that only those who are entitled

to forage over the land or who have permission to forage can do so. This system of permission involves both the spiritual and secular management of the resources. Contextual banning of hunting, or burning a particular area of land can be instigated as a religious sanction or as the result of a death or a dispute. Such practices can be extended by landowners to other economic resources on Aboriginal land such as the community store. Ownership as defined under the existing land rights legislation allows the continuation of such management of resources by land owners. Reeves recommends the ending of the permit system partly on the basis that exclusion is race-based, but this is a very narrow interpretation of the Aboriginal Land Rights (Northern Territory) Act. Aboriginal people can be excluded from access to a particular area of land under the operation of Aboriginal law, and the permit system is a means whereby those who are not covered by Aboriginal law can obtain permission to enter Aboriginal land. It provides a point of articulation between Aboriginal and non-Aboriginal law allowing Aboriginal people to exercise their right under both.

Reeves's explicit objective is to change the purposes of the Aboriginal Land Rights (Northern Territory Act) from granting Aboriginal people land rights to being an instrument to facilitate development. His recommendations achieve this by reducing the size and power of the existing Land Councils and changing the concept of traditional owner. The power of the Land Councils has been an important factor in enabling local Aboriginal communities to maintain their autonomy and allowing their own systems of value and customary law to operate in changing circumstances. Reeves (1998: 204) is quite wrong when he argues that 'traditional owners are not organised to take any action relevant to the secular interests of Aboriginal people'. The system of land ownership provides management structures and decision-making processes, and mechanisms for distributing returns from land, including the production of certain commodities and the use of certain resources. These processes are dynamic and capable of responding to changed circumstances, as can be seen by the ways in which Aboriginal corporations have become involved in new economic ventures while still paying due attention to traditional structures and values. Issues of spiritual affiliation and responsibility are integral to the reproduction of Aboriginal society but are not of themselves a barrier to change or development, nor to engagement with wider political and economic structures.

Introduction

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

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

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

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

The use made of anthropological evidence in the Reeves report can be criticised on two main grounds:

1) it does not reflect current understandings of Aboriginal land ownership and

2) the recommendations contained in the report do not flow logically from the analysis of the anthropological evidence.

Traditional Aboriginal Owners and Anthropology

An extensive literature on traditional Aboriginal owners has developed in recent years (Maddock 1980, Peterson and Langton 1983, Hiatt 1984, Williams 1986, Fingleton and Finlayson 1995, Smith and Finlayson 1997, Sutton 1998), but in general that literature is not reflected in Reeves' conclusions. His view of Aboriginal land ownership and local group organisation is heavily constructed towards the conclusions that he draws, and misrepresents and simplifies the current state of knowledge. The report frequently cites the work of anthropologists out of context and draws conclusions that are the opposite of those intended by the writers. While this applies to anthropological writings it applies equally to aspects of the Blackburn judgement which are central to Reeves' own argument.

The Reeves report takes from the Blackburn judgement the position that usufruct—the rights to exploit the resources of the land for the purposes of hunting and gathering—is central to a definition of ownership and devalues other rights in land. Although the arguments in the report are often implicit, Reeves' support for the conclusions of the original Blackburn judgement (in which ownership consisted of 'the right to use or enjoy, the right to exclude others, and the right to alienate') and his playing down of the role of spiritual affiliation to the land and the role of descent groups, in particular the clan, is good evidence for his underlying assumptions. These are supported by the fiction that had the Gove case been made on the basis of individual relationship with land Blackburn would have recognised native title. In the passage concerned it is clear that Blackburn is citing this possibility to demonstrate its absurdity.

The appointment of Mr Justice Woodward, who had been the advocate for the Yirrkala people, to carry out the Commission which resulted in the Aboriginal Land Rights (Northern Territory) Act indicates that the Act was a response to the Blackburn judgement. Woodward (1974:1) was charged to report on 'the appropriate means to recognise and establish the traditional rights and interests of the Aborigines in and in relation to land'. The Woodward Commission addressed the fact that the law as it was then interpreted did not recognise native title. Woodward addressed those aspects of Aboriginal law that did not fit in with the conception of land ownership represented in Blackburn's judgement and developed a framework that would allow their incorporation. The legislation that was developed allowed the return of most unalienated Crown Land in the Northern Territory to Aboriginal ownership on a view of Aboriginal law similar to that advocated in the Gove Land Rights case.

A key feature of the Aboriginal Land Rights (Northern Territory) Act is that it allows for the separation of land ownership from land use while allowing that some relationship exists between the two. In this the legislation reflects the direction of anthropological understandings as they have developed over a period of more than 100 years as well as the case put by the people of Yirrkala in the Gove Land Rights

case. As I will argue below, Reeves' implication that the patrilocal–patrilineal corporate group underlies the definition of Traditional Owner under the Aboriginal Land Rights (Northern Territory) Act is quite wrong (see 1998: 133 [a corporate group, recruited by patrilineal descent, residing and subsisting on its estate, its spiritual home] 144 [small-localised patrilineal groupings]).

Research undertaken since the Gove case has greatly enlarged understanding of Aboriginal systems of land ownership and in particular it has demonstrated the articulation of the relationship between land ownership and the use of rights entailed by that ownership. Issues that Reeves draws attention to, such as the intersecting nature of rights in land, the existence of complementary and secondary rights in land, and the fact that systems of land ownership operate in the context of regional systems are important factors to be taken into account. The regional systems can be conceptualised in many different ways: as a wider system of law which ensures the maintenance of title (see Sutton 1995); as a regional connubium; as a set of overlapping kindred networks; as a set of secondary, subsidiary, or complementary rights in land (Williams 1986: 175); or as a reflection of some level of Aboriginal regional identity based on language, ceremony, friendship or enmity. I will discuss these conceptualisations in more detail later. However at this stage it is important to emphasise that the regional entities are seldom bounded—they overlap each other and often change over time. The regional extensions of relationships between people and a given area of land are contextually defined with reference to the more local groups and ultimately the interconnections extend across Australia. An attempt to draw boundaries around regions is an arbitrary exercise. The existing Land Rights legislation allows for this complexity both in the claims procedure and in the operation of the existing land councils.

A different version of history

The Reeves report begins with an analysis of the early anthropological writings of Fison and Howitt and subsequently of Radcliffe-Brown in an attempt to show continuities between the early definitions and the subsequent group based definition of Traditional Owner under the Aboriginal Land Rights (Northern Territory) Act. The report fails to show how anthropologists after Radcliffe-Brown came to terms with some of the central problems of Aboriginal land ownership and developed a more sophisticated understanding of the relationship between Aboriginal land ownership and land use. These changes in understanding were indeed reflected in the Act and in its subsequent interpretations in law.

The early anthropological literature on Aboriginal land ownership and local organisation is in general inadequate. The work of Howitt and Fison was based on populations of southeastern Australia who had been removed from their traditional lands, whose populations had been decimated and whose traditional cultural practices were often banned by the authorities. Radcliffe-Brown's work, although based more on his own fieldwork than is generally acknowledged, again largely neglected the detailed study of the relationship between Aboriginal people and land. Fison's, Howitt's and Radcliffe-Brown's statements about land ownership, and in particular

about the relationship between land ownership and land use, were not based on detailed first hand evidence. Although there was some pioneering ecological and population research by Tindale and Birdsell from before World War II no detailed ethnographic studies of the relationship between Aboriginal people and their land were undertaken until the 1960s.

There are a number of reasons for the paucity of anthropological research into the relationships between Aboriginal people and the land. There were very few researchers in the field, the focus of the discipline moved away from economy and ecology towards the study of kinship and religion, the Aboriginal populations studied were often in the process of being removed from their land, and the logistic difficulties of researching hunter–gatherer groups on the ground proved formidable. However while early writings cannot be taken as an accurate account of Aboriginal relations with land they provide important general evidence on land ownership and support for the general idea that rights in property were group based. As Reynolds' historical research has amply demonstrated ( ) it was routinely acknowledged, from first contact, that Aboriginal people owned land. The emphasis that early researchers place on group rights suggests that Aboriginal people emphasised collective aspects of ownership. However, details of the system of ownership remained unanalysed and taken for granted. Moreover from quite early on anthropologists have provided detailed analyses of the group ownership of sacra—songs paintings, dances and sacred objects—and the distribution of rights in sacra on a societal basis (e g Spencer and Gillen 1899, and Warner 1958). These sacra have subsequently been shown to be directly related to land ownership and hence provide indirect evidence for the types of relationship involved in the ownership of and the distribution of rights in land. It has been shown, moreover, that relations of kinship and marriage are widely influenced by group organisation. Part of the difficulty of understanding the relationship between Aboriginal groups and land has always been that the basis of the relationship differs from ownership as conceived under European Australian law.

In the 100 years since Howitt and Fison first formulated a model of Aboriginal land ownership a number of central themes have evolved in the literature. Three of these are crucial to the Reeves report:

1) the relationship between land ownership and land use;
2) the nature of Aboriginal group organisation; and
3) the issue of scale.

The distinction between groups of people living together 'on the ground' engaged in the daily round of hunting and gathering and groups such as clans, which are part of the structure of the society, has been present from the beginning, at least implicitly.

In Fison and Howitt's (1888) model the land was owned by a patrilineal group of kin—the horde—who were the actual occupiers of the land. This model is one of the antecedents of what became the patrilineal–patrilocal band model of hunter–gatherer

social organisation. It appears at first sight that the concept of the horde totally collapses the land-using group into the land owning group. But logic dictates that groups who occupied land must have comprised members of more than one descent group. People married into a group other than their own and so the 'horde' would at least have included members of outside groups who married in. Radcliffe-Brown (1930) explicitly drew the distinction between the group of people occupying the land and the clan groups who owned the land (for a detailed discussion see Stanner 1966: 7-11). In the Radcliffe-Brownian model a core of patrilineal kin formed the heart of the land-using group but that group also included members of other clans by marriage. It is important to restate that these early models developed for Australia were almost wholly theoretical—no one provided documentary evidence of groups on the ground in support of their arguments. However the presumption that descent groups played a role was supported by the evidence of the existence of social groups and by an abundance of Aboriginal evidence linking groups of people to land.

By the 1960s the model of the patrilineal–patrilocal band had come in for criticism on a number of grounds. On the one hand there was no detailed documentation of its existence and on the other it did not fit with the newly developing ecological models of hunter–gatherer societies. The models developed by Lee and De Vore (1968) were predicated on the assumption that hunter–gather societies required small, flexible group organisation, which allowed people to respond to the exigencies of the environment, in particular to variations in seasonal abundance. Environmental and social factors meant that people had to respond to the availability of resources and this would result in groups of different sizes being formed at different times of the year. It was thought that a rigid structure of patrilineal bands would work against such flexibility. It was also assumed that such groups could not be maintained over time since some would grow too large and others would become extinct. It is important to realise that this model too was based on logical deduction with even less supporting empirical evidence. The basic problem with this model (apart from the lack of supporting evidence) was that it provided no mechanism for achieving flexible group organisation. Moreover it left clan (or descent group) organisation, for which there was considerable evidence in Australia, completely outside the model.

A different critique of the band model in Australia came through the work of Hiatt (1962, 1965) and Meggitt (1962). They argued that in the cases of the Gidjingali of Central Arnhem Land (Hiatt) and the Walpiri of the Central Desert (Meggitt) groups of a larger size than the band, which could be termed communities, were relevant to understanding regional hunter–gatherer activity and were at the same time units of identity. Hiatt (1962) did not suggest that these communities were land owning groups rather they represented a body of people who occupied a region and to an extent resided together. Meggitt's 'community' on the other hand was not a residential unit but an early attempt to demarcate a regional system (see e g Sutton 1996). On the whole later analysts have not taken up the concept of community though many of the issues to which Hiatt and Meggitt drew attention have been relevant to subsequent debate. The critique of the status of the patrilineal *band* as a core feature of Aboriginal society was largely accepted. However, contra Reeves' analysis, Hiatt and Meggitt provided no convincing evidence to replace the band with a community level of organisation, no ethnographic data on how the community

articulated with hunting and gathering activities on the ground and no model of how the community related to clan organisation (see Peterson 1969, and Morphy and Morphy 1984 for critiques). At this stage research appeared to have uncoupled the groups on the ground (whether 'band' or 'community') from social and religious groups (the 'clan' or 'totemic cult' group) but failed to suggest any relationship between them.

Hiatt's and Meggitt's critiques were an important stage in the development of a more sophisticated analysis of the relationships between Aboriginal people and the land and for the development of models that were more firmly grounded in data. Subsequent research has developed new models of the relationship and has provided a great deal of additional data.

Stanner's response (1965) was to tease out the implicit complexities of the earlier models of local organisation and to show how different levels of organisation articulated in maintaining the relationship between people and land over time. He distinguished between two types of group: the clan, a descent group which owned areas of land which he referred to as their 'estate'; and the band which was the group of people who hunted and gathered together and who occupied what Stanner termed a 'range'. The membership of the band was drawn from a number of neighbouring clans, and its range overlapped the estates of a number of clans but was coterminous with none of them. Stanner also introduced a further level of regional organisation, which he characterised as the domain that comprised the set of interacting clans and bands operating within a regional framework. The advantage of Stanner's model was that it provided a mechanism whereby flexible band organisation was achieved and it provided a link between clan organisation and band formation. Clans provided the framework for band organisation. As with the previous models Stanner's analysis was largely theoretical—detailed information about the relationships between clans and bands over time had still not been recorded. However it is important to stress that this model reflected indigenously expressed categories and was not contradicted by such evidence as did exist.

Stanner's model is certainly consonant with the way in which the evidence was presented and interpreted in the Gove Land Rights case. It was very different from the patrilineal–patrilocal band model of social organisation, it acknowledged the complexities of Aboriginal local organisation, and this, ironically, was partly why Blackburn found against the plaintiffs. Reeves gives considerable significance to the rejection of Stanner's model by Justice Blackburn in the Gove land Rights Case.

Nancy Williams (1986) has presented a detailed analysis of the Gove Land Rights case and Justice Blackburn's judgement. The issue of *terra nullius* apart the judgement was based partly on the fact that Blackburn failed to gain a clear understanding of the relationship between Yolngu land ownership and land use, and partly because the relationship presented did not accord with his conception of a proprietary relationship. He placed undue emphasis on exclusive possession and usufruct: 'I think that property in its many forms, generally implies the right to use or enjoy, the right to exclude others, and the right to alienate' (Blackburn 1971: 272). He concluded that the 'clan is not shown to have a significant economic relationship with

the land' (1971:270) arguing that if such a relationship existed it should have been possible to show the 'band as being the economic arm of the clan, and as establishing a practical link between particular land and a particular clan.'

It was almost as if the Blackburn judgement required the existence of the patrilineal–patrilocal band in order for the clan to have any status as a land owning group within the system. The difficulties were anticipated by Stanner when he wrote, 'possibly the greatest single handicap which the Yirrkala Aborigines face in making their case will be to counter the widespread but erroneous idea among Europeans that the day-to-day usage of land was itself the system of ownership and possession' (cited in Williams 1986:). However in a society in which marriage was exogamous and men had to spend considerable periods of time with their in-laws, and in which visiting relatives in distant parts was an important part of the process of male initiation, it is likely that the hunting and gathering band would often be comprised of members of a number of related clans and that the owning clan would comprise a minority of its members. Members of the respective clans were dispersed over a wide region and economic activity depended on an interlocking series of rights associated with kinship and group membership. However in the eyes of the Yolngu of Yirrkala none of this diminished the central position that descent groups held in the system of land ownership and land management.

Aboriginal systems of land ownership do not focus on exclusive *use* of land. Rather they centre on ownership *of the land itself and the sacred property associated with the land*: the songs, dances, names, paintings, and sacred objects associated with the land. In most areas of the Northern Territory it has been possible to identify kin based groups which are corporate with reference to land and sacred property. People have the right to use that property for their own economic benefit (for example in the arts and crafts industry). Sacred property is also directly linked to the management of land since it gives the owning group the right to exclude people from it and provides them with the body of inherited knowledge that is necessary for the effective management of that land over time. Hence there is a strong relationship between land ownership and both the short term and long term use of the land. If there was no descent-based (or otherwise continuing group) to take this central role with respect to land then a totally different system of managing the relationship between people and land would have to be envisaged.

Research undertaken since the Gove case has greatly increased understanding of the relationship between land ownership and land use and of the existence of a nexus of secondary, subsidiary (Williams 1986: 175), and complementary rights in land.

Land ownership and land use

In his research published in a series of papers Peterson (1972, 1974, 1975, 1986) gathered for the first time much of the data that was necessary to understand and demonstrate how the clan–band system operated. Peterson's analysis was based on his

own long-term fieldwork and a compilation of the limited documentary evidence on band composition recorded by earlier researchers. He shows, contra Reeve (1998: 147), there is a direct though complex 'relationship between spiritually defined social units and the land-using units'. Peterson's (1972) analysis shows how the composition of the hunter–gatherer band is influenced by a number of different factors—a significant one of which is the clan ownership of land. People spend much of their lives living on and in the vicinity of their own clan's land. Peterson was able to demonstrate that the detailed composition of groups on the ground can be explained in terms of sentimental, sociological, and ecological factors. Sentimental ties to clan lands encourage people to spend time as members of groups ranging over their own clan lands. As they grow older there is an increasing tendency for people to spend more time in their own country, so that in many cases senior members of owning clans will be members of bands that utilise the resources of that land. However at other stages of their life cycle people will spend considerable periods of time away from their own clan lands. At marriage men will frequently spend many years living with their wife's family, only returning to their own family once the marriage is well established (Peterson 1974).

Over the long term people develop knowledge of their own and other clan territories that can be used to manage the land effectively. They develop a widespread network of social relationships that underpin and reinforce regional networks of marriage and exchange. The long term relationships between people and land are patterned by descent and linked into regional patterns of authority, and this is the underlying order that enables the flexible formation of Aboriginal hunter–gatherer groups. Flexible principles of band formation are part of sociohistorical process in the region and band formation is not subject to constant renegotiation. It is here that permission fits in. People often hunt and gather on other people's lands and the right to forage on an area of land is clearly not the exclusive property of the owning group. However as a rule people only hunt and gather in areas where they have permission. Sometimes that permission is assumed on the basis of precedent and kinship, rather than specifically asked for (see Williams 1986: 103). However the fact that people are occupying land with permission means that they have to respond to the requirements of the owning group and they may have that permission withdrawn if they disregard rules associated with land use (for example by desecrating a sacred site or breaking marriage rules). Reeves (1998: 395) shows that he fails to understand the nature of permission when he implies that the land-occupying group (band) is the group that gives permission to enter land. He fails to understand the role of ritual in maintaining boundaries or to understand that permission is as much built into social relationships as created through them.

The recommendation in Reeves' report to abolish the permit system, follows directly from his failure to understand the role of permission-giving in Aboriginal systems of ownership. His reasoning is not entirely clear. In response to the NLC submission that 'traditional Aboriginal owners of Aboriginal Land, have as part of their title the right to admit and exclude persons from land', Reeves (1998: 302) writes that 'they incorrectly describe the traditional Aboriginal owners as the owners of Aboriginal land'. He argues that it is the Aboriginal Land Trusts who hold the land. While the technicalities of ownership are complex the spirit of the legislation is to recognise the

rights in land of traditional owners and in an earlier chapter Reeves (page 148) writes 'Traditional Aboriginal owners have the ultimate control of the land (conditional on the cooperation of the land council) and they are even entitled to receive money arising from rents from land.' Subsequently he uses the argument that the exclusion is race-based, but this is a very narrow interpretation of the act. Aboriginal people can be excluded from access to a particular area of land under the operation of Aboriginal law, and the permit system is better seen a means whereby those who are not covered by Aboriginal law can obtain permission to enter Aboriginal land. It provides a point of articulation between Aboriginal and non-Aboriginal law.

Reeves's selective use of Peterson's work is illustrative of the way he distorts the arguments of many of the anthropologists he cites. He dismisses Peterson's critique of Meggitt's model of a community level of organisation because, he says, Peterson assumed that 'a land owning group must have some corporate existence in its identity with an exclusive territory and signified by having a totem' (Reeves 1998: 137). The phraseology is ambiguous, it is certainly not Peterson's, it runs counter to the thrust of Peterson's analysis and fails to address the substance of Peterson's critique. Later in the chapter Reeves draws on Peterson's work to support his model of regional systems by drawing attention to Peterson's ecological arguments about the existence of two principle levels of population grouping: these are 'the local band or band population and the drainage basin based culture-area population' (Reeves 1998: 142). Peterson's drainage basin populations bear no relationship to the 'regions' that Reeves subsequently identifies and to adduce the former as evidence for the latter, as he does, is completely spurious.

Nowhere does Reeves discuss in detail the part of Peterson's analysis, which demonstrates the relationship between descent groups (ie clans) and bands. He acknowledges that Peterson's submission argues that the Land Rights legislation has 'correctly identified the group having the main authority for making decisions about land' but then implies that Peterson's acknowledgment that the ownership of clan estates is subject to regional politics somehow contradicts their central place in the system. Actually, it does exactly the opposite. The very existence of political process and procedures confirms the existence of a body of indigenous law relating to descent group ownership of land. As Williams (1986: 9) pointed out nearly a decade ago, 'disputes over land…cannot be explained *except* in terms of the rights that are claimed and contested, or in terms of accusations of breach of rights or of defence against such allegations.' And indeed in the report Reeves confirms the definition of traditional owner under the Act!

Secondary, subsidiary, and complementary rights in land

Anthropological understanding of the nexus of rights in which land ownership is embedded in has increased greatly as a result of research undertaken for land claims. This issue can be usefully looked at from three perspectives:

1) the existence of complementary rights in land;

2) the operation of processes of succession to land; and
3) the use of land.

The last of these was considered in detail in the previous section.

Throughout Australia rights in land and rights in sacra generally extend out from the owning group to members of other groups and to individuals who are related to the owning group. The details of such systems of relationship vary on a regional and historical basis. Throughout most of the Northern Territory descent groups are pivotal to the system of land ownership. In the more arid regions of the Western Desert occupied by people such as the Pintubi land-owning groups are formed on a wider basis, although in these cases too patrifiliation is a major mode of recruitment, reflecting the importance of links to land inherited through the father (Myers 1982: 189 refers to 'a patrifilial core'). However for the most part the land claim process has identified patrilineal descent groups as a central feature of land ownership. It may be significant that the two smaller land councils have based their internal structure on patrilineal clan organisation.

Although patrilineal clans are widely recognised as land owning groups other individuals and groups also have important roles to play in relation to land ownership and the exercise of ownership rights. The precise way in which rights are extended depends in part on the details of regional social organisation such as whether or not there are semi-moieties or whether a Murngin or Arandic kinship system applies, and on regional history—the extinction of groups through colonial process. The extension of rights can be based on kinship or on ritual ties, but not as a rule on residence. The most commonly found set of complementary rightholders are those linked to the owning group through their mother. Throughout the Northern Territory people gain important rights and responsibilities in relation to their mother's land— a fact noted strongly by Woodward (1974: 16). In some areas these rights articulate with principles of group formation while in others they operate on a more individual basis.

Throughout much of central Australia a distinction is drawn between groups referred to as *kirda* and *kurdungurlu*. In the Roper Valley the equivalent distinction is between *mingirringgi* and *djunggayi* and other terms can be found elsewhere. The terms can be applied with different meaning in different contexts and at different levels of organisation. The primary distinction is between members of a group whose rights are based on their relationship traced through their patriline (*kirda/mingirringgi*) and a group of people (*kurdungurlu/djunggayi*) whose mothers are members of the *kirda/mingirringgi* group. Many English terms have been used to characterise the difference in roles between the two groups: the most frequently used are 'owner' versus 'manager'. In much of Arnhem Land the distinction is less formalised but none the less the rights and responsibilities of children of women of the clan (*waku*) are recognised.

Throughout the Northern Territory children of women of the clan or owning group are allocated formal roles in their mother's clan ceremonies. In a ceremonial context in some parts of Australia the distinction between *kirda* and *kurdungurlu* or their equivalents can be used to divide all the participants in a ceremony into two categories according to their relationship to the owners of the ceremony. However these categories do not function as groups in other contexts. In most land claims where *kurdungurlu* have been included as traditional owners this has meant the inclusion only of those linked by descent to the set of people patrilineally linked to the land. The role of these people has usually been defined as different from and complementary to that of those linked patrilineally to the land (for a detailed discussion of these issues see Morphy and Morphy 1984). *Kurdungurlu* hold their right through their mothers and in general cannot pass those rights on directly to their own children, though because of the patterns of intermarriage between patrilineal groups it is quite likely that the children of *kurdungurlu* (or their equivalents elsewhere) will in many cases have a similar relationship to land and ceremony in their own right, through *their* mothers. As Sutton (1995:4) argues ownership is constituted in terms of the existence of the narrower group of right holders who become the reference point either through kinship or shared spiritual ties.

The complementary rights of *kirda* and *kurdungurlu* must be differentiated from rights of succession. In eastern Arnhem Land and throughout the parts of Australia where land ownership is moiety specific it is impossible for people linked matrilineally to land to convert their status to that of land owner. In eastern Arnhem Land should a group become extinct or be approaching extinction then its land will be reallocated to another group of the same moiety. There are two bases upon which land can be transferred: on the basis of descent or through ritual ties. Both, however, are framed linguistically in kinship terms. Clans of the same moiety may be in the relationship of *gutharra* ((sister's) daughter's child) and *märi* (mother's mother('s brother)) to each other. This relationship is kin-based in that many members of the *gutharra* clan will have actual mother's mothers from the *märi* clan (and not vice versa). *Gutharra* clans have a strong claim over the land of their *märi* clans. Clans that are close in ancestral–ceremonial identity are referred to as *yapa* (sister) clans, or as 'one company'. These also have a basis for making such a claim. The outcome of such claims depends on political process and factors such as the relative size of the 'competing' clans are relevant. Inheritance by a *gutharra* group is the equivalent of a European landowner being succeeded by a nephew if he dies without male issue: in the first case we have a society which vests property rights in groups, and in the second a society which vests property rights in individuals.

Peter Sutton (1995: 8) has made the important point that these processes of succession depend on the operation of a regional system of law in which groups have a collective interest in maintaining the system of title independent of the interests in any particular case (see Morphy 1988 and 1990). Members of the wider regional group may be said to have an underlying or 'residual interest in all the smaller estates of the region, somewhat in the same sense that the Australian State has an underlying interest in all Australian lands.' Quite typically Reeves cites the first part of this passage but not the second part which conveys the sense in which Sutton intends it to be understood. Sutton goes on to argue that title persists even in the case of disputes—in other words

the spaces over which disputes take place are not simply the product of individual action but exist as part of an ongoing system, just as under Australian law freehold blocks have an existence independent of the disputes that surround them. It would be quite wrong to argue, however, that this wider body of people is itself the land-owning group. It is, rather, an abstract conceptualisation of what allows land ownership to operate, or what is implied by a particular system of land ownership. This is what Sutton means when he writes, 'the whole is typically a fabric that fades into the distance, not a neatly finite unit' (1995: 9).

Succession is an important component of any system of property law. However Reeves at times seems to use the existence of succession as evidence for the fragility of land owning groups. Reeves (1998: 144) talks about 'the inevitable extinction of small-localised patrilineal groupings" and that 'individuals and small descent groups, have short life-times' (ibid: 147) that groups 'frequently become extinct' (ibid: 179). Certainly in parts of Northern Australia the colonial encounter, disease, massacre and the disruption to traditional life brought about by the imposition of the cattle station economy has resulted in the extinction of some groups and placed a premium on processes of succession and broad conceptions of ownership. In other areas succession is a relatively rare occurrence and local populations are everywhere increasing. Moreover Aboriginal processes of succession are a mechanism for avoiding the extinction of title and ensuring continuities over time in the relationship between people and land (see e.g. Meggitt 1962: 212). The operation of the Aboriginal Land Rights (Northern Territory) Act has allowed such processes to continue.

The structure of Aboriginal society and the articulation of its different levels of social organisation allow links to be extended outwards almost infinitely, on the basis of ritual ties or kinship relations. Aboriginal structures are designed so that every individual may be fitted to a particular context and to have role with respect to that context. Hence when people visit a community for the first time they can be fitted into the local classificatory kinship system and when a large ceremonial gathering is held all present have a place in the structure of the performance. The facility with which Aboriginal people globalise their social categories creates an appearance of fit between different levels of organisation that may sometimes mask underlying inconsistencies. The fitting of people into the more global setting often involves the covering up of such inconsistencies, revealed for example in the fact that someone's subsection has been changed to fit in with a wrong marriage, or that tracing genealogical relationships between two people in different ways results in a totally different kinship terms being applied. The system of land ownership, however, operates on a local scale in which the relationship between descent and land ownership has a central place.

The Reeves report attempts to use the complex nature of systems of local and supra-local organisation to undermine the status of the local descent group or clan as a component of the system and to emphasise other levels of organisation such as the community. Early analysts set the tone for this approach: they too were looking for a *single* primary level of organisation. They believed that it comprised autonomous

multifunctional groups such as the patrilineal–patrilocal band. The discovery that groups existed at other levels, such as the 'community', has been interpreted by some as the sign of a *new* primary level of organisation rather than being recognised as a sign that Aboriginal social organisation is more complex than has been realised hitherto: that different levels of organisation exist, just as they do in Euro-Australian society.

The reproduction of groups—both physical and social—takes place within a nexus of individual relations, which crosscut all levels of organisation. These relationships between individuals are integral to the functioning of groups and to the process of their reproduction over time. There has been a recent tendency to assert that individual relationships based on kinship are somehow 'more real' than the groups that they connect. But these individual relationships are in turn influenced by the history of relationships between groups and are hence no more real or less abstract than the groups themselves. In order fully to understand Aboriginal local organisation it is necessary to understand the complex and dynamic relationships between groups at different levels of organisation and to allow for the crosscutting nature of individual ties. Groups such as the local descent group, where such groups can be identified, are not 'less real'. Rather, they operate within a wider system of social and group relations.

The complexity of group organisation is often reflected directly in language. Many Aboriginal languages have naming systems that apply to groups at different levels of segmentation and to relationships between individuals with reference to group organisation. These complexities were brought out for the Yolngu languages in the Gove case without being fully understood and have been discussed in detail by Williams (1986). She has shown how there are sets of names which can be applied to groups that are formed on a number of different principles: through descent, according to the season and purpose for which people gather together, according to sacred relationships between groups, and so on. These naming systems articulate well with the levels of group organisation discussed by Stanner, Peterson, Morphy, Keen and others and form a part of the internal process of maintaining relations between people and land.

Traditional Ownership under the Aboriginal Land Rights (Northern Territory) Act 1976

The definition of a 'traditional Aboriginal owner' under the Aboriginal Land Rights (Northern Territory) Act is:

> a local descent group of Aboriginals who:
>
> a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
>
> b) are entitled by Aboriginal tradition to forage as a right over that land.

I will consider three critical elements of this definition in turn in relation to current anthropological understandings of their applicability: a) the local descent group b) spiritual relationship to land c) foraging rights.

a) The local descent group

The Land Rights (Northern Territory Act) makes reference to the 'local descent group', intending to reflect Aboriginal systems of ownership, in which rights in land are vested in groups, not in individuals. Reeves devotes considerable attention to the concept of local descent group. The issues surrounding the concept are complex and are as much a matter of Australian law as they are of anthropology. The local descent group was strongly criticised by Maddock (1980) and Gumbert (1981) partly on the grounds that in their opinion it would not be widely applicable in land claim cases and partly because it might exclude other Aboriginal interests in land. They were concerned that the Aboriginal Land Rights (Northern Territory) Act should address the land needs of as wide a body of the Aboriginal population of the Northern Territory as possible (see also Reeves 1998: 217). As in the case of the Reeves report there was a suggestion that the act should have a somewhat different agenda to the one given it by Parliament. Maddock in particular was concerned that the definition of traditional owner under the Act would exclude people linked matrilineally to the land.

The critics of the concept of were thus concerned that it carried with it the implications of the patrilineal–patrilocal band despite the fact that its definition mentioned neither patriliny nor residence. Reeves also takes this view of the concept.

It is fair to say that if the term had been interpreted narrowly to refer to a patrilineal descent group then it would have imposed too great a restriction on the number of claimants for particular areas of land. But as the land claim process proceeded it proved possible to allow the concept a wider interpretation. While the concept 'local descent group' is consonant with anthropological understandings of the relationship between Aboriginal people and land (being linked both to Stanner's model of local organisation, and having been used very occasionally by Ronald Berndt) it was not originally a term of art in anthropology and its meaning has been established through its use in the land claims process. It has been interpreted to include a wide variety of principles of group formation with respect to the ownership of particular areas of land. Its definition does not specify the mode of descent and so allows for links to be established through both mother and father. It does not require that the group itself be tightly bounded, so that in some cases people who have complementary relationships to the land have been included as members of the set of traditional owners. The definition has proved flexible enough to allow both for regional variation in the system of land tenure and for changes that have occurred over time as result of the impact of colonisation.

b) common spiritual affiliation and primary spiritual responsibility

Aboriginal people assert land ownership in general terms as well as with reference to spiritual affiliation to land. As Sutton (1995:21) states 'the first incident of title

is…one that allows you to rightfully say, that's my country. To assert possessive pronouns about a bit of land'. While there may be differences in the sense in which people of different cultures use a phrase such as 'my land' or 'my mother's land' the fact that people make such distinctions is prima facie evidence of a system that gives different people different relationships with different areas of land. The objective of the Aboriginal Land Rights (Northern Territory) Act was to specify some of the particularities of Aboriginal land ownership that enabled the group of owners to be identified. An exclusive right to forage for wild animals is no more a criteria for identifying the owners of an area of land under Aboriginal law than it is under Australian common law. The introduction of spiritual criteria which thereby link the ownership of land with the ownership of religious property in general was intended to accord with particular characteristics of Aboriginal systems of ownership.

Reeves (1998: 211) has difficulty with the inclusion of criteria of spiritual relationships with land as part of the definition of traditional ownership since he argues that it relies on a person's spiritual beliefs which are not susceptible to resolution by the application of legal principle. However Aboriginal spiritual relationships with land are not only a matter of belief but are part of a body of widely recognised 'law', which can be subject to cross examination. The successful application of the definition, without dispute, in countless land claim cases attests to the fact that the criteria of spiritual relationship can be demonstrated in court. In the same passage he also suggests that the determination of ownership through legal process reduces the 'authority of senior elders, who normally determine matters based on their knowledge of and expertise in, these matters'. However it could just as easily be argued that the land rights legislation, by acknowledging the importance of spiritual relationships to land, supports the authority of such senior elders and depends on their expertise.

The inclusion of the criteria of spiritual affiliation and responsibility is important not simply because they reflect the terms in which Aboriginal people express their relationship to land and the basis of their system of ownership, but because it places land within a broader category of property rights. There is no simple division, in Aboriginal societies, between religious life and secular life. This does not mean simply that religious matters enter into the operation of secular life through imposing controls on hunting and gathering activity but also that there are economic aspects to religious property. On the one hand the religious ordering of society provides a long established mode of managing the economy of Aboriginal society. On the other hand certain forms of religious property in art, song and other forms of knowledge are directly convertible into economic returns through the arts and craft industry, where cultural products are marketable commodities.

Reeves' failure to understand the nature of the ownership of religious sites and knowledge comes out clearly when he is discussing issues of compensation (1998: 286). He argues, against the NLC, that relationship to land gives rise to responsibilities of care rather than ownership. As evidence for his position he cites the fact that under traditional Aboriginal law a *kurdungurlu* for the site is likely to exact compensation from a *kirda*. He then argues that under Aboriginal law there is no

provision for such compensation to be paid by a non-Aboriginal person. The system he discusses only applies to a small area of Australia. In such cases both *kirda* and *kurdungurlu* are often included among the traditional owners. The existence of compensation payments internally can be considered part of an overall system of legal rights in land. The land rights legislation is designed to enshrine Aboriginal rights in land as ownership of land under European law. Hence it should provide mechanisms whereby Aboriginal rights in land can be protected. The land rights legislation acknowledges the spiritual relationship between Aboriginal people and the land. If outsiders can enter Aboriginal Land and damage sites without compensation then that would be a failure to ensure they have those rights. The particular way in which compensation is then distributed under Aboriginal law is a separate issue. The existing land rights legislation enables compensation to be directed internally according to Aboriginal tradition. The fact that in some cases the compensation may be directed from *kirda* to *kurtungurlu* may have a bearing on who are considered the traditional owners in the particular case but does not alter the fact that proprietary interests in land exist.

The interests that people have in sites is interconnected with interests that they have in other forms of sacra many of which have value as commodities - paintings, songs, dances, the right to commercially exploit certain natural resources such as crocodile eggs. The threat to a sacred site, or damage to or improper use of an object associated with it, can have a knock on effect on a series of other products or transactions that are related to it. Hunting in a particular area may have to cease, certain paintings may be withdrawn from production —the consequences may be fundamentally economic though always with reference to religious values. Compensation for sacred sites should not be limited to damage to the immediate site but to the overall damage.

The relationship between religion and economy is integral to the fabric of Aboriginal society. Reeves (1998: 204) is quite wrong when he argues that 'traditional owners are not organised to take any action relevant to the secular interests of Aboriginal people'. The system of land ownership provides management structures and decision-making processes, and mechanisms for distributing returns from land, including the production of certain commodities and the use of certain resources. These processes are dynamic and capable of responding to changed circumstances, as can be seen by the ways in which Aboriginal corporations have become involved in economic processes while still paying due attention to traditional structures and values. Issues of spiritual affiliation and responsibility are integral to the reproduction of Aboriginal society but are not of themselves a barrier to change or development, nor to engagement with wider political and economic structures.

c) Rights to hunt and forage

Reeves continually emphasises Blackburn's judgement that Yolngu clans did not have proprietary interests in land (Reeves 1998: 137), despite the fact that the land rights legislation was introduced precisely to remedy the negative decision in the Gove Land Rights case. As we have seen, Blackburn's judgement was based on the fact that Yolngu clans did not have exclusive property rights in the hunted and gathered

resources of the land. Blackburn failed to understand the role that land ownership has in the management of the resources of the land, and that ownership in the Aboriginal case entails far more than the right to hunt and gather on the land. In contrast the Land Rights (Northern Territory) Act did not define the landowners in terms of any exclusive right to forage over the land but simply required that they had the right to forage on the land themselves.

Aboriginal people do not label the people who have the right to hunt and forage over the land as the owners, though rights to forage are one of the rights of ownership (with certain specific contextual exceptions). In land claims people have routinely acknowledged that the local descent group has had the right to forage over the land but have seldom asserted that they have exclusive rights to the animal and plant resources of the land. It could be argued superficially, that in some respects Aboriginal law is congruent with Australian law on the question of the status of wild produce. Under Australian law title to wild produce is not vested in the land-owners either, 'fish like other living wild animals are incapable of being owned until they are killed or caught' (Reeves 1998: 232). This is the position that Reeves favours when dealing with rights of the sea: he recommends that 'the common-law position regarding the ownership of living fish and native fauna on Aboriginal Land' be confirmed in the Land Rights Act.

However despite the superficial appearance of similarity, under Aboriginal law the rights of the owning group are much stronger than the common law position referred to by Reeves. The resources of the environment are managed and protected by the land owners through a system of permission which ensures that only those who are entitled to forage over the land or who have permission to forage can do so. This system of permission involves both the spiritual and secular management of the resources. Contextual banning of hunting, or burning a particular area of land can be instigated as a religious sanction or as the result of a death or a dispute. Such practices can be extended by landowners to other economic resources on Aboriginal land such as the community store. Ownership as defined under the existing land rights legislation enables such management of resources by landowners to be continued.

Anthropological evidence, Reeves' analysis, and the proposed amendments

Reeves argues that a series of regional land councils should be formed to replace the Northern and Central Land Councils, to allow the new representative bodies to adopt decision making processes that accord with their traditions and provide a system of dispute resolution that accommodates Aboriginal traditional practices and processes that is accessible, inexpensive and effective.

However Reeves provides little direct evidence that the operation of the Land Rights Act legislation has been disrupted by an excessive number of disputes over traditional ownership or that such disputes are a result of the failure to accommodate to traditional Aboriginal practices within the land rights legislation. The land rights

legislation has been remarkably successful in returning land to Aboriginal people and, with notable exceptions, in avoiding disputes over traditional ownership. The operation of the legislation by the land councils has not been constrained by the definition of traditional owner and there is every evidence that the land councils have encouraged the widest application of the concept. They have not imposed a rigid definition of traditional owner and wherever possible they have encouraged traditional owners to solve problems among themselves. The vesting of ownership in Land Trusts that are one step removed from the land claim process has facilitated the continued operation of Aboriginal law by not fixing the group of traditional landowners at a particular point in time. The Northern Land Council proposed that the powers of the Land Rights Commissioner be extended to resolve disputed cases by arbitration (Reeves 1998: 185) precisely because it wished to avoid imposing solutions on the parties.

Disputes over resources and land are inevitable and are a normal part of Aboriginal political process, as Reeves himself acknowledges (citing Keen 1994: 129). Williams (1986) has shown that the competing bases for establishing claims to vacant land and cross cutting ties that establish links between different groups are among the factors that are taken into account as part of Yolngu legal process. The fact that disputes over land have continued subsequent to the passage of the land rights legislation is a sign that normal process is continuing. Reeves' assertion (1998: 180) that it should be obvious that the source of certain disputes 'lies within the framework of Land rights Act " is made without any supporting evidence. Many of the disputes that Reeves alludes to have in fact been resolved under the current framework and their resolution testifies to the success of the current system. On the whole the Land Councils have avoided major disputes over traditional ownership, in contrast to what has happened under Native Title Act. Martin (1995 : 29) has argued that, 'this situation [of disputed claims] will often be compounded where there are representative bodies recognised under the Native Title Act which lack the resources, expertise, relatively broad base and standing of the Northern Territory's Central and Northern Land Councils or Queensland's Cape York Land Council.' Sutton (1995:2) likewise argues that the land claim process has been characterised by an absence of conflict precisely because the land councils were able to adopt a broad regional approach and ensure that consensus is reached before the claims reach the courts. He argues that in the case of Native Title claims, where the litigants were individually funded, competition and conflict increased.

The existing land councils by definition take account of the regional nature of land ownership. Reeves' intention to break up these regional bodies into smaller entities makes no sense in terms of his own presentation of the anthropological evidence. The smaller bodies would themselves be in part an artefact of colonial history, being focused in many cases on populations centred around government settlements and mission stations. While such regions may useful subdivisions for administrative purposes and for ensuring a breadth of representation within the existing land councils, they do not reflect traditional levels of regional organisation. Even in cases such as eastern Arnhem Land, where there is an anthropological case to be made for a degree of regional coherence in terms of the kinship system and the relatedness of the languages of the Yolngu-speaking bloc, the boundaries rapidly disappear on closer

analysis. People of the western part of the Yolngu region interact with non-Yolngu groups centred in the Maningrida region and southerly Yolngu groups such as the Ritharrngu have close links with people in Ngukurr and Numbulwar. In both cases these links with non-Yolngu are probably closer that the links to the Yolngu communities at Yirrkala or Galiwinku. Moreover two of the cases Reeves puts forward to justify the development of regional land councils concern groups who are in dispute with other groups *within* the eastern Arnhem Land region: the North East Arnhem Ringgitj Land Council and the Marthakal Land Council. Far from solving such disputes the creation of a separate Eastern Arnhem Land Council might well exacerbate them, resulting in an increasing Balkanisation of Aboriginal land councils and increasing legal and political complexities and costs.

The replacement of 'traditional owner' under the Act by a more general concept 'member of a Regional Land Council' defined in terms of residence and traditional affiliation to an area of land within the region, would neither reflect systems of Aboriginal land ownership nor be easy to apply (1998: 595). The regional entities themselves would be arbitrary as far as any traditional pattern of land ownership is concerned. People would be forced to choose an affiliation since they could not belong to more than one region (whereas under indigenous law and existing Australian law they may have rights and responsibilities in a number of 'communities'). To give residence and ownership equal weight in a definition purporting to be a definition of ownership under Aboriginal law makes nonsense of the very law itself. The new criteria might in any case make it more difficult to draw up a list of traditional owners since the imprecision of the phrase 'traditional affiliation' might result in endless court cases to define tradition in the particular context. It is worth noting that the smaller land councils — the Tiwi Lands Council and the Anindilyakwa Council —which Reeves sees as a model for the pragmatic application of Aboriginal law have adopted the patrilineal clan-based definitions of traditional owner which Reeves sees as problematic, and which indeed are much narrower than allowed for under the Aboriginal Land Rights (Northern Territory) Act. Reeves' (1998: 213) solution to the problem of disputes over traditional ownership, which is simply to deny the right of appeal to courts, would seem to give a higher value to pragmatism than to justice.

Reeves makes a series of invalid assumptions about Aboriginal regional organisation. His statement that regional populations tend to be linguistically cohesive is wrong. Each of Reeves' proposed regions has immense linguistic diversity reflecting the cross-cutting nature of linguistic and social relationships in Aboriginal Australia, which is turn reflected in high levels of multi-lingualism. Linguistic cohesiveness cannot be used as an argument in favour of regional Land Councils. It is especially wrong to use Peterson's drainage basins as a model for regional systems, since they are of a scale that includes within them enormous linguistic diversity. The concept of regional cultures is equally problematic as basis for identifying units of administration. 'Regional cultures' is not a well analysed concept anthropologically and there is no evidence that the proposed Regional Land Councils correspond to recognised culture areas.

Reeves argues that the smaller regional land councils would be less bureaucratic. There is no evidence to support this. Indeed the evidence that Reeves (1998: 96-7) himself cites suggests the opposite. The Anindilyakwa Land Council has a budget of $347,000, a staff of 21, and represents a population of 1303. The NLC on the other hand has a budget of $8,376,195, a staff of 85, and serves a population of some 25,000. By any criteria, on these figures the larger land councils are much lighter on administration!

The suggestion that the creation of regional councils would resolve the situation for the members of the Stolen Generation, but only if they are resident in the area seems to be a contradiction in terms. People who are linked by descent are clearly covered by the existing Act, which, by not having a narrowly defined residential criterion, has in fact enabled many of the Stolen Generation people to be included in claims. Indeed Reeves cannot cite a single case where such a person has been disadvantaged under the present Act.

Conclusion

The Reeves report purports to allow Aboriginal Australians to adopt decision making processes that accord with their traditions. Even if this were the case, and I have argued that it is not, it would be at a severe price. Reeves proposes a structure that will remove those decision making processes from the wider Australian legal arena. The Land Rights legislation has been effective *because it incorporates aspects of Aboriginal law within European Australian law*. As a result, European Australian law has to take account of Aboriginal law, whether it be in the area of permission to enter land, compensation for the damage of sacred sites or decisions over traditional ownership. Reeves' recommendations will remove these features from the land rights legislation either by removing the powers as in the case of the permit system or by removing issues from the Euro-Australian legal framework as in the case of disputes over traditional ownership.

Any body of law that is designed to exist at the point of articulation between two legal systems is bound to be complex. It must not only articulate two legal traditions, but it must allow for discontinuities <u>within</u> each tradition. Within Aboriginal Australia there are discontinuities between the laws of different groups: the existing Land Rights Legislation has proved flexible enough to accommodate several models of Aboriginal social organisation. And Euro-Australian law also has areas of potential discontinuity between different jurisdictions and is open to multiple interpretations. Australian law and Australian anthropology are both involved in developing a vocabulary which reflects indigenous concepts, structures and processes. In anthropology the meaning of terms changes over time with deepening understandings of the concepts they refer to. In law the meaning of terms such as those comprising the definition of 'traditional owner' will be established over time by precedent. The meaning of a term such as 'clan' or 'descent group' in the context of contemporary Australian anthropology is different from the meaning it had in nineteenth century anthropology or the sense it has when applied to West African societies, even though it is possible to draw a historical connection between the uses of the word in different contexts. The

application of the definition of traditional owner has been part of a process of establishing the distinctive principles or 'faithfully representing the nature of local customary law in relation to land' (Sutton 1995: 4), using the definition as a guide. A more general concept (such as that proposed by Reeves) while it might be more broadly applicable would also have to be subject to practice and precedent and might fail to recognise the particularities of Aboriginal ownership systems in particular cases. If there were considerable evidence that the definition of traditional owner had of itself resulted in many unsatisfactory determinations then it would be a matter of considerable concern. However such is not the case, as Reeves recognises in confirming the continued use of the definition for land claim procedures.

The redefinition of the Land Rights Act so that it becomes a vehicle for 'development' is a way of subverting the Act by reducing the autonomy of Aboriginal people. Land rights legislation has been successful because it puts Aboriginal people in a position to negotiate with other Territorians as independent landowners. The proposed changes to the Aboriginal Land Rights (Northern Territory) Act compromises that independence and will have the opposite effect to that (ostensibly) intended. It is argued that the reason for changing the Act is because it has high value to Aboriginal Australians and is thought of 'as being their act for them'. It seems quite Machiavellian then to take 'their act' away from them and divert it to quite different purposes. Part of the reason that the current Act is valued is that it affords Aboriginal people autonomy and sources of income that are independent of government, enabling them to set their own objectives, independently.

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Appendix 4

Delay and uncertainty in negotiations for mining on Aboriginal land: A response to the Reeves Report

18 FEBRUARY 1999

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Delay and uncertainty in negotiations for mining on Aboriginal land: A response to the Reeves Report

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

The error in Reeves' analysis is simple but critical. To estimate the costs of delay it is necessary to take account of changes in mineral prices and changes in the cost of mining operations over time, which depend on the rate of technological change. In general, these two factors will tend to cancel each other out.

Reeves' mistake is to observe that the costs of extracting ore *from a given mine* will tend to rise over time, as the grade of ore declines and less accessible parts of the orebody over time, then to assume that the costs of mining operations in general will rise at the same rate. That is, Reeves assumes that, the later mining is commenced, the higher the real cost of extraction will be. In reality, the real costs of mining are declining. However, whenever mining at a given site is commenced, extraction costs will tend to rise over the life of the mine.

The effect of Reeves' erroneous assumption is to greatly overstate the economic costs of delays in exploration and mining. A corrected calculation shows that the true costs are about one-third of those estimated by Reeves.

SUMMARY OF THE ANALYSIS

The analysis in the Reeves Report is based on two assumptions:

(i) There is a long-term downward trend in the real price of minerals. (The average rate of decline is 1 per cent per year); and

(ii) *Over the life of a given mine*, unit costs of extracting and processing ore rise as grades fall and transport distances back to on-site processing facilities become progressively longer.

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

(i) a one-year delay in commencing exploration reduces the net present value (NPV) of the mine project by 17 per cent, and shortens the economic life of the mine by one year;

(ii) a two-year delay in commencing exploration reduces the net present value (NPV) of the mine project by 34 per cent and shortens the economic life of the mine by two years; and

(iii) a seven-year delay would render the project non-viable.

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

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

An alternative analysis

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

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

It can easily be seen that, if both output prices and input costs decline by 1 per cent per year, the profit associated with any given output will also decline by 1 per cent per year. It follows that the net present value of the project calculated from the starting date will decline by 1 per cent per year of delay. If a discount rate of 5 per cent is used, the net present value of the project calculated from some fixed date such as the year 2000 will decline by 6 per cent per year of delay. It may be computed that a delay of 7 years will reduce the net present value of the project by around 35 per cent. This is a significant loss, but much less than that estimated by Reeves who suggested that a 2-year delay would reduce NPV by 35 per cent and that a 7-year delay would kill the project altogether.

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

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

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

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

1 Internal rate of return
2 Net present value

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

The implications of a range of alternative assumptions and modified scenarios are considered in the Appendix. However, the analysis presented above shows that Reeves has greatly overestimated the costs of delays incurred prior to the commencement of the project. Larger reductions in NPV arise if delays take place after significant costs have been incurred.

Although Reeves refers to uncertainty and delays, his analysis deals only with delays. As has been shown here, Reeves greatly overstates the cost of delays. It seems likely that costs associated with uncertainty exceed costs associated with delay. Clearly, the lower the probability of ultimately obtaining agreement on exploration and mining,

the less the incentive to invest even modest resources in identifying potentially prospective sites.

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

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

Appendix

To examine sensitivity to this assumption we will consider two alternative assumptions

(i) the costs of mining operations in general are constant over time.

(ii) the costs of mining decline at a real rate of 2 per cent per year

The results are reported in Tables 2a and 2b

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

Table 1a: Corrected calculations of the effects of delay on the attractiveness of mining projects (Assuming constant real costs of mining)

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

1 Internal rate of return
2 Net present value

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

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

1 Internal rate of return
2 Net present value

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