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LEGAL ASPECTS OF THE REEVES REPORT

MEMORANDUM OF ADVICE

Preliminary

This memorandum of advice has been prepared at the request of the Aboriginal and Torres Strait Islander Commission. It addresses legal issues that arise in relation to implementation of the recommendations of the Reeves Report, including legal issues on which the Commission has specifically requested advice.

The opinions expressed are of course my own.

SUMMARY OF ADVICE

Part I : Acquisition and Compensation Issues

- It is strongly arguable that any amendment of the *Aboriginal Land Rights (Northern Territory) Act 1976* that gave rise to an acquisition would require the payment of just terms compensation.
- In any event, if the principles of the *Racial Discrimination Act 1975* are applied, compensation must be provided for any acquisition.
- Implementation of the following recommendations may give rise to an acquisition
    - That RLC's hold all Aboriginal land (paras 27-32)
    - Modification of rights relating to Aboriginal land (paras 33-43)
    - That a grant under the Land Rights Act should extinguish native title (paras 51-60)
    - That a grant under the Pastoral Land Act (NT) should extinguish native title (paras 61-63)
    - Taking over the assets of Royalty Associations (paras 64-70)
    - Reservation of ownership of living fish and native fauna (paras 71-74)
    - Remedy of the 'error' in relation to the Elliott Stockyards (paras 75-78).

Part II: Cultural Protection, Racial Discrimination and Related Issues

(i) International Covenant on Civil and Political Rights

- Implementation of the following recommendations, either individually or cumulatively, would give rise to breach of Australia's obligations under the International Covenant on Civil and Political Rights
- Repeal of s.70 of the Land Rights Act together with repeal of Part II of the Aboriginal Land Act (NT) (the prohibition of entry on Aboriginal Land and the permit system)

- Repeal of s.74 and amendment of s.71 of the Land Rights Act to remove the current protection against application to Aboriginal land of inconsistent Northern Territory laws and instead to enable application of Northern Territory laws to Aboriginal land notwithstanding negative effects on the use and occupation of that land
- Repeal of ss 67 and 68 of the Land Rights Act and insertion of new provisions with the result that Aboriginal land may be compulsorily acquired by the Northern Territory and roads may be constructed over Aboriginal land without Aboriginal consent Reservation to the Crown of ownership of all living fish and native fauna on Aboriginal land together with a joint management regime in which conservation and other interests would override Aboriginal interests
- Amendment of the Land Rights Act and the *Mining Act* (NT) to make provision for licences to enter Aboriginal land for reconnaissance exploration without Aboriginal consent
- Transfer of all Aboriginal land into 18 separate regions with 18 new Regional Land Councils becoming the trustees and carrying out the trustee duties presently carried out by the Land Trusts together with provision for the Northern Territory Aboriginal Council to be able to intervene in the affairs of the Regional Land Councils.

(ii) Racial Discrimination

- Implementation of a number of recommendations, either alone or in combination, would give rise to inconsistency with the principles of the *Racial Discrimination Act 1975 (RDA).*
- The later legislation would prevail over the RDA.
- Implementation of those recommendations would, however, give rise to racial discrimination contrary to the *International Convention for the Elimination of All Forms of Racial Discrimination*
- In consequence, the constitutional validity of the *Racial Discrimination Act 1975* would be at risk.

- Those recommendations include
    - That RLC's hold all Aboriginal land (implementation would require expropriation from current title holders, the Land Trusts
    - Taking over the assets of Royalty Associations.

Part III : Payments to Royalty Associations

- Reeves contends that the mining royalty equivalents paid to royalty associations are public moneys. Therefore the royalty associations should be accountable for them.
- The analysis is legally flawed. Reeves gives insufficient weight to the legal and policy consequences of the interposition of the Land Councils between the Aboriginal Benefits Reserve and the Royalty Associations.
- In consequence of that interposition the moneys cease to be public moneys for the purposes of the *Financial Management and Accountability Act 1997*.
- An entirely different legal and accounting regime, the *Commonwealth Authorities and Companies Act 1997*, applies.
- In determining appropriate accountability arrangements regard should be had to
    - the historical background, in particular the historical explanation of the payments as compensation
    - the reasons for and the consequences of interposition of the Land Councils between the public money account (the Aboriginal Benefits Reserve) and payments to Royalty Associations.

Part IV : Judicial Power Issues

- Implementation of the following recommendations is likely to give rise to invalidity by reason of infringement of the requirements of Chapter III of the *Constitution*
    - The recommendation that the Aboriginal Land Commissioner have regard to detriment
    - The recommendation that dispute resolution functions be conferred on Regional Land Councils with a right of appeal on a question of law to the Aboriginal Land Commissioner.

Part V : Natural Justice and Judicial Review

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

PART I : ACQUISITION AND COMPENSATION ISSUES

1. In this part, I examine

    - Whether s.51(xxxi) of the *Constitution* (the acquisitions power) applies to s.122 (the territories power) (paras 2-10)
    - Whether and to what extent the acquisitions power applies to the Land Rights Act (paras 11-19)
    - What constitutes an acquisition for the purposes of s.51(xxxi) (paras 20-28)

I conclude that, assuming s.51(xxxi) of the *Constitution* and the *Racial Discrimination Act 1975* apply, implementation of the following recommendations in the Reeves report would constitute an acquisition requiring the provision of 'just terms' compensation (paras 29-80)

- That RLC's hold all Aboriginal land (paras 29-34)
- Modification of rights relating to Aboriginal land (paras 35-45)
- That a grant under the Land Rights Act should extinguish native title (paras 53-62)
- That a grant under the Pastoral Land Act (NT) should extinguish native title (paras 63-65)
- Taking over the assets of Royalty Associations (paras 66-72)
- Reservation of ownership of living fish and native fauna (paras 73-76)
- Remedy of the 'error' in relation to the Elliott Stockyards (paras 77-80).

I conclude that prevention of certain land claims would not constitute an acquisition.

Whether s.51(xxxi) applies in the territories

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

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

3. Section 51(xxxi) has been described as a constitutional guarantee (*Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 276, 284-285, *Clunies Ross v Commonwealth* (1984) 155 CLR 193, 201-202, *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 509, *Mutual Pools and Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 168). It operates 'to reduce the content of other grants of legislative power' (*Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134, 160). An acquisition 'for any purpose in respect of which the Parliament has power to make laws' must provide for just terms. Otherwise it will be invalid. That s.51(xxxi) applies to the placita of s.51, including s.51(xxvi) (the race power), is not in doubt. The first question for consideration is whether s.51(xxxi) applies also to s.122, 'to reduce the content' of that power, or whether s.122 is an independent power.

4. In *Teori Tau v The Commonwealth* (1969) 119 CLR 564, a unanimous High Court held that the 'grant of legislative power by s.122 is plenary in quality...it is not limited or qualified by s.51(xxxi)' (119 CLR, 570). An acquisition of property in the territories did not, therefore, require the payment of 'just terms' compensation.

5. The decision has been followed and applied in a line of cases (*Clunies–Ross v The Commonwealth* (1984) 155 CLR 193, 201, *Northern Land Council v The Commonwealth* (1986) 161 CLR 1, 6, *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 269, *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 246, *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155, 169, 177, 193).

6. More recently, the reasoning underlying *Teori Tau* has been questioned. The Court has rejected construction of s.122 'as though it stood isolated from other provisions of the Constitution which

might qualify its scope' (*Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 272, see also *Svikart v Stewart* (1994) 181 CLR 548, 574–575, *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 176–177, 222). This gave rise to doubt as to the authority of *Teori Tau*.

7. In *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513, leave was sought to re-open *Teori Tau.* The Court was divided. Four judges refused leave (Brennan CJ at 540, Dawson J at 552, Toohey J at 560, McHugh J at 575) but a differently constituted majority of four (Toohey, Gaudron, Gummow and Kirby JJ) substantially narrowed its practical application (see paras 11-17 below).
8. Brennan CJ considered *Teori Tau* rested on a principle, carefully worked out in a significant succession of cases, that s.122 confers a power that is additional to the powers conferred by s.51 and is not qualified by that section (190 CLR, 541, 545, see also Dawson J at 552-554, Toohey J at 560, McHugh J at 575-576).
9. Gaudron, Gummow and Kirby JJ, on the other hand, held that *Teori Tau* should be overruled (Gaudron J at 561, 565, Gummow J at 600, 613, 614, Kirby J at 656, 661). Gummow J, with whom Gaudron J agreed (190 CLR, 561, 565) held that s.51 and s.122 should be read together : 'Section 122 is not to be torn from the constitutional fabric' (190 CLR, 598), rather, 'within the meaning of par (xxxi), s.122 states a purpose in respect of which the parliament has power to make laws' (190 CLR, 600). Gaudron J held that the constitutional guarantee contained in s.51(xxxi) operated in respect of laws passed in reliance on s.122 (190 CLR, 561) and *Teori Tau* should no longer be treated as authority to the contrary (190 CLR, 565). Kirby J held s.122 was to be read 'as subject to the express and implied safeguards, restrictions or qualifications appearing elsewhere in the *Constitution.* Doing so requires the overruling of the authority of *Teori Tau*' (190 CLR, 656).
10. The result is that *Teori Tau* has not been overruled. The decision stands as authority for the proposition that s.122 is not limited by s.51(xxxi). Its practical application has, however, been narrowed (paras 11-17 below).

Does s.51(xxxi) apply to the Land Rights Act?

11. Notwithstanding that *Teori Tau* has not been overruled, the practical operation of the decision has been very substantially narrowed. This came about because Toohey J, one of the majority who declined to overrule *Teori Tau*, joined Gaudron, Gummow and Kirby JJ in holding that *Teori Tau* was not an obstacle to giving effect to the guarantee in s.51(xxxi) where one of the purposes of a law was a purpose arising under s.51. This development requires analysis of Commonwealth laws applying in the territories in a new light.

12. The issue arises because a law may be able to be supported by more than one head of power. To the extent that the Land Rights Act is supported by s.122, it is clear, on the authority of *Teori Tau*, now confirmed by *Newcrest*, that s.51(xxxi) does not apply. Section 122 is not, however, the only relevant power. The Land Rights Act may also be supported by s.51(xxvi), the race power. If the sole source of power to enact the Land Rights Act were the race power, s. 51(xxxi) would apply and any acquisition would require 'just terms' (*Attorney– General (Cth) v Schmidt* (1961) 105 CLR 361, 371). The question is whether the law can nevertheless be free from the limitation of s.51(xxxi) if it is supported by s.122. A further question is whether it is relevant to consider also whether the law is one of general application.

13. The traditional view is that where a law is supported by a constitutional power, the availability or otherwise of another power is irrelevant (*Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36, 135, *Newcrest*, 190 CLR, 534). Thus if the Land Rights Act is wholly supported by s.122, it is necessary to consider only whether s.122 is subject to s.51(xxxi). Application of s.51(xxxi) to the race power is irrelevant. This was the analysis adopted in *Newcrest* by Brennan CJ (190 CLR, 534), McHugh J (190 CLR 581, 583, 584) and, it seems, by Dawson J (190 CLR, 559).

14. Toohey J, on the other hand, considered it 'almost inevitable that any acquisition of property by the Commonwealth will now attract the operation of s.51(xxxi) because it will be in pursuit of a purpose in respect of which the Parliament has power to make laws, even if that acquisition takes place within a Territory. It will only be if a law can be truly characterised as a law for the government of a Territory, *not in any way answering the description in par (xxxi), that Teori Tau*

will constitute such an obstacle. And that is an unlikely situation on the view I take of the operation of the paragraph' (190 CLR, 561, emphasis added). Gaudron J held that where a law has two purposes, one of which falls within the terms of s.51(xxxi) and the other of which is for the government of a Territory, s.51(xxxi) applied (190 CLR, 568). Gummow J agreed: 'where s.51(xxxi) is engaged by a law with respect to, for example, external affairs, it is not disengaged by the circumstance that the law in question is also a law for the government of the Territory' (190 CLR, 614), as did Kirby J (190 CLR, 661–662).

15. It follows from the foregoing analysis by Toohey, Gaudron, Gummow and Kirby JJ that if the Land Rights Act is a law for any purpose in respect of which the Parliament may make laws under s.51, then s.51(xxxi) will apply. Since the Land Rights Act is clearly a law with respect to people of the Aboriginal race (s.51(xxvi), it follows that s.51(xxxi) applies.
16. I add that I have considered whether the Land Rights Act must be distinguished from the legislation considered in *Newcrest* for the reason that, unlike the legislation there under consideration, parts of which had application outside the Northern Territory, the substantive provisions of the Land Rights Act are confined to the granting of land in the Northern Territory. I can find no support for such a distinction in the judgments. Any doubt is in my view dispelled by the clear language in the passage from the judgment of Toohey J cited above. That Toohey J would have overlooked the operation of the Land Rights Act is in my view inconceivable.
17. I therefore conclude that, while *Teori Tau* has not been overruled, its application has been relevantly diminished with the consequence that s.51(xxxi) applies to any amendment to the Land Rights Act that constitutes an acquisition. 'Just terms' must be provided.
18. I add, lest the contrary implication be incorrectly drawn, that it does not follow that a grant of freehold to an Aboriginal Land Trust requires the payment of compensation to the Northern Territory. At the time of self-government, the vesting in the new body politic then established of Commonwealth land located in the Territory was from the outset subject to rights of the Commonwealth to acquire such land and to make grants of such land to Land Trusts, in both cases

without payment of compensation (Land Rights Act, s.3A, *Northern Territory (Self Government Act) 1978*, ss 69,70).

19. Nor does it follow that all past grants of freehold and leasehold in the Northern Territory that extinguished native title without compensation would be invalid (190 CLR, 560, 561, per Toohey J, 613, per Gummow J, cf 190 CLR 576, per McHugh J). Past Commonwealth grants of land *in the ordinary course of Territory administration* and prior to self-government would ordinarily have been made solely under s.122, not s.51. And s.122 remains unqualified by s.51(xxxi)

What constitutes an acquisition of property

20. Consistently with the characterisation of s.51(xxxi) as a constitutional guarantee, 'acquisition' and 'property' are to be liberally construed (*Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 285, 290, *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1, 349, *The Commonwealth v Tasmania* (1983) 158 CLR 1, 145, 246-247, 282-283, *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 509, *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, 303-304). Property has been said to extend to 'every species of valuable right and interest including choses in action' (*Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 290). '(I)t extends to innominate and anomalous interests' (*Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1, 349 per Dixon J). The acquisition may be by some person other than the Commonwealth (*P J Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382, *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397, *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480, 510-511, 526, *Mutual Pools and Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 188, 199), but a law which adjusts competing rights of persons in a particular relationship or area of activity or as an incident of some general regulation of conduct is not an acquisition (*Australian Tape Manufacturers Ltd* 176 CLR, 510, *Mutual Pools*, 179 CLR, 171-173, 177-178, 189-190, *Nintendo Co Ltd v Centronic Systems Pty Ltd* (1994) 181 CLR 134, 161). Nor, it seems, is a law which operates 'to overcome distortion, anomaly or

unintended consequences in the working of the particular scheme (*Health Insurance Commission v Peverill* (1994) 179 CLR 226, 237).

21. It was long thought that a mere prohibition did not give rise to an acquisition. This view was based on a passage in the judgment of Mason J in *The Commonwealth v Tasmania (1983) 158 CLR* 1, 145 where he said that s.51(xxxi) did not apply merely because Commonwealth

> 'legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be.'

22. Similarly, mere extinguishment of a right, per se, does not involve an acquisition *(Reg v Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation (1985)* 159 CLR 636, 653*),* provided there is no acquisition of a benefit (*Mutual Pools and Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 172 per Mason CJ*).* 'On the other hand...an extinguishment, modification or deprivation of the proprietary rights of one person would involve an acquisition of property by another by reason of some identifiable and measurable countervailing benefit or advantage accruing to that other person as a result (*Mutual Pools*, 179 CLR, 184-185, per Deane and Gaudron JJ). It is not necessary that the benefit correspond exactly with that which is lost (*Mutual Pools*, 179 CLR, 223). In *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, a challenge to proclamation of Stage 3 of Kakadu National Park (in which the recovery of minerals was prohibited), the advantages acquired by the Director of National Parks and Wildlife 'were the acquisition of the land freed from the rights of Newcrest to occupy and conduct mining operations thereon and in the case of the Commonwealth, the minerals freed from the rights of Newcrest to mine them. In accordance with the authorities, that is sufficient derivation of an identifiable and measurable advantage to satisfy the constitutional requirement of an acquisition' (190 CLR, 634).

23. Special considerations apply in relation to statutory rights. These have been described as 'inherently susceptible of variation' (*Health Insurance Commission v Peverill* (1994) 179 CLR 226, 237 (per Mason CJ, Deane and Gaudron JJ). Variation of a right that is inherently susceptible of

variation does not constitute an acquisition (ibid). The principle does not, however, extend to 'antecedent property rights recognized by the general law' (ibid). Moreover, 'in some circumstances the extinguishment of a chose in action against the Commonwealth would amount to an acquisition of property' (*Mutual Pools and Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 172-173). This is so 'at least where the extinguishment results in a direct benefit... and the cause of action is one that arises under the general law. The position may be different in a case involving the extinguishment or modification of a right that has no existence apart from statute. That is because, prima facie at least and in the absence of a recognized legal relationship giving rise to some like right, a right which has no existence apart from statute is one that, of its nature, is susceptible of modification or extinguishment. There is no acquisition of property involved in the modification or extinguishment of a right which has no basis in the general law and which, of its nature, is susceptible to that course' (*Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, 305-306 per Mason CJ, Deane and Gaudron JJ).

24. In *Health Insurance Commission v Peverill* (1994) 179 CLR 226, the same three Justices said it was significant that the rights terminated were 'not based on antecedent proprietary rights recognized by the general law' (179 CLR, 237).

25. Special considerations appear to apply to interests in land granted by statute. Thus in *Newcrest* Brennan CJ held the prohibition on mining to constitute an acquisition consisting of the benefit of relief from the burden of Newcrest's rights to carry on operations for the recovery of minerals (190 CLR, 530). Gummow J referred to 'the use of statute to carve out interests from the particular species of ownership enjoyed by the Commonwealth ...It is not correct, for the purposes of the application of s 51(xxxi) to identify the property held by Newcrest as no more than a statutory privilege under a licensing system' (190 CLR, 635) (see also Dawson J at 547, Toohey J at 560, Gaudron J at 561, Kirby J at 639). McHugh J (in sole dissent on this point) held that Newcrest's interest in the mining leases was 'property' but there was no acquisition because there was no gain by the Commonwealth (190 CLR, 573-574).

26. Extinguishment of proprietary interests granted pursuant to statute will not always amount to an acquisition. In *Commonwealth v WMC Resources Ltd* (1998) 152 ALR 1, the Court held, by majority, that exclusion of an area from WMC's offshore petroleum permit did not constitute an acquisition. Brennan CJ considered the rights to be proprietory in nature and if they had been compulsorily transferred to a third party this would have constituted an acquisition. The modification of WMC's rights did not, however, constitute an acquisition because those rights were not acquired by the Commonwealth (152 ALR, 10). This analysis turned on the absence of any proprietary interest on the part of the Commonwealth in the continental shelf. Gaudron J took a similar view (152 ALR, 25, 27). Equivalent action in relation to land would, it seems, have constituted an acquisition because it would have relieved the Commonwealth of a reciprocal burden on its title to land (152 ALR, 11-12). McHugh J held that WMC's rights, being conferred by statute, 'were always liable to be amended, revoked or extinguished by legislation enacted under (the) same power' (152 ALR, 42). Gummow J relied, in part, on similar analysis: 'Any proprietary rights which were created in respect of the Permit were liable to defeasance. By reason of their nature, upon such defeasance of those rights there would be no acquisition of property to which s 51(xxxi) applied' (152 ALR 57) (see also Toohey and Kirby JJ, in dissent, at 21, 57, 68, 72-3, 75)
27. I have dealt with the foregoing concepts at some length for the reason that they will be critical to the characterization of many of the proposed amendments to the Land Rights Act which would modify or extinguish rights under that Act.
28. Application of these principles to the proposed statutory modification of rights under the Land Rights Act presents considerable difficulty. In *Georgiadis*, Mason CJ, Deane and Gaudron JJ recognised that 'there will inevitably be borderline cases in which the question whether a law bears the distinct character of a law with respect to the acquisition of property for a s 51(xxxi) purpose is finely balanced' (179 CLR, 307). They said *Georgiadis* was such a case. So too are a number of the Reeves proposals. If the Parliament were to act on a narrow view of what constituted a s.51(xxxi) acquisition and implemented 'borderline' proposals without provision for just terms compensation, the legislation would generate uncertainty until the doubt was judicially resolved. In

relation to native title issues a key objective of the Parliament has always been to remove uncertainty. It seems difficult to conceive that the Parliament would now choose by amending legislation to create new uncertainty in relation to Aboriginal land.

Whether the proposal that RLC's hold all Aboriginal land would constitute an acquisition from Land Trusts

29. Under the Land Rights Act as it stands, an estate in fee simple is granted to a Land Trust by the Governor-General on receipt of a recommendation by the Minister (ss 10, 11, 12). A Land Trust is a body corporate (s.4(3)). Its main function is to hold title to land vested in it in accordance with the Act and to exercise its power *as owner* for the benefit of the Aboriginals concerned (s.5, emphasis added).
30. I emphasised the words 'as owner' because it is important to appreciate that the Land Trust is owner of an estate in fee simple. The Land Trust must exercise its functions as owner in accordance with the Act, in particular, in accordance with directions given to it by the Land Council (s.5(2)). The fact that the exercise of the Land Trust's functions is regulated by the Act in no way detracts from the fact that the Land Trust is the owner of an estate in fee simple. There is nothing unusual about statutory regulation of the exercise of powers by a body corporate. Any trustee must of course exercise its powers in accordance with the terms of the relevant trust.
31. Reeves considers the manner in which Aboriginal land is currently held does not correctly reflect Aboriginal tradition. He therefore proposes a radical change in the way the land is to be held. Reeves recommends the establishment of a system of Regional Land Councils (RLC's) (594). One of the three main functions of a RLC should be 'to hold in trust all Aboriginal land in its region' (597). Thus land granted under the Land Rights Act would be held by these new RLC's instead of by the Land Trusts.
32. Chapter 27 of the Reeves Report, dealing with the establishment of RLC's and their land management functions, does not explain what mechanism would be used to effect this change. In

an earlier chapter, he appears to contemplate transfer of the land from the Land Trusts to the RLC's and dissolution of the Land Trusts (Chapter 21, 482).

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

34. I have considered a possible argument that the proposed change would represent a change of form rather than substance and for that reason would not constitute an acquisition. I note in this respect that the title of a Land Trust is subject to change as a result of amalgamation (ss. 4(1B), 4(1C)). The important distinction between this provision and the Reeves proposal is that the amalgamation process is dependent upon the traditional owners being in favour of amalgamation and a request from the Land Council. The changes Reeves proposes would be imposed without any corresponding process. Not only would there be a new owner. That new owner would hold title for the benefit of a new class. 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 Land Trust to the RLC. (Compare also the legislation invalidated in *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1, especially at 348-349 per Dixon J).

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

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

    - Repeal of s.67, removing the current protection against compulsory acquisition (383)
    - Repeal of s.70, removing the current prohibition of entry on Aboriginal land
    - Repeal of s.74 (which prevents application to Aboriginal land of Northern Territory laws that are incapable of operating concurrently with the Act) and wider application of Northern Territory laws, including the *Local Government Act*, to Aboriginal land in the Northern Territory (410, 412-413)
    - New provision for licences to enter Aboriginal land to carry out low level exploration activities. The proposed RLC's would not have any power to veto an application or to require any payment (529, 540).

36. In relation to conventional title, changes of this kind, or at least many of them, would probably be characterized as regulatory, or as adjustment of competing rights, and therefore as not constituting an acquisition. I note in this respect that 'a law which merely regulates the enjoyment of native title' does not extinguish native title (*Mabo [No2]* 175 CLR, 64). Of course, 'property will be deemed to be appropriated even if the interest acquired is only a portion of the interest concerned' (*Minister for the Army v Dalziel* (1944) 68 CLR 261, 290). Alternatively, the rights proposed to be modified may be characterized as statutory rights 'inherently susceptible of variation'. The question for consideration is whether, in the case of the Land Rights Act, a different characterization is required. In my view the answer to that question is 'yes', for the reason that the Land Rights Act establishes a new and unique form of statutory title. The effect of the proposed modifications, either individually or collectively, would be so to diminish essential elements of that title as to constitute an acquisition. 'Property, in relation to land, is a bundle of rights exercisable with respect to land' (*Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 285). In relation

to conventional fee simple, that bundle of rights is to be found primarily in the common law of real property. The traditional rights attaching to traditional Aboriginal ownership are very different. To construe the Land Rights Act as an act that does no more than confer 'ownership' in the common law sense would be fundamentally to misconstrue its effect. For the Land Rights Act establishes a property regime that is not known to the common law. Land is vested communally through the device of Land Trusts. A special statutory regime is put in place for the use and management of that land, rights in relation to that land and protection of those rights. The objects are the substantive restoration of traditional rights together with security and protection for those rights. In relation to Aboriginal land granted under the Land Rights Act, the relevant 'bundle of rights' is to be found not only in the fee simple title but also in the special statutory regime established by that Act, including the statutory rights and the protection of those rights. In the same way as the acquisition of less than the fee simple was in *Dalziel* found to be an acquisition of property, so may be the extinguishment of significant aspects of the bundle of statutory rights relating to Aboriginal land, for example, those provisions conferring protection against destruction by hostile laws or hostile executive action.

37. Key purposes of the Land Rights Act are to grant to Aboriginal people their traditional land in a form that consistently with modern legal structures reflects the systems and attributes of traditional ownership and to protect those interests. In part these objectives are achieved through the vesting of fee simple in Land Trusts. In part, they are achieved through special statutory provision reflecting in a contemporary way other attributes of traditional ownership. These other provisions include communal ownership and control through the device of Land Trusts. They include also the statutory protection of Aboriginal land from construction of roads without the consent of the traditional owners (s.68), conferral of rights of entry on Aboriginal persons in accordance with Aboriginal tradition (s.71) and exclusion of most other forms of entry (s.70), exclusion of Northern Territory laws that are not capable of operating concurrently with the Land Rights Act (s.74) and the protection of Aboriginal land from acquisition by the Northern Territory (s.67). I consider provisions of this kind to be more than mere regulation (which would be subject to change without

giving rise to acquisition issues). Rather, they constitute part of the special form of statutory title established by the Act. It is an integrated scheme. The special nature of the scheme has been recognised in a series of decisions (eg, *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 355, 358, *R v Kearney; Ex parte Northern Land Council* (1984) 158 CLR 365, *R v Kearney; Ex parte Japanangka* (1984) 158 CLR 395). Significant changes to that statutory title may constitute diminution of title giving rise to an acquisition.

38. It does not necessarily follow that each individual change would give rise to an acquisition. Take removal of the current protection against acquisition by the Northern Territory. Toohey J saw s.67 as fundamental to the inalienability of Aboriginal land (*Seven Years On*, para 175). He went on to say that 'the underlying principle is that Territory laws should not be able to divest Aboriginals of their *title* to land' (para 176, emphasis added). Toohey J then drew an important distinction: 'A power to acquire interests in, but not title to, Aboriginal land does not necessarily offend that basic principle' (para 176). He saw a distinction between a power to acquire interests by way of lease or easement and a power to acquire fee simple. Having regard to the conditions and safeguards built in to the Reeves recommendation (Reeves, 383-384), I do not consider that this recommendation on its own would constitute an acquisition (subsequent acquisition of, for example, an easement would of course be an acquisition).
39. Different considerations arise in relation to access.
40. In *Gerhardy v Brown* (1985) 159 CLR 70, (an unsuccessful challenge to s.19 of the *Pitjantjatjara Land Rights Act 1981* (SA), which prohibited any non-Pitjantjatjara person from entering land vested in the Anangu Pitjantjatjaraku body corporate without permission, as being inconsistent with the *Racial Discrimination Act 1975*), Gibbs CJ recognised that the legislature had taken the view that 'to enable the Pitjantjatjaras to live on the land in accordance with their traditions and customs and to maintain their relationship to the land...it is necessary not only that they should own the land but also that they should have full control of access to it' (159 CLR, 87). Mason J accepted that the State Act 'is to be seen as a legislative measure which seeks to convert the traditional land ownership of the Pitjantjatjara people into a modern legal framework approximating as closely as

may be to the central feature of traditional Aboriginal ownership' (159 CLR, 103). Mason J went on to say that 'the object of legislation of this kind is not merely to restore to an Aboriginal people the lands which they occupied traditionally, but also to provide that people with the means to protect and preserve their culture' (159 CLR, 104). Wilson J took a similar view (159 CLR, 113). Brennan J said it was 'artificial to regard s.19 as having a purpose or operation divorced from their use or management of their lands' (159 CLR, 117).

41. The object of the corresponding provision in the Land Rights Act is the same. The historical record confirms that the establishment of the permit system was an important attribute of ownership of Aboriginal land. Woodward J, in para 109 of the *Second Report of the Aboriginal Land Rights Commission,* said

> 'One of the most important proofs of genuine Aboriginal ownership of land will be the right to exclude from it those who are not welcome. The Land Councils believe that this principle should be supported by a permit system and I agree with them.'

42. Woodward J made it clear that the permit system was to be confined to 'Aboriginal traditional land'. It was not to apply to freehold and leasehold title held by Aboriginal bodies (para 122). Since it was not to apply to freehold, it was clearly intended as a special attribute of traditional Aboriginal land, over and above the normal attributes of ownership of freehold. In my view the permit system is part of the special 'bundle of rights' attaching to Aboriginal land. This right is also, in my view, a valuable right. Abolition of the permit system confers a clearly discernible benefit on other persons, namely relief from the obligation to obtain a permit prior to entry on Aboriginal land.

43. The proposed repeal of s.74 together with the proposed wider application to Aboriginal land of certain Northern Territory laws including the *Local Government Act* would enable the application to Aboriginal land of those laws notwithstanding that they are incompatible with traditional use and occupation of that land (see in particular proposed new ss 71(3) and 71 (4), at Reeves, 412). The current protection against incompatibility would be reversed (cf *R v Kearney; Ex parte Northern*

Land Council (1984) 158 CLR 365, 393). Northern Territory laws would therefore be able directly to interfere with use and occupation by Aboriginal people of Aboriginal land.

44. The proposal for the granting of licences for low level exploration activities stand in sharp contrast with the provisions in s.19 relating to dealing with interests in land by Land Trusts. In relation to those provisions, Brennan J said in *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 359

> 'The usufructuary rights of Aboriginals in respect of Aboriginal land, once acquired, might be overridden by the granting of a lease or licence by a Land Trust (s. 19(3)), or by a surrender of that land to the Crown (s.19(4)), but any of those events requires the approval of the traditional Aboriginal owners, and of any Aboriginal community or group that might be affected thereby (s.19(5)(a) and (b)). The Aboriginal people connected with a tract of country were thus made competent to use their country in a non-traditional way *if and when an Aboriginal consensus to do so should be established'* (emphasis added).

45. In the preceding paragraphs I have sought to show the significance of the current protections as attributes of a unique form of title. Considered individually some but not all of the changes proposed by Reeves may give rise to an acquisition. Collectively, the proposed changes would very substantially alter the rights attaching to Aboriginal land. In my view, removal of the current protection against compulsory acquisition by the Northern Territory, removal of the prohibition of entry on Aboriginal land, removal of the protection against application of incompatible Northern Territory laws together with provision enabling application to Aboriginal land of Northern Territory laws that are incompatible with traditional use and occupation of that land and provision for exploration licences over Aboriginal land without Aboriginal consent and without compensation would, together, constitute so significant a diminution of the 'bundle of rights' attaching to Aboriginal land as to constitute an acquisition. Aboriginal people would no longer be able fully to use and manage their lands 'in such a way as to allow their traditional relationship with their country to be enjoyed and their traditional obligations in respect of their country to be fulfilled' (cf, *Gerhardy v Brown*, 159 CLR, 116, per Brennan J). I should, however, emphasise that this

conclusion is based on my analysis of the unique character of Aboriginal land. While I consider the arguments in support of this analysis and conclusion to be powerful, there is no authority directly in point.

Whether proposals for prevention of certain land claims would constitute an acquisition

46. Several of the recommendations in the Reeves report would prevent existing land claims from proceeding. Relevant recommendations are in the form that 'The Land Rights Act be amended to prevent claims to...', 'The Land Rights Act be amended to provide that the areas...are not available for claim', ''The Land Rights Act be amended to provide that the areas...not be available for claim' (247-248).

47. It is in my view clear beyond doubt, having regard in particular to the 'sunset clause' (s.50(2A)), that these recommendations can have application only to claims that have already been made. Indeed, the clear intention is, by 'legislative intervention', to 'determine' those claims (222) or to 'treat them as finally disposed of' (231) or to have them 'removed' (239). The form of these proposals is relevantly indistinguishable from the form of the legislation considered in *Georgiadis* and *Mewett*. Section 44(1) of the *Safety, Rehabilitation and Compensation Act 1988* provided that 'an action or other proceeding for damages does not lie against the Commonwealth...'. In each of these cases the High Court held that the extinguishment of a cause of action against the Commonwealth gave rise to an acquisition of it by the Commonwealth. Because just terms was not provided, the legislation was invalid.

48. Would implementation of these Reeves recommendations similarly effect an acquisition of property? That the proposals would extinguish existing claims (or parts of those claims) is clear beyond doubt. The more difficult question is whether those claims constitute 'property' for the purposes of s.51(xxxi). That requires consideration of the nature of the rights of persons who have made claims under the Land Rights Act.

49. The first obstacle in the way of establishing that the claim is property is that, unlike the common law claims for damages extinguished by s.44(1) of the *Safety Rehabilitation and Compensation Act 1988,* the claim is no more than a statutory right, and therefore inherently susceptible to

extinguishment or defeasance. Extinguishment of the statutory right to claim under the Land Rights Act does not extinguish antecedent rights under the general law. Thus the right to pursue a common law claim to native title is not adversely affected.

50. The second and equally formidable obstacle relates to the nature of the rights attaching to a claim. Do these rights constitute property? It is arguable that a claim is a chose in action. The claimants have a legally enforceable right to have their claim determined in accordance with the Act. In consequence of extinguishment of the right, the Commonwealth is relieved of the burden of resolution of the claim.

51. The difficulty with this approach arises from the very limited rights available to the claimants. No matter how strongly the claimants make out their case, and even if they are successful in securing an affirmative finding and recommendation from the Aboriginal Land Commissioner, the claimants have no legal right to a favourable outcome, that is, to a grant of land. '(T)he purpose of s.50 is to open up the possibility of a grant' (*R v Toohey: Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 345). The making of a grant remains discretionary (s.67(5)(d)) (158 CLR, 334, 349, 362 and compare the legislation considered in *NSW Aboriginal Land Council v Minister* (1988) NSWLR 685, 687, 694). The whole process is administrative. The rights of the claimants can aptly be described as procedural rights – the right to have their claim properly considered and determined. Procedural error in this process may attract judicial review but the claimants have no right to substantive relief (in the sense of an order for the granting of land). Contrast a claimant in a common law action who makes out the facts necessary to establish the cause of action. An administrative claim is not a right protected by s.8(c) of the *Acts Interpretation Act 1901* (*Director of Public Works v Ho Po Sang* [1961] AC 901, 919-912, *Esber v The Commonwealth* (1992) 174 CLR 430, 439-441, *Gerrard v Mayne-Nickless Ltd* (1996) 138 ALR 494, 510-512). To adapt the language of *Ho Po Sang,* the claimants have no more than the hope of a grant. In my view, a land claim under the Land Rights Act, being an administrative application subject to discretionary determination, does not constitute property for the purposes of s.51(xxxi) (cf *R v Kearney: Ex parte Japanangkja* (1984) 158 CLR 395, 417).

52. I note that I have been briefed with extensive material relating to, amongst other things, the right to claim offshore areas. I have perused that material and the relevant authorities. In light of the conclusion that I have reached, that amendment of the Act to prevent these claims from being pursued does not constitute an acquisition, I have not found it necessary to express any view on the difficult legal issues raised by claims in respect of offshore areas.

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

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

54. That native title may be extinguished by inconsistent grant was clearly established by *Mabo v Queensland [No. 2]* (1992) 175 CLR1, 15, 64, 69, 110-111, 195-196. Also apparently established is that, at common law, extinguishment of native title by the Crown by inconsistent grant is not wrongful and does not give rise to a claim for compensatory damages (175 CLR, 15, 63, cf 111, 194). This somewhat surprising result is reached on the basis of what may now be seen as a technical majority (drawing on Dawson J who was substantially in dissent). Reasoning in support is meagre. No attempt is made substantively to address the contrary views of Deane, Toohey and Gaudron JJ. There may well be some prospect of re-opening this point. In any event, the majority did not address the application of s.51(xxxi) of the *Constitution.* It seems reasonably clear that native title rights are legal rights legislative extinguishment of which by the Commonwealth would constitute an acquisition for the purposes of s.51(xxxi). This was the view of Gummow J in *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513, citing Deane and Gaudron JJ in *Mabo [No 2]* as authority for the proposition that 'legislation...which is otherwise within power but is directed to the extinguishment of what otherwise would continue as surviving native

title (or which creates a 'circuitous device' to acquire indirectly the substance of that title), may attract the operation of s.51(xxxi)' (190 CLR, 613) (in relation to the Northern Territory, s.50(1) of the *Northern Territory Self Government Act 1978* makes corresponding provision). Also, the conclusion of the majority was expressly 'subject to the operation of the *Racial Discrimination Act 1975'* (*Mabo [No 2], 15*). The Parliament has elected not to override the *Racial Discrimination Act 1975* (*Native Title Act 1993*, s.7). I will assume, for the purposes of this part of the advice, that the *Racial Discrimination Act 1975* will continue to be applied to any future extinguishment of native title. In consequence any acquisition of native title will require provision of compensation.

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

> 'Native titles may be extinguished by grants of freehold because such grants are inconsistent with the continued preservation of native title. A grant of an estate in fee simple to a Land Trust under the Land Rights Act is not however a grant that extinguishes native title; indeed the two co-exist harmoniously. Land is granted to Land Trusts under the Land Rights Act to preserve native titles and Aboriginal interests and is not inconsistent with the continued enjoyment of native title'(42 FCR, 44).

56. In my view that conclusion (and the detailed reasoning that preceded it) is correct.
57. Reeves notes that the High Court refused special leave to appeal from the decision of the Federal Court but the majority of the Court (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ, Deane and Gaudron JJ dissenting) (Reeves at 449 incorrectly includes McHugh J among the dissentients, see Transcript, 13 April 1994, 90) said they were 'not to be taken as necessarily agreeing with the conclusion of the Full Court that the grant of an estate in fee simple to a Land Trust under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) is consistent with the preservation of native title to the land the subject of that grant'(13 April 1994, 90, unreported). This somewhat

curious and inconclusive passage was preceded by a statement by Mason CJ that what he was about to say 'represents the views of the majority of the Court, Justices Deane and Gaudron dissenting'. Although the statement may be ambiguous, I understand it to mean that Deane and Gaudron JJ dissented from that part of the reasons in which the majority said they were not to be taken as necessarily agreeing with the conclusion of the Federal Court. I note also that, of the seven Justices who constituted the Court in *Pareroultja*, only two remain, Gaudron J and McHugh J. Gaudron J was in the minority and McHugh J was in the majority. In the circumstances I do not think that much weight can now be attached to the inconclusive observation concerning the conclusion of the Federal Court.

58. Extinguishment has been considered by the High Court, the Federal Court and the National Native Title Tribunal in subsequent cases. I have not been able to find any subsequent expression of disapproval of *Pareroultja* (or any expression of doubt).

59. In *Fejo v Northern Territory* (1998) 156 ALR 721, [1998] HCA 58, the question of extinguishment of native title by freehold grant arose directly for decision. The language of the main judgment appears unequivocal : 'Native title is extinguished by a grant in fee simple' (156 ALR, 736, [1998] HCA 58, 43, per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). Kirby J wrote to similar effect (156 ALR, 157, [1998] HCA 58, 107). At first sight, it may appear that, in light of this seemingly unequivocal proposition, *Pareroultja* can no longer stand. Yet the supporting reasoning is not inconsistent with *Pareroultja.* The basis for the unequivocally expressed proposition is explained in the following sentence of the main judgment : 'And it is extinguished because the rights that are given by a grant in fee simple are rights that are inconsistent with the native title holders continuing to hold any of the rights or interests which together make up native title.' (ibid). A little later in the judgment their Honours say ' The rights of native title are rights and interests that relate to the use of the land by the holders of the native title....They are rights that are inconsistent with the rights of a holder of an estate in fee simple' (156 ALR, 737, [1998] HCA 58, 47). The inapplicability of that reasoning to the situation where '(l)and is granted to Land

Trusts under the Land Rights Act to preserve native titles and Aboriginal interests' (42 FCR,44) is in my view plain.

60. According to Reeves (448) the Commonwealth argued in *Fejo* that *Pareroultja* should be overruled (this is not apparent from the transcript). The Court clearly had the opportunity to express its disapproval of *Pareroultja* but it did not do so. Indeed, Kirby J referred to *Pareroultja* with apparent approval (156 ALR, 758, [1998] HCA 58, 110).

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

62. As already indicated, I consider the decision and the detailed reasoning in *Pareroultja* to be correct. I also consider that, in light of subsequent citation of the case and the fact that the High Court did not take the opportunity to express disapproval, the decision remains authoritative. A grant of an estate in fee simple to a Land Trust under the Land Rights Act does not give rise to the inconsistency necessary for extinguishment of native title. New provision for legislative extinguishment would, it seems, confer a benefit through the expansion of radical title (*Mabo [No 2]*, 175 CLR, 60, 69). Implementation of the Reeves recommendation for legislative extinguishment would constitute an acquisition requiring provision for

compensation. Quantification of the compensation, having regard to the cause of extinguishment, would raise questions of some difficulty. On the basis that Aboriginal people place special value on native title (which is held as of right rather than in consequence of grant), it would not be safe to assume that compensation would be nominal.

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

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

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

65. The considerations relating to grants of community living areas are similar to but not identical with those relating to grants under the Land Rights Act. Reeves argues that the criteria for applications for grants of community living areas differ from the criteria for native title claims (467). There is some force in this argument. The difference may be greater than is the case under the Land Rights Act. Reeves argues also that such grants are 'deemed by s. 46(1B) of the *Lands Acquisition Act* (NT) to be "freed and discharged from native title rights and interest"' (468). I can find no such reference to native title in s.46(1B). The section provides that land is granted 'freed and discharged from all other interests, trusts, restrictions, dedications, reservations, obligations, encumbrances, contracts, licences, charges or rates of any kind, and for this purpose any interest that a person had in the granted land is divested or modified to the extent necessary to give effect to this subsection'. This provision is widely expressed. It is arguable that its effect is to extinguish native title. On balance, and having regard to the need for a clear and plain intention, to the examples given in *Mabo [No 2]* of legislative and executive acts which would be consistent with the

preservation of native title and to the decisions of the Federal Court in *Pareroultja* and particularly in *Ward* ([1998] 1478 FCA (24 November 1998), 86), I consider that these provisions do not exhibit the necessary intention to extinguish native title. Implementation of the Reeves recommendation for legislative extinguishment would require provision of compensation.

Whether the proposals for taking over the assets of Royalty Associations would constitute an acquisition

66. In Chapter 28 Reeves recommends that "The existing assets and liabilities of the Royalty Associations will be taken over and rationalised' (609).

67. In Chapter 16 Reeves recommends that '...all other income from activities on Aboriginal land should be applied by NTAC or the RLC's to particular purposes...'(368). The identified purposes include 'scholarships, housing, health etc'. These are purposes that would ordinarily be seen as within the responsibilities of government.

68. Reeves explains that he includes within the expression 'royalty association' any of the following incorporated Aboriginal associations:

    - An association the members of which live in an area affected by mining operations and which receive MRE's (mining royalty equivalents) from a Land Council
    - An association that receives moneys paid under an agreement in relation to exploration and mining pursuant to the provisions of the Land Rights Act (such an agreement may include, for example, provision for payment of compensation for damage or disturbance to Aboriginal land (Land Rights Act, s.44A(1), and see generally ss35(3), 42, 43, 44, 46, 48A, 48B, 48D)
    - An association of traditional Aboriginal owners that receives moneys payable under other provisions of the Land Rights Act including fees received in relation to the operations of national parks and lease or licence payments made pursuant to other provisions of the Act (these include, for example, rent for use of Aboriginal land) (Reeves, 312-313).

69. Reeves goes on to note that Royalty Associations have many other income sources including 'income received from commercial enterprises and investments' (Reeves, 313). The

recommendation in Chapter 16 is expressed to apply to 'all other income from activities on Aboriginal land' (368). It would therefore apply also to all these other income sources, including the many successful business enterprises. Some of the relevant payments would as I understand it be paid in the first instance to Land Councils, sometimes pursuant to commercial agreements, and distributed by the Land Councils to the Royalty Associations.

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

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

72. In my view, for reasons the same in substance to those set out in para 32 above, the acquisition from associations incorporated under the relevant Commonwealth and Northern Territory laws of their assets and from the Land Councils of contractual and other rights, as proposed, would constitute acquisition of property for the purposes of s.51(xxxi) .

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

73. Reeves 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 (247). He suggests 'This confirmation could be achieved by including a reservation to the Crown of the ownership of all living fish and native fauna on Aboriginal land in the Northern Territory similar to the reservations contained in s. 12(2) of the Act' (232). Section 12(2) is in the form 'A deed of grant under this section shall be expressed to be subject to the reservation that...' (Followed by a reservation of the right to minerals). Reeves appears to have in mind, however, a 'reservation' that would apply to past grants as well as to future grants.

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

75. In so far as the recommendation is intended to apply also to existing grants, different considerations apply. The recommendation would require the 'reservation', out of the existing title, of 'ownership of all living fish and native fauna'. This recommendation appears to be based on a proposition in an earlier paragraph that '(A)t common law, fish, like other living wild animals, are incapable of being owned until they are killed or caught'(232). The problem with this analysis is that it fails to take account of the usufructuary nature of native title (*Mabo v Queensland [No 2]* (1992) 175 CLR 1, 51-52). It also fails to take account of relevant Australian authority. Directly relevant is the judgment of Kirby P in *Mason v Triton* (1994) 34 NSWLR 572, that 'a 'right to fish' based upon traditional laws and customs is a recognisable form of native title defended by the common law of Australia (579 per Kirby J, see also 580-582, see also 600 per Priestley JA). This passage was adopted by Franklyn J in *Derschaw v R* (1996) 90 A Crim R 9, 12, with whom Murray J agreed (90 A Crim R, 36). In *Dillon v Davies* (1998) 156 ALR 142, Underwood J appears to proceed on the same basis (see especially at 146) as does Lee J in *Ben Ward v State of Western Australia* ([1998] 1478 FCA, 122). In *Fejo v Northern Territory of Australia* [1998] HCA 58 (10 September 1998), the High Court was prepared to assume 'that those rights may encompass a right to hunt, to gather or to fish' (47, per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne, Callinan JJ). A similar view has been taken in Canadian authorities (*R v Sparrow* [1990] 1 SCR 1075, *Van der Peet v R*, [1996] 2 SCR 507). It is also the assumption on which ss 211(3) and 223(2) of the *Native Title Act 1993* are based. Olney J in *Yarmirr v Northern Territory of Australia* (1998) 156 ALR 370, notes that s.223(2) may preserve a right to fish in a case in which native title to possess or occupy land has been extinguished (156 ALR, 406). The proposed determination in *Yarmirr* included a

determination that '(T)he native title rights and interests which the court considers to be of importance are the rights of the common law holders ...(b) to fish...' (156 ALR, 439).

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

Whether the proposal to remedy the 'error' in relation to the Elliott Stockyards would constitute an acquisition

77. Reeves says the Elliott 'stockyards were apparently included, in error, in the land grant made to the Gurungu Aboriginal Land Trust on 12 December 1991. It was always the intention of the authorities, when making this grant, to exclude the Elliott stockyards' (267). He goes on to recommend 'that this obvious error be remedied' (267, also 270). Reeves does not cite any authority for his assertion as to 'the intention of the authorities, when making this grant'. Nor does he refer to the relevant legislation.

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

79. It may, of course, be the case that an error was made in the legislation itself. Indeed, the historical record suggests this may be the case. Provision for inclusion of the Elliott Locality in Schedule 1 was originally made by the *Aboriginal Land Rights (Northern Territory) Amendment Act 1990.* In his second reading speech the Minister said 'In accordance with concerns raised by the Northern Territory, an area used for cattle yards and a dip at Elliott has been excluded from the area to be scheduled' (House of Representatives Hansard, 31 October 1989, 2152). The relevant part of the

Schedule then inserted excluded ‘an area of 2.72 hectares more or less and known as an area for cattle yards and dip...’.It appears that the problem (if it is a problem) arose when the *Aboriginal Land Rights (Northern Territory) (Land Description) Regulations* (No 115 of 1991) amended the Schedule by omitting the original description of the Elliott Locality and inserting a new description. This is the description that appears in the current Act. I understand that, unlike the original description, the new description includes the stockyards. I am not aware of the reasons for the change to the description in the Schedule. One possible explanation is that the intention changed in that it was decided that the area of the stockyards should be made available for grant. It is also possible that the description was changed for some unrelated reason and that in the course of making the change an error occurred. I do not have access to any explanation for the change to the description. In any event, the subsequent grant was made in accordance with the new Schedule.

80. Reeves does not explain what he has in mind when he proposes that ‘this obvious error be remedied’. On the basis that, if an error was made, the relevant error occurred in the 1991 amendment to the Act, that the grant was in accordance with the Act, and that the grant was made over 7 years ago I do not see any scope for application of ‘the slip rule’. Any rectification can now be effected only by voluntary surrender, under s.19(4) of the Land Rights Act, or by acquisition. An acquisition would require provision for compensation.

PART II : CULTURAL PROTECTION, RACIAL DISCRIMINATION, AND RELATED ISSUES

1. In this Part, I examine

- Whether implementation of the recommendations would give rise to breach of Australia's obligations under the International Covenant on Civil and Political Rights
- Whether implementation of the recommendations would be inconsistent with the principles of the *Racial Discrimination Act 1975,* would give rise to breach of Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination and would put at risk the constitutional validity of the *Racial Discrimination Act 1975*
- Whether legislation implementing the recommendations would be invalid by reason of relevant limitation of the power in s.51(xxvi) of the *Constitution* to beneficial laws.

2. I conclude that, having regard to the history of Aboriginal disadvantage,

(i) implementation of the following recommendations, either individually or cumulatively, could give rise to breach of Australia's obligations under the International Covenant on Civil and Political Rights

- Repeal of s.70 of the Land Rights Act together with repeal of Part II of the Aboriginal Land Act (NT) (the prohibition of entry on Aboriginal Land and the permit system) (paras 34-38)
- Repeal of s.74 and amendment of s.71 of the Land Rights Act to remove the current protection against application to Aboriginal land of inconsistent Northern Territory laws and instead to enable application of a wide range of Northern Territory laws to Aboriginal land notwithstanding negative effects on the use and occupation of that land (paras 39-40)
- Repeal of ss 67 and 68 of the Land Rights Act (which protects Aboriginal land against resumption by the Northern Territory and against construction of roads without Aboriginal consent) and insertion of new provisions with the result that Aboriginal land may be compulsorily acquired by the Northern Territory and roads may be constructed over Aboriginal land without Aboriginal consent (paras 41-42)
- Reservation to the Crown of ownership of all living fish and native fauna on Aboriginal land together with a joint management regime in which conservation and other interests would override Aboriginal interests (para 43).

- Amendment of the Land Rights Act and the *Mining Act* (NT) to make provision for licences to enter Aboriginal land for reconnaissance exploration without Aboriginal consent (paras 44-48).
- Transfer of all Aboriginal land into 18 separate regions with 18 new Regional Land Councils becoming the trustees and carrying out the trustee duties presently carried out by the Land Trusts together with provision for the Northern Territory Aboriginal Council to be able to intervene in the affairs of the Regional Land Councils (paras 49-57).

(ii) implementation of the following recommendations would be inconsistent with the principles of the *Racial Discrimination Act 1975*, would give rise to breach of Australia's obligations under the International Convention for the Elimination of All Forms of Racial Discrimination and would put at risk the constitutional validity of the *Racial Discrimination Act 1975* (paras 59-111)

- Dissolution of the Land Trusts and the vesting of Aboriginal land in Regional Land Councils subject to intervention by the Northern Territory Aboriginal Council, the members of which are appointed by the Commonwealth and Northern Territory Governments
- Taking over the assets of Royalty Associations and all other income from activities on Aboriginal land

(iii) the validity of implementation of the recommendations would not be at risk by reason of possible limitation of s.51(xxvi) of the *Constitution* to beneficial laws (paras 112-117)

Preliminary

3. Implementation of the Reeves recommendations requires consideration of Australia's obligations under international law including general principles of international law and treaties to which Australia is a party. International law imposes constraints on States in relation to treatment of ethnic and indigenous minorities. International law also imposes positive obligations on States to protect the rights of ethnic and indigenous minorities. Aboriginal people are a minority indigenous people with their own culture.
4. Particularly relevant to implementation of the Reeves recommendations are the so-called 'International Bill of Human Rights', and the International Convention on the Elimination of All Forms of Racial Discrimination (the Racial Discrimination Convention).

5. Further principles of international law relating specifically to the rights of indigenous peoples are being developed. ILO Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries makes extensive provision for protection of the rights of indigenous people. That convention has, however, attracted only modest support. Australia is not a party. Also relevant is the draft Declaration on the Rights of Indigenous Peoples, currently being considered by the Commission on Human Rights. While some argue that the ILO Convention and the draft Declaration are evidence of evolving international standards, that view is not universally accepted. Because of the substantial uncertainty whether the principles in the ILO Convention and the draft Declaration have developed into rules of law binding on States, I will not deal with them further.
6. Of the components of the International Bill of Rights, it is sufficient to refer to the International Covenant on Civil and Political Rights (the Covenant). Equality and non-discrimination 'constitute the dominant single theme of the Covenant' (Ramcharan, Equality and Discrimination, in Henkin, *The International Bill of Rights* (1981)). The Racial Discrimination Convention deals directly and specifically with discrimination on the grounds of race. Australia is a party to both the Covenant and the Racial Discrimination Convention. It follows that Australia is bound by the obligations established by these instruments. Australia is also a party to the First Optional Protocol to the Covenant (enabling individual complaints of violations to be made to the Human Rights Committee at Geneva). I add that equality and non-discrimination are widely accepted as binding principles of customary international law.

The International Covenant on Civil and Political Rights

7. Articles 2 and 26 of the Covenant set out a series of fundamental principles relating to equality and non-discrimination. Article 17 provides, inter alia, that '(N)o one shall be subject to arbitrary or unlawful interference with his privacy'. Article 27 provides special additional protection for minority cultures. For present purposes, it is the key provision. Article 28 establishes the Human Rights Committee, the main functions of which are to consider country reports made under Article 40 and individual complaints made under the Optional Protocol.

8. Article 27 of the Covenant provides as follows

> Article 27
>
> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

9. Some preliminary observations may be made. Article 27 speaks of persons – it does not confer international legal personality on the minority group. The Article protects the right of members of an ethnic minority to act together, 'in community with the other members of their group', to enjoy their culture and to profess and practice their religion. What are protected are individual rights which may be exercised as members of a group. Through the protection of individual rights, group rights are also protected. Together with Article 18, Article 27 guarantees the right to practise religion in private. Article 27 does not permit any derogation. Article 2 requires States 'to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant'.

10. Numerous recommendations made by Reeves would remove or diminish existing measures for the protection of Aboriginal culture, giving rise to breach of these provisions, or to the risk of breach. It is necessary to consider the cumulative effect of the recommendations as well as the effect of individual recommendations in isolation. Before considering the application of the Covenant to particular recommendations it is convenient to consider the construction of the relevant provisions.

11. A threshold question is at what stage a violation of the Covenant may be said to occur. In respect of some of the individual recommendations made by Reeves, it may be argued that they do not *directly* deny to Aboriginal people the right to enjoy their own culture. Arguably, denial does not occur until, for example, repeal of s.70 (the prohibition of entry onto Aboriginal land) leads to an actual entry onto Aboriginal land during a ceremony, or the removal of protection against compulsory acquisition leads to actual acquisition of, for example, a sacred site.

12. The answer to such argument is that, although Aboriginal people may in practice be able to enjoy their culture until an actual interference occurs, the relevant legal issue is whether Aboriginal people have the legal *right* to enjoy their culture without interference. Article 27 is not to be interpreted as if it were a domestic statute. Consistently with international human rights jurisprudence, the Article is to be understood as imposing a positive obligation on states. What Article 27 requires is not merely actual enjoyment by members of ethnic minorities of their own culture but also the legal right to that enjoyment. Mere sufferance of an ethnic minority is not enough. The ethnic minority must enjoy their culture *as of right.* The cumulative effect of recommendations made by Reeves, as analysed below, would be so to diminish those rights as to give rise to breach of Article 27. Some individual recommendations may also give rise to breach.
13. It is important, in this respect, not to confuse the jurisdiction of the Human Rights Committee established under Article 28 with the obligations of State parties to the Covenant under Article 27. The two are not necessarily co-extensive. The Committee has at times taken a relatively narrow view of its jurisdiction (but a much broader view of the obligations of states under the Covenant). As to jurisdiction, the Committee has taken the view that 'it has only been entrusted with the mandate of examining whether an individual has suffered an actual violation of his rights. It cannot review in the abstract whether national legislation contravenes the Covenant' (*Hertzberg v Finland,* Communication No 61/1979, Thirty Seventh Session, 2 April 1982, para 9.3). Thus part of a complaint by Sami reindeer breeders in Finland alleging *expected* logging operations was inadmissible (*O. Sara v Finland*, Communication No 431/1990, Fiftieth Session, 9 July 1991, paras 5.1, 5.3). The explanation for this view is to be found in the language of Article 1 of the Optional Protocol to the Covenant, by which States Parties recognize the competence of the Committee to receive and consider communications from individuals who claim to be victims of a violation. A person is not seen to be a 'victim of a violation' merely because legislation contravenes the Covenant. They must be 'actually affected' (*O. Sara v Finland,* supra).
14. More recently, however, in relation to a complaint by Nicholas Toonen that provisions of Tasmania's Criminal Code which criminalized various forms of sexual contacts between men

(including all forms of sexual contacts between consenting adult homosexual men in private) violated the Covenant, the Committee was satisfied that Toonen 'could be deemed a victim' for the reason that he 'had made reasonable efforts to demonstrate that the threat of enforcement and the pervasive impact of the continued existence of these provisions on administrative practices and public opinion had affected him and continued to affect him personally , and that they could raise issues under articles 17 and 26 of the Covenant' (*Toonen v Australia*, Communication No 488/1992, Fiftieth Session, 31 March 1994, para 5.1).

15. It appears, therefore, that there may be some doubt whether a Government decision to implement the Reeves recommendations, and passage of implementing legislation, would in all cases provide sufficient basis for an admissible complaint to the Committee. A complaint by an Aboriginal person alleging violation of the Covenant may be admissible only if the complainant was 'actually affected'. An Aboriginal person whose property is expropriated would be actually affected. An Aboriginal person whose protection from adverse laws is removed would need to be able to show some adverse effect arising from removal of the former protection, eg, the cancellation of ceremonies because previous privacy protection has been removed. Later practice of the Committee, referred to below, indicates that, at least where some effect is established, the Committee will have regard also to the threat posed by future activities.
16. Turning then to the nature of the obligations imposed by the Covenant, it is now well established that, notwithstanding the apparently limited jurisdiction of the Committee, the Covenant and in particular Article 27 imposes on states parties to the Covenant positive obligations to protect rights. In my view, implementation of a number of the Reeves recommendations would significantly diminish the right of Aboriginal people to enjoy their own culture and would be contrary to Australia's obligations.
17. Support for the view that the Covenant imposes positive obligations is to be found in the 'general comments' made under Article 40(4) by the Human Rights Committee established under Article 28, in the Committee's 'Communications' in relation to individual complaints and in the writings of publicists.

18. In the Human Rights Committee's Annual Report to the United Nations General Assembly, U.N. Doc. A/49/40 vol. 1 (1994), the Committee considered in depth the interpretation of Article 27 and reported as follows (General Comment No 23 (50))

> Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a "right" and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party…. The Committee concludes that article 27 relates to rights whose protection imposes specific obligations on States parties.' (Annex V, paras 6.1, 9)).

19. In General Comment No 23 (50), the Human Rights Committee also observed

> 'that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection to ensure the effective participation of members of minority communities in decisions which affect them' ((para 7).

20. In support the Committee referred to *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada* (Communication No 167/1984, Forty-fifth Session, 26 March 1990), a case in which the Committee upheld in substance a claim that expropriation of the Lubicon Lake Band's land for commercial interest (oil and gas exploration) constituted a violation of Article 27 (paras 2.1, 29.1, 33). The Committee recognized 'that the rights protected by Article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong' (para 32.2).

21. The Committee has previously recognised that 'not every interference can be regarded as a denial of rights within the meaning of article 27' (*Lovelace v Canada,* Communication No 24/1977,

Thirteenth Session, 30 July 1981, para 15). Thus, while statutory restrictions on the right of members of an ethnic minority to reside on a reserve cannot be ruled out, any such restrictions 'must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole' (*Lovelace v Canada*, supra, para 16). In that case the Committee determined that the right of an Indian woman 'to access to her native culture and language "in community with the other members of her group," ha(d) in fact been, and continues to be interfered with' in circumstances where by marriage to a non-Indian the woman had lost her legal status as a Indian. Accordingly the facts disclosed a breach by Canada of Article 27.

22. Subsequently, in *Kitok v Sweden* (Communication No 197/1985, Thirty-third Session, 27 July 1988), an unsuccessful claim by a Sami that he had lost his right to reindeer herding because he had lost his membership of his Sami village (the necessary condition for the exercise of the right), the Committee expanded on these principles. In that case the Committee concluded that limitation of the right to engage in reindeer breeding to members of the Sami villages was reasonable and consistent with Article 27 (para 9.6). Referring to *Lovelace v Canada*, the Committee said ''a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification *and to be necessary for the continued viability and welfare of the minority as a whole'* (para 9.8, emphasis added). Whether the relevant Reeves recommendations satisfy these tests may be thought to raise questions of fact and degree on which minds may differ. My view (for the reasons developed below) is that the Reeves Report does not establish the necessary justification.

23. Two further important decisions, *Lansman v Finland*, Communication No 511/1992, Fifty-second Session, 26 October 1994 and *Jouni E. Lansman v Finland*, Communication No 671/1995, Fifty eighth Session, 30 October 1996, concern complaints by Sami reindeer breeders that (in the first case) quarrying of stone and its transportation through their reindeer herding territory and (in the second case) logging and the construction of roads would violate their rights under Article 27 to enjoy their own culture which has been traditionally based on reindeer husbandry.

24. In the first case, Finland conceded that 'culture' in Article 27 'covers reindeer herding as an "essential component of the Sami culture " ' (para 7.3), but submitted that

- the activities complained of were insignificant (para 7.9).
- not every measure which in some way altered previous conditions could be construed as adverse interference contrary to Article 27 (para 7.10).
- States enjoy a certain degree of discretion in applying Article 27 (para 7.12).

25. The Committee substantially agreed with these submissions, determining that 'measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27' (para 9.4). The Committee considered the question to be 'whether the impact of the quarrying...is *so substantial* that it does effectively deny to the authors the right to enjoy their cultural rights' (para 9.5, emphasis added). The Committee also recalled paragraph 7 of its general comment on Article 27, 'according to which minorities or indigenous groups have a right to the protection of traditional activities such as hunting, fishing...and that measures must be taken "to ensure the effective participation of members of minority communities in decisions which affect them"' (para 9.5). The Committee concluded on the facts that the quarrying that had already taken place did not amount to breach of Article 27. With regard to the Sami concerns about future activities, the Committee said that these must be carried out in a way that the Sami continue to benefit from reindeer husbandry. If mining activities were to be approved on a large scale this may constitute a violation of Article 27. Finland was under a duty to bear this in mind when extending existing contracts or granting new ones (para 9.8).

26. In the second case, the issues and the submissions of the parties were in many respects similar. Again, the Committee saw 'the crucial question to be determined' to be 'whether the logging...is of such proportions as to deny the authors the right to enjoy their culture' (para 10.4) Again, the Committee was unable to conclude on the facts that the logging activities constituted such a denial (paras 10.5, 11). Matters which influenced the Committee included the fact that Finnish authorities 'did go through the process of weighing the authors' interest' and that the 'domestic courts considered specifically whether the proposed activities constituted a denial of

article 27 rights' (para 10.5). The scale of future approved logging activities did 'not appear to threaten the survival of reindeer husbandry' (para 10.6). If, however, 'logging plans were to be approved on a scale larger than that already agreed to for future years ...or it could be shown that the effects of logging already planned were more serious than can be foreseen at present, then it may have to be considered whether it would constitute a violation...' (para 10.7). The Committee went on to say that it 'deems it important to point out that the State party must bear in mind when taking steps affecting the rights under article 27, that though different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of Sami people to enjoy their own culture' (para 10.7).

27. The requirements of the Covenant in relation to Sami people have been given detailed attention in Norway, particularly by the Norwegian Sami Rights Committee. In the Summary of the First Report of the Committee, particular emphasis is placed on two aspects, preservation of culture and positive obligations, being a requirement for 'positive special advantages for ethnic minorities to the extent necessary to enable them to preserve and enjoy their own culture' (4, 5, 13). 'The minority must be provided with the necessary means to maintain and carry on their culture' (p 6). On the positive discrimination issue, the summary is categorical: 'There is no doubt about the fact that Article 27 authorizes a claim to positive discrimination' (p.16). It is concluded that 'the provision today imposes a certain obligation on the states to give more active support, ie to provide favourable conditions enabling the minority to safeguard and carry on their culture' (p19). The summary concludes that 'The provision imposes an obligation on the Norwegian State to take active steps to ensure that Sami culture is carried on in Norway' (p 20).

28. Chief Justice Carsten Smith, the first Chairman of the Sami Rights Committee, in a recent publication, Carsten Smith, 'The Development of Sami Rights since 1980' in *Becoming Visible – Indigenous Politics and Self-Government* (eds Terje Brantenberg, Janne Hansen, Henry Minde) The University of Tromso, Sami dutkamiid guovddas – Centre for Sami Studies, Tromso, Norway (1995) said

A principal point is that (Article 27) stipulates requirements for *special measures* positive discrimination. The whole point of the regulation is that it shall provide special protection for minorities. A state which has an ethnic minority, will therefore not fulfil its obligations merely by ensuring equal legal treatment of all its citizens, that is to say by avoiding negative discrimination. The principle of formal equality of citizens is therefore no longer an expression of the extent of protection under international law with regard to minorities...

The second principal point in the interpretation relates to the understanding of the *culture concept,* whether it only encompasses the ideal forms of expression such as literature, theatre etc., or also comprises the *material foundation* for the culture of an ethnic minority. The use of natural resources and other economic conditions should be included to the extent that they are crucial for the group's ability to maintain and carry on its own culture (p 2, emphasis in original).

29. Turning to Article 17, the protection against arbitrary interference with privacy, in *Hopu and Bessert v France* (Communication No 549/1993, Sixtieth session, 29 July 1997) the Committee concluded that construction of a luxury hotel complex on the ancestral burial grounds of ethnic Polynesians in Tahiti constituted interference with the right to privacy (para 10.3). On the basis that the 'State party has not shown that this interference was reasonable in the circumstances, and nothing in the information before the Committee shows that the State party duly took into account the importance of the burial grounds for the authors, when it decided to lease the site for the building of a hotel complex', the Committee concluded 'that there has been an arbitrary interference with the authors' right to family and privacy (para 10.3). It appears from this communication that, once it is established that privacy is interfered with, the Committee will look to the State party to establish that the interference was otherwise than arbitrary. The State party will be expected to establish that interference was reasonable in the circumstances and that the importance of the rights of those whose privacy was interfered with was taken into account.
30. In light of these authorities, the following principles emerge

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

31. I note also that in its most recent native title determination, *Mualgal People v State of Queensland* [1999] FCA 157, the Federal Court determined the nature and extent of the native title interests to be to

    '(a) live on and build structures on the determination area;

(b) maintain and manage the determination area for the benefit of the Mualgal people, including to:

(i) conserve and safeguard the natural resources of the determination area;

(ii) make decisions and impose conditions about the use and enjoyment of the determination area and its natural resources by the Mualgal people and other persons;

(iii) make decisions and impose conditions about access rights to the determination area by other persons;

(c) use and enjoy the determination area and its natural resources for social, cultural, economic, religious, spiritual, traditional and customary purposes, including to:

(i) hunt, fish and gather;

(ii) exercise and carry out economic activities on the determination area including to grow, produce and harvest; and

(iii) engage in trade;

(d) exercise cultural, spiritual, religious, traditional and customary rights and discharge such responsibilities on the determination area, including to:

(i) preserve sites on the determination area of significance to the Mualgal people and other Torres Strait Islanders;

(ii) decide on, carry out and pass on the culture, traditions and customs of the Mualgal people which apply to the determination area;

(iii) conduct and maintain cultural, spiritual and religious practices and institutions through ceremonies and proper and appropriate maintenance and use of the determination area;

(iv) inherit, dispose of or give native title rights and interests in the determination area to others;

(v) resolve disputes between the common law holders and other parties in relation to the determination area; and

(vi) conduct burials on the determination area.'

32. This determination is, in my view, a valuable illustration of the cultural rights in relation to Aboriginal or Torres Strait Islander land that may be protected by Article 27.

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

Repeal of s.70 of the Land Rights Act - access and permits

34. The proposed repeal of s.70 of the Land Rights Act (the current prohibition of entry onto Aboriginal land) together with the proposed repeal of the permit system (309) would substantially weaken the existing capacity to close Aboriginal land for ceremonies, leading to risk of entry onto Aboriginal land contrary to cultural constraints, including interference with ceremonies and interference with privacy. In an earlier part of this advice, in the context of acquisition and compensation issues, I expressed the view that a key purpose of the Land Rights Act was to grant to Aboriginal people their traditional land in a form that consistently with modern legal structures reflects the systems and attributes of traditional ownership. In part this was achieved through a series of special statutory provisions, including special forms of statutory protection. It is true that

this protection goes beyond the normal protection afforded to the owners of non Aboriginal land. That is not done without reason. Special protection may, for example, be necessary to ensure the enjoyment of Aboriginal culture (non-Aboriginal culture does not have the same emphasis on private ceremonies and sacred sites). Protection is consistent also with the positive obligation of states to provide protection for minorities against private individuals, the right of Aboriginal people to live on their own land protected by law and the right of Aboriginal people to protection of their culture.

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

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

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

38. I add that in light of *Hopu and Bessert v France* (supra) I think it unlikely that the Committee would uphold as reasonable a general decision to open all roads to towns notwithstanding interference with the privacy of Aboriginal communities. The grounds that might in particular circumstances justify an interference with Aboriginal culture are not made out.

Application of Northern Territory laws

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

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

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

Removal of protection against Northern Territory acquisition

41. Sections 67 and 68 of the Land Rights Act protect Aboriginal land against resumption by the Northern Territory and against construction of roads without Aboriginal consent. These provisions are part of the special statutory scheme of protection of Aboriginal land. Reeves recommends repeal of these provisions and the insertion of new provisions enabling the acquisition of interests in Aboriginal land for public purposes subject to a special statutory procedure requiring notification to the Land Council and an Act of Parliament (383). No special protection (in the sense of a requirement for special reasons or a requirement that special weight to be given in the decision making process to preservation of Aboriginal culture) would remain. The current protection would therefore be removed. What would be put in its place would require a special procedure but no substantive weight would be required to be given to Aboriginal interests.
42. No power to acquire interests in Aboriginal land is necessary to enable the provision of services to Aboriginal people in accordance with arrangements with which Aboriginal people agree. Compulsory acquisition is necessary only in the absence of agreement. It follows that the proposed power is necessary only to enable acquisitions contrary to Aboriginal wishes. I add that mere existence of the power may serve to coerce Aboriginal people into agreement. Conferral of the power to acquire interests in Aboriginal land may not itself constitute a breach of Article 27. The detriment, or risk of detriment, may not be sufficiently substantial, at least until the exercise of the power (or threatened exercise of the power) in a manner adverse to Aboriginal rights. Nevertheless, I think that the Committee would consider this proposal, involving the removal of an existing protection and the creation of the means for future interference with cultural rights without any need to satisfy an overriding ‘national interest’ requirement, seen in context and

together with the other adverse proposals, to be part of a package of proposals that, cumulatively, would give rise to breach of Article 27.

Reservation of living fish and native fauna on Aboriginal land

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

Low level exploration licences

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

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

46. I understand the reference to sacred sites to be a reference to sites that are registered with the Aboriginal Areas Protection Authority (from whom Reeves envisages details of sites would be obtained). I understand also that relatively few sacred sites *on Aboriginal land* are registered with the Authority. The reason appears to be that, in consequence of the current requirement for the consent of Aboriginal owners to mineral exploration and other activities on Aboriginal land, Aboriginal people have not seen a need to register with the Authority sites that are on Aboriginal land. The Reeves recommendations do not make provision for protection of sites on Aboriginal land that are not registered with the Authority. One consequence of the recommendations would therefore be to impose a new practical need to register with the Authority sites on Aboriginal land. Aboriginal people may see this as lessening the ability of traditional owners to protect spiritual information.
47. The proposed terms and conditions undoubtedly reduce what would otherwise be a significant risk of serious cultural infringement. On the other hand, no provision is recommended for consultation with Aboriginal land-holders or for Aboriginal land-holders to negotiate further conditions. To the contrary, the recommendation is that 'Notice should be given to the RLC for the area that such a licence *has been granted*' (529, emphasis added). The Regional Land Council should not be able to require that any payment be made. The protection provided by the current right of veto in respect of mineral exploration activities on Aboriginal land would be removed. Entry of miners on Aboriginal land without Aboriginal consent may itself constitute cultural infringement. Moreover, the risk of breach of the proposed terms and conditions may be high. Denial of the opportunity to negotiate for payments means that Aboriginal people are denied the possibility of a compensating benefit.
48. I conclude that this recommendation would remove current protection against unwanted mineral exploration activities on Aboriginal land and would give rise to a new risk of infringement of cultural rights. In the absence of a consequential actual infringement, these consequences may not be sufficient, seen in isolation, to give rise to a breach of Article 27. In the context of the recommendations as a whole, and bearing in mind that applicants for licences would not need to

satisfy any 'national interest' or similar criteria, the lack of Aboriginal involvement in the licensing process, the limited protection of Aboriginal sacred sites and the absence of any compensating benefit for Aboriginal people, this recommendation is likely to be seen as part of a package of unfavourable developments that, cumulatively, give rise to breach of Article 27.

Abolition of Land Trusts

49. Reeves recommends transfer of all Aboriginal land into 18 separate regions with 18 new Regional Land Councils becoming the trustees and carrying out the trustee duties presently carried out by the Land Trusts (486). A new body, the Northern Territory Aboriginal Council, appointed by the Commonwealth Minister and the Northern Territory Chief Minister, would be able to intervene in the affairs of the Regional Land Councils (608, 616). These recommendations would radically alter current decision making arrangements.
50. That the cultural rights protected by Article 27 include the right of Aboriginal people to effective participation in decisions concerning their land is beyond doubt.
51. The current Land Trust system was intended to be, and is widely seen to be, a reflection in modern statutory form of traditional ownership. Reeves disputes that analysis and considers that the manner in which Aboriginal land is currently held does not correctly reflect Aboriginal tradition. He considers that Aboriginal tradition would more correctly be reflected by the Regional Land Council structure he recommends. A key feature of the structure Reeves proposes is to add residence as a sufficient qualification for participation in decision making (ie, Aboriginal persons who were resident in the area of a Regional Land Council would be able to be members of the Regional Land Councils and to participate in decision making notwithstanding that they had no traditional affiliation with the land).
52. If Reeves is correct in his understanding of Aboriginal tradition, it necessarily follows that his Regional Land Council recommendations would not give rise to breach of Article 27.
53. It is my understanding that the Reeves analysis is strongly disputed by expert anthropologists. The prevailing view appears to be that the Land Trust system correctly reflects Aboriginal tradition and

that the Reeves proposals for participation in Regional Land Council decision making on the basis of residence would be inconsistent with Aboriginal tradition.

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

55. For obvious reasons I am not in a position to express a view on the anthropological debate. From a legal perspective, if Reeves is wrong in his anthropological analysis, the effect of his recommendations would be to remove a system that ensures participation by Aboriginal people, in accordance with Aboriginal tradition, in decisions relating to their land and to put in its place a system where such participation was otherwise than in accordance with Aboriginal tradition. Aboriginal land would be managed in part by persons who under Aboriginal tradition had no relevant management rights. Breach of Article 27 would result.

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

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

Summary of Article 27 issues

58. The Human Rights Committee would assess implementation of the recommendations against the historical inequity and disadvantage suffered by Aboriginal people. It would have regard also to the longstanding hostility between the Northern Territory Government and the Land Councils. The Committee would give weight to the positive obligation to redress that historical disadvantage, to the generally regressive effect of the recommendations and to the possible consequences of removal of the current protection from the operation of Northern Territory law. The Committee would

apply Article 27 on the basis that the Article imposes on States specific obligations to take positive measures to ensure the protection of the existence and exercise of Article 27 rights. It would find that many of the Reeves recommendations would remove existing positive protection measures. Some individual recommendations would give rise to direct breach of Article 27 obligations. Other individual recommendations considered above may not on their own constitute violation of Article 27. Taken together the cumulative effect is, however, so substantially to erode the rights of Aboriginal people as to give rise to violation of Article 27. I add that the reasonable and objective justification that would be necessary to ensure that such substantial erosion of Aboriginal rights did not constitute violation is not made out.

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

59. The Racial Discrimination Convention requires States parties to prohibit racial discrimination in all its forms. The Convention is implemented in Australia by the *Racial Discrimination Act 1975* (the RDA). The relevant head of power supporting the validity of the RDA is the external affairs power.

60. I shall consider, in turn,

- Whether implementation of the Reeves recommendations would be inconsistent with the RDA
- Whether implementation of the Reeves recommendations would be inconsistent with Australia's obligations under the Racial Discrimination Convention
- Whether implementation of the Reeves recommendations would put at risk the constitutional validity of the RDA.

Inconsistency with the *Racial Discrimination Act 1975*

61. I note at the outset that, although the RDA is widely seen as giving effect to fundamental values, its legal status is that of an ordinary act of the Parliament. Inconsistency with the RDA does not give rise to invalidity. To the contrary, a later act that is inconsistent with the RDA will, in accordance with ordinary principles of statutory construction, prevail. The question of inconsistency with the RDA is therefore primarily a policy question.

62. Later inconsistent legislation may, however, give rise to an important question of constitutional validity – not in relation to the later legislation but in relation to the validity of the RDA itself. If the later legislation so significantly amends the RDA that the RDA no longer implements Australia's obligations under the Racial Discrimination Convention, the validity of the RDA may be in doubt. I consider this question further below.

63. The key provisions of the RDA are ss 10 and 8, which provide as follows

SECT 10 RIGHTS TO EQUALITY BEFORE THE LAW

(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

(3) Where a law contains a provision that authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander; not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person.

PART II--PROHIBITION OF RACIAL DISCRIMINATION

EXCEPTIONS Section 8

This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which subsection 10(1) applies by virtue of subsection 10(3).

64. Paragraph 4 of Article I of the Racial Discrimination Convention, referred to in s.8 of the RDA, provides as follows

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

65. The rights referred to in Article 5 of the Racial Discrimination Convention include 'The right to own property alone as well as in association with others' and 'The right to inherit'.

66. The questions for consideration are, first, whether, in consequence of implementation of any of the recommendations, Aboriginal persons would not enjoy a right that is enjoyed by non Aboriginal persons or would enjoy that right to a more limited extent (the principle underlying s.10(1)) and, if the answer be yes, whether this is a situation to which the principle in s.10(1) would have no application because of s.8.

67. The following recommendations would in my view be inconsistent with the principle in s.10(1) of the RDA

- Dissolution of the Land Trusts and the vesting of Aboriginal land in Regional Land Councils subject to intervention by the Northern Territory Aboriginal Council, the members of which are appointed by the Commonwealth and Northern Territory Governments (482, 597)
- Taking over the assets of Royalty Associations (609) and all other income from activities on Aboriginal land (368)

68. I have previously described these recommendations in more detail.

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

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

71. Having regard to the weight that has been attached, in the context of native title, to the 'formal equality' concept, some consideration of the concept is called for.

72. It is convenient to begin with authorities cited by Brennan J in *Gerhardy v Brown* and with observations by Brennan J in that case.

73. Brennan J cited an important passage from the opinion of Judge Tanaka in the *South West Africa Cases (Second Phase)* ([1966] ICJR at 305-306)

> ...the principle of equality before the law does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal.
>
> ...
>
> To treat unequal matters differently according to their inequality is not only permitted but is required...'the principle to treat equal equally and unequal according to its inequality,

constitutes an essential content of the idea of justice (Goetz Hueck, *Der Grundsatz der Gleichmassigen Behandlung in Privatrecht,* 1958, p.106)[translation]

74. This passage is widely regarded as authoritative. In McDougal, Lasswell and Chen, *Human Rights and World Public Order* (Yale, 1980), it is described as 'profound and eloquent' (599). In Brownlie, *Basic Documents on Human Rights* (Oxford, 3rd ed, 1992), it is said to be 'Probably the best exposition of the concept of equality in existing literature' (567).

75. 'Brennan J goes on in his judgment to say 'Formal equality must yield on occasions to achieve ... "effective, genuine equality"'. A means by which the injustice or unreasonableness of formal equality can be diminished or avoided is the taking of special measures' (159 CLR, 129-130.). In Brennan J's view a distinction based on race that advances genuine equality is a special measure 'calculated to eliminate equality in fact' (159 CLR, 130). Brennan J noted, however, that '(S)ome writers regard benign discrimination as falling outside the concept of discrimination in international law' and he cited McKean, *Equality and Discrimination Under International Law* (Oxford, 1983). So far as the Convention is concerned, I consider this to be the prevailing view. Formal equality of treatment may entrench inequality. Not all differences in treatment, not all distinctions based on race, constitute discrimination.

76. So far as construction of the RDA is concerned, Brennan J holds that s.9 relates to 'all formal discrimination including benign discrimination unless the benign discrimination is effected by a special measure' (159 CLR, 131). Section 9 therefore prohibits a distinction based on race that denies formal equality unless the distinction is a special measure (ibid). Finally, he notes that the proviso in Article 1(4), relating to the maintenance of separate rights, 'is intended to limit the period during which formal discrimination may be permitted' (159 CLR, 140). The special measure must be kept under review. When the objectives of the special measure have been achieved, formal discrimination becomes unsustainable and the special measure cannot continue (159 CLR, 140-141).

77. This analysis is of course applicable also to s.10(1). If the analysis be correct, repeal of the relevant provisions of the Land Rights Act *upon the attainment of the objectives of the special measure*

would not be discriminatory. I do not understand it to be contended that the condition is now satisfied.

78. In *Pareroultja v Tickner* (1993) 42 FCR 32, the Federal Court held that the Land Rights Act was a special measure (42 FCR, 47). The formal equality/substantive equality issue was not argued in that case. The Court was not asked to consider whether a benign distinction constituted discrimination. In any event, the Federal Court was bound by *Gerhardy v Brown.*

79. There is an important substantive difference between the two views. On the substantive equality view, a benign distinction is not within the concept of discrimination at all. Differential treatment does not constitute discrimination where the purpose of different treatment is to achieve equality of outcome. On the formal equality view, benign discrimination is discrimination but is 'saved' by the special measure exception. A special measure may be withdrawn. Withdrawal of a special measure does not offend the prohibition against discrimination, at least where following the repeal the rights of the minority race are formally equal with the rights of other races. In relation to the amendments to the *Native Title Act 1993,* the formal equality argument, as I understand it, is that the amendments are not discriminatory for the reason that modification of, for example, the right to negotiate does not infringe formal equality.

80. Resolution of the formal equality/substantive equality debate may not be necessary for the purposes of this advice. It is, however, relevant to observe that, in light of more recent consideration of the issue by the High Court, Brennan J's analysis appears difficult to sustain.

81. In its reasons for judgment in the challenge to the *Native Title Act 1993,* the High Court, in *Western Australia v The Commonwealth* (1995) 183 CLR 373, had the opportunity simply to follow *Gerhardy v Brown* and hold the Act to be a special measure. Instead, the Court said 'the *Native Title Act* can be regarded either as a special measure under s.8 of the *Racial Discrimination Act'* (citing *Gerhardy v Brown*) 'or as a law which, although it makes racial distinctions, is not racially discriminatory so as to offend the *Racial Discrimination Act* or the International Convention on the Elimination of All Forms of Discrimination' (sic) (183 CLR 483-484, citing authorities that support

the substantive equality approach, that is, that benign discrimination does not constitute discrimination).

82. The first citation is to an article by Wojciech Sadurski, *Gerhardy v Brown v The Concept of Discrimination: Reflections on the Landmark Case that Wasn't, Sydney Law Review*.vol 11 (1986) 5. The purpose of the article is to establish the deficiency of the 'special measures' argument adopted in *Gerhardy v Brown* and to argue that racially based protective distinctions are not discriminatory.

83. The next citation is to McKean, *Equality and Discrimination under International Law,* 288. The concluding sentence on that page is 'The principle of equality of individuals under international law does not require a mere formal or mathematical equality but a substantial and genuine equality in fact' (288). A little earlier on, McKean writes 'The principle does not require absolute equality or identity of treatment but recognizes relative equality, ie. different treatment proportionate to concrete individual circumstances...Distinctions are reasonable if they pursue a legitimate aim and have an objective justification, and a reasonable relationship of proportionality exists between the aim sought to be realised and the means employed.' (286, 287).

84. The third citation is to Brownlie, a leading international law authority. I have not been able to obtain the particular publication cited but I have obtained a later publication by the same writer in which Brownlie directly criticizes the Court's analysis in *Gerhardy v Brown.* As to the international law principle, he writes 'The most important point is that the fact that a primary criterion involves a reference to race does not make the rule discriminatory in law, provided the reference to race has an objective basis and a reasonable cause. It is only when the reference to race lacks a reasonable cause and is arbitrary that the rule concerned becomes discriminatory in the legal sense' (Brownlie, *Treaties and Indigenous Peoples* (Oxford, 1992) 44). In relation to the High Court's reasoning in *Gerhardy v Brown,* Brownlie writes 'The difficulty is that the High Court appears to treat the "special measures" clause as legitimating what would otherwise be discriminatory in law, since they view the legislation without that clause as being discriminatory. This approach is a further development of the original faulty premiss (sic), which is

the assumption by the High Court that the protection of traditional land rights is discriminatory in the first place' (45-46).

85. The final footnote reference is to the (Australian) Law Reform Commission's Report No 31, *The Recognition of Aboriginal Customary Laws.* The Report, after citing international authorities, concludes 'although these' (ie systems of protection for or recognition of minority cultures) 'may make special provision for such groups, they will not be discriminatory if they are a reasonable response to the special circumstances of the minority, are generally accepted by it, and do not deprive individual members of the minority group of basic rights' (para 148). In relation to the provisions of the Racial Discrimination Convention, the Report continues 'If the definition of "discrimination" in Art 1(1) is read as incorporating the general international law test based on "reasonable classifications", then the scope of Art 2(2) would not be limited to "special measures" under Art 1(4), but would include measures which are not discriminatory, in the Art 1(1)sense, at all. Given the drafting history of the Convention, the pre-existing and widely accepted meaning of discrimination in international law, and the apparent consensus of writers, this may be the better interpretation' (para 150).

86. What significance is to be attached to the citation of these authorities? Had the Court been content to follow *Gerhardy v Brown*, one would have expected it merely to refer to the *Native Title Act* as a special measure and to cite its earlier decision as authority. Characterization of the *Native Title Act* in the alternative, together with citation by the Court of extensive authorities that directly criticize *Gerhardy v Brown* and support the alternative analysis, is an unusual approach. The explanation may well be that resolution of the difference between the two analyses was not necessary in the particular case. Nevertheless, significant weight must surely be attached to the deliberate citation of authorities critical of the Court's earlier decision and supporting a different analysis. I understand these citations to indicate recognition on the part of the Court that the international law of discrimination recognizes that in appropriate circumstances a law which makes racial distinctions may not be discriminatory and that if the issue were to arise for decision again the Court would be disposed to reconsider the reasoning in *Gerhardy v Brown* and to construe ss 9 and

10 of the RDA in conformity with international law (cf, *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 : 'the courts should, in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty', per Brennan, Deane and Dawson JJ).

87. The substantive equality approach is consistent with the jurisprudence of the Committee on the Elimination of Racial Discrimination. In its General Recommendation XIV (Forty-second session, 1993) the Committee reported

> The Committee observes that a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4, of the Convention.

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

89. In any event, several significant considerations take the Reeves recommendations beyond those considerations that were viewed by the Government as 'saving' the modification of the right to negotiate

- a grant of inalienable fee simple to traditional Aboriginal owners under the Land Rights Act is not, in my view, the kind of temporary measure contemplated by the special measures provision. Only Aboriginal people have the necessary traditional link with the land. This is a benign distinction that is not discriminatory
- the criteria for cessation of a special measure are not satisfied
- the fee simple title of the Land Trusts and the assets of the Royalty Associations are property rights of the kind protected by Article 5
- even if 'formal equality' be the test, expropriation and transfer of land and a wide range of other assets as proposed is not in my view consistent with 'formal equality'

- a law for the dissolution of the Land Trusts, the vesting of Aboriginal land in Regional Land Councils in which residence is a qualification for participation in decision making authority (notwithstanding absence of traditional affiliation) and subjection of the Regional Land Councils to intervention by the Northern Territory Aboriginal Council, the members of which are appointed by the Commonwealth and Northern Territory Governments, would be a law to which s.10(3) of the RDA applies and therefore not a law to which the special measures exception has any application.

90. For all these reasons I consider implementation of the recommendations relating to the expropriation and transfer of assets would be contrary to the principles of the RDA.

Inconsistency with the Racial Discrimination Convention

91. The Racial Discrimination Convention is notable for its unqualified language. Unlike many other international conventions which embody loosely expressed objectives, the key obligations of the Racial Discrimination Convention are expressed in absolute terms.

92. Thus in Article 2 States Parties undertake to pursue

> '...a policy of eliminating racial discrimination in all its forms...and , to this end:
>
> (a) Each State Party undertakes to engage in no act or practice of racial discrimination'.

93. "Racial discrimination' is defined in Article 1 to mean

> 'any distinction, exclusion, restriction or preference based on race, colour, descent...which has the purpose or effect of nullifying or impairing the recognition , enjoyment or exercise , on an equal footing, of human rights..'

94. Article 2(2) requires States Parties to take special and concrete measures to ensure the adequate development and protection of certain racial groups for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.

95. In Article 5, State Parties undertake, in compliance with the fundamental obligations laid down in Article 2,

‘to prohibit and eliminate racial discrimination *in all its forms* and to guarantee the right of everyone, without distinction as to race, colour or national origin, to equality before the law, notably in the enjoyment of the following rights:

...

d) Other civil rights, in particular

...

(v) The right to own property alone as well as in association with others;

(vi) The right to inherit;

96. No exceptions are contemplated. A party cannot, for example, implement the Racial Discrimination Convention except in relation to members of a particular race or except in relation to a particular human right.

97. In its consideration of application of the Convention, the Committee on the Elimination of Racial Discrimination (established under Article 8) has given particular attention to its application to indigenous people. General Recommendation XXIII on the rights of indigenous peoples (Fifty-first session, 1997) included the following recommendation

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

98. Attention has also focussed on Australia’s treatment of its indigenous people. In its consideration of Australia’s ninth periodic report (made under Article 9 of the Convention), at its 1067th meeting on 18 August 1994, the Committee said

The situation of the Aboriginal and Torres Islander people remains a subject of concern, despite efforts aimed at remedying the injustices inherited from the past. The Committee recommends that Australia pursue an energetic policy of recognizing Aboriginal rights and furnishing adequate compensation for the discrimination and injustice of the past. The Commonwealth Government should undertake appropriate measures to ensure a harmonious application of the provisions of the Convention at the federal and state or territory levels. (A/49/18, paras 543 and 547)

99. More recently, members of the Committee have expressed concern about amendments to the *Native Title Act 1993*. In the exercise of its powers under Article 9(1)(b) of the Convention, the Committee requested Australia to provide information on those amendments to enable the Committee 'to examine the compatibility of any such changes with Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination' (Fifty-third session, summary record of the 1287th meeting, 11 August 1998, Decision 1(53)). Summary records of the Committee's Fifty-fourth session are not yet available but official United Nations press releases of 12 and 15 March 1999 refer to concern about a 'regressive situation' and racially motivated violations and discrimination. The Committee's decision of 18 March 1999, that four specific provisions of the amendments discriminate against indigenous title-holders and that they cannot be considered to be a special measure (CERD/C/54/Misc.40/Rev.2, 18 March 1999) is a salutory warning that legalistic defences of discrimination drawing on 'formal equality' arguments are unlikely to meet with international acceptance.

100. Because of the importance and relevance of the Committee's observations these warrant consideration in some detail.

101. The Committee notes at the outset the effect of past discriminatory practices

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

102. These are strong words, particularly in the context of the polite restraint usually characteristic of international diplomacy. The passage is a salutory reminder that implementation of the Reeves recommendations needs to be considered against the background of historical treatment of Aboriginal people.

103. The Committee continues

> 4.The Committee recognizes further that the land rights of indigenous peoples are unique and encompass a traditional and cultural identification of the indigenous peoples with their land that has been generally recognized.

104. Clearly there can be no doubt as to the seriousness with which the Committee views discriminatory interference with these rights.

105. In relation to the 1998 amendments to the *Native Title Act 1993*, the Committee

> expresses concern over the compatibility of the Native Title Act, as currently amended, with the State Party's international obligations under the Convention. While the original Native Title Act recognizes and seeks to protect indigenous title, provisions that extinguish or impair the exercise of indigenous rights and interests pervade the amended Act. While the original 1993 Native Title Act was delicately balanced between the rights of indigenous and non-indigenous title holders, the amended Act appears to create legal certainty for governments and third paries at the expense of indigenous title.(para 6).

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

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

Convention and raises concerns about the State Party's compliance with Articles 2 and 5 of the Convention.

107. This decision was reached only after receipt by the Committee of a detailed written submission from the Australian Government. Government officials (including a senior officer of the Attorney-General's Department) appeared before the Committee. Notwithstanding the effort the Government put into presentation of its legal position, the Government's legal analysis has not been accepted.

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

109. For all these reasons, including those set out above in relation to the RDA, implementation of the recommendations relating to expropriation and transfer of Aboriginal assets would in my view give rise to breach of Australia's obligations under the Racial Discrimination Convention.

Validity of the RDA

110. The RDA is supported by, and only by, the external affairs power (because the RDA applies equally to persons of every race, it is not supported by the race power) (*Koowarta v Bjelke-Petersen* (1982) 153 CLR 169). While it may not be a condition of validity that the Commonwealth implement all the obligations of the treaty (*Commonwealth v Tasmania* (1983) 158 CLR 1, 172 per Murphy J, 233-4 per Brennan J, 268 per Deane J), validity requires that the law conform to the treaty (*Commonwealth v Tasmania* (1983) 158 CLR 1, 131 per Mason J), or be 'appropriate and adapted to' the carrying into effect of the treaty (158 CLR, 259 per Deane J). 'Deficiency in implementation of a supporting convention is not necessarily fatal to the validity of a law; but a law

will be held invalid if the deficiency is so substantial as to deny the law the character of a measure implementing the Convention or it is a deficiency which, when coupled with other provisions of the law, make it substantially inconsistent with the Convention' (*Victoria v The Commonwealth* (1996) 187 CLR 416, 489, per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ, see also *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 74-75, per McHugh J).

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

Implementation and *Constitution,* s.51(xxvi)

112. I am asked to consider 'the extent to which adopting the recommendations requires legislation that would arguably be invalid having regard to the failure of the decision in *Kartinyeri v The Commonwealth* (1998) 152 ALR 540 to resolve the issue as to whether s.51(xxvi) would support a law for the detriment of people by reference to their race?'

113. The main argument for the plaintiffs in *Kartinyeri* was that the *Hindmarsh Island Bridge Act 1997* was invalid on the ground that s.51(xxvi) required that, in relation to Aboriginal people, any law enacted in reliance upon it must be for the benefit or advancement of Aboriginal people, or not detrimental to or discriminatory against Aboriginal people.

114. Brennan CJ and McHugh J held that the *Hindmarsh Island Bridge Act 1997* was in substance a partial repeal of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (152 ALR, 547). The Parliament having exercised its power to enact the Heritage Protection Act, it had the same power to amend or repeal that Act (152 ALR, 550). The repealing law was therefore supported by s.51(xxvi) and it was unnecessary to resolve the opposing views of s.51(xxvi) (152 ALR, 551). Gaudron J held that there was a need for a law to be reasonably capable of being viewed as appropriate and adapted to some difference which the parliament might reasonably judge to exist by reference to the language of s.51(xxvi) (152 ALR, 558). Prima facie, 'the circumstances which presently pertain to Aboriginal Australians are circumstances of serious disadvantage, which disadvantages include their material circumstances and the vulnerability of their culture. And prima facie, at least, only laws directed to remedying their disadvantage could reasonably be viewed as appropriate and adapted to their different circumstances' (152 ALR, 558). Gaudron J went on to hold that s.51(xxvi) 'not only authorises the Heritage Protection Act but, also, authorises its partial repeal ... the Heritage Protection Act as amended by the Bridge Act remains a law for the protection and preservation of areas and objects of significance in accordance with Aboriginal tradition and...continues to be a valid enactment under s.51(xxvi)' (152 ALR, 560). Gummow and Hayne JJ also rejected the view that the Parliament could not limit the scope of a special law by a subsequent determination that something less than the original measure was necessary (152 ALR, 568). They considered and rejected the argument that s.51(xxvi) would support only those laws which were for the benefit of the indigenous races (152 ALR, 569-570). Kirby J held that 'the race power in para (xxvi) of s 51 of the Constitution does not extend to the enactment of laws detrimental to, or discriminatory against, the people of any race (including the Aboriginal race) by reference to their race (152 ALR, 593).

115. The constitutional challenge therefore failed.

116. Callinan J did not participate in the decision. In light of published advice he has previously given, I would not expect Callinan J to uphold a challenge based on argument that s.51(xxvi) is confined to beneficial laws.

117. In my view, the outcome of a constitutional challenge to implementation of the Reeves report on the ground that, at least in relation to Aboriginal people, s.51(xxvi) was confined to beneficial laws would fail. The Court, or a majority of the Court, would hold that, quite apart from the question of availability of s.122, the power to enact the Land Rights Act extended to repeal or relevant modification of that Act.

PART III : PAYMENTS TO ROYALTY ASSOCIATIONS

In this Part I answer a series of specific questions concerning payments to Royalty Associations, including the legal character of the moneys paid and accountability arrangements.

- **Are the moneys paid out to associations under paragraph 35(2)(b) of the Land Rights Act 'public money' within the meaning of the *Financial Management and Accountability Act 1997*?**

- **Does the Report contain an adequate explanation of the meaning of 'public money'?**

- **Is there any legal basis to ATSIC's submission to the Reeves Review that Mining Royalty Equivalents, once they have been transferred to the ABR, lose their 'public money' status and become 'private moneys', at least in character?**

- **Is there any legal basis to the submissions made by the Land Councils which argue that Mining Royalty Equivalents are private rather than public moneys?**

- **Is there any legal basis to Reeves opinion that as mining royalty equivalents are public moneys, the recipients of these moneys are accountable for them as public moneys?**

Preliminary

1. I note that I have been briefed with extensive historical background material. In accordance with my instructions, I have carefully perused and considered all that material. The historical background material is, in my opinion, directly relevant to explain the policy reasons the moneys are paid, the consequential perception of the character of the moneys and the important public policy issues that arise in relation to the competing considerations of public accountability and accountability to Aboriginal people. After much thought I have, however, concluded that the historical background material is not directly relevant to the *legal* characterisation of the moneys for the purposes of the *Financial Management and Accountability Act 1997* (the FMA Act).

2. Since my advice is sought primarily in relation to the legal characterisation of the moneys, I have not found it necessary to refer in detail to the historical background material.

Summary of advice

3. Reeves appears to assume that the mining royalty equivalent payments can be given a single characterisation. I consider that assumption to be incorrect. The *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act) provides for a series of payments or transfers. The legal character of the money changes in the course of that transfer process as follows

   - Moneys 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).
   - Moneys 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.
   - Moneys 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.

4. The error Reeves makes, on my analysis, 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.

5. What accountability requirements, if any, should be imposed in respect of payments by Land Councils to Royalty Associations under s.35(2)(b) is a question of public policy. Relevant considerations to the formulation of that public policy include, in my view

   - the historical background, in particular the historical explanation for those payments as compensation to Aboriginal people for disturbance to their land, together with public commitment by government to self-determination for Aboriginal people

- the interposition of the Land Councils between the public money account and the payments to the Royalty Association.

Reasons

(i) Background

6. It is convenient to note four things at the outset. First, the moneys paid into the Reserve are not royalties. Royalty payments by miners in respect of mining activities on Aboriginal land go to the two governments. Secondly, the measure of the payments out of the CRF into the Reserve is (subject to exceptions not presently relevant) the sum of the royalties received by the Commonwealth and the Northern Territory in respect of mining on Aboriginal land. Thirdly, there can be no doubt that from the outset the policy intention was that Aboriginal people should, through the mechanism of a special trust fund, receive the benefit of royalties paid in respect of mining on their land. Aboriginal control over disposition of the moneys was a later development. Fourthly, while the payments were seen as a form of compensation for cultural and economic disturbance to Aboriginal land, they were not established as compensation in a strictly legal sense. The amount available is not calculated by reference to the disturbance or damage, payments are and always have been discretionary and the beneficiaries do not necessarily correspond with the relevant traditional owners or those directly affected by mining activities.

7. In this respect I note the following

- prior to 1953, s.21 of the *Aboriginals Ordinance 1918-1947* (NT) prohibited the holder of a miner's right from entering or remaining within an Aboriginal reserve, thus effectively preventing mining on reserves.
- In Cabinet Decision No 432, 27 May 1952, Cabinet authorised the Administrator of the Northern Territory to introduce an Ordinance providing for mining rights on Aboriginal reserves. The decision included the following conditions

  '.....

  (d) Royalties shall be levied on minerals won from mining on aboriginal reserves or from lands resumed therefrom for mining purposes.

(e) A Trust Fund shall be established into which the royalties will be paid and applied, with the approval of the Minister, for the general benefit of aboriginals as the Minister determines, including the making of grants to Aboriginal institutions.'

- When announcing the decision to the Parliament, the Minister for Territories, Mr Hasluck, said '...some form of compensatory benefit should be given' (House of Representatives Hansard, 6 August 1952, 44, 47). The intention was, in the Minister's words 'to enable the natives to benefit directly from such mining' (ie prospecting and mining on a reserve) (speech, The Record in the Northern Territory, 29 September 1952, reproduced in Hasluck, *Native Welfare in Australia*, 1953, 20, 29).
- Section 21 of the *Northern Territory (Administration) Act 1910*, inserted in 1952, gave partial effect to the policy, establishing the Aboriginals (Benefits from Mining) Trust Fund into which were to be paid amounts equal to the royalties relating to mining on Aboriginal reserves, the Fund to be applied in accordance with the direction of the Minister for the benefit of Aboriginals or Aboriginal institutions.
- Section 3 of the *Aboriginals Ordinance 1953* (NT) repealed s.21 of the Ordinance and s. 5 of the *Mining Ordinance 1953* (NT) inserted a new Part VIIA into the *Mining Ordinance 1939-1952* providing for mining on Aboriginal reserves.
- Aboriginal control may be traced to the Second Report of the Aboriginal Land Commissioner, Woodward, 1974, which recommended 'all royalty payments be paid out by the government to the regional Land Councils for distribution...' (paras 508 – 510, 609, 708(xiii), 708(xiv)).

8. The origins of the current legislative scheme are, therefore, to be found in s.21 of the *Northern Territory (Administration) Act 1910* and the Second Report of the Aboriginal Land Commissioner, Woodward, 1974. Since Northern Territory self-government, legal ownership of minerals other than uranium is vested in the Northern Territory (*Northern Territory (Self Government Act) 1978*, s.69). The Commonwealth retains ownership of uranium. Aboriginal people, on the other hand,

view minerals on their land as belonging to them. Arguably, the scheme represents a compromise between formal legal ownership of minerals on Aboriginal land and Aboriginal perceptions.

9. Thus the scheme gives Aboriginal people the benefit of the royalties without conferring ownership. For every dollar paid to governments in respect of mining on Aboriginal land, the Land Rights Act requires that a dollar be drawn from the CRF and paid into the Reserve (again, subject to exceptions not presently relevant). Once the moneys have been paid into the Reserve, they may (subject only to deduction of mining withholding tax – see *Income Tax Assessment Act 1936*, ss128U – 128X, 221Z – 221ZL) be paid out only in favour of Aboriginal people and their organisations. The payments are channelled initially to the Land Councils in the areas affected (s.64(3)) and ultimately to Aboriginal organisations in those areas (s.35(2)(b)). The scheme originally applied in respect of mining on Aboriginal reserves. Subsequently it was applied to land granted under the Land Rights Act.
10. Reeves does not dispute that the Parliament has established a scheme whereby Aboriginal people receive the ultimate benefits of the whole of the amounts paid by way of royalty for mining on Aboriginal land.
11. Subject only to minor exception, no discretionary decisions are taken by governments as to the amounts to be appropriated out of consolidated revenue for the purposes of the scheme. These amounts are not subject to annual political and budgetary determination. The Parliament has pre-determined the basis for the appropriation, being the whole of the combined royalty payments. In this sense also it is not unreasonable for Aboriginal people to refer to the money as their money – the Parliament has provided for the money to be appropriated for their benefit. The moral justification for the view that the royalty money now belongs to Aboriginal people is therefore overwhelming.
12. These factors are not, however, conclusive as to the legal character of the money. To ascertain the legal character of the money it is necessary to consider the legal structures that have been adopted.
13. I add that, while the historical background may establish an intention that the payments be compensatory, I do not consider payments under ss 64(3) and 35(2)(b) to be compensation in a

strict legal sense. This for several reasons. First, the total amount available, based on ad valorem royalties, is not calculated by reference to, and bears no necessary relationship with, the disturbance or damage attributable to mining. Secondly, under the scheme payments by Land Councils to beneficiaries are discretionary. Thus the scheme does not establish any entitlements to payment on the part of those who might have a claim for compensation, the relevant traditional owners or any others affected. Thirdly, there is in my view insufficient correlation between those who might benefit from the scheme and those who might have a claim for compensation.

(ii) Payments into the Reserve

14. I begin with the money paid into and held in the Reserve. Section 62 of the Land Rights Act establishes the Reserve. Sections 63(2) and 63(4) require payment out of the CRF into the Reserve of amounts equal to the amounts of royalties received by the Commonwealth and the Northern Territory in respect of mining on Aboriginal land. I have already noted that the measure of these payments is the sum of the relevant royalties. I have also expressed the view that this consideration is not conclusive as to the legal characterisation of the money. What is significant, indeed in my view conclusive, for the purposes of legal characterisation of those moneys in the Reserve, is the provision in s.62(2) of the Land Rights Act that *the Reserve is a component of the Reserved Money Fund* (the RMF*).*

15. The RMF is established by s.20 of the FMA Act. This Fund is part of the new accounting system for public money.

16. The main purpose of the FMA Act is 'to provide a framework for the proper management of public money and public property' (see the Reader's guide to the FMA Act). This Act establishes a new accounting system for public money that is based on the CRF and three other funds established by the Act (including the RMF). Public money is defined in s.5 to mean

> a) money in the custody or under the control of the Commonwealth; or
>
> b) money in the custody or under the control of any person acting for or on behalf of the Commonwealth in respect of the custody or control of the money;

including such money that is held on trust for, or otherwise for the benefit of, a person other than the Commonwealth'.

17. Section 17(1) provides that all public money falls into one of the classes there set out. These classes include money in the CRF and money in the RMF established by s.20. It is to these classes of money that the detailed accounting and other requirements established by the FMA Act apply. One example of those requirements is the provision for the Minister for Finance to issue a 'drawing right' for the payment of money out of the Fund (s.27).
18. *By reason of the fact that the Reserve is established as a component of the RMF,* it is in my view clear beyond doubt that moneys in the Reserve are public money within the meaning of the FMA Act.
19. I note that s.62(3), dealing with interest from the investment of money from the Reserve, s.64A, which enables the Minister to direct the transfer of moneys from the Reserve to the CRF and s.64B, which in substance applies the financial reporting provisions of the FMA Act, confirm that this is the position.

(iii) Payments to Land Councils

20. I turn, next, to payments out of the Reserve. For the purposes of this advice it is sufficient to refer to moneys paid out of the Reserve to Land Councils under s.64(3). That section requires the payment *out of the Reserve* from time to time *to each relevant Land Council* of an amount equal to 30% of the amounts paid into the Reserve under s. 63(4).
21. Land Councils are established by the Minister under s.21 of the Act. They are bodies corporate (s.22) to which the *Commonwealth Authorities and Companies Act 1997* (the CAC Act) applies (cf s.22A). Until payment out by the Land Councils, the moneys are now held in trust *by the Land Councils* (s.35(8)). Having been paid *out of* the Reserve *to* the Land Councils, these moneys are no longer held *by the Commonwealth*. They are not moneys in the Reserve (and therefore no longer part of the RMF). *They have therefore ceased to be public money for the purposes of the FMA Act*. The accounting regime in the FMA Act no longer applies. The moneys are now held by bodies corporate to which a different accounting regime, the CAC Act, applies. An example of the

many significant consequences of the application of this different accounting regime is that the provision in s.27 of the FMA Act for the Minister for Finance to issue drawing rights no longer has any application.

22. I add, lest the contrary be thought, that the provision in s.35(10) for investment of the money in investments *of the kind* authorised by s.39 of the FMA Act is merely a provision identifying the kind of investment required. It is not a provision bringing the money back within the FMA Act. Indeed, if the FMA Act applied of its own force, the provision would not have been necessary.

23. The accounting regimes under the FMA Act and the CAC Act are fundamentally different. The reasons for these differences were succinctly explained by the Minister for Finance in his second reading speech introducing the FMA Bill to the Parliament

> 'In relation to financial administration, every Commonwealth body falls into one of two categories, according to the basic legal financial status that each body has. It either has the legal capacity, in its own right, by virtue of its incorporating legislation, to acquire ownership of money or other assets coming into its possession; or the body will function only as a financial and custodial agent for the legal entity that is the Commonwealth, without acquiring separate legal ownership of the money and assets it deals with on the Commonwealth's behalf. The proposed Commonwealth Authorities and Companies Act is to apply to the operations of bodies that fall into the first category; that is, financially autonomous incorporated Commonwealth bodies that can acquire legal ownership of money in their own right. The proposed Financial Management and Accountability Act is to apply to the second category of bodies that, financially, are agents of the Commonwealth.'(House of Representatives Hansard, 12 December 1996, 8344)

24. Land Councils are, of course, within the 'first category' identified by the Minister. The FMA Act does not apply.

(iv) Payments to Royalty Associations

25. I come, finally, to payments by Land Councils to Royalty Associations under s.35(2) of the Land Rights Act. In brief, the section requires that within 6 months of receiving the moneys under s.63(4) the Land Councils pay out those moneys to Royalty Associations, in such proportions as the Land Councils determine. The moneys have already ceased to be public money for the purposes of the FMA Act. The payments are made directly by Land Councils to Royalty Associations. They are not routed through the Reserve or through any of the other classes of accounts that constitute public money for the purposes of the FMA Act. It follows that they are not public money for the purposes of that Act.

(v) Taxation and interest provisions confirm this analysis

26. If there were any doubt as to the correctness of the foregoing analysis, that doubt must surely be dispelled by the taxation treatment of the money distributed to the Aboriginal recipients. As then the Treasurer (Mr Howard) explained when introducing the *Income Tax Assessment Amendment Bill (No 2) 1979*, liability for tax is imposed 'in the first instance on the Aboriginals or bodies who receive the payments'. Section 128 V of the *Income Tax Assessment Act 1936* so provides : 'Where a mining payment is made to, or applied for the benefit of, a person, that person is liable to pay income tax on the amount of the mining payment at the rate declared by the Parliament for the purposes of this section.' The expression 'mining payment' is defined in s.128U to include a payment of moneys having their source in ss 63(2) and 63(4) of the Land Rights Act.

27. Collection of the tax is effected by means of a withholding system (that is, deductions at source). As the Treasurer went on to explain 'the recipients are not actually called on to make tax payments'. Those who made the payments 'will be required to deduct withholding tax ...*in satisfaction of the tax liabilities of the recipients'* (House of Representatives Hansard, 3 May 1979, 1822)(emphasis added)(see now s.221Z, also s.23AE).

28. If the money when received were public money, no question of liability to tax would arise. Imposition of income tax confirms that the Parliament treats receipt of the money as receipt of private income in the hands of the recipients.

29. The treatment of interest earned on the moneys also confirms the analysis. Section 35(11) of the Land Rights Act relevantly requires the Land Council to pay to the Royalty Association to whom money is paid under s.35 any interest *received by the Land Council* while that money was held in trust and invested. This provision may be contrasted with s.62, which recognises that interest from the investment of the money *from the Reserve* is received by the Commonwealth. The reason for the distinction is this : Because the Reserve is public money, the interest is received by the Commonwealth; once the money is held by the Land Council, the interest is no longer received by the Commonwealth but is now received by the Land Council. Simply put, it is no longer public money.

(vi) Recapitulation

30. It is convenient at this point to recapitulate key features of the scheme. The moneys start off in the Reserve and at that stage are public money for the purposes of the FMA Act. Once the moneys are held by the Land Councils they have ceased to be public money for the purposes of that Act. They are not held by the Commonwealth. They are held by the Land Councils in trust for the Royalty Associations (s.35(8)). When those moneys are paid out to the Royalty Associations in accordance with s.35(2)(b), the moneys so paid out are not public money for the purposes of the FMA Act and the payments are not regulated by the accounting scheme of that Act.

(vii) Implications for accountability arrangements

31. I add one additional observation. It was not, as a matter of law, necessary to interpose the Land Councils between payments out of the public account (the Reserve) and the beneficiaries (the Royalty Associations). Provision could as a matter of law have been made for payment direct from the Reserve to the Royalty Associations. Authority to determine the amounts to be paid to each Royalty Association could, for example, have been conferred on the Minister (and exercised by officials, under delegation). Had that structure been adopted, it would have been in accordance with practice to require the Royalty Associations to be publicly accountable for the receipt by them of public moneys.

32. This was not, however, the scheme the Parliament established. The Parliament chose instead to provide for payment from the Reserve to the Land Councils. It is the Land Councils who determine the payments to the Royalty Associations. No doubt the intention was to recognise the role of the Land Councils as an element of Aboriginal empowerment or self-determination.
33. Consistently with conventional accountability arrangements, it is in my view appropriate to look to the Land Councils for accountability for their handling of these moneys. Section 37 of the Land Rights Act, which requires a Land Council to include particulars of s.35(2) determinations in its annual report, suggests this was also the view adopted by the Parliament.
34. Where Reeves falls into error, in my view, is that he fails to understand, or to attach sufficient weight to, the interposition of the Land Councils in the process. That the original source is the CRF and the Reserve is not in dispute. The fact that the funds are subsequently 'passed through' the Land Councils, as he puts it (351) cannot simply be glossed over. It is clearly a deliberate break in the chain. To describe the process as passing through is at best a gross over-simplification. As explained above, the legal character of the money changes. Moreover, this is no mere technical change. This is a break of substance. For this is the point where discretionary decision-making occurs. The very reason for 'passing through' the Land Councils is to repose responsibility, and consequentially accountability, in the Land Councils (rather than in the Royalty Associations where accountability would otherwise fall).
35. It will be apparent from the above that I consider the interposition of the Land Councils and the conferral of the key discretionary function on the Land Councils to be directly relevant to accountability. In consequence of this structure it is in my view appropriate that
    - The Land Councils be publicly accountable in respect of their determinations under s.35(2)(b)
    - The Royalty Associations be accountable primarily to their members and to a limited extent to the Land Councils.

Does the Commonwealth have the power to legislate to determine how funds received by Royalty Associations are to be used and to be accounted for to the Government and Parliament?

Is it possible for the government to pass amendments to the Act which prevent ABR recipients from making distributions to individuals for any purpose or which only allow that the funds given to individuals be used in specific ways?

Advice and Reasons

36. Yes. The moneys in the Reserve are as a matter of law public moneys. The Parliament may impose conditions (or authorise the Minister to impose conditions) on the distribution of public moneys. Conditions of the kind described would in my view be valid. It does not follow that such requirements are morally justifiable or appropriate. Whether such requirements should be imposed is however a matter of policy, not of law.

With respect to s.35A of the Act, in the event an incorporated body receiving mining royalty equivalents, particularly a Royalty Association, does not comply, is a Land Council able to decide to withhold further distributions to that organisation pending receipt of the necessary information or are there any other legal mechanisms open to Land Councils to enforce compliance?

Advice

37. The Land Council can defer payment but only until the expiration of 6 months after receipt of the moneys by the Land Council. Compliance with s.35A is a relevant consideration in relation to the Land Council's determination of the proportion of the moneys to be paid to each eligible Aboriginal Council and Incorporated Aboriginal Association. The Land Council does not have any other enforcement powers in relation to the reporting obligation.

Reasons

38. Section 35(2)(b) requires a Land Council to pay out within 6 months of receipt moneys paid to the Land Council under s.64(3). No provision is made for the Land Council to extend this period. Section 35(5), which requires a Land Council to report to the Minister where it has not disbursed any amount that it is required so to disburse, confirms that the Land Council has no discretionary power to extend time. It follows that the Land Council cannot defer payment beyond the 6 months period. Section 35(9), which enables the receiving organisation to request the Land Council to hold the moneys in trust, does not require a contrary view. The relevant request is made by the receiving organisation and can be revoked by that organisation at any time.

39. These moneys are to be paid out to eligible Aboriginal Councils and Incorporated Aboriginal Associations in such proportions as the Land Council determines. The Land Council therefore exercises an important discretionary function in relation to the amount to be paid to each eligible organisation.

40. In the event that there were only one Aboriginal Council or Incorporated Aboriginal Association eligible to receive payment, s.35(2)(b) would ordinarily require the payment to be made notwithstanding failure to comply with the s.35A obligation (difficult questions would arise if the Land Council suspected fraud or gross financial mismanagement).

41. Assuming, however, that there is more than one Aboriginal Council or Incorporated Aboriginal Association eligible to receive payment, the proportion to be paid to each is for the Land Council to determine. The Land Council in its annual report must include particulars of its determinations under this provision (s.37). The s.35A reporting obligation establishes an element of accountability on the part of Royalty Associations to Land Councils. This provision was inserted in 1987 in light of recommendation 11(h) of the *Report on the Review of the Aboriginal Benefit Trust Account* (Altmann, *1984*): 'The Minister should consider including a requirement in sub-ss. 35(2)...of the Act that requires recipient incorporated bodies to lodge annual financial records and statements with Land Councils *to assist in their determinations* (emphasis added, see also paras 9.22, 11.16, 11.27, 11.37 of the Report).

42. The Act does not, however, develop the relationship between Land Councils and Royalty Associations.

43. That does not, in my view, mean that in the exercise of its discretion in determining the amounts to be paid to each eligible organisation the Land Council is entirely at large. The obvious implication of the s.35A reporting obligation is that the Land Council is to take those reports into account when making is determination. Failure by an Aboriginal Council or Association to comply with the s.35A obligation to provide a copy of the relevant financial statement is in my view a consideration the Land Council can, and indeed must, take into account in making its determinations.

44. The s.35A reporting obligation is imposed on the relevant incorporated Aboriginal community or group. The Act does not confer any other enforcement powers on Land Councils in relation to compliance with this obligation. The 'responsibility to enforce s.35A', to which Reeves refers (354), goes no further, in my view, than this requirement to take compliance with s.35A, and the reports themselves, into account in making determinations under s.35(2)(b).

PART IV : JUDICIAL POWER ISSUES

1. In this part I consider
    - Whether Chapter III of the *Constitution* would apply to amendments of the Land Rights Act implementing the Reeves recommendations
    - Whether any amendments of the Land Rights Act to implement the Reeves recommendations would be invalid, or of uncertain validity, by reason of infringement of Chapter III.
2. I identify two likely infringements of Chapter III
    - The recommendation that the Aboriginal Land Commissioner have regard to detriment
    - The recommendations that dispute resolution functions be conferred on Regional Land Councils with a right of appeal to NTAC and a further right of appeal on a question of law only to the Aboriginal Land Commissioner.

Whether Chapter III would apply

3. Many of the Reeves recommendations may be implemented by legislation enacted pursuant to s.122 of the Constitution, the territories power. Such legislation may also be able to be enacted pursuant to s.51(xxvi), the race power. Some recommendations also draw on existing institutions established by legislation enacted pursuant to other federal powers.
4. The traditional view of Chapter III is that it has no application to legislation enacted pursuant to s.122. Thus in *Spratt v Hermes* (1965) 114 CLR 226, a challenge to the validity of the appointment of a magistrate in the Australian Capital Territory on the ground that the magistrate was not appointed in accordance with Chapter III, the High Court held that s.122 was a plenary power enabling the Parliament to create territory courts which are not Chapter III courts created under s.71 and which are not subject to the appointment and tenure requirements of s.72. Subsequently, in *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591, the Court held, following *Spratt v Hermes*, although not without notable reservations (eg 'whatever I might myself have

thought if the slate were clean...', 125 CLR at 598, per Barwick CJ), that the Supreme Court of the Australian Capital Territory was not a federal court.

5. *Spratt v Hermes* was based in large part on old authority, for example, *R v Bernasconi* ((1915) 19 CLR 629, in which the High Court had held that the requirement in s.80 of the Constitution for trial on indictment to be by jury had no application to a trial in the Territory of Papua.

6. Some members of the Court have recently indicated support for the view that the Constitution places territory courts within the scheme of Chapter III and have shown interest in reconsidering earlier authority to the contrary (*Kruger v The Commonwealth* (1997) 190 CLR 1, 84 per Toohey J, 108 – 109 per Gaudron J, 162, 167-176 per Gummow J, *Gould v Brown* (1998) 151 ALR 395, 422 – 424 per Gaudron J, see also 497, 498 per Kirby J). This view has not, however, been shared by all members of the Court. Other members of the Court have cited and followed existing authority (*Kruger v The Commonwealth* (1997) 190 CLR 1, 41- 44 per Brennan CJ, 54 – 60 per Dawson J, 141 –142 per McHugh J, *Gould v Brown* (1998) 151 ALR 395, 406, 409 per Brennan CJ and Toohey J, cf 443 – 444 per McHugh J).

7. More generally, there is support for the view that the Constitution is to be read as a whole and the power conferred by s.122 is not independent of other provisions of the Constitution (*Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 122 per Gaudron J, 176-177 per Deane and Toohey J, *Capital Duplicators Pty Ltd v Australian Capital Territory (1992)* 177 CLR 248, 272 per Brennan, Deane and Toohey JJ, *Newcrest Mining (WA) Pty Ltd v The Commonwealth* (1997) 190 CLR 513, 604, 643, 651 per Kirby J). (See also, in the Federal Court, *Spinks v Prentice* (1998) 157 ALR 555, 558 – 561).

8. In light of the recent decision in *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513, there may also be support for the view that, to the extent that the Land Rights Act may be supported by s.51(xxvi) of the Constitution, Chapter III applies (making resolution of application of Chapter III to s.122 unnecessary).

9. The judgments in a very recent decision in which the issue was addressed but not resolved, *Northern Territory of Australia v GPAO* [1999] HCA 8, 11 March 1999, indicate that the issue

remains one that divides the Court. Gleeson CJ and Gummow J, in a joint judgment, said 'No issue arises as to whether s 122 of the Constitution authorises laws creating "territory courts" which are not federal courts created under s 71 but upon which the Parliament may confer federal jurisdiction. If the Parliament may do so, a question arises with respect to the application to such "territory courts" of the reasoning in *Kable v Director of Public Prosecutions (NSW)'* ([1999] HCA 8, 92, footnotes omitted). This passage together with footnote references appears to imply a willingness to reconsider earlier authority. Gaudron J adhered to the view she expressed in *Gould v Brown* but recognised scope for different treatment in respect of courts created under s.122 ([1999] HCA 8, 126,127). McHugh and Callinan JJ were of the view that Chapter III did not apply ([1999] HCA 8, 170). Kirby J, in dissent, did not find it necessary to deal with the issue ([1999] HCA 8, 218). Hayne J did not deal with the issue directly but agreed with Gleeson CJ and Gummow J. His judgment cast doubt on earlier authorities ([1999] HCA 8, 254, 257).

10. The present situation therefore is that, although *Spratt v Hermes* and *Capital TV and Appliances Pty Ltd v Falconer* stand, three current members of the Court, Gaudron, Gummow and Kirby JJ, have expressed dissatisfaction with those authorities and, given an appropriate opportunity, would probably hold that Chapter III applied to decision-making under the Land Rights Act. McHugh and Callinan JJ, on the other hand, would probably follow existing authority. Gleeson CJ and Hayne J have not addressed the issue directly but have given some indication of willingness to review earlier authority. The issue was raised in Mr Eastman's challenge to Carruthers J, heard on 24-26 March 1999, but it is not possible to predict the outcome of that challenge. There is no certainty that the Court's decision will be given prior to conclusion of the inquiry by the House of Representatives Standing Committee (judgment in complex constitutional cases is often reserved for 6-12 months). In the meantime, the issue must be regarded as uncertain but in my opinion, having regard to the trend of recent decisions on s.122, to the weight the Court now attaches to judicial independence and to the protections afforded by Chapter III, and the new concept of an integrated judicial system (*Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577), there is a

significant prospect that the Court would construe amendments to the Land Rights Act implementing the Reeves recommendations in light of Chapter III of the Constitution.

11. It is therefore necessary to consider whether implementation of any of the recommendations in the Reeves report may infringe Chapter III.

Possible infringements of Chapter III

(i) The recommendation that the Aboriginal Land Commissioner have regard to detriment

12. An Aboriginal Land Commissioner must be a judge of the Federal Court of Australia or of the Supreme Court of the Northern Territory (s.53(1)).
13. Non-judicial functions can be conferred on Chapter III judges provided two conditions are observed, first, the judge must consent and, secondly, the function must be compatible with the judge's performance of his or her judicial functions (*Grollo v Palmer* 1995) 184 CLR 348, 364-365).
14. Consent does not give rise to difficulty. The question for consideration is whether the function Reeves proposes be conferred on the Commissioner is compatible with judicial office.
15. Application of the incompatibility doctrine is not without difficulty. In *Grollo v Palmer*, the Court held (McHugh J dissenting) that the conferring on Federal Court judges as persona designata of power to authorise telephonic interception was not incompatible. In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, on the other hand, the Court held (Kirby J dissenting) that the purported nomination by the Minister of Mathews J to prepare a report under s.10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* was not compatible with Mathews J's office as a Federal Court judge. The purported nomination was therefore ineffective.
16. As the Act stands, the primary function of the Commissioner is to ascertain and report to the Minister whether any Aboriginals are traditional Aboriginal owners of land (s. 50(1)(a)). That

function is to be exercised judicially (*R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 349. The Commissioner is also required to *comment* on a number of other matters including

> '(b)the detriment to persons or communities including other Aboriginal groups that might result if the claim were acceded to either in whole or in part' (s.50(3)(b)).

17. This function is incidental to the Commissioner's primary fact-finding function. As Brennan J put it in *R v Toohey; Ex parte Meneling Station* (1982) 158 CLR 327

> 'The Commissioner can, usefully and appropriately, be asked to ascertain the facts relating to these matters and to comment upon them in the light of the knowledge he has necessarily acquired and the sensitivities he has necessarily developed in the course of his duties' (158 CLR at 361).

18. Significantly, it is not the function of the Commissioner to evaluate detriment, or to make recommendations on the basis of detriment (*R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327). That is a policy, or political, function of considerable sensitivity. It is a function that is reposed in the Minister.
19. Reeves recommends that the Act be amended to require the Commissioner in making his report *to have regard to* detriment (255 – 256, 269). The result would be to transform the Commissioner's function from a primarily fact-finding function to one of providing policy advice to the Minister.
20. Brennan J succinctly describes and analyses the differences between the two functions in the following passages

> 'If the Commissioner were required or entitled to have regard to these matters in making his recommendation, his function would be very different from the function of determining whether there is a local descent group whose traditional attachment to the land makes it right that a grant of land be made. The factors referred to in pars. (a) to (d) of s.50(3) are factors which are relevant to a political decision, a decision which has regard to all the circumstances relevant to the question whether a grant should be made . The political decision and the administrative action required to implement it are functions reposed in the Minister...' (158 CLR at 360 –

361).'But the weighing of the considerations specified in sub-s.(3) and all other relevant considerations in deciding whether a grant should be made is appropriately a matter for a Minister, not for a judge – particularly when the question for decision is pregnant with political controversy' (158 CLR 361 – 362).

21. The proposal therefore involves conferring on the Commissioner a function currently reserved for the Minister. The function proposed to be conferred incorporates a significant policy or political element. It is necessarily a function that is 'an integral part of, or is closely connected with, the functions of...the Executive Government' (189 CLR at 17). In my view, there is a substantial risk that the High Court would hold that this function is incompatible with federal judicial office. The function may be incompatible also with the office of a Justice of the Supreme Court of the Northern Territory, either because Chapter III applies to that Court or because, in light of *Kable,* that court is part of an integrated judicial system.

22. The effect of the application of the constitutional doctrine of incompatibility 'is not to vacate the office to which the Ch III judge has been appointed but to sterilise the power to interfere with the protection which the Constitution gives to the independence of Ch III judges' (*Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 16). Future purported appointments to the office of Aboriginal Land Commissioner would be invalid. An existing appointment would not be terminated but the exercise of the Commisioner's functions would be invalid.

(ii) Conferral of judicial functions on non-judicial bodies

23. Under the Act as it stands Land Councils exercise a range of administrative functions. Those functions must of course be exercised in accordance with the common law, in particular, in accordance with administrative law principles. Land Councils are subject to judicial review (for an example of application of the *Administrative Decisions(Judicial Review) Act 1977* to review of a decision of a Land Council relating to identification of traditional Aboriginal owners, on the ground of breach of natural justice, see *Majar v NLC* (1991) 24 ALD 134, 139, 151).

24. Land Councils are also required to use their best endeavours to settle by way of conciliation disputes with respect to land. The importance the Act places on conciliation as a means of settlement of disputes with respect to land is seen in specific provision for courts to adjourn proceedings with respect to such disputes to enable the Land Council to undertake conciliation with a view to settlement.

25. Under the Reeves proposals, the Land Councils and Land Trusts would be replaced by new Regional Land Councils (RLC's) which, in addition to the current 'administrative' functions, would exercise new dispute resolution functions. RLC's would, for example, deal with 'All disputes arising out of the Land Rights Act' (213). The report does not specify with any degree of particularity the nature of the disputes with which the RLC's are to deal but it appears from the preceding discussion that it is envisaged that the RLC's will adjudicate disputes as to traditional Aboriginal ownership and Aboriginal tradition (212, 213). The report is critical of 'recourse to legal and bureaucratic procedures to decide matters that properly belong within the Aboriginal domain' (212), notwithstanding that 'the object of many of these disputes is to have traditional Aboriginal ownership recognised legally' (212). Reeves' intention appears to be that all disputes relating to land should be adjudicated by the RLC's. The jurisdiction of the courts would be removed, as would be the formal conciliation responsibilities now conferred on the Land Councils. Disputes falling within this recommendation could relate also to entitlement of a person to be a member of the RLC, including whether the person is an Aboriginal person (595). Membership of the RLC is the legal basis for the exercise of rights in relation to Aboriginal land and governance. Such membership is therefore the source of key legal rights.

26. The disputes to be resolved by the RLC's would concern rights and obligations of Aboriginal people as between themselves, not disputes between Aboriginal people and government. Resolution of those disputes is not, therefore, 'in aid of the administrative functions of government' (*Wilkinson v Clerical Administrative and Related Employees Superannuation Pty Ltd* (1998) 152 ALR 332, 346, 357). Resolution of disputes arising from the operation of law is at the

very heart of the exercise of judicial power (*Huddart Parker & Co Pty Ltd v Moorehead* (1908) 8 CLR 330, 357, *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 360).

27. The proposals go on to provide for a person aggrieved to have a right of appeal to NTAC and a further right of appeal, on a question of law only, to the Aboriginal Land Commissioner (213). It is inherent in the proposals that there should be no right of judicial determination of these disputes, whether by way of original jurisdiction or review jurisdiction.
28. The jurisdiction of the High Court, under s.75(v) of the *Constitution*, cannot be excluded.
29. None of the RLC's, the NTAC or the Aboriginal Land Commisioner is a Chapter III court, able to exercise the judicial power of the Commonwealth. The Reeves proposals therefore contemplate conferral of power conclusively to determine questions of fact and law on bodies that are not Chapter III courts. As is well known, only Chapter III courts can exercise the judicial power of the Commonwealth (see, eg, *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 and a long line of earlier decisions). Assuming Chapter III applies, the scheme would for this reason be invalid.

PART V : NATURAL JUSTICE AND JUDICIAL REVIEW

1. I am asked to consider also 'the extent to which the decision making processes recommended in chapter 10 of the Report displace the rules of natural justice and judicial review under the *Administrative Decisions (Judicial Review) Act 1978'*
2. I note that, in relation to the Land Rights Act in its present form, the Federal Court has held that a Land Council must comply with the rules of natural justice in carrying out its statutory function to identify the traditional Aboriginal owners of land which has been vested in a Land Trust and that the *Administrative Decisions (Judicial Review) Act 1977* applies to decisions of the Land Council relating to recognition of Aboriginal Groups as traditional owners (*Majar v NLC* (1991) 24 ALD 134, 139, 151).

Displacement of the rules of natural justice

3. Reeves expresses the view that 'the most appropriate system is one which allows each RLC to adopt the decision making process that it considers most accurately accords with Aboriginal traditional processes and which is in the best interests of Aboriginal people in its region' (210) . He proposes a provision along the following lines

   'In carrying out its function with respect to any Aboriginal land in its area, 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.' (210)

4. This formulation, read in isolation, and containing as it does specific obligations to consult and to obtain consent, may appear to enshrine the common law principles of natural justice. In any event, those principles apply unless clearly excluded (*Kioa v West* (1985) 159 CLR 550, 584, *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, 653, *Annetts v McCann* (1990) 170 CLR 596, 598). Moreover, an intention to exclude natural justice will not lightly be inferred.
5. Had the recommendations gone no further, I think it unlikely that a court would have construed the formulation as expressing a clear intention to exclude natural justice. However, Reeves goes on to

explain that 'this broad and flexible requirement will allow for different processes to be followed depending upon the circumstances...For example, RLC's may decide that decisions to grant licences to enter Aboriginal land for a short periods (sic) of time may be made by the chairperson and CEO' (210).

6. The intention appears to be that consultation will be a matter for the RLC to determine. There will be no objective right to consultation. In at least some circumstances Aboriginal persons whose interests will be affected by a decision will *not* be consulted. That is, they will not be notified and will not be given the opportunity to comment.
7. Much will depend upon the terms of the legislation. Assuming the legislation incorporated a provision along the lines recommended by Reeves, I think it likely that a court would identify sufficient ambiguity to justify reference to the Reeves report (*Acts Interpretation Act 1901*, s.15AB(2)(b)). The report clearly contemplates circumstances in which natural justice would not apply. If the RLC believed it was not required to consult a particular Aboriginal person then (assuming the formation of that belief was not itself legally defective), it need not do so. It is in those circumstances and to that extent that natural justice would be excluded .

Displacement of the AD(JR) Act

8. Reeves proposes that
    - 'a person aggrieved by a decision of a RLC should have a right of appeal to NTAC'
    - '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.' (213)
9. As already indicated (Part IV , Judicial Power issues, para 27), I consider it to be inherent in these proposals that they are intended to displace the usual system of judicial review. This would include the AD(JR) Act. Of course, it is not constitutionally possible to exclude the original jurisdiction of the High Court under s.75(v) of the Constitution.
10. Whatever view be taken as to the best method of primary decision making, no good reasons are advanced for excluding judicial review in respect of legal error in the primary decision making

process. Assume, for example, that a person affected by a decision could establish one of the well known and well established grounds of review, such as bias, procedural error, fraud, bad faith, failure to take relevant considerations into account or taking irrelevant considerations into account. On what grounds should that person be denied the normal avenues of legal redress? In my view, the proposed exclusion of judicial review is contrary to accepted legal policy. The proposal is likely to attract criticism in the Senate.

ERNST WILLHEIM

7 April 1999