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Financial aspects of Aboriginal land rights in the Northern Territory

J.C. Altman and D.P. Pollack

No. 168/1998

Discussion Paper

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Professor Jon Altman
Director, CAEPR
The Australian National University
October 1998

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ISSN 1036–1774
ISBN 0 7315 2603 1

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Foreword

In September 1997, I gave a seminar 'Financial aspects of the NT Land Rights Act: a critical evaluation and proposals for change' at the Centre for Aboriginal Economic Policy Research. This seminar was based on long-term research on these issues that I have been undertaking since 1982, including the chairing of a review of the Aboriginals Benefit Trust Account (ABTA) in 1984 and participation in a working party that again reviewed the ABTA in 1989.

Subsequently, a summary of this seminar was provided to John Reeves QC who included it as a short section (pps 9–11) in his issues paper 'Review of the Aboriginal Land Rights (NT) Act 1976' of December 1997. At that time I negotiated to assist Mr Reeves as a consultant to the review on two of its terms of reference, namely:

- the operations of the Aboriginals Benefit Reserve (formally the ABTA) including the distributions out of the Trust Account; and
- the operations of the royalty associations and their reporting requirements.

Unfortunately, owing to other pressing work commitments, I withdrew this offer of assistance late in 1997. However, early in 1998, Mr David Pollack from the Aboriginal and Torres Strait Islander Commission's (ATSIC) Native Title and Land Rights Branch joined CAEPR on a secondment. Mr Pollack had considerable experience in working in both the Northern Territory and Canberra on the issues raised by these terms of reference. Consequently, I re-negotiated with Mr Reeves to provide a small-scale consultancy report on these issues, to be jointly prepared by Mr Pollack and myself during March and April 1998. Mr Pollack was able to visit Darwin and work with the review team in April 1998. A condition of the consultancy agreement was that all intellectual property rights in the research material shall vest upon its creation with us, with the proviso that nothing was to be released in public prior to completion of the review and provision of a final report to the Minister (for Aboriginal and Torres Strait Islander Affairs).

The decision to quickly publish this report as a CAEPR Discussion Paper has been made for two reasons. First, there is a great deal of information of public interest in our consultancy report 'NT Land Rights Review: Financial Aspects' that was not included in Mr Reeves's final report *Building on Land Rights for the Next Generation: Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976*. Second, there was a significant divergence between the broad approach that we recommended, which sought incremental change to the financial operations of the Land Rights Act and Mr Reeves's proposed major restructuring.

The content of this discussion paper has not altered since it was submitted as a consultancy report to the reviewer in May 1998 apart from the inclusion of Table 3 at page 7. Some amendments have been made for editorial purposes, and statistical information submitted as appendices in the original have been included as tables in the text. Given that it is likely that there will be further public debate

about the Reeves recommendations, we thought it useful to have our perspectives widely available to facilitate this debate.

Professor Jon Altman
Director, CAEPR
October 1998

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Glossary

ABR	Aboriginals Benefit Reserve
ABTA	Aboriginals Benefit Trust Account
ABTF	Aborigines Benefits Trust Fund
ACAA	*Aboriginal Councils and Associations Act 1976*
ALRA	*Aboriginal Land Rights (Northern Territory) Act 1976*
ATSIC	Aboriginal and Torres Strait Islander Commission
ALC	Anindilyakwa Land Council
AI Act	*Associations Incorporation Act 1978*
ANAO	Australian National Audit Office
ATO	Australian Taxation Office
CLC	Central Land Council
CAEPR	Centre for Aboriginal Economic Policy Research
CAC	*Commonwealth Authorities and Companies Act 1996*
CDEP	Community Development Employment Projects (scheme)
CHIP	Community Housing and Infrastructure Program
CRF	Consolidated Revenue Fund
DAA	Department of Aboriginal Affairs
FMA	*Financial Management and Accountability Act 1997*
FMS	Financial Management Strategy
GMAAAC	Granites Mine Affected Area Aboriginal Corporation
GEAT	Groote Eylandt Aboriginal Trust
GEMCO	Groote Eylandt Mining Company
HIPP	Health Infrastructure Priority Projects
IBA	Indigenous Business Australia
ILC	Indigenous Land Corporation
KRSIS	Kakadu Region Social Impact Study
MRE	Mining Royalty Equivalent
MWT	Mining Withholding Tax
NTOA	Nabarlek Traditional Owners Association
NAHS	National Aboriginal Health Strategy
NTH	Native Title Holders
NLC	Northern Land Council
NT	Northern Territory
TLC	Tiwi Land Council

Summary

In July 1997 the Minister for Aboriginal and Torres Strait Islander Affairs, Senator The Hon John Herron, announced that the *Aboriginal Land Rights (Northern Territory) Act 1976* would be reviewed. Senator Herron appointed Mr John Reeves QC to undertake the review. Mr Reeves submitted his report *Building on Land Rights for the Next Generation: Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976* to the Minister in August 1998.

This Discussion Paper focuses on financial aspects of the legislation. Since commencement of the legislation in 1977, approximately $400 million in mining royalty equivalents (MREs) have been transferred from the Commonwealth's Consolidated Revenue Fund to the Aboriginals Benefit Reserve (ABR) (previously the Aboriginals Benefit Trust Account). In accordance with the legislation this amount has been disbursed to other institutions, including land councils and royalty associations, and to incorporated bodies to be used for the benefit of Aboriginal people in the Northern Territory. In the 20 years of the operations of the legislation the apportionment of these funds has never been substantially reviewed nor rigorously contested.

The review provided an opportunity to resolve a number of long-standing issues which have historical legacies and have proven to be ambiguous and contestable in their application. These include the proportional division of ABR receipts, the public or private nature of MREs, the usage of those moneys and the imposition of Mining Withholding Tax (MWT). This Discussion Paper argues that many of the institutions created by the legislation are operating suboptimally and that the review provided the potential to clearly define the role and objectives of the financial institutions created in the Land Rights Act. Current developments such as the prospect of statehood for the Northern Territory become important issues for examination particularly in the context of Commonwealth/Territory relations and the governance of the ABR in the 21st century.

This paper also discusses the heterogeneous evolution of royalty associations noting that blanket recommendations are difficult to apply given that royalty associations have operated variably both over the life cycle of individual organisations, compared to other indigenous organisations, and in the context of wider political and economic forces. Notwithstanding the comments of this paper, and the recommendations of the review, there remains an urgent need for further research and assessment of performance of these associations in order to evaluate past performance and future viability. Nevertheless, it is apparent that some immediate amendments to the legislation are required particularly in the area of accountability measures, clarification in respect of the purpose of mining royalty equivalents and the provision of mentoring services for the future development of royalty associations.

The policy implications of reviewing the financial aspects of the Land Rights Act that has been in place for over 20 years is very complex. A selection of our recommendations with significant policy implications follow. In respect to the

ABR, a unique institution in its own right, we contend that it is operating suboptimally owing primarily to a lack of an institutional vision and mission. It is important that this issue is addressed, and that a clear role or amalgam of roles is created. Options we envisage include:

- maintaining the status quo—the ABR as a clearing house with a minor role as a reserve;
- an Investment House—set an investment goal (eg. self-sufficiency) and identify the purpose and type of assistance to, or for, the benefit of Aboriginal people in the Northern Territory (economic development);
- a Development Corporation—set a vision with a focus on the development of Aboriginal land with a commercial orientation; and
- a Sociocultural Corporation—set a vision with the primary objective as the maintenance of indigenous culture and society and a complimentary focus on employment creation.

All these options cannot, in our view, be addressed immediately, partly because of the need to reach consensus among all affected parties. This paper recommends the establishment of a working party with representatives from the land councils, ABR, Northern Territory Government, and commerce to address this particular issue. Conceivably the Aboriginal and Torres Strait Islander Commission (ATSIC) would establish the working party.

It is apparent that there are a number of other issues which need to be addressed immediately. Therefore as a first step to reform we make the following recommendations:

- that a rigorous assessment of the implications of the new Commonwealth auditing regime be undertaken in order to gauge its full impact upon the institutions created by the Land Rights Act;
- that the point at which MREs change from public moneys to become private moneys is investigated;
- that mechanisms are instituted to ensure MREs are not used solely as substitution funding;
- that the equity and efficiency implications of the MWT are again investigated (if individual cash payments made by some royalty associations cease then MWT logic is defeated);
- that royalty associations are consulted widely in respect to any recommendations which might affect their commercial and service operations;
- that amendments to the Land Rights Act be made to enhance the accountability of royalty associations and to establish a 'mentoring' regime within the Act;
- that royalty associations identify clear missions for themselves which are interrelated with that of the ABR;

- that appropriate structures are put in place that differentiate commercial activities from social activities, commercial from charitable and encourage some alliance building with mainstream business (on a commercial front) and other agencies, especially ATSIC regional councils but also the Northern Territory Government, on community development functions; and
- that a regime be instituted that discourages individual payments and encourages investment.

Acknowledgments

Most issues raised in this discussion paper originated from a seminar entitled 'Financial aspects of the NT Land Rights Act: a critical evaluation and proposals for change' given by Jon Altman at CAEPR in September 1997 shortly after the announcement of the review. Barry Vellnagel, of the Minerals Council of Australia, provided valuable comments as the discussant at that seminar, as did a number of other participants. An outline of the issues raised at the seminar were published at pages 10-11 of 'Review of the Aboriginal Land Rights (NT) Act 1976: Issues Paper 1997' released by Review Head John Reeves QC in December 1997. Subsequent to the seminar further research was undertaken both in Canberra and Darwin.

We would like to thank Mike Lane and the staff of the ABR for providing much of the statistical information contained in this paper, John Reeves and the staff of the Office of the Aboriginal Land Rights Review in Darwin for other related papers received in the course of the review, and the staff of the Business Affairs Office, Darwin, who were most helpful during the file searches undertaken. We would also like to thank Will Sanders and Diane Smith for their useful comments as readers of our consultancy report and Nicolas Peterson, John Taylor and Mike Dillon for helpful comments in numerous discussions. Editorial assistance was provided by Linda Roach and Hilary Bek, and layout was by Jennifer Braid.

Aboriginals Benefit Reserve (formerly the Aboriginals Benefit Trust Account)

With the enactment of the *Financial Management and Accountability Act 1997* and consequential amendment of the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA), the Aboriginals Benefit Trust Account (ABTA) was renamed the Aboriginals Benefit Reserve (ABR) as of 1 January 1998.

The ABTA was created in the ALRA in December 1976, but it did not become operational until 1 July 1978 when s.21 of the Northern Territory (Administration) Act was repealed. The ABTA has historically played a critical role in the whole question of Aborigines and mining royalties in the Northern Territory (NT), for it is the primary royalty distributing institution established in the ALRA (Altman 1983: 70).

The ABTA consists of a secretariat, staffed by six public service officers of the Aboriginal and Torres Strait Islander Commission's (ATSIC) NT State Office, and a 15 member Aboriginal Advisory Committee. It has a dual role. On the one hand, the secretariat acts as a clearing house and is responsible for the distribution to land councils of 70 per cent of statutory mining royalty equivalents (MREs). The proportion distributed to the lands councils for further distribution to the 'areas affected' associations (30 per cent), occurs automatically with no ministerial involvement. The proportion distributed to the land councils for administrative purposes pursuant to ss.64(1) (40 per cent), and supplementary funds pursuant to ss.64(7) are scrutinised by ATSIC Officers as the Minister is required, under s.34 of the ALRA, to approve estimates of expenditure for the land councils. On the other hand, the secretariat and the Advisory Committee are responsible for advising the Minister on the distribution of ss.64(4) moneys that can account for up to 30 per cent of the remaining MRE receipts each year.

In the period 1978/79 (when the ABTA commenced) to 1996/97 under the so-called 40/30/30 formula, the following payments were made:

- $116 million (about 30 per cent of MREs) paid to areas affected (as distinct from fully negotiated and potentially well defined compensation under agreement provisions);
- $202 million (about 52.5 per cent of MREs) to fund land councils;
- $67 million (about 17.5 per cent of MREs) in grants to, or for, the benefit of Aboriginal people in the NT (also includes ABTA administration costs) (Altman cited in Reeves 1997: 9).

As at 31 March 1998, the net funds reserves of the ABR was approximately $50 million. This financial position is subject to:

- the receipt of future statutory royalty equivalents under s.63 and interest revenues;
- payments under ss.64(4) as a consequence of the funds allocated for grants for 1996/97 and 1997/98; and

- the necessary payments to the land councils under ss.64(1), 64(7) and 64(3).

The actual timing and quantum of the cash inflows and outflows above cannot at present be precisely measured. It is forecasted that the ABR will hold reserves of about $36 million at 30 June 1998.

Notably, this is the first time the reserve has reached $50 million and minor growth of the reserve has occurred over the last few years. While the growth can be attributed to many factors, the most significant was the implementation of the Financial Management Strategy (FMS) in 1994/95. This strategy was introduced to reverse a significant decline in the reserve and was essentially an expenditure policy rather than an investment strategy. It was premised on 'freezing' land council administrative expenditure at 1993/94 levels, thus reducing the expanding draw on ss.64(7) supplementary moneys. The strategy also limited expenditure of grants pursuant to ss.64(4) to $5 million per annum and attempted to ensure that funds in the reserve would not drop below $23 million. One analysis of the ABR (Walter and Turnbull 1993) suggested that a figure of $64 million would be preferred to ensure that the ABR became self-sufficient in providing for grants under ss.64(4) fixed at $5 million per annum and to buffer it from any dramatic downturns in revenue.

Under the original legislative framework, s.62 of the ALRA defined the ABTA as a Trust Account for the purposes of s.63A of the *Audit Act 1901*. Effectively this means that royalty equivalents paid into the ABR are public moneys. With the repeal of the Audit Act, the trust fund became a reserve. A new legislative regime has replaced it by the following three Acts, the:

- *Auditor-General Act 1996*;
- *Financial Management and Accountability Act 1997* (FMA); and the
- *Commonwealth Authorities and Companies Act 1996* (CAC).

There are some obvious consequences of this new regime which include:

- the auditor of the land councils will be the Australian National Audit Office (ANAO);
- tabling dates for annual reports will change; and
- criminal sanctions can be applied.

However, there are concerns that a rigorous assessment of the impact of this new regime on the operations of the institutions created by ALRA has not been pursued to date. Of particular concern is that land councils, as statutory authorities, may be required to repay surplus funds to the Consolidated Revenue Fund (CRF) at the end of each financial year, as ATSIC is required to do. The requirement to repay surplus funds to the CRF would essentially make ss.35(1) of the ALRA redundant. Notably, the new regime also provides for exemptions in some areas in respect to those associations incorporated under the Commonwealth's *Aboriginal Councils and Associations Act 1976* (ACAA). The

impact of these exemptions, and whether they apply to royalty associations incorporated under NT legislation, has not been fully explored.

Nature of the fund—public or private?

The nature of the fund and whether MREs are public or private moneys has long been an issue of debate and largely remains unresolved. It would appear that the original intent of the recommendations of Woodward were that MREs were a form of compensation which, in essence, substantiates arguments that the moneys received by traditional owners and residents of areas affected by mining are private. However, the mechanism by which those moneys are released by the Commonwealth from the CRF present a strong case that the moneys are in fact public and should be accountable in the public domain. In the 1984 review of the ABTA, Altman (1985: 8) noted that this was an issue of significant division along predictable lines. All representatives of Aboriginal organisations held the view that MREs are Aboriginal moneys. The bureaucratic and legal view expressed by members of the then Department Aboriginal Affairs (DAA) was that MREs are public moneys.

The distinction between royalties as public or Aboriginal moneys is significant on a number of counts. First, if royalties are Aboriginal moneys, then a case can be made for Aboriginal organisations to administer their disbursement. If they are public moneys, then they should, arguably, be controlled by officers of the Australian Public Service or the like. Second, there is the question of financial accountability. If MREs are accepted as public moneys, then Treasury-style financial accountability may be required with justification. If MREs are Aboriginal moneys, then accountability could be to Aboriginal bodies like land councils (who are in fact statutory authorities of the Commonwealth and, under the new auditing legislative framework, will be audited by the ANAO).

Regardless of the views taken by Aboriginal organisations and bureaucrats, it is important to note that there are a variety of accountability requirements within the ALRA regime. A high degree of accountability is required by ATSIC and the Minister in regard to the funds disbursed pursuant to ss.64(1) and ss.64(7) of the ALRA for land council administrative costs. Land councils are required to table their annual reports in the Commonwealth Parliament. The 30 per cent of funds disbursed via the land councils to organisations in 'areas affected' has proved to display a weakness in accountability due to flaws in the legislation. These moneys are, arguably, regarded as direct compensation for the negative impacts of resource development projects. The remaining 30 per cent held in the ABR (for investment, grants and its own expenditure) have a high degree of formal accountability owing to the administration of these moneys by ATSIC and strict reporting requirements as a Commonwealth agency.

These differences raise many ambiguities, particularly given that the original source of funding is the CRF. If the moneys are indeed compensatory, and private in nature, why should they be used to fund land councils which are Commonwealth statutory authorities? Conversely, if the nature of the moneys are

public why are the 'areas affected' moneys not as highly accountable as the administrative moneys of the land councils?

Who should administer the fund ?

In the 1984 review of the ABTA it was recognised by all members of the working party that, as a long-term objective, complete Aboriginal control of the ABTA is desirable (Altman 1985: 13). While the ATSIC (1998) submission to this review acknowledges and supports this position, there has been no further critical assessment of such a position since the time of the 1984 review. The ABR is essentially managed and controlled by officers of ATSIC. The Advisory Committee has little input into the investment strategies or the day-to-day operations of the reserve.

ATSIC

The ABR Secretariat is currently a section of the NT State Office of ATSIC. Staff salaries, related expenses and running costs have historically been met by ATSIC and its predecessor DAA. Its approach to management of the ABR has been conservative. ATSIC staff exercise a range of substantive delegations for the Minister.

Both the Northern Land Council (NLC) and Central Land Council (CLC) commented, in their respective submissions to the review, that the management of the ABR by Commonwealth government officers has always been problematic. It is noted that ATSIC, and the DAA before it, are not neutral agencies, and their respective agendas are not necessarily consistent with those of the land councils and their Aboriginal constituents or the Advisory Committee. Indeed, ATSIC and DAA have/had a nation-wide, rather than a specific NT, agenda. Furthermore, the staffing and resourcing of the ABR is subject to government-initiated cuts to the public service generally, or specific cuts to ATSIC, unless the ABR is funded through ss.64(5). The current political climate also suggests that the certainty of the continuation of ATSIC either as an organisation, or in its current administrative role, cannot be guaranteed.

The land councils

Under the original Woodward model it was intended that land council administrative costs and distributions to royalty associations were to be paid directly to land councils from MRE revenue raised on Aboriginal land (that is 70 per cent of MREs). The ABTA was to receive only 30 per cent of MREs for grant functions pursuant to ss.64(4). However, with the drafting and the enactment of the legislation, the ABTA became the initial recipient of all MREs and charged with the role of distribution of MREs to the land councils.

While the land councils are funded by MREs, a regime initially established to protect them from the discretion of government budgetary decisions, policy

decisions taken by Ministers, ATSIC and its predecessor, in curtailing land council expenditure demonstrate that land councils have similar 'government' style constraints in which they operate. Furthermore, as MREs are a commodity based revenue which fluctuates, year to year funding can vary. Given the current political environment and financial constraints, the enhancement of land council functions and the further allocation of resources to undertake those functions is unlikely to be supported.

Independent board

The ABR consists of a small secretariat and an Advisory Committee. The primary, and almost solitary role, of the Advisory Committee is to recommend to the Minister, or Minister's delegate, projects and expenditure relating to the making of grants to, or for, the benefit of Aboriginal people in the NT pursuant to ss.64(4) of the ALRA.

The Advisory Committee currently consists of 15 members. A chairperson is appointed by the Minister while the remaining 14 members are elected from the membership of the four NT land councils. The Advisory Committee membership is based loosely on a proportional population representation model. There are seven members from the NLC region, five from the CLC region, and one each from the Tiwi Land Council (TLC) region and the Anindilyakwa Land Council (ALC) region. The composition, both in terms of total membership, representation and terms of office are policy decisions as the ALRA does not specify these provisions. The practice has been that the Minister approves terms of office of three years and land council nominees are selected through the land council election process.

The Advisory Committee is expected to act impartially and objectively, while at the same time being responsive to Aboriginal requirements and priorities. While the Committee is meant to be an apolitical body, for Aboriginal people, control of resources (particularly in the contemporary context, cash) is synonymous with politics. Altman (1985: 98) noted that it was of concern to members of the ABTA Working Party that under the current system, Advisory Committee members were under continuous pressure to approve grants for their local areas and often held personally responsible by their regional base when applications were rejected. The solution to this complex situation is not to relieve Aboriginal people of decision making powers, but rather to set up systems that offer Aboriginal people who are expected to make fair and impartial decisions, reasonable safeguards against direct regional or family pressure and coercion.

In conjunction with this is the need to clearly establish a mission statement for the ABR, and to ensure that such a mission statement receives consensus within the NT Aboriginal community. The prospect of an independent board elected by all NT Aboriginal people would go some way to addressing these issues. Its membership, representativeness, processes and management would be determined by the ABR's mission statement. If the ABR were to be investment orientated then issues of contestability and the inclusion of outside, possibly non-indigenous, expert participation, needs to be considered.

One important issue is how members of an independent board are selected. Currently the process for nomination to the Advisory Committee is undertaken by the land councils. Alternatively, selection could be undertaken by a separate NT-wide election process but this is a very expensive process. Possibly, selection to the ABR could coincide with ATSIC regional council elections. Another alternative could be that each regional council nominate either its chairperson or another councillor as a member of the ABR Board.

Allocation of mining royalty equivalents

Under the current legislation the allocation of MREs is as follows:

1. Ss.64(1)—40 per cent of MREs is paid to land councils for administrative expenses in proportions as determined by the Minister, having regard to the number of Aboriginal people living in the area of each land council.

Table 1. Disbursements out of the ABR pursuant to ss.64(1)

	NLC	CLC	TLC	ALC	MWT	Total
1978/79	255,151	148,838	21,262		29,077	454,328
1979/80	468,166	273,796	39,014		53,353	834,329
1980/81	920,564	536,995	76,714		104,908	1,639,181
1981/82	1,299,560	758,077	108,296		148,098	2,314,031
1982/83	3,889,333	2,392,773	330,637		431,866	7,044,609
1983/84	3,689,237	2,406,024	320,803		409,536	6,825,600
1984/85	3,914,774	2,553,114	340,415		434,572	7,242,875
1985/86	4,658,061	3,037,866	405,049		517,082	8,618,058
1986/87	4,030,537	2,628,611	374,181		448,936	7,482,265
1987/88	3,357,060	2,130,289	354,341		359,679	6,201,369
1988/89	4,079,412	2,660,486	354,732		436,825	7,531,455
1989/90	6,091,387	3,972,644	529,686		652,267	11,245,984
1990/91	7,738,348	5,046,749	672,900		828,624	14,286,621
1991/92	7,849,865	5,352,180	713,624	356,812	878,773	15,151,254
1992/93	3,852,520	2,626,718	350,229	175,115	431,280	7,435,862
1993/94	6,693,048	4,563,442	608,459	304,229	749,299	12,918,477
1994/95	6,063,376	4,134,120	551,216	275,608	456,977	11,481,297
1995/96	5,598,423	3,817,106	508,947	254,474	424,033	10,602,983
1996/97	6,104,500	4,531,608	665,693	332,847	471,764	12,106,412
Total	80,553,322	53,571,436	7,326,198	1,699,085	8,266,949	151,416,990

Source: ABR.

The current allocation to each land council for administrative costs as determined by the Minister in accordance with ss.64(1) is:

NLC	22 per cent;
CLC	15 per cent;
TLC	2 per cent;
ALC	1 per cent.

2. Ss.64(3)—30 per cent of MREs is disbursed from the ABR to the land councils for distribution in accordance with ss.35(2) to Aboriginal councils or incorporated bodies in the areas affected by mining operations.

Table 2. Disbursements out of the ABR pursuant to ss.64(3)

	NLC	CLC	ALC	MWT	Total
1978/79	318,939			21,808	340,747
1979/80	585,208			40,014	625,222
1980/81	1,150,705			78,681	1,229,386
1981/82	1,624,450			111,073	1,735,523
1982/83	4,959,558			323,899	5,283,457
1983/84	4,812,048			307,152	5,119,200
1984/85	4,896,726			312,557	5,209,283
1985/86	5,205,456	1,079,776		401,185	6,686,417
1986/87	5,130,734	481,986		358,259	5,970,979
1987/88	4,705,871	609,248		327,257	5,642,376
1988/89	4,056,417	1,264,556		327,618	5,648,591
1989/90	6,671,445	1,273,842		489,200	8,434,487
1990/91	8,323,126	1,770,371		621,468	10,714,965
1991/92	2,676,714	690,310	7,337,338	659,079	11,363,441
1992/93	2,203,913	1,026,958	2,022,565	323,460	5,576,896
1993/94	4,234,611	1,959,764	2,932,508	561,963	9,688,836
1994/95	3,881,226	2,097,213	2,289,801	342,733	8,610,973
1995/96	3,473,975	1,318,199	2,842,039	318,024	7,952,237
1996/97	4,205,686	2,671,796	3,107,915	414,889	10,400,286
Total	73,116,808	16,244,019	20,532,166	6,340,309	116,233,302

Source: ABR.

Table 3. Disbursements out of the ABR pursuant to ss.64(4) and 64(5)

Year	s.64(4)	s.64(5)
1978/79	2,481,695	4,091
1979/80	1,094,590	2,810
1980/81	500,713	9,729
1981/82	871,277	12,164
1982/83	659,582	18,204
1983/84	2,000,178	43,906
1984/85	4,888,055	56,009
1985/86	3,474,727	18,064
1986/87	1,083,036	83,078
1987/88	4,108,745	154,888
1988/89	8,076,203	239,691
1989/90	2,516,657	194,371
1990/91	8,330,927	215,978
1991/92	7,770,955	317,141
1992/93	9,561,396	98,495
1993/94	674,403	129,757
1994/95	651,181	174,819
1995/96	4,114,620	171,378
1996/97	3,895,506	98,699
Total	66,754,446	2,043,272

Note: Above figures for years 1978/79 to 1986/87 are cash figures. Figures for 1987/88 to 1996/97 are accrual based.

Source: ABR.

Table 4. Disbursements out of the ABR pursuant to ss.64(7)

	NLC	CLC	ALC	MWT	Total
1978/79					Nil
1979/80	307,917	218,232		33,674	559,823
1980/81	280,982	50,000		22,631	353,613
1981/82	1,107,138	284,553		97,461	1,489,152
1982/83	220,989	80,000		20,580	321,569
1983/84	293,586				293,586
1984/85	1,242,474			98,046	1,340,520
1985/86	128,724				128,724
1986/87	1,012,342	178,127		73,298	1,263,767
1987/88	3,294,367	2,184,053		303,394	5,781,814
1988/89	3,292,690	1,371,529			4,664,219
1989/90	2,219,442	1,420,618		54,767	3,694,827
1990/91					Nil
1991/92	900,000	1,500,000	116,602	124,952	2,641,554
1992/93	4,373,758	3,863,747	69,779	474,299	8,781,583
1993/94	1,776,453	1,670,134		153,701	3,600,288
1994/95	2,468,514	3,017,568	35,318	163,399	5,684,799
1995/96	4,554,259	3,779,371		304,272	8,637,902
1996/97	371,851	485,662		223,976	1,081,489
Total	27,845,486	20,103,594	221,699	2,148,450	50,319,229

Source: ABR.

3. Ss.64(4), 64(5) and 64(7)—30 per cent of MREs is to be utilised as follows:
   - Ss.64(4)—to, or for, the benefit of Aboriginal people living in the NT. This has been facilitated by application-driven grant funding.
   - Ss.64(5)—for administrative costs of the ABR Secretariat.
   - Ss.64(7)—allows for supplementary funding for land council administrative costs where ss.64(1) distributions are insufficient.

40/30/30

The allocation of MREs to land councils, areas affected and to grants to, or for, the benefit of Aboriginal people of the NT was initially arrived at arbitrarily. As Woodward commented 'in the final analysis an arbitrary decision has to be made and tested in practice to see how it works'. Woodward stated that this matter must be reviewed by the Government on request from the land councils from time to time, in the light of the amounts of money involved and the respective needs of land councils, local communities and other communities (Woodward 1974: 113).

Woodward recommended that all royalty payments be paid over by the government to the regional land council for distribution as follows:

- four-tenths to be retained by the land councils;
- three-tenths to be paid to the local community; and
- three-tenths to be paid to the ABTA (Woodward 1974: 114).

Woodward's 40/30/30 formula was never fully adopted in the ALRA. While ss.64(1) stipulates that 40 per cent of royalties be paid to land councils to finance

their Ministerially-approved budgets, and ss.64(3) states that 30 per cent of MRE receipts of the ABTA will be paid to land councils for distribution to incorporated bodies in the areas affected by mining, ss.64(4) does not guarantee that the full remaining 30 per cent of the ABTA receipts will be distributed Territory-wide. The most significant departure from Woodward's 40/30/30 formula occurred in 1979 when, by an amendment act, ss.64(7) was included in the ALRA (Altman 1985: 64). This amendment allowed the Minister to direct supplementary MREs, from the residual 30 per cent held in the ABR, to land councils when the 40 per cent of MREs did not meet the cost of their proposed administrative expenditure for a particular year.

In fact under the FMS, implemented by the previous Labor Minister (Tickner) and continued by the current Liberal Minister, approval of grants pursuant to ss.64(4) is limited to $5 million per annum. Furthermore, the inclusion of ss.64(5) in the ALRA provided that moneys, originally intended specifically by Woodward for grants, could also be used to meet the administrative expenses of administering the ABTA. Notably, there has been only a very minor draw by the ABR for its administrative expenses (at the most 0.5per cent of its income over time). However, there has been substantial drawing on the fund by the land councils for supplementary funds under ss.(7). Some $50,319,229 (gross including MWT) has been approved as supplementary administrative moneys for the land councils. The net result is that the ratio of disbursements from the ABR over time is actually 52.5 per cent to the land councils, 30 per cent as areas affected moneys and only 17.5 per cent in grants to, or for, the benefit of Aboriginal people in the NT.

Toohey (1984: 109) noted in his report that the matter of distributing moneys from the ABTA in a way less arbitrary and more equitable than at present was not an easy one to resolve. Putting aside the question of whether 40 per cent is adequate for the administrative costs of land councils, the division of the remaining 60 per cent needs to be objectively considered. Toohey noted that one approach would be to amend ss.64(3) and reduce the percentage from 30 to 10, thereby leaving 50 per cent for distribution for the benefit of Aboriginals living in the NT. In effect, this would have been a regressive policy as there was a 10 per cent allocation to areas affected by mining under the pre-land rights regime. Another option noted by Toohey would be to discard the notion of percentages and empower the Advisory Committee to determine, from year to year, the distribution of moneys paid out of the ABTA (Toohey 1984:109).

While Toohey favoured a reduction in the percentage distribution under ss.64(3) to ensure a more equitable distribution to Aboriginal people in the NT and to broaden the range of beneficiaries of MREs, he was very conscious of the impact on those associations already receiving areas affected moneys. Some associations had established projects, including commercial enterprises, which anticipate receipt of 30 per cent of MREs for at least the life of the mine. The same issues remain salient today. Organisations such as Gagudju have invested heavily in the regional economy. Indeed, the current financial problems faced by Gagudju

demonstrate the organisation's reliance on MREs to maintain its investments and its broader commitments to social program objectives.

Therefore, any alteration to the current allocative formula might have drastic results for royalty associations. If changes were to be made, it is imperative that the existing financial obligations of royalty associations are not overlooked. It would be necessary to examine the potential for other sources of funding to ensure the continued viability of these operations.

Ultimately, Toohey suggested that the status quo be maintained but also suggested that the formula be reviewed in about two years time. In 1984, the ABTA Working Party examined the question, although it was not within its terms of reference. The Working Party endorsed Justice Toohey's recommendation for a review of the formula and at the same time canvassed possible options. These included:

- The pooling of all moneys raised under ss.64(3) from which incorporated bodies could apply for funds for projects that diminish the impact of the disturbance of mining, thereby explicitly recognising a role of areas affected moneys.
- That all ss.64(3) moneys be paid to a 'new' ABTA, in actual effect discounting the regional compensatory nature of the payments. The existing royalty associations would have the same access to grants as other Aboriginal groups. Compensation payments would be paid by the mining company pursuant to s.43 and s.44 (Altman 1985: 246).

The Working Party eventually adopted the position that the original Woodward model should be strictly implemented. It took the view that the ABTA was intended to be a clearing house. The Working Party recommended the repeal of ss.64(7) and 64(5) and an amendment to ss.64(4) to guarantee that at least 30 per cent of MREs be paid to a proposed restructured ABTA to ensure it met the original intent of the grant function (Altman 1985: 248).

There have been two significant developments since these reviews were undertaken which arguably need consideration in determining an allocation formula. The first is recognition of native title and the possibility that compensation payments from mining disturbance may accrue to Aboriginal native title holders (NTH) and claimants in the NT. Notably, these payments are explicitly compensation and in all probability would be paid direct to a prescribed body corporate, the membership of which will be solely NTHs. This is a comparable regime to the negotiated agreement moneys under the ALRA except that in the case of the ALRA such payments are made to the land council for distribution to the traditional owners or as specified in the agreement. However, under the broad allocative model of the ALRA benefits can accrue to Aboriginal people, in the form of grants, without any proximity to the area affected by mining. In effect, a NTH can be a beneficiary, by way of a grant pursuant to ss.64(4) of the ALRA, from mining moneys derived some distance from their land and at the same time be a beneficiary of the native title compensation regime in respect to their specific

land. Of course, under the Native Title Act no statutory MREs are guaranteed to NTHs affected by mining (Altman and Pollack 1998). This is a particularly complex issue to resolve in terms of equity and balance in the NT.

The second development is the sunset clause, which came into effect on 5 June 1997 and will impact on the operations of the CLC and NLC in the future. At 31 October 1997 there remained some 113 land claims requiring resolution (Reeves 1997: 1) but no further claims can be lodged. This does not imply any reduction in workload and function of those land councils which pursue land claims (namely the NLC and CLC) at this stage. However, it would appear inevitable that in the medium to long term this function will become redundant under the ALRA. Having said that, this review provides an opportunity to reassess the direction of all the land councils in the post-sunset clause era. The prospect of the land councils not needing to commit money for research, administration and legal services involved with land claims in the future poses the prospect that resources could be directed increasingly to economic and land development strategies. Furthermore, the prospect arises of the diminution of the draw on the resources of the ABR.

Conceivably, it is possible that new strategies could be put in place now. One option would be to fund the NLC and CLC either by grant or by specific payment from the CRF for their respective land claim programs, separate to existing funding. This funding arrangement would be limited to the time frame necessary to complete the land claim process. There is a precedent for such direct funding where the NLC and CLC are funded as Native Title Representative Bodies by grant from ATSIC. There are prospects of achieving economies of scale due to the overlap of some land claims and native title claims in some locations. The benefits to the land councils include the opportunity to concentrate the resources of the remainder of the organisation, which would be funded from the current stream of MREs, towards its other existing functions while also enhancing their land management and development activities.

Land councils/investment/community facilities/grants

As noted 70 per cent of MREs are fixed for disbursement to land councils for administrative purposes (40 per cent) and for further disbursement to areas affected (30 per cent). While the ALRA specifies usage by the land councils for administrative purposes, it is silent in respect to areas affected. Under ss.64(4) the Act specifies that of the remaining 30 per cent, the Minister may approve grants to, or for, the benefit of Aboriginal people in the NT. The interpretation of 'to, or for, the benefit' can be very wide and the ALRA does not specify any generic use of these moneys.

The application of areas affected moneys is addressed in Part II in respect to royalty associations. As outlined there, these moneys have been applied to a mix of community services and infrastructure, investments and commercial enterprises and, sometimes, individual cash payments. Grants from the ABR are historically of a capital, rather than recurrent, nature and have been directed to a

range of economic, social and cultural projects including some infrastructure and enterprises. Of the number of grants made, vehicles and boats feature predominantly. The practice of utilising MRE moneys for community services and facilities is problematic. This matter is dealt with under the heading of substitution.

Since the enactment of the legislation the primary focus of the NLC and CLC has been to claim land. The land councils have been very successful in expanding the Aboriginal land 'estate' of the NT. The ABR has been party to this expansion by purchasing pastoral leases which are later lodged for claim under the ALRA. It has been argued, from a management perspective, that the Aboriginal land 'estate' should not expand beyond the capacity of resources to manage and develop that land. The post-sunset clause era provides the opportunity to reassess the management needs and development potential of the 'estate'. In this respect, consideration needs to be given to the role the ABR can play in land management and development and the potential for a strategic alliance with the Indigenous Land Corporation (ILC).

Income source

The ABR's current revenue source is limited to receipts of MREs from CRF, although it accrues some relatively minor revenue from investment, and ATSIC funds its operation costs. The ABR has been unable to generate significant income from investment due to its predominant role as a clearing house and rarely has the capital available to accumulate significant investment revenue.

Mining royalties

The role of mining royalties was central to Woodward's scenario, for he realised the need for funds independent of annual budget appropriations. The historical precedent dating back to 1952 existed whereby the Commonwealth surrendered its royalty receipts in favour of Aborigines (Altman 1983: 3–8).

Under the current arrangements the Commonwealth has a continuing obligation to pay into the ABR amounts equivalent to those which it receives by way of mining royalties derived specifically from uranium[1] and also equivalents of royalties received by the NT Government, which do not go into the CRF. Essentially the arrangement is premised on the recommendations of Woodward that minerals and petroleum on Aboriginal land should remain the property of the Crown, but nevertheless Aboriginal people should be 'compensated' with these payments to address the negative impacts of mining on their lives. By the end of the 1997/98 financial year more than $400 million will have been paid out of the CRF to the ABR under this arrangement.

Other possible sources

The Crough Review (Crough 1989) raised the possibility that the ABTA, or the Aboriginal organisations receiving income through the ABTA, might be funded on a basis other than that of MREs. It was suggested that it might be possible to link the ABTA's income to other forms of taxation raised from activities of (mining and non-mining) companies on Aboriginal land.

A further option would be to aggregate all revenue derived from mining or development on Aboriginal land in the NT within the ABR. This would increase the capital basis of the ABR and potentially generate additional investment income. No doubt this is a contentious option given the 'private' nature of these moneys, and traditional owners would need an inducement for it to occur. Such an inducement may be a dollar for dollar expenditure on community projects in their area.

The aggregation to the ABR could also include gate takings and other related income from Parks. Moneys released from the ABR would be directed to projects in the area from where the moneys were derived. Consideration could also be given to aggregating income from native title land within the ABR. This, however, would be politically and legally difficult to achieve.

It should be noted that, in aggregating these revenues, significant administration and other resources could be expended. The potential exists for such expenses to offset a significant proportion, if not all, of the benefits of the additional investment returns.

Rather than seek additional revenue one of the more obvious methods to increase the income of the ABR would be to enhance its investment activities with a mixture of expenditure control and deregulation of investment constraints. The FMS goes part way in facilitating expenditure control. Those identified constraints under Commonwealth financial legislation and regulation could be loosened or amendments passed to exempt the ABR so it could participate in a wider range of investments. The abolition of MWT would also assist with strengthening the development potential of the ABR. A reduction in the ABR's grants activities would also provide the basis for increased capital accumulation.

The possibility of receiving funds from the ILC could also be examined if the ABR were to adopt a land management oriented focus. An agreement could be negotiated whereby the ABR was provided with a NT-wide allocation to address land management projects together with its own resources. This would probably be a dollar for dollar arrangement between the ABR and the ILC.

Investment

The ABR 1996/97 annual report notes that moneys which are surplus to immediate requirements are either placed on deposit or invested. The Secretariat has an investment strategy which attempts to maximise investment returns, within its legislative constraints, whilst meeting liquidity requirements.

Investments are concentrated in the 'official money market' where funds are mainly invested in Bank Accepted Bills of Exchange and interest bearing deposits and the 11am Call Market.

The investment strategies of the ABR have been criticised by the land councils and others. Altman (1996b: 7) observed that accumulated reserves totalling $31.5 million (in nominal terms) at 30 June 1996 represented only 8 per cent of the ABTA's overall income. The CLC (1997) noted that less than 10 per cent of ABTA revenue is generated by investment. Some have argued that in order to advance the investment potential of the ABR it should become autonomous and free from the many legislative constraints in which it currently operates. The NT Chief Minister suggested that the ABR should be established as a statutory authority with a commercial orientation. Altman (1996b) suggested the establishment of a NT Commercial Development Corporation with a goal of enhancing economic development for indigenous people on Aboriginal land.

In response to these suggestions, it should be noted that the legislation does not require the ABR to save. The CLC (1997) re-emphasises that the role of the ABR is to provide compensation for Aboriginal bodies in the NT and not to generate revenue. The position expressed is that the exposure of ABR moneys to market risk is unacceptable. Risk taking with moneys that represent compensation for those largely in low income brackets has been considered unacceptable by the ABR Secretariat and the land councils, regardless of the safeguards of the constraints imposed by the Audit Act.

It has also been suggested that the ABR could adopt improved measures to increase revenue into the fund even within the constraints of the existing Commonwealth financial regime. It is asserted that under both the old and new Commonwealth financial regime there is scope for alternative avenues for investment which the ABR has failed to pursue. However, the relevance of such arguments are unclear as they are based substantively on particular sections of the legislation which may not apply to the ABR. With these range of views it would appear necessary to clarify exactly what the ABR can legally invest in, but more importantly to determine its actual charter and the purpose of any expanded investment role.

The charter

Critical to the evolution of a 'charter' for the ABR is the consensus from all stakeholders. There would appear to be four options:

ABR as a clearing house (status quo): If the ABR is to remain primarily a clearing house then perhaps its current functions are adequate or require marginal improvement with some minor amendments to the legislation.

ABR as an investment house: If the ABR is to become a mechanism for capital accumulation with a long-term goal of self-sufficiency and expansion, for the benefit of Aboriginal people in the NT, a major overhaul of its focus and operations is required. It would be necessary to assert a new direction of land

rights in the NT with a greater focus on economic development. Ultimately, from this position, a new institution would be required with suitable flexibility to invest in large wealth-creating projects.

ABR as a development corporation: This is basically a composite of the two above and would entail many of the aspects of an investment house, but with less risk. The onus would be on improved financial management with existing resources rather than seeking increased revenue from investment. The focus of operations would be towards the development of Aboriginal land and related commercial activities.

ABR as a sociocultural corporation: The mission being the maintenance of indigenous culture and society. The orientation would be towards land management and development. Projects, funded jointly with other government agencies, would focus on employment creation as well as specific allocations to linguistic, ceremonial and cultural ventures.

Commercial advice

Under its current operations and legislative safeguards, as a clearing house and small investor the ABR arguably provides adequate commercial advice. However, with a reorientation towards major investment and financial objectives, outside commercial and investment expertise of the highest quality would seem imperative.

Such independent expertise would be required not only to ensure professional commercial advice, but to introduce contestability in the decision-making process and buffer the Board from regional and local politicking. Expertise and advice could be accessed by including Ministerially appointed experts to the Board (like the ILC), employing staff with the relevant skills and qualifications in a restructured ABR, or by seeking advice from consultants.

Indigenous Business Australia

The proposed Indigenous Business Australia (IBA) intends to aggregate most, if not all, Commonwealth Aboriginal investment funds in order to benefit from higher rates of return and lead to enhanced revenue for all participating funds. The inhibiting factors to this proposal are dealt with broadly under s.3.4.6.4. Notably, the IBA limits its aggregation only to Commonwealth funds. Revenue raised under State legislation such as the New South Wales Aboriginal Land Rights Act or Pitjantjatjara Land Rights Act, is not included. The question needs to be raised as to why only revenue raised in the NT is to be included. This is particularly relevant in the context of the prospect of Statehood or patriation of the administration of the legislation to the NT.

Cooperation with other indigenous investment funds

There are a number of factors which inhibit the prospect of active cooperation with other indigenous investment funds. The ALRA itself is unique and unusual in the Australian context. The institutions created by the ALRA are unique, particularly the ABR. Notably, the contextual relationship between non-indigenous and indigenous people is very different to the rest of Australia, as 27 per cent of the total NT population is indigenous. Furthermore one of the more significant outcomes of the ALRA is that almost 50 per cent of the land mass of the NT is held, or will be, by Aboriginal land trusts.

A further consideration is the explicit orientation of the ALRA towards benefiting specifically the Aboriginal people of the NT. The combination of these factors, and notably the perception of the resistance of the stakeholders in the ABR, suggest that any integration with other investment funds will be seen as loss of control of resources. Furthermore, any potential support of the NT Government, either politically or economically, is linked to the good sense of maintaining all of the ABR's activities within the NT.

Distribution of funds

As already outlined, the distribution of funds is predicated on the 40/30/30 formula but, based on the assessment of distributions from the ABR since its creation, the net result of those distributions is 52.5/30/17.5.

Questions of how distributions are undertaken, and to which entity, will ultimately be determined in the context of any changes to the current regime. The options include:

- maintaining the status quo;
- Woodward's model—whereby 30 per cent is guaranteed under the legislation in ss.64(4);
- funding land councils from CRF direct with all MREs going to the ABR for grants and areas affected either on a 50/50 or other proportions to be decided;
- a revised formula which would perhaps reduce or enhance the proportion of distribution to areas affected; and
- establishing a regime without a formula where the Board of the ABR determines allocations annually with some guarantees for land councils.

Policy guidelines

The ABR has produced policy guidelines for the purposes of grant funding and administration, and financial distributions to the land councils. These policy guidelines are reviewed from time to time and as the need arises. In the main the policy guidelines are formulated by the ABR Secretariat sometimes with assistance from the Native Title and Land Rights Branch in ATSIC's Central

Office; policy guidelines in respect to grant funding and administration are formulated with the assistance of the ABR Sub-Committee. As the ABR is part of ATSIC, Commonwealth financial regulations and guidelines apply.

As already noted, the FMS has been successful in its goal to arrest the decline in the reserve. It is due for review during 1997/98.[2] A set of guidelines described as a 'New Funding Regime for land councils' were implemented on 1 July 1996 to specifically address those land councils which required supplementary funds under ss.64(7). These guidelines were introduced to address several issues. As moneys are now released from the ABR on a quarterly basis, land councils drawing on ss.64(7) moneys are required to report their financial position on a quarterly basis. Therefore, the need for ss.64(7) moneys is under quarterly review. A benefit of this new regime to the land councils is that funds are guaranteed to be released in the first week of each quarter. In the past land councils have been required to take overdrafts with associated costs at the beginning of each financial year to cover the period before they were in receipt of the first MRE distributions of the year.

While this paper does not incorporate an extensive review of the ABR's policies guidelines, in the main these guidelines appear to be operating satisfactorily and achieving the required goals in the context of the current regime. Although there are some inadequacies in guidelines to address the assessment of the performance of grants. It would be inevitable with the implementation of any recommendations from this review that the policy guidelines of the ABR might become either redundant or require review.

Administration of the distribution

In terms of past performance in accountability and transparency, the ABR is arguably the preferred institution within the ALRA framework to administer the distribution. However, the question needs to be examined if the ABR were to adopt an enhanced role of investment and commercial activity, as to whether it would want to undertake the role as clearing house as well.

In this context, the original Woodward model could apply; MREs could be paid direct to the land councils for their administrative expenses and for further distribution to areas affected. As an alternative, areas affected moneys could be distributed direct from the ABR rather than the land council. This alternative could include provisions for a proportion of the areas affected moneys to be withheld by the ABR for investment on behalf of the royalty association. The ABR would become the accountability point for the royalty association, while the land council would adopt a mentoring role with each royalty association.

Transparency in the distribution

Due to the application of Commonwealth financial management and auditing requirements, the distribution of funds in and out of the ABR is highly

transparent. The ABR is now required to produce annual reports which document the source of revenue and income, and clearly record the disbursements to the relevant institutions and organisation pursuant to ss.64(1),(3),(4) and (7).

The land councils, who are now caught under an identical accountability regime as that of the ABR, also provide a high level of transparency in the level of financial disbursements. However, it is not always easy to identify the specific category of payments made to royalty associations in the land council annual reports. Although the land councils specify their determinations under ss.35, in some instances the land councils records only composite payments to royalty associations. This presents further problems in attempting to identify in the royalty association's financial statements the type and category of payments received.

It would be beneficial, in light of the need for transparency of distributions, for the financial statements of the land councils (in respect to disbursements) and royalty associations (in respect to income) to specify the type, category and specific section of the ALRA from which moneys are derived.

Targeting benefits to Aboriginal communities

It has been the practice of the ABR that applications for grants pursuant to ss.64(4) are assessed initially by ATSIC regional office staff. This practice has been adopted to avoid duplication of grant allocations and it is reasonable to expect officers in the region to have a better knowledge of the applicant and past performance as a grant recipient. Furthermore, regional office staff have a closer relationship with ATSIC regional councils and would be familiar with the priorities set in regional plans and community plans. While the ABR also liaises with other Commonwealth and NT agencies which provide assistance for Aboriginal people, the focus has been at the regional level rather than NT-wide.

A departure from this practice would be dependent on the ABR being given a new charter. Nevertheless, mechanisms already exist for improved targeting of benefits to Aboriginal communities which perhaps have not been fully explored and integrated with ABR processes. For example, the intent of regional plans and community plans is to produce consultative and negotiated plans that address the needs and priorities of Aboriginal communities, and attempt to evaluate potential resources. These documents are potentially instructive not only in assisting to determine community project priorities but also in interpreting the expectations of institutions. In this regard, it would be useful, if not necessary, for the ABR Advisory Committee and the Sub-Committee to refer to regional plans in policy deliberations.

As an alternative model, the composition of the ABR Advisory Committee could potentially be made up of representatives from ATSIC regional councils. As the formulators of the regional plans, these representatives might have a better approach to targeting benefits than the current land council nominees. However,

if the ABR were to have a land management and development focus, land council nominees would arguably be better qualified.

Accountability of recipients of grants

As grants from the ABR are predominantly of a capital, rather than a recurrent, nature, the practice has been adopted that the ABR pays the provider directly on invoice rather than via the grant recipient. Essentially, accountability procedures cease at this point. ATSIC-style acquittal processes are not applied as the usage and the application of the grant funds are qualified at the point of transaction.

However, there has been a lack of assessment of the performance of the grants. This was an area of constant criticism by auditors in the late 1980s, as was the failure of the then ABTA to create performance indicators. Only one review has been undertaken specifically focused on assessing the performance of the grants, which was in 1990/91. This review examined a cross-section (approximately 25 per cent of the total and covered all regions) of the grants made since the establishment of the ABTA. It attempted to evaluate the benefits accrued by particular types of generic grants and recommended a format for performance indicators. The implementation of the recommendations of the review were put on hold following the moratorium on the ABTA's grant functions in the following years. An assessment of the ABTA's annual reports since 1990/91 reveals no record of the use of any performance indicators.

Substitution

In submissions to this review the large land councils have maintained the view that MREs are compensatory. The land councils (CLC 1997: 111; NLC 1997: 121) expressed the following view that such funds are compensatory in nature and are not intended to substitute for unsatisfactory government expenditure for Aboriginal development. The land councils argued that ABTA funds reflect:

- a special right to compensation for traditional owners of land directly affected by mining operations;
- a wider entitlement to compensation for loss of land or connected rights and associated disadvantage to Aboriginal people throughout the NT; and
- the need to provide land councils and Aboriginal bodies providing representation, advice and additional services or assistance with financial support that is insulated from political party machinations and the immediate control of government.

A number of reports (see, for example, the Kakadu Region Social Impact Study (KRSIS) 1997) have suggested that MREs and other mining payments have been utilised to substitute normal government funding for community infrastructure and other projects. These observations are largely based on anecdote rather than on substantive research. It is argued that, as a net result of

substitution, Aboriginal groups in receipt of mining moneys utilise those moneys for social welfare and services, and therefore do not accrue the benefits from a development. In effect, what are initially perceived as compensation moneys due to disturbance by mining, eventually offset legitimate government expenditure.

As noted in the KRSIS (1997: 34) services, housing and infrastructure come from a limited pool of government resources. Many agencies apply tests for allocations based on need. In simple terms, money or services go proportionally to where the need is greatest or where people are poorest. This practice is widely accepted as appropriate and was acknowledged as appropriate by the KRSIS Advisory Group. However, with either actuality or perception of income and facilities from mining and tourism, areas that receive moneys from mining, such as the Kakadu Region, may slip down the priority list. While this may or may not occur in other areas where moneys are derived from development on Aboriginal land, it is a likely outcome given the criteria regional councils and other agencies apply.

The perceived phenomenon of substitution would appear to be regionally or locally based. There does not appear to be any discounting of allocation of government funds to the NT from national allocative regimes. The NT was allocated $160 million by ATSIC in 1996/97, which is the second highest allocation of all State and Territory allocations (Western Australia being the highest with $190 million). In order to gauge the extent of substitution it would be appropriate to inquire with ATSIC Regional Councils and the NT Government as to whether there exist implicit or explicit policies and practices which divert resources away from Aboriginal groups who are in receipt of MREs.

At the same time, consultations could ensue to encourage joint-funding arrangements between agencies and associations receiving mining royalty equivalents. Joint-funding arrangements would ensure that government agencies participate in the development process in those communities which have, arguably, been neglected in the past due to the perception they have adequate resources to address the problems they face.

Mining Withholding Tax (MWT)

Historically, the receipts of the Aborigines Benefits Trust Fund (ABTF) from 1966 when it first received mining royalties, to 1978 when it was superseded by the ABTA, were untaxed. Similarly, investment and interest income accrued by the ABTF were regarded as non-taxable income. When the ABTA became operational on 1 July 1978, its receipts were also untaxed. However, amendments to the Commonwealth tax legislation in 1979 made MREs taxable income. In June 1979, the *Income Tax Assessment Act 1936* was amended to include special provisions for taxation of payments made in respect of mining operations on Aboriginal land. The rate of taxation was originally specified in the *Income Tax (Mining Withholding Tax) Act 1979* as 6.4 per cent. This rate was calculated according to explanatory memorandum at the rate of 32 per cent applied to 20 per cent of gross revenues concerned. In effect, though the tax is levied at the rate

of 20 per cent of the minimum tax rate on all mining payments (Altman 1985: 229–230).

The MWT is a final tax and later distributions do not attract further tax liability when in the hands of Aboriginal recipients. MWT is payable on distributions of MREs from the ABR. The formal liability for the tax rests on the Aboriginal recipients of the mining payments while the responsibility of payment rests with the ABR.

The current rate of MWT is 4 per cent; however, it has been reduced at various times since it was first levied. Initially set at 6.4 per cent, it declined to 6 per cent (November 1982), to 5.8 per cent (November 1984) and to 4 per cent (November 1994) (ATSIC 1997: 1). The most recent reduction occurred following the efficiency audit of the NLC by the ANAO which recommended the MWT be reviewed (Auditor-General 1993/94).

Financial information provided by the ABR indicates that since MWT was first levied on the ABTA the following amounts have been paid to the Australian Taxation Office (ATO):

- $8,266,949 levied against ss.64(1);
- $2,148,450 levied against ss.64(7); and
- $6,340,309 levied against ss.64(3).

MWT is also levied against outgoings from the ABR in respect to grants pursuant to ss.64(4). While the total MWT levied since the introduction of the tax is difficult to quantify in respect to ss.64(4) the amounts levied during the years 1990/91 to 1993/94 indicate the variation from year to year. In 1990/91 an amount of $164,790 was levied; 1991/92 totalled $300,639; 1992/93 totalled $436,613; and in 1993/94 totalled $23,460 (ABTA annual reports). These variations can be explained by the fact that grant approvals and release of funds do not necessarily take place in the same financial year.

MWT is not levied against ss.64(5) as it has been the practice of the ABR to derive its administrative expenses from non-taxable funds (that is, interest earnings and minor receipts).

An assessment of the effectiveness of this tax concession to meet its objectives has not been rigorously undertaken. The tax has been extremely effective in taxing mining payments made out of the ABR. However, compliance with respect to other mining payments made in the NT and on Aboriginal land in the States is unclear. For example, the ATO estimates that it collected $1.1 million in MWT in 1995/96, 92 per cent of which was paid by the then ABTA (ATSIC 1997: 1). The MWT framework, and ATO practice, do not clearly distinguish the taxing of MREs (that are paid from CRF to the ABR and are totally transparent) from payments from mining companies to Aboriginal interests that are also liable to MWT. With respect to the objectives of the tax:

- It is unclear if the MWT adds certainty in negotiating exploration and mining agreements given that most are influenced by many unknown variables like the future price of minerals and mine profitability;
- It is unclear if the MWT is well targeted being a blanket tax; and
- The incorporation of indigenous people into the Australian taxation system has increased significantly in the 18 years since the introduction of the concession (ATSIC 1997: 2).

Previous reviews of the ABTA (Altman 1985; Crough 1989) have found that the MWT is unfair. It exacerbates funding problems of land councils and enhances the perception of poor performance of the ABR as payments are always referred to as gross rather than net. The 1989 review found the MWT 'discriminatory' and an 'unnecessary and inequitable impost' (Crough 1989: 44, 46). The working party of the 1984 review was 'unanimous in its belief that the levying of mining withholding taxes on mining royalty equivalents was not only inequitous, but also increased the funding difficulties experienced by Aboriginal land councils and hampered the effective granting operations of the ABTA under sub-s.64(4)' (Altman 1985: 229).

Recommendations/options

The ABR is a unique institution that is perceived as operating suboptimally owing to a lack of an institutional vision and mission. It is important that this issue is addressed and that a clear role, or amalgam of roles, for the ABR is created.

The options include:

- Maintaining the status quo—the ABR as a clearing house with a minor role as a reserve. This includes the need to enhance accountability requirements of the royalty associations and the establishment of performance assessment criteria for grants.
- An investment house—set an investment goal (e.g. self-sufficiency) and identify the purpose and type of assistance to, or for, the benefit of Aboriginal people in the NT (economic development).
- A development corporation—set a vision with a focus on the development of Aboriginal land with a commercial orientation.
- A socio-cultural corporation—set a vision with the primary objective as the maintenance of indigenous culture and society and a complimentary focus on employment creation.

These options must be addressed immediately, partly because of the need to reach consensus from all the affected parties. We recommend the establishment of a working party with representatives from the land councils, ABR, NT Government, and commerce to address this issue. Conceivably ATSIC would establish the working party.

Issues of governance, proportional division of receipts, and the future of the ABR on statehood will need to be resolved. There is also the need to address the lack of a clear charter for ABR which has resulted in lack of accountability for performance because performance indicators are not strictly defined.

As a first step to reform we recommend:

- That a rigorous assessment of the implications of the new Commonwealth auditing regime be undertaken in order to gauge its full impact upon the institutions created by the ALRA;
- That the point at which MREs change from public moneys to become private moneys is investigated;
- That mechanisms are instituted to ensure MREs are not used solely as substitution funding;
- That the equity and efficiency implications of the MWT are again investigated (if individual cash payments made by some royalty associations cease then MWT logic is defeated);
- That an appropriate governance structure for the ABR for the 21st century is considered to ensure that the fiscal base of the ABR is enhanced.

In order that the basis be laid for the potential transformation and orientation of the ABR, we recommend the following interim measures:

- That land council budgets are limited to 40 per cent of total MREs;
- Ss.64(3) payments remain at 30 per cent but with enhanced accountability and better definition of use to which moneys should be applied; and
- Ss.64(4) continue to be restricted to $5 million per annum but with the proviso that ABR Advisory Committee is encouraged to expand the reserves of the ABR if possible.

Royalty associations

It should be noted at the outset that the term 'royalty association' is a euphemism that is not entirely accurate. Because of differences in the historical periods when associations were established, differences in mining agreements, and differences in the land rights of Aborigines, there has been no development of a single royalty association model (Altman 1983: 134). Furthermore, the term has been applied in some instances to include those associations established to receive only moneys pursuant to ss.35(3) and 35(4) of the ALRA which are agreement and rental moneys not MREs. It has also been suggested that organisations receiving moneys pursuant to ss.35(1), which are surplus administrative moneys distributed by the land councils, could nominally be described as 'royalty associations'.

Such broad interpretations expand the horizons of any investigation into the operations of royalty associations. Indeed, the CLC noted in their submission to

this review that there are currently around 45 different Aboriginal corporations within the CLC jurisdiction receiving moneys under ss.35(2), 35(3) and 35(4). These organisations have memberships ranging from seven to over 2,000 and incomes ranging from below $3,000 to over $1 million per annum (CLC 1997: 122; Ngurratjuta/Pmara/Ntjarra Aboriginal Corporation 1998). Notably, there are only two organisations within the CLC jurisdiction that currently receive areas affected moneys. Whereas it appears that within the CLC jurisdiction a policy has evolved of creating small associations specifically to receive mining agreement rent moneys and statutory rental moneys, in the NLC jurisdiction the tendency has been to disburse all moneys, be they statutory or non-statutory payments, to a single incorporated entity. The net effect, dependent on the definition of royalty association applied, is that the quantum amount of money derived from mining is greater in the NLC region where there are fewer royalty associations, or organisations in receipt of mining moneys, than in the CLC region.

Notwithstanding the importance of reviewing the accountability and effectiveness of the smaller associations and the impact of negotiated royalties and rent moneys, the major focus here is on those organisations historically referred to as 'royalty associations'. This refers to associations that receive statutory MREs, disbursed pursuant to ss.35(2) of the ALRA which have become known as 'area affected' money. In most cases negotiated agreement moneys and rent have also been paid to these organisations.

Those royalty associations are listed in Table 5. That Table also details the Act under which each organisation is incorporated, the date of incorporation and the amount, or estimated amount, the organisation has received pursuant to ss.35(2) over the last ten years. Some of these organisations are incorporated under the Commonwealth's ACAA, while others, in the most part the longer established, are incorporated under the NT *Associations Incorporations Act 1978* (AI Act) and its preceding ordinance.

The operations of royalty associations have been largely unreviewed. Although a number of studies have focused on specific royalty associations (e.g. Gagudju, Nabarlek Traditional Owners Association (NTOA)), a broad and comprehensive review of their role and operations has not been pursued despite the importance of these organisations within the financial regime of the ALRA. There has been an evident reluctance by both the Commonwealth and land councils to work together to improve the effectiveness of royalty associations, even when outcomes have been poor (Altman 1996a: 46). Therefore, little can be said about these bodies due to the paucity of available information about their operations and because the utilisation of moneys paid to 'areas affected' has not been rigorously assessed. It has been argued in the past that the reluctance to review the operations of royalty associations (by both land councils and the government) is linked to political expediency—some of the most articulate and influential indigenous leaders in the NT are members and office bearers of the associations (Altman and Dillon 1988: 141).

Table 5. Royalty association incorporation details and receipts of ss.35(2) moneys, 1987/88 to 1996/97

Association	Incorporating legislation	Date of incorporat'n	Income ($ mill.)	Period
NLC region				
Gagudju	AI Act (NT)	8/9/80	17.57	(except 95/96)
Gundjehmi	ACAA	14/7/95	1.76	(95/96 to 96/97)
Gumatj	AI Act (NT)	10/7/79	10.23	
Dhanbul	AI Ord (NT)	12/10/72	.19	(88/89 to 90/91)
Rirratjingu	ACAA	23/8/85	2.33	
Lahynhapuy	AI Ord (NT)	17/10/85	1.61	(92/93 to 96/97)
Dhimurru	ACAA	8/9/92	0.30	(est since 1993)
GEAT	AI Ord (NT)	21/8/69	9.97	(87/88 to 90/91)
Non-active				
Kunwinjku	AI Act (NT)	/1/82	14.40	(all repts to 93)
NTOA	ACAA	5/4/88	2.56	(87/88 to 91/92)
CLC region				
Ngurratjuta	ACAA	23/8/85	6.50	
GMAAAC	ACAA	31/1/90	7.17	
ALC region				
GEAT	AI Ord (NT)	21/8/69	12.60	(91/92 to 95/96)
Amangarra	ACAA	7/6/94	8.34	(94/95 to 96/97)

Notes: a. Some of the above figures may include lease agreement payments.

b. The amounts shown in the above table for the royalty associations in the NLC and CLC regions are derived primarily from the NLC and CLC responses to the reviewer. There are a number of discrepancies when compared with other research due to the timing, methodology and inclusion of other payments. The NLC response to the reviewer did not specify any payments to the Dhimurru Aboriginal Corporation. It appears that the disbursement of royalty equivalents is via the Gumatj Association. Payments to Dhimurru were also identified by Martin (1995).

Sources: Anindilyakwa Land Council annual reports 1992 to 1997; Altman and Smith 1994; Martin 1995; NLC and CLC responses to reviewers questions (March 1998); Gumatj Association financial statements.

What is apparent is the diversity of the administrative and commercial operations of the royalty associations. The ambit of operations is, in most cases, much wider than receiving MREs and making use of them. Many royalty associations have incorporated Community Development Employment Program (CDEP) schemes in their operations (e.g. Gumatj, Ngurratjuta), while others have developed intricate corporate structures with a focus on commercial development (e.g. Gagudju). Most provide services, in many cases housing, to their members. The Dhanbul Association which began as an incorporated body to receive royalties has since become Yirrkala's community council (Altman 1983: 134). Inherent in the expansion of royalty association operations, is that the organisations receive ATSIC grants to facilitate projects under the CDEP, Community Housing and Infrastructure Program (CHIP), National Aboriginal Health Strategy (NAHS) and Health Infrastructure Priority Projects (HIPP) schemes. This means that they have accountability requirements outside the land

rights regime. At the same time many of the services provided by royalty associations are funded by the areas affected moneys.

In their study of the NTOA, Altman and Smith (1994) identified a number of key problems that have the potential to recur in similar organisations:

- governance problems: determining the membership, the directors and the managing director and ensuring an appropriate standard of behaviour from these three groups;
- expenditure versus investment: the satisfying of present needs by current expenditure as opposed to the potential benefits of deferred expenditure through savings and profitable investment; and
- the role of the external agencies: these include the land council, ATSIC, the Registrar of Aboriginal Corporations and the NT Registrar-General.

Most of what is known suggests that the performance of royalty associations has generally been disappointing. There has been an apparent lack of transparency, planning, focus and outcomes in their operations and historically they have been poorly managed.

Public or private moneys

This issue was dealt with in Part I under the heading of the ABR. Nevertheless, it should be emphasised that the payment of the 30 per cent areas affected moneys was intended as direct compensation whereas the allocation of 30 per cent from which grants could be made for the benefit of Aboriginal people in the NT is more broadly compensatory and was also partially intended to ensure that significant income differentials did not arise between different Aboriginal groups (Altman 1985: 243). In other words, the validity of the argument of MREs being compensation moneys is best sustained in respect to areas affected moneys.

From this point of view it is argued that the funds received by these Associations lose their status as 'public funds'. Therefore the onus for accountability of the Associations is to the Aboriginal community, in which case general corporate regulation responsibilities apply. The issue of accountability to members becomes a major problem for these organisations as the ALRA does not make it clear whether they receive MREs under ss.64(3) as compensation payments or as a share of mineral rent, and whether they are expected to utilise these moneys in any particular way (Altman and Dillon 1988: 141).

On the other hand, there are suggestions that there should be more effective scrutiny and regulation of the financial affairs of these entities than is presently provided for under the ALRA as they are public moneys paid out of CRF. These suggestions are also raised in the context of issues of the poor performance of the royalty associations, including lack of transparency, complaints by members, mismanagement and fraud.

At the same time the distinction between statutory and non-statutory moneys need to be taken into account. Moneys such as those negotiated through

agreements and rent are arguably more private than MREs and hence less legally amenable to external accountability (Altman 1996b: 8). Indeed, under s.44A(1) the legislation specifies that 'terms and conditions agreed upon under s.42 or s.43, or determined under s.44, shall include terms and conditions requiring the payment by the applicant of compensation for damage or disturbance caused to the relevant Aboriginal land, and to the traditional Aboriginal owners of the land, by exploration activities undertaken on the land...'. Notably, compensation is explicitly specified in relation to exploration activities. These negotiated agreement moneys are provided as an inducement to traditional owners to trade away their de facto property rights in minerals provided by the veto. Conceptually, this suggests a 'private' and confidential arrangement between the land owner and developer.

Mining royalty equivalents

Under the current regime the ABR disburses MREs in accordance with ss.64(3) to the relevant land council in which the mining operations are located. Pursuant to ss.35(2), the land council is required to determine the appropriate incorporated councils or associations to receive the areas affected moneys and to release the moneys to that entity. The ALRA requires that the land council take such action within six months of receiving the moneys or otherwise seek ministerial direction.

Table 6 specifies the total amounts disbursed from the ABR to the relevant land council pursuant to ss.64(3) between 1978 and 1997.

Table 6. Disbursements from the ABR to land councils under ss.64(3), 1978–97

Land council	Dollars ($)
NLC	73,116,808
CLC	16,244,019
ALC	20,532,166

Notes: a. The TLC has not received any funding under ss.64(3).

b. $6,340,309 has been levied in MWT against ss.64(3) disbursements.

c. Prior to the establishment of the ALC in 1991, ss.64(3) disbursements derived from GEMCO were received by the NLC for distribution to the areas affected on Groote Eylandt.

Source: ABR.

The income differentials of moneys received under ss.35(2) of the royalty associations from areas affected moneys are wide. The Gagudju Association, which receives moneys derived from mining of uranium at the Ranger Mine, has received the highest total amount with an estimated $40 million. Since 1980

Gagudju has received an average income in excess of $2 million. Other Associations receive less than $1 million per annum. These income differentials are attributed mainly to the type of mineral commodity, its market value, the scope of the mine and its production and the royalty rate.

Negotiated royalties

Pursuant to ss.35(3) moneys received by a land council under s.42,43,44,46,48A,48b or 48D are to be paid within six months of receipt in accordance with the agreement. If the agreement makes no specific application provisions, these moneys are distributed to Aboriginal councils, or incorporated groups or communities affected by the agreement, in such proportions as the land councils determine.

A number of studies have attempted to quantify these receipts (see Industry Commission 1991; Kauffman 1997). The CLC (1997: 130) quantified negotiated royalties receipts in its region between 1982/83 and 1995/96 to $36.4 million, however this appears to be a composite amount of receipts pursuant to ss.35(3) and 35(4) and other receipts but do not include MREs. The NLC record a figure of $8.4 million (for the period 1982/83 to 1996/97) specially referred to as contractual payments under the heading of mining. It is a particularly difficult exercise to quantify receipts of these payments to each individual royalty association given the many recipient organisations receiving these moneys, the variations in the negotiated agreements and the non-monetary aspects of these agreements. It is also difficult to distinguish statutory and non-statutory mining receipts in the financial statements of the royalty associations that receive both. Rather than attempt to quantify the amount of these moneys received by royalty associations the important issues are the actual and potential use of these moneys.

The amount and usage of negotiated agreement moneys and rent can be observed in relation to the Djabulukgu Association. The association was established to receive mining moneys from the Jabiluka Uranium mine. The mine is not yet in production, so areas affected moneys under ss.35(2) have not been paid. The Industry Commission (1991: 391) noted that the association had received, or will receive, under its original agreement signed with Pancontinental: $1 million up-front (after ministerial approval); $800,000 for NLC administration costs; $1.2 million annually (years 2,3,4) after project approval; $1.2 million after sale of 3,000 tonnes yellowcake per year for the first five years; $3.4 million on commencement of production; and $500,000 per annum credited against royalties. A significant amount of interest has accrued over the years as the funds received after signing the agreement were invested in the early 1980s and have largely been expended by the Association.

Under the objectives of the original agreement with Pancontinental the moneys can be applied to funding of Aboriginal business, housing, educational scholarships, community amenities and basic utilities, transportation and communication systems, development of outstations, and the provision of group

health insurance and a hospital scheme (Altman 1983: 132). The association has commercial interests in the region and a stakeholding in a hotel near Kakadu. Notably, the services and projects where moneys can be directed under the agreement could arguably be described as the public sectors domain and suggest a reliance on these moneys for self-sufficiency.

Gate moneys

Rental payments are made by the Commonwealth and NT Governments under lease agreements. In the NLC jurisdiction rentals are accrued from Kakadu National Park (Commonwealth), Nitmuluk National Park (NT) and Gurig National Park (NT). In the CLC jurisdiction there are no NT National Parks and moneys are derived only from the agreement with the Commonwealth for Uluru-Kata Tjuta. Under the lease agreements a percentage of entry and camping fees are paid to the traditional Aboriginal owners. Revenue is also derived from commercial activities in the parks such as from the Seven Spirits Bay tourist resort in the Gurig National Park. There is potential that further and extended lease agreements will be entered into following the resolution of outstanding land claims (e.g. Goodparla).

The NLC (1997: 54) noted that from a financial perspective, income from parks have delivered the greatest improvement in financial returns to traditional owners. Considered solely as commercial operations, parks have been an unqualified success. The income from concessions, which has risen steadily since 1986/87, is indicative of not only the commercial opportunities that parks provide but of the increasing potential for engagement by traditional owners in such commercial opportunities (NLC 1997: 54).

Table 7 provides financial information about lease payments for Uluru and Kakadu for the years 1990/91 to the third quarter of 1997/98.

Parks Australia North qualified these amounts by noting that the Uluru figures from 1994/95 onwards were obtained from commitment and expenditure reports, and that the 1993/94 figures were calculated from 25 per cent of park use fees receipted plus the annual rental of $150,000. The 1994 Uluru lease agreement allowed for an annual payment of $150,000 to be indexed from May 1990 to January 1994. Prior to the 1991 Kakadu lease agreement, where an annual payment of $150,000 was agreed and indexed from May 1988 to January 1991, a nominal annual rental of $1 was paid.

The question of how these moneys are and could be utilised was raised by the KRSIS (1997) in respect to the lease moneys received by traditional owners from Kakadu National Park. The report noted the need to review how the Park rent and revenue share payments should be utilised to ensure some consistency with the accountability required of financial flows from mining activity on Aboriginal land (KRSIS 1997: 33). KRSIS (1997: 34) recommended that the NLC assess the application of moneys paid for the lease of Kakadu National Park by

Parks North and encouraged a regime to be established that considered the application of the moneys for community benefit.

Table 7. Uluru-Kata Tjuta and Kakadu lease payments 1990/91 to third quarter 1997/98

Year	Lease Payment	
	Uluru-Kata Tjuta	Kakadu
1990/91	301,734	251,611
1991/92	444,327	446,692
1992/93	484,835	507,029
1993/94	888,938	541,178
1994/95	962,502	618,756
1995/96	928,874	975,881
1996/97	1,176,700	1,542,755
1997/98 (to 31/3)	1,014,655	1,063,786

Source: Parks Australia North.

There is an apparent need to improve the accountability of these moneys and their application. Potentially these receipts could be paid into the ABR to enhance investment potential for the benefit of Aboriginal traditional owners. However, this would be dependent upon the nature and the charter of the ABR. Alternatively, the gate moneys could be directed to royalty associations to enhance their investment capabilities.

Other moneys

As noted above, due to the diversification of operations by royalty associations, most are in receipt of funds from government agencies for a variety of functions. Some have also established commercial enterprises from which income is accrued.

From an assessment of examples of royalty association's financial statements, and other research, the following other sources of income have been identified:

- negotiated agreement (both monetary and non-monetary);
- negotiated royalties;
- ATSIC program funding (primarily CDEP and CHIP);
- other Commonwealth funding;
- NT Government funding;
- income from investment and commercial enterprises; and
- other royalties (e.g. from quarries).

Public accountability

Accountability of royalty associations has both historically and comparatively received less scrutiny than the land councils or the ABR. Nevertheless, it is important to note that royalty associations are held publicly accountable under two regimes—under the ALRA and under the legislation which incorporates them. Furthermore, royalty associations receiving funding from government agencies are additionally accountable to the funding agency in respect to the use of specific grant moneys.

Pursuant to ss.35A(1) and (2) of the ALRA the incorporated entities which receive moneys paid out under s.35 must lodge financial records with the land council. S.35A(2) defines 'relevant financial statements' to mean the financial statements required by the law under which the Aboriginal community or group was incorporated. The ALRA does not prescribe what should happen if these records are not lodged with the land council. Nevertheless, the NLC argues that both sections imply:

- an accountability relationship with the NLC in that associations must provide copies of their audited financial statements relating to the year in which these moneys were received; and
- an accountability of the land councils because they are in turn scrutinised to ensure that a proper determination under s.35(2) is made.

The NLC also argue that in conjunction with s.35A it is clear these requirements imply an intention by Parliament that the land councils be aware of the financial position of royalty associations, and for the association to demonstrate how distributions are being utilised to improve the welfare of members, and ameliorate the impact of mining on the affected communities. However, no real direction is provided by the ALRA and these conclusions are arrived at only by implication (NLC 1997: 133). The NLC also noted that where the association does not comply with the ALRA, land councils have no power to pursue the matter except to withhold the payments although this avenue is not specified in the legislation.

A further deficiency noted by the NLC was that the ALRA does not specify when the financial statements are to be lodged. This matter could be dealt with by specifying a lodgement date or lodgement time frame in either the legislation or regulations.

The NLC has been criticised by the ANAO (Auditor-General 1993/94: 11) for taking only limited action, as required by s.35A, to receive or monitor the financial statements from Aboriginal associations who receive payments under s.35. However, the land councils are extremely limited under the current legislation as to what action can be pursued. Because the ALRA still does not specify what the land councils should do when irregularities or audit qualifications are detected, the expectations and responsibilities of the land councils remain ambiguous (NLC 1997: 134).

In order to rectify the inadequacies of the legislation the NLC has recommended:

- That the practicable period for the lodgement of financial statements be specified in s.35A of the ALRA as being within six months after the end of each financial year, namely by 31 December of each year.
- In the event that financial statements are not lodged in this period, the land councils be given the power to withhold the distribution of royalties to associations and that this be specified under s.27 of the ALRA.
- That the land councils are empowered to request additional relevant financial material as a complementary process to submitting annual audited financial statements.
- That s.23 or s.35A is amended to clarify and formalise a role for the land councils in providing support, financial advice and assistance to royalty associations.
- That s.25 and s.27 are strengthened to require the land councils to withhold royalty distributions from associations if they are assessed as not meeting the land councils' criteria for financial stability and accountability.

The CLC has different views to that of the NLC and emphasised a policy of self-determination rather than any active engagement with royalty associations. However, the CLC has not yet faced the same range of disputes over areas affected moneys as the NLC. Nor have they experienced the same criticisms as the NLC in dealing with the affairs of royalty associations. Indeed, in a letter to this review dated 30 March 1998, the CLC stated that both Ngurratjuta and the Granites Mine Affected Area Aboriginal Corporation (GMAAAC) have an excellent record of compliance with s.35A.

The ATSIC submission to this review suggested that royalty associations should be accountable under the regulatory regimes for incorporated bodies and be subject to trust law in the normal way. Regulatory authorities should cooperate with land councils and the royalty associations to improve compliance standards. ATSIC did suggest that some additional supervision through land councils could be argued and recommended that the land councils and regulatory authorities should cooperate to assist royalty associations to achieve appropriate standards of management and accountability and compliance with regulatory requirements. ATSIC's submission, together with others, noted the need for an examination of the effectiveness of the relationship established by s.35A of the ALRA between the royalty associations and the relative land councils, in terms of the monitoring of the financial status of royalty associations.

There are other considerations for the land councils. Land councils may not wish to get too close to the activities of royalty associations because this places them in the invidious position of being in potential direct conflict with their constituents. It might be preferable to allow government to monitor the activities of these associations. But this would require statutory amendment (Altman 1996b: 8). Walter and Turnbull (1993) recommended that the ABR be chartered

with the responsibility of monitoring both land council and royalty association financial statements. The monitoring of the land council financial statements occurs quarterly since the introduction of guidelines in 1996. However, no statutory or policy mechanism has been introduced to monitor and follow-up the operations of royalty associations.

Some previous attempts have been made to clarify the responsibilities of land councils. The former Minister for Aboriginal Affairs (Tickner), indicated in a letter to the land councils that the statutory duty is not satisfied with the receipt of the financial records. The implication was that there is a duty to ensure that the recipient bodies have 'done the right thing' with the moneys they receive (CLC 1997: 124). The dilemma is that under the current legislative framework it is not explained how such moneys are to be utilised. Hence there is a need to specify that the broad objectives of ss.64(3) moneys are to ameliorate the impact of mining and to facilitate the economic development of those residing in areas affected by mining.

It is necessary to clarify the relationship between land councils and royalty associations in terms of accountability, monitoring and assistance requirements. It is clear that the legislation needs to be amended so as to either dispose of the requirement of royalty associations to furnish financial statements to the land council and accept that accountability is satisfied through the incorporating legislation, or to adopt similar measures recommended by the NLC and amend the legislation to enhance the accountability regime. It would appear that under the former, the relevant registrar would not have the necessary wide ranging scope in functions to fulfil a 'mentoring' role. Another option would be to grant the function to the ABR so as to allow it to receive financial statements and monitor the royalty associations and to take follow-up action when required. It is imperative that such a 'mentoring' role would entail assistance with planning and advice on strategic options.

Consideration should also be given to amending the legislation so that the recipient entities are required to lodge annual reports and record all income in an easily readable form for both Government agencies and their constituencies. Annual reports would be lodged with the agency to which they are accountable.

Accountability—to members

Toohey (1984: 108) noted that the land councils and Aboriginal organisations raised the question of accountability for moneys received pursuant to ss.64(3) and distributed pursuant to ss.35(2). He noted that it was raised with him that when moneys left a land council they have ceased to possess any public character. However Toohey commented 'That may be so; at the same time the moneys are for the benefit of certain Aboriginals and the associations clearly have a responsibility to them for those moneys'.

Some case studies undertaken for the review of the ACAA (Finlayson 1996; Martin 1996) suggest that those organisations which had developed broadly

representative structures, and had instituted procedures to maximise equity in service delivery, participation in decision-making, and accountability to their constituencies in achieving their objectives had also achieved at least reasonable fiscal accountability. Conversely, those which had deficient or virtually non-existent mechanisms to ensure such principles were more likely to demonstrate poor financial accountability. That is, organisations which are accountable to their members or constituencies are more likely to be effective in what they undertake and more financially accountable.

Furthermore, while internal accountability certainly relates to such factors as representativeness, responsiveness and equity as Rowse (1992) suggests, there are also crucial dimensions of it which arise from the Aboriginal political and social domain, and can be expressed for instance through relations of kinship, familial obligations, and culturally-defined rights to speak about particular matters. The most effective organisations appear to be those which have made creative use of principles drawn from both domains in establishing structures and processes which seek to maximise internal accountability (Martin and Finlayson 1996: 13).

Aboriginal Councils and Associations Act (Commonwealth)

Under the ALRA, accountability to members is prescribed by its incorporation legislation. When royalty associations are incorporated under the ACAA there are cultural safeguards to ensure that traditional and communal lines of accountability are acknowledged in the formation of the association. Such cultural safeguards are not necessarily ensured under NT legislation. The risk is that constitutions and other authoritative documents may be meaningless to members as they may be framed in non-indigenous terms. Notably, the financial statements of organisations, while a necessary component of any accountability regime, are often extremely complex.

Those royalty associations incorporated under the ACAA are required to lodge financial statements with the Registrar of Aboriginal Corporations. The documents include an independent auditor's report. The independent auditors are all registered with the Registrar of Aboriginal Corporations and are all practising accountancy firms that are used by Australian commercial business.

The Registrar for Aboriginal Corporations provided to the reviewer financial and other information in respect to the following royalty associations: Ngurratjuta, GMAAAC, Rirratjingu Association, Dhimurru Land Management Aboriginal Corporation and the Amangarra Aboriginal Corporation. It is difficult to establish whether all Associations had complied historically with the legislative requirements as only samples of the most recent documentation were provided. However, from the information provided it was established that most had complied in the last four or five years.

The issue of non-compliance was raised by the Registrar with the Rirratjingu Association in March and May 1994. The Registrar requested the

Association to ensure the maintenance of the register of members, to ensure that meetings are held in compliance with the Association's rules, and to ensure that the correct processes are implemented in the authorisation of payments. This action was taken in response to audit criticisms in the 1993/94 financial statements. Those criticisms also noted that documentation could not be located to confirm clan distributions for that year. Furthermore, income recorded as royalties for the financial years 1992/93 ($310,593) and 1993/94 ($546,863) differ from the amount of disbursement specified by the NLC ($90,000 and $627,471 respectively). This can partly be accounted for by time lags in distribution, and the inclusion of other payments. It is a further example of the difficulties confronted in accessing the use of MREs and the need to clarify the category of income.

The financial statements of the other Associations were generally satisfactory and there were few qualifications. In the Ngrurrajuta and GMAAAC financial statements it was easy to identify MREs received as that income was specified as statutory mining royalty equivalent income and was not complicated by incorporating other type of mining moneys. However, it was difficult to establish MRE income in other financial statements. In the case of Dhimurru royalty income is not specified although the Gumatj Association financial statements indicate payments to Dhimurru in 1994/95 ($121,875) and 1995/96 ($97,500). There is, however, an item described in the Dhimurru financial statements as 'Contributions from Clans' which may address this income, but again the outgoings from Gumatj are not the same as the income recorded by Dhimurru.

Generally there is no detailing of individual cash payments in the financial statements although almost all statements indicate allocations to outstations without any details as to the purpose of these outgoings.

Associations Incorporation Act (NT)

There are five active royalty associations incorporated under NT legislation. These are the Groote Eylandt Aboriginal Trust (GEAT), Gagudju Association, Gumatj Association, Yirrkala Dhanbul Community Association Inc., and the Laynhapuy Homelands Association. The now defunct Kunwinjku Association was also incorporated under NT legislation as is the Djabulukgu Association, which is yet to receive areas affected moneys.

An investigation of the files held by the NT Registrar-general was undertaken by the Centre for Aboriginal Economic Policy Research (CAEPR) to determine compliance of these organisations in submitting annual financial statements. It was found that the organisations have an impressive record of compliance. Both Gagudju and Gumatj had met all requirements and the other organisations had missed only one or two lodgements in recent years (this could possibly be due to the Registrar's office in not filing them). However, there did appear to be some problems with compliance back in the early 1980s as GEAT

lodged all previous years records only in 1981. This has certainly been rectified since.

Notwithstanding this impressive recent record of compliance in submitting financial statements to the relevant registrar, there are particular limits to what action the registrars can pursue. Even then there is evidence that actions might not be pursued. As outlined by Altman and Smith (1994) in the Kunwinjku Association and NTOA cases, a host of monitoring and support agencies clearly failed to exercise adequate care, including (in no particular order) the NT Registrar-General's Department in Darwin, the Office of the Registrar of Aboriginal Corporations in Canberra, DAA (and ATSIC since 1990), the NLC and Ministers for Aboriginal and Torres Strait Islander Affairs. External agencies may have excuse to directly intervene when required, although it is difficult to clearly identify an independent arbiter to decide when intervention is justified or needed. It is also difficult to determine which agency has responsibility over particular issues (Altman and Smith 1994: 28). Rather than such involvement being initiated in response to crises situation or in response to audit criticisms, a more formalised and constructive role might prove to be of considerable assistance to royalty associations.

Distribution

Due to the lack of transparency in royalty association fiscal distributions which is countered by the argument that disclosure is not required due to the private nature of the moneys, it is difficult to establish exact details of recipients and actual distributions by royalty associations. The financial statements provided to respective registrars do not necessarily detail the specific categories of income from development nor do they specify individual cash payments.

At a general level it is known that MREs and other mining derived income is applied to:

- community services and infrastructure;
- commercial enterprises and investments;
- vehicles and other transportation;
- running costs of the association and other entities within the corporate structure;
- ceremonial and cultural activities;
- trusts for educational activities;
- individual cash payments; and
- other organisations within, or close to, the area affected.

Policy guidelines on distribution

At a general level, distribution of areas affected moneys by royalty associations has attempted an amalgam of investment, community services,

infrastructure and individual payments. In some cases, such as in the Kakadu and Gove regions there have been further distributions to other organisations (e.g. Gundjehmi to Gagudju, Gumatj to Dhimurru and others). In most cases areas affected moneys have also been utilised for running costs of the royalty associations.

The CLC have noted that the two royalty associations in its jurisdiction, Ngurratjuta and GMAAAC, apply their funds to community purposes and investments only, in accordance with the relevant rules of the association. Currently, no payments are made to individuals by either of these associations although we are informed that the practice has occurred in the past in respect to negotiated agreement moneys in regards to Ngurratjuta. The CLC has adopted the view that these funds are for community benefits rather than for the benefit of traditional land owners alone.

In the Top End there is a history of cash payments being made to individuals while, at the same time, there is evidence of more aggressive investments as well as the use of MREs for community facilities and services. In the most part, those organisations which operate primarily as a royalty association due to their reliance on MREs (e.g. Gumatj, Gagudju, GEAT) specify the type or proportion of MREs to be used for investment purposes in their constitutions. The Gagudju Association constitution provides for the Association 'to transact or carry on all types of business and in particular in relation to the investment collection and receipt of money and the sale and purchase of property of any kind whatsoever'. The Gumatj constitution allows it 'to invest all or any of the funds of the Association in any investment'. The original GEAT constitution specified 50 per cent to be invested, however the amended constitution of 1997 only notes that the funds of the Association may be invested in any investment permitted by law.

The findings of Justice Martin of the NT Supreme Court in respect to the use of funds by GEAT are instructive. Justice Martin found that there were 88 family groups who belong to the 13 clans identified in the Trust Deed. The Trust is essentially a charitable trust. Its funds must only be spent on the education, benefit, welfare, comfort and general advancement in life of eligible Aboriginal persons. Funds cannot be used for the benefit of a particular Aboriginal person or persons, which is not beneficial to the community. Justice Martin elaborated on this finding by stating that GEAT funds could be used for medical, funeral, and church purposes. They could be used for old aged/pensioner and handicapped purposes, for homeland grants, including the purchase of vehicles to move from the centres to outstations, for education purposes, including adult education, for sport and recreation, for ALC purposes including environmental and sea management courses, for the payment of power and water authority charges and for festivals and ceremonies, including the charter of aircraft to fly people to cultural festivals, and for the purposes of the treatment of substance-abuse. However, Justice Martin found that Trust funds could not be used for making loans to individuals, unless the funds advanced were adequately protected, and

were at commercial rates of interest (Flynn J. vs Mamarika, NT Supreme Court No. 132 of 1995 Martin CJ 20 March 1996).

Individual payments/community facilities

Woodward (1974) did not specifically state for what purposes negotiated royalties and affected areas moneys should be used, but he did make it clear that these moneys were not to be distributed to individuals and were for the collective use of communities and groups. Implicit in Woodward's recommendations was a belief that royalties should be equitably distributed and that traditional owners of areas affected should not have preferential status over residents of these areas. While he did not specify how royalties should be used to lessen the impact of mining, there is little doubt that he intended the moneys to be used to bring the standard of community facilities, etc, closer to the level that would be created in the nearby mining towns and Australian standards generally (Altman 1983: 111).

A number of the royalty associations have succumbed to the political pressure and relative poverty of their members and made payments to individuals. The amount of all distributions to individuals over time cannot be quantified. In some instances we suspect that the recording of payments to outstations may in fact be payments to individuals. From past research we are aware that the Gagudju Association, which has actively supported outstation development and other regional community development goals, has made conservative distributions of cash to its adult members, which never exceeded $2,000 per annum so as not to jeopardise Social Security entitlements (Altman 1996a). In most cases it is difficult to establish whether payments to individuals are derived from the more 'public' type MRE moneys or 'private' negotiated agreement moneys as in most financial statements there is no specification of the exact source of the income. Furthermore, it should be noted that associations could readily make payments to individuals from the revenue of their commercial arms.

Payment of both MREs and agreement moneys to individuals has arguably reduced the opportunities of royalty associations to accumulate capital and invest for the future. On the other hand, while negotiated payments may be significant in some cases, when consideration is given to how the moneys can best be applied to ensure an agreeable benefit for all members, the payment of cash may prove to be the most equitable. Of course this position is supported by the interpretation of those moneys being private. However, given the amount of the total receipts and that the income is limited to the life of a mine, opportunities to accumulate resources is severely restricted when individual payments are made. There is a need to clarify the nature of both MREs and negotiated moneys and the point at which they do become private.

Of particular concern, if a policy is adopted to discourage individual payments is the practice of some royalty associations in distributing moneys to other Aboriginal organisations. This practice occurs in the Kakadu region where the recently established Gundjehmi Aboriginal Corporation, which was

legitimately established as Gagudju was considered to be an unsuitable entity to receive ss.35(2) moneys, disburses funds to the Gagudju Association (Altman 1996a). It also occurs in the Gove area where the Gumatj Association distributes funds to other organisations in the area. While the practice may be legitimate from a perspective that the funds are being forwarded to other organisations for reasons such as providing services, the funds, once disbursed from the royalty association, immediately become private and the recipient organisation is free to distribute the funds, as they wish. This might include making payments to individuals, unless there is a formal agreement or contract as to the usage of the funds by the originating royalty association.

Investment

Most royalty associations have some form of investment which may or may not be predicated on a strategic policy. The CLC (1997: 122) notes that the concept of investment is difficult for traditional people to understand and it is difficult to see its relevance when there are so many unmet needs. Nevertheless, the investments undertaken by royalty associations allude to their recognition that the payment of MREs has a time limit and strategies need to be put in place for the organisation to evolve beyond that time limit.

It is generally recognised that some royalty associations have been relatively commercially successful with their investments, while others have been outright failures. In some situations impressive regional developments have occurred while there is also evidence of failures, in terms of regional economic development, as with the Kunwinjku Association in Western Arnhem Land. Until quite recently, the Gagudju Association was, arguably, regarded as the most successful post-land rights royalty association in the NT. Such positive assessments have been made primarily by academic social sciences researchers (Stanley 1982; Altman 1983; O'Faircheallaigh 1988; Altman and Dillon 1988) rather than on the basis of close financial scrutiny (Altman 1996a: 9) or indepth research with members. These assessments have been based, first and foremost, on the Association's ability to meet diverse goals. It has invested heavily in the regional economy, especially in tourism enterprises and now owns two of the three major hotels in the region. The Association has historically been favourably assessed as an association that has wisely utilised mining moneys for the benefit of its members, while also investing for the future (Altman 1996a: 6). However, more recent assessments have pointed to the vulnerability of the organisation (Lewis 1996; Altman 1996a).

The Ngurratjuta Association is also acknowledged as a successful royalty association although its income has been comparatively moderate compared with Gagudju. The Association has a range of diverse investments including residential properties in Alice Springs, the establishment of Ngurratjuta Air, and a portfolio of shares, mortgage trusts and unit trusts (Marshall 1994; Floreani 1998). As Floreani (1998) notes, some of the organisation's investments have been successful and others have not. Ngurratjuta has liquidated Yarringka Air

(helicopter business) and is re-assessing its investment in Glen Helen Lodge. The reality is that royalty associations operating in a commercial environment are open to both the benefits and pitfalls of the market place.

Both ATSIC (1998) and the NT Government (1998) submission noted the need to encourage investment. ATSIC suggested that royalty associations should be encouraged to balance the use of trust moneys between short-term expenditure for current needs of beneficiaries and medium and long-term investments which preserves capital and produce ongoing income and benefits future generations. The NT Government (1998: 110-11) expressed the view that royalty equivalent payments are often not applied for the long-term benefit of Aboriginal Territorians and recommended a further examination into the nature of the funds being transferred to royalty associations, the purpose of those funds, their application and appropriate accountability.

In a recent study of the Gagudju Association, Altman (1996a) raised the question as to whether the ALRA should specify an investment ratio for royalty associations and categories of investment. This could be achieved by specifying a proportion of MREs and other receipts, for example 50 per cent, to be invested by the royalty association. Alternatively the ABR could be empowered to withhold a proportion for investment which would be released to the royalty association as a capitalised amount in the post-mine era, thereby assisting the viability of the association beyond the life of the mine.

Equity

It is apparent that Woodward gave particular attention to the question of equity in the distribution of MREs. The 40/30/30 formula was designed to ensure a broad base of beneficiaries. Furthermore, areas affected moneys were intended to ameliorate the impact of mining for both traditional owners and the Aboriginal residents of the area affected. Woodward was conscious that mining moneys could lead to significant income differentials between traditional owners and other Aboriginal people unless they were distributed in broad equitable amounts and applied to community purposes.

However, there is often a tension between principles drawn from wider sociopolitical sphere, such as those of broadly-based equity and access to services and resources, and the imperatives of the Aboriginal domain. In such circumstances, the principle of the 'common good' which underpins notions such as equity of access to resources and services can be rendered problematic. Organisational structures and processes need to take into account and incorporate the realities of localism, while still enabling effective and accountable services to the broader Aboriginal constituency. This tension poses a fundamental challenge both to Aboriginal organisations and to policy makers and is by no means easy to resolve (Martin and Finlayson 1996: 13).

Such issues are particularly apt in the context of royalty associations and the equitable distribution of areas affected moneys. The issue becomes even more

sensitive given that many Aboriginal leaders have dual roles not only in traditional and administrative terms but have dual membership and authority in land councils and royalty associations. On the one hand this situation leads to questions of conflict of interest in western terms while on the other the Aboriginal domain permits these dual roles and authority based on traditional leadership and ownership. This could partly be resolved by incorporating mechanisms to enhance the internal accountability of Aboriginal organisations (Martin and Finlayson 1996: 13). Nevertheless, both land councils and royalty associations remain exposed to criticism from bureaucrats and the broader community unless the issue of dual organisational authority is resolved.

Transparency

In many respects there has been little transparency of the specific activities of royalty associations and even the best appear to be extremely financially vulnerable and operating suboptimally (Altman cited in Reeves 1997: 9). Transparency is intermittently linked with accountability but more strongly linked with performance. Accountability requirements such as financial statements do not necessarily require detailed explanations of the specific source of incomes nor absolute precision on the usage of that income.

Most royalty associations receive mining agreement moneys and rents as well as statutory royalty equivalents (Altman and Smith 1994: 29). In most instances it is very difficult to identify the exact amount paid under ss.35(2) as opposed to other moneys especially other mining derived moneys. In examining the financial statements held by the NT Registrar General it was found that in many cases organisations' financial statements had not recorded royalty receipts when advice from the land council recorded a distribution to the organisation.

It would appear that it is necessary to develop guidelines for financial statements for both the organisations and their auditors. It might also be useful for royalty associations to produce annual reports to explain their activities, to satisfy the requirements of bureaucrats and clearly demonstrate to members how income has been derived and how it has been utilised.

Areas affected

The distribution of areas affected moneys pursuant to ss.35(2) has remained problematic throughout the existence of the ALRA. Determinations by land councils of the area affected has proved to be a central issue in disputes between land councils and royalty associations over the years and at times these disputes have been taken into the courts (Altman 1983: 1996). Issues such as the control and usage of areas affected moneys have also been precipating causes and influences for some 'breakaway' land council movements (Martin 1995).

The problems are multifaceted. First, whereas Woodward (1974: 114) recommended that the three-tenths share be paid to 'communities' established within 60 kilometres of the mineral lease, the legislation that was enacted did not

specify what is meant by areas affected nor did it assist with any criteria on how it should be assessed. This has led to disputes regarding who should be included and excluded in accessing the benefits.

Second, the membership of those recipient organisations of ss.35(2) moneys, do not necessarily conform with the intended beneficiaries under the legislation. This leads to considerable tension within the organisations. Third, the ALRA specifies a dichotomy between traditional owners, who make the decisions as to whether mining should proceed, and affected residents. Yet both are equal beneficiaries pursuant to ss.35(2). This has led to inevitable conflict between the two groups as to who should receive payments under the legislation. A number of authors (Turnbull 1980; Altman 1983; Toohey 1984) have noted that the traditional Aboriginal owners of the land, whose consent is required before a mining interest is granted and an agreement is entered into, may not necessarily benefit under ss.35(2).

The establishment of the Gagudju Association to receive moneys from the Ranger mine is instructive in outlining the problems and interpretations by a land council of the area affected by mining. Originally, the NLC took the view that the entire NLC region—the top half of the NT—was affected by the Ranger mine, so the Gagudju Association was only one of many Aboriginal organisations entitled to share in the royalties. Legal advice from within the Bureau of the NLC took a much narrower view that only those people living in the immediate vicinity of the mine who were traditional owners or had some other traditional attachment to the mine area were entitled to receive royalties (Levitus 1991: 160). This interpretation is clearly in contravention of Woodward's intent, for he recommended that the area affected be defined as an area within 60 kilometres of a mine site. Furthermore, this interpretation would have excluded almost the entire Gagudju Association membership.

The Deputy Crown Solicitor in Darwin proposed a third view, that the 'area affected' by a mining operation depended on the circumstances of each case and was not reducible to a formula but may well extend beyond the direct physical influence of a mine. The Deputy Crown Solicitor's opinion emphasised two other points: first, that the ss.35(2) plainly designates residence, not traditional ownership, as the relevant criterion for membership of a royalty-receiving association; and second, that an association is entitled to receive royalties only if all members are resident within the area affected (Levitus 1991: 160).

An amendment to ss.35(2)(b), based on the recommendations of Altman (1983; 1985) and Toohey (1984), provided some guidance for determining Association membership, by referring to people who 'live in, or are the traditional owners of, the area affected by' the mining operations. However, the application of this clause has been uncertain or unsatisfactory in three respects: the boundaries of area affected, the limits of traditional ownership, and the recognition of residence (Levitus 1991: 161). These issues remain salient today.

More recent views of the NLC have reverted to the more narrow view of the area affected by the Ranger mine. This has once again highlighted the problems

with the membership of Gagudju and has been one catalyst of the recent dispute between the NLC and Gagudju. With the suspension of ss.35(2) moneys to Gagudju the NLC, needing to meet its requirements and release the moneys under s.35, assisted with the creation of the Gundjehmi Aboriginal Corporation which consists of approximately 25 traditional owners of the Ranger site (Altman 1996a).

The NLC have recommended that:

- s.35(2) of the ALRA be amended so that the focus is on 'people affected' by mining rather than 'areas affected' (this view was also recommended by the KRSIS in 1997);
- s.35(2) be amended to allow the land councils to make conditional distribution decisions, such that the distribution is conditional on certain requirements being met by the royalty association; and
- s.25 and s.27 be strengthened to give powers to the NLC to withhold royalty distributions from associations until any issues of recipients' grievances are settled.

While Woodward's recommendation was not incorporated in the ALRA and the area affected remains undefined, the spirit of his recommendation is partly useful (Altman 1985: 202). Despite the arbitrariness of defining affectedness as being within 60 kilometres of a mine site, there is a view expressed, for example by the 1984 ABTA Working Party, that even an arbitrary definition is better than none. Arguably, the focus of Woodward's recommendation was towards the Top End where a number of mines had operated on Aboriginal land for sometime. In this respect, while the area affected by mining will no doubt vary from mine to mine, there are some distinct variations of the impact of mining between the NLC and CLC region. It is therefore very difficult to specify the area affected on a Territory-wide basis. However, it may be of use to land councils if some reference to a spatial area was specified in the ALRA even if for guidance purposes only (Altman 1985: 202).

Taxation

The CLC has identified a potential problem regarding the tax position of its Royalty Trust Account. This Trust Account is used to administer disbursements from the ABR and other mining moneys within the CLC region before further disbursement to the Aboriginal beneficiaries. It was believed until recently that the exemption obtained by the CLC in respect of its status as a public benevolent institution applied equally to the Royalty Trust. Advice is being sought on the question as to whether the CLC is required to apply for a tax file number for the Trust Account. If required the CLC will commence quarterly returns to the ATO. The returns will be made in respect of payments made by the Trust, moneys held by the Trust and for organisations. These moneys are in relation to agreements that are leases or rental agreements and bank interest earned (CLC 1997: 125).

A recurring qualification in the audits of GEAT deal with the tax liability of the Association. In the 1981/82 financial statements prepared by Pannell Kerr

Forster (Chartered Accountants) it was reported that a: 'legal opinion has been received by the association which indicates that the association is not liable to income tax, nor responsible for deduction of withholding tax on any distribution of royalty money originally received from Groote Eylandt Mining Company Proprietary Limited. There has been no reported judicial authority to confirm this opinion, and if it is not confirmed, this may expose the association to an income tax liability or liability to recover withholding tax on any distribution made which are deemed to be royalty distributions'. A similar, although not as detailed, qualification was raised in the 1995/96 audit of GEAT.

These two apparently similar issues remain unresolved in the sense that they are awaiting legal opinions or judicial confirmation. Notably the recent decision of the Commonwealth Government to apply MWT to NTHs in receipt of mining negotiated moneys implies that it is the government's intention to tax these types of mining moneys at source. Any action pursued to have exemptions from MWT applied to the ABR could incorporate exemptions to the payments made by these public benevolent institutions.

Social Security

A long-standing concern of the Department of Social Security (now Centrelink) has been the impact on entitlements of the receipt of mining moneys by Aboriginal people who are in receipt also of social security benefits or CDEP payments. The concerns relate predominantly to the failure by individuals to disclose these amounts. Notably, royalty associations have intentionally limited their payments to individuals within thresholds so as any social security and other entitlements are not reduced. Nevertheless, the problem would be overcome by disallowing cash payments of mining moneys to individuals by royalty associations.

A further issue raised by Centrelink concerns the release of information about Royalty receipts. It is the view of Centrelink that information regarding the recipients of payments from royalty associations should not be openly available to the public, but should be released to Government departments and agencies where information is held under the protection of the Privacy Act (1988) and is used to ensure correct payments of moneys from public revenue, and to protect these moneys (Centrelink 1997: 5). Once again, if no further cash payments are made to individuals, and Centrelink is informed of such a decision, then the need for this information becomes obsolete.

Recommendations/options

Royalty associations have operated variably both over the life cycle of individual organisations compared to other indigenous organisations and in the context of wider political and economic forces. Under these circumstances and given the heterogeneity of royalty association forms—both statutory and in terms

of objectives—it is difficult to make blanket recommendations. The following issues need to be addressed immediately.

- That royalty associations are consulted widely in respect to any recommendations which might affect their operations, particularly in respect to their commercial operations.
- That ss.35(2) is amended to clarify the purposes of MRE moneys. The purpose would include that the moneys are to ameliorate impacts of resource development projects by providing opportunities for enhanced community development, greater participation in regional economic development, and the creation of opportunity for future generations.
- That the relevant amendments to the ALRA be made to enhance the accountability of royalty associations and to establish a 'mentoring' regime within the Act. There is a need to introduce discipline to royalty associations which would include the provision of additional reporting mechanisms including performance indicators. The points of accountability would be to the relevant Registrar, the land council, or the ABR, but ultimately to the Minister.
- That guidelines be introduced for royalty association financial statements that detail the specific source of income under the ALRA and detail the expenditure and usage of that income.
- That royalty associations identify a clear mission/vision which is interrelated to that of the ABR. A fundamental issue we have not addressed is staffing of these organisations. There is a need for enhanced community participation in activity and the separation of board and staff/expertise. Some royalty associations are multi-million dollar organisations operating as community development organisations rather than business houses.
- That appropriate structures are put in place that divide commercial activities from social activities, commercial from charitable and encourage some alliance building with mainstream business (on a commercial front) and other agencies, especially ATSIC regional councils but also the NT Government, on the community development side. Discretion over dollars should allow strategic expenditure to leverage in resources from government that will make a real difference to people residing in areas affected.
- That a regime be instituted that discourages individual payments and encourages investment.
- That consultations be held with ATSIC regional councils in the NT to determine their views on substitution and the allocation of program funding to organisations in receipt of areas affected moneys and to identify strategies of integrated funding.

Notes

1. The actual proportion of funds paid by the Commonwealth in respect to the Ranger agreement is about 77 per cent of the royalties received from ERA. Although the agreed royalty rate is 5.5 per cent which is paid to the Commonwealth, the Commonwealth pays 1.25 per cent to the NT Treasury and 4.25 per cent to the ABR.
2. This review may be delayed due to the all encompassing review of the ALRA.

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