

**Northern Territory land rights:
purpose and effectiveness**

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Professor Jon Altman
Director, CAEPR
The Australian National University
April 1999

Foreword

Late in 1997, Dr Julie Finlayson was commissioned by the Northern Land Council (NLC) to provide a desk-based literature search addressing the first term of reference for the review of the *Aboriginal Land Rights (Northern Territory) Act 1976* undertaken by John Reeves QC between October 1997 and August 1998. Dr Finlayson's paper focused very specifically on a consideration of 'the effectiveness of the legislation in achieving its purpose'.

The paper 'The effectiveness of the legislation in achieving its purpose' was included as an appendix to the Northern Land Council submission to the Reeves Review called 'Our Land, Our Law: Submission to the Review of the Land Rights Act, December 1997'.

Subsequently, in August 1998, John Reeves's Report *Building on Land Rights for the Next Generation: Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976* was published by the Aboriginal and Torres Strait Islander Commission. In January 1999, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HORSCATSIA) chaired by the Hon Lou Lieberman, MP, announced an Inquiry into the Reeves Report. It is anticipated that HORSCATSIA will provide a final report to the Minister for Aboriginal and Torres Strait Islander Affairs in August 1999.

Unfortunately, while the Reeves Report is publicly available, most of the submissions provided as part of the review process are not widely available. With the approval of the NLC, a decision was made early in 1999 to publish Dr Finlayson's paper as a CAEPR Discussion Paper. This decision has been made for two main reasons. First, CAEPR is always keen that its consultancy research is published to ensure transparency and accountability. Second, there is a public interest in the Reeves Review and the subsequent HORSCATSIA Inquiry and Dr Finlayson's research provides a very useful summary of a diversity of issues in the literature.

This discussion paper complements an earlier one 'Financial aspects of Aboriginal land rights in the Northern Territory' (*CAEPR Discussion Paper No. 168/1998*) that is the published version of a consultancy undertaken for the Reeves Review by CAEPR early in 1998. As with the earlier discussion paper, it is my view that it will be useful to have Dr Finlayson's paper widely available to facilitate informed debate about the Reeves recommendations.

Professor Jon Altman
Director, CAEPR
April 1999

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Summary

Acknowledgments

Introduction

This Discussion Paper had its origin in a joint consultancy, between the Northern Land Council (NLC) and the Centre for Aboriginal Economic Policy Research (CAEPR) to prepare a submission to the review of the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) on 'the effectiveness of the legislation in achieving its purpose'. The contracting parties agreed that the submission be published as a CAEPR Discussion Paper.

What was the original intent of the Act?

Assessments of the Act's effectiveness in achieving its purpose depend essentially on how the purpose of the legislation is defined (see Reeves 1997 para 73). Here, the question is addressed with respect to what Justice Woodward in formulating the Act considered to be the purpose of the legislation as his inquiry was directed first, by the terms of his commission, and second, as to the interpretation he publicly made of these terms (Woodward 1973).

The Discussion Paper concludes by reviewing the achievements of land rights with respect to four broad areas;

- legislation;
- economic;
- social; and
- cultural.

Clearly, the effectiveness of the legislation in achieving its purpose can only be assessed in the light of what is known of the intent of the Act. It seems that the ALRA did not originally envisage encompassing all Aboriginal people in the Northern Territory. In part, this was because the terms and conditions of the Act established a 'traditional owner' status for eligibility to land. Justice Woodward was conscious of the prospect of excluding categories of Aboriginal people under these criteria, and consequently, that not all-Aboriginal people in the Northern Territory would benefit from the new legislation. Woodward certainly acknowledged that the legislation should be beneficial to Aboriginal people in the Northern Territory (Woodward 1973).

Woodward therefore recommended that Aboriginal people also be eligible to claim land on the basis of need. The consideration of a needs basis for land rights was consistent with the letters patent to him that the Act should provide a secure economic base for Aboriginal people currently marginalised from any 'real opportunity of achieving a normal Australian standard of living'. Indeed, the implementation of land rights was expected to do 'simple justice to a people who have been deprived of their land without their consent and without compensation' (Woodward 1973: para ; see also discussion in Merlan 1994: 13-6; also Neate

1989: 4–6). At the time, this provision would have made it possible for Aboriginal residents of town camps to claim land.

However, an important point in retrospect, is that the original form of the legislation changed as a direct result of the dismissal of the Whitlam Government in 1975 and its replacement by the Fraser-led Liberal Country Party Government. The Fraser Government was not in favour of a needs basis to land rights and thus made the qualification to claim land more restrictive. Consequently, the application of the ALRA has inevitably targeted a specific group of indigenous people for whom the original terms of the ALRA remain relevant and appropriate today.

The basic assumption of the legislation's purpose as Woodward (1973) enunciated it, is that it should be beneficial to Aboriginal people in the Northern Territory. Woodward also appreciated that the legislation's aims or purposes should be congruent with, and in some degree reflect, current anthropological knowledge and understanding of traditional Aboriginal relationships to land; a matter to which a good deal of the Reeves Review (Reeves 1997) is devoted.

A further point in appreciating the effectiveness of the ALRA to achieve its purpose is to examine the outcomes for Aboriginal people as a consequence of land rights. Choices and options are expressive of the effectiveness of the legislation and its purpose and many Aboriginal people have exercised autonomy and decision-making in their life style choices. In many cases, these choices have

- deliberately taken them away from centralised settlements or townships to out stations;
- enabled them to participate in a subsistence economy;
- enhanced indigenous resource management of Aboriginal land;
- furthered their engagement in the development, and management of cultural tourism;
- encouraged the development of an important economic base through the emergence of an Aboriginal art and craft industry; and
- sponsored innovative joint management ventures with the Commonwealth Government of Aboriginal-owned National Parks, such as Uluru and Kakadu. Other outstanding tourist destinations such as the Gurig National Park (Aboriginal owned land under joint management) and Nitmiluk National Park (owned by the Jawoyn people under joint management with the Parks and Wildlife Commission of the Northern Territory) also represent Aboriginal equity in projects on traditional land.

In this Discussion paper the focus is deliberately on the effectiveness of the Act. In order to canvass the issue, what Woodward (1973) wrote with respect to his understandings and expectations of the Letters Patent for his commission is given prominence.

The paper is divided into four sections.

The submission begins with an examination of the anthropological background to Woodward's understanding of traditional Aboriginal land ownership in the Northern Territory.

Secondly, particular points set out in Reeves' (1997) Issues Paper for the conduct of the Review of the *ALRA* are directly engaged. However, in general, the discussion is limited to the question of the intended purposes of the Act. Yet a re-examination of the original terms of Woodward's commission is timely, if only because, as Reeves points out in relation to the present review:

The Minister has not directed me upon what he considers the purposes of the Act are. Again, I assume this was deliberate on the Minister's part to ensure that I am not fettered in matters I may consider during the review. In my view, the matters I have set out under the heading 'no core principles guiding the review' below support this assumption (Reeves 1997: 3 para 21).

Thirdly, the question of whether Woodward (1973, 1974) identified any core principles as crucial to the purposes of the Act and its outcomes is examined. The paper revisits the source documents for his views; in particular, his findings in relation to the terms of reference of his commission and which resulted in publication of his First Report (July 1973) and Second Report (April 1974).

Lastly, the submission focuses on the outcomes of twenty-years of land rights. These achievements might well be used in seeking assessments of the 'effectiveness of the legislation'.

Anthropological background: Justice Woodward's First Report (July 1973)

There are *four* key points to be made in terms of the anthropological background to the legislation.

- Woodward sought to encapsulate and translate into legislation indigenous concepts of consultation, authority, and decision-making operative in traditional land tenure systems.
- The legislation was to reflect the indigenous emphasis on their relationship to land as a spiritual connection.
- Woodward saw the importance of defining Aboriginal people's key social unit as traditional landholders, while acknowledging the existence of other rights and the capacity to include members wider than the patrilan. Woodward foresaw that change would impact on the mechanisms for delivery of land rights (Woodward 1974: 9) but this was not to be interpreted out of context, in isolation from the other main principles he saw as integral to the development of the Act (Woodward 1974: 8–10). Similarly, he was aware of differences between Aboriginal groups and the need for sufficient flexibility to accommodate these differences. One way of handling the latter was through

the establishment initially of two land councils dealing with broadly different geographical and cultural areas.

- Woodward foreshadowed the need for flexibility in any formalised system of recognition of land rights. He alluded to changes in surrounding circumstances, such as in relation to local commercial and economic opportunities. He did not expect Aboriginal tradition to be static (Woodward 1974).

He said that Aboriginals should be free to follow their own traditional methods of decision-making, and should be free to choose their own manner of living. In saying so he thought it necessary to remind some non-Aboriginal enthusiasts that this involves a freedom to change traditional ways as well as a freedom to retain them. Accordingly, he suggested that any scheme for recognition of Aboriginal rights to land must be sufficiently flexible to allow for changing ideas and changing needs amongst Aboriginal people over a period of years (Woodward 1974 cited in Neate 1989: 10).

In the First Report of the Land Commissioner (July 1973), Woodward outlines the terms of reference for his commission. He was authorised to inquire and report upon a number of issues including:

the appropriate means to recognise and establish the traditional rights and interests of the Aborigines in and in relation to land, and to satisfy in other ways the reasonable aspirations of the Aborigines to rights on or in relation to land, and, in particular, but without in any way derogating from the generality of the foregoing:

- (a) arrangements for vesting title to land in the Northern Territory of Australia now reserved for the use and benefit of the Aboriginal inhabitants of that Territory, including rights in minerals and timber, in an appropriate body or bodies, and for granting rights in or in relation to that land to the Aboriginal groups or communities concerned with that land;
- (b) the desirability of establishing suitable procedures for the examination of claims to Aboriginal traditional rights and interests in or in relation to land in areas of the Northern Territory of Australia outside Aboriginal reserves or of establishing alternative ways of meeting effectively the needs for land of Aboriginal groups or communities living outside those reserves;
- (c) the effect of already existing commitments, whether in the nature of Crown leases, Government contracts, mining rights or otherwise, on the attainment of the objects of recognising and establishing Aboriginal traditional rights and interests in or in relation to land;
- (d) the changes in legislation required to give effect to the recommendations arising from (a), (b), and (c) above; and
- (e) such other matters relating to rights and interests of the Aborigines in relation to land as may be referred to the Aboriginal Land Rights Commission by the Minister for Aboriginal Affairs (Woodward 1973: iii).

An interesting aspect of Woodward's commission was that land rights were to be established on the basis of traditional rights which had no previous history of being legally enforceable in Australia (Maddock 1983: 61). Nor was Woodward

asked to justify 'whether Aborigines should be granted rights in land, since the government had already decided that they should' (Woodward 1973: 4 para 17).

In terms of the anthropological background to the legislation five key points should be made.

- First, Woodward sought to encapsulate and translate into the legislation indigenous concepts of consultation, authority, and decision-making operative in traditional land tenure systems.
- Second, the legislation was to reflect the indigenous emphasis on their relationship to land as a spiritual connection.
- Third, Woodward saw the importance of defining a key social unit as traditional landholders, while acknowledging the existence of other rights and the capacity to include members wider than the patrilian.
- Fourthly, Woodward foresaw that change would impact on the mechanisms for delivery of land rights (Woodward 1974: 9) but this was not to be interpreted out of context, or in isolation from the other main principles he saw as integral to the development of the Act (Woodward 1974: 8–10). Similarly, he was aware of differences between Aboriginal groups and the need for sufficient flexibility to accommodate these differences. One way of handling the latter was through the establishment of initially two land councils dealing with broadly different geographical and cultural areas.
- Finally, Woodward foreshadowed the need for flexibility in any formalised system of recognition of land rights. He alluded to changes in surrounding circumstances, such as in relation to local commercial and economic opportunities. He did not expect Aboriginal tradition to be static.

The ALRA is thus established on, a notion of Aborigines' entitlement to land, to be demonstrated on the basis of certain criteria assumed to be within or arising from Aboriginal tradition (Merlan 1994: 13).

To this end, in his First Report Justice Woodward articulates in detail what he understands to be the nature of traditional Aboriginal rights in land. He includes his descriptive report on 'Aborigines and their Land' under the section on 'Facts' in the First Report, and as Appendix A in his Second Report.

Woodward draws on anthropological data as the basis of his understanding of traditional land tenure systems (Woodward 1973, 1974). In speaking of the wide distribution and scrutiny given to the First Report, he says of the anthropological sections:

In particular the description of the traditional relationship between Aborigines and their land seems to have been accepted by Aborigines and by others who have studied the subject (Woodward 1974: 4).

But while he provides a detailed account of traditional land ownership, he acknowledges that his task of inquiry was to some extent a superfluous exercise for Aboriginal people:

In one sense, discussion of land ownership seems to them unnecessary. They know which Aborigines own which tract of land by Aboriginal law, whether it is now part of an Aboriginal reserve or of a cattle station (Woodward 1973: 2).

Woodward devoted a whole chapter in his First Report (Woodward 1973: 4–10) to discussion of traditional Aboriginal land ownership, including principles for control and access of Aboriginal people who are not members of the clan (where the clan is identified as the key social unit for land ownership). Traditional rights of clan landowners involve both rights and duties:

The spiritual connection between a clan and its land involves both rights and duties. The rights are to the unrestricted use of its natural products; the duties are of a ceremonial kind—to tend the land by the performance of ritual dances, songs and ceremonies at the proper times and places (Woodward 1973: 7).

On the basis of the available anthropological evidence, he goes on to describe what he understands to be the principles of customary law by which Aboriginal people in the Northern Territory own land. He begins with the clan as the basic landholding unit and identifies patrilineal descent as the primary means by which the clan recruits new members (Woodward 1973: 39 paras 41, 42).

However, he is aware that other mechanisms also entitle individuals to assert rights in country. For instance, rights and authority also derive from matrilineal descent, conception sites, birth sites, long-term residence, father's burial site, father's father's burial place, and sites on the dreaming track of a totemic ancestor (Hiatt 1984: 9; see also Peterson, Keen and Sansom 1977). These additional rights qualify individuals to participate in decision-making about clan territory and endow them with customary authority to speak for country (Woodward 1973: 9 para 56).

In his 1980 review of the ALRA, Rowland too, accepted Woodward's exegesis of the various customary bases underpinning the tie between traditional owners and land ownership. He reiterated that the recipients of the legislation will be:

Persons who are entitled to beneficial interest in the land (that is) Aborigines entitled by Aboriginal tradition to the use and occupation of the land; (s.4(1))
Rowland 1980: 5).

Woodward attached paramount importance to the spiritual connections between Aboriginal people and land as a crucial principle of land rights. In his discussion of the aims of Aboriginal land rights he writes:

In order to achieve recognition of land rights for Aborigines in the best possible form, it is necessary first to be clear as to the aims underlying such recognition. I assume these to be [amongst a list of points given]

(iii) the preservation, where possible, of the spiritual link with his own land which gives each Aboriginal his sense of identity and which lies at the heart of his spiritual beliefs (Woodward 1974: 2).

The implementation of the ALRA in 1976 has been followed by a number of reviews; some of which have focused on specific aspects of the Act (see Toohey

1984). In a commentary explaining why land rights was based on indigenous tradition, Maddock makes the following points:

One argument for basing land rights on tradition is that Aborigines have a more than human relationship to the land of their forebears. Their relationship to it is part of divine history and loses sense when considered apart from this context. Woodward J. saw land rights as aiming at 'the preservation, where possible, of the spiritual link with his own land which gives each Aboriginal his sense of identity and which lies at the heart of his spiritual beliefs'. He quoted Ronald Berndt's opinion that Aborigines have 'two levels of ownership, the primary or religious level and the secondary or economic level'. Because religious ties to land are usually thought to be fixed and unchangeable it follows that Aborigines should be granted their ancestral country, and not land somewhere else (Maddock 1983: 34).

In Merlan's overview of the ALRA she argues that in policy terms the ALRA is more concerned with entitlement rather than the needs of Aboriginal people (although the latter was also briefly considered in terms of the Act's purpose). She writes:

The LRA [Land Rights Act] is orientated towards entitlement rather than need or any other of the chief ethical concepts used to assess social policies and systems: the meeting of certain criteria establishes 'traditional ownership', some of the aspects of which are stated in terms of the kind of relationship to country that must be found to be the case, and one of which—the foraging condition—must be found as a matter of 'right' within Aboriginal tradition. It is of course understood to be beneficial legislation: as Murphy, J. stated, 'the purpose of s.50 (which requires the Commissioner to comment on advantage to Aborigines with traditional attachments to the land claimed, *inter alia*) is to open up the possibility of a grant of land which has traditional Aboriginal ownership, not to close it' (Merlan 1994: 15).

Some reviews have debated the appropriateness of codification and translation of ethnographic notions into legal concepts. In particular, the notion of 'traditional owner' and the centrality of the 'patrilineal clan' as the key social unit with rights in land has been a focus for anthropological debate (see Maddock 1983; Keen 1984; Morphy and Morphy 1984; Scheffler 1984; Smith 1984).

Yet Woodward intended the Act to establish legal constructs which were congruent with the ethnographic reality of contemporary Aboriginal land practices. Consequently, over time the concept of a 'local descent group' gradually acquired a strictly legal definition and application under the legislation (Scheffler 1984: 41). Woodward remarked: 'Aborigines have waited many years for some practical recognition of their title to land' (Woodward 1973: 2). In this sense, Woodward saw the ALRA as a full and acceptable legal response to the recognition of indigenous land tenure with its laws of inheritance and entitlement.

Woodward's consideration of the ethnographic reality of Aboriginal relationships to land was broadly inclusive. It encompassed discussion of relationships between land tenure and language groups; land tenure and land use; and finally, land tenure and descent. He concludes however that the clan, by which he means the local descent group, is commonly the key social unit.

In the post-ALRA anthropological debates about the centrality of the clan as the key landowning unit, other rights to land have emerged for consideration. Consequently, successive Land Commissioners

have shown remarkable flexibility in interpreting the notion of 'local descent group', considering how united anthropologists initially were in thinking this would be necessarily interpreted as 'patriclan' ... perhaps most remarkably, in several cases findings have been in favour of 'language groups', or people who may be collectively regarded as a 'group' on the basis that all claim affiliation to a social-territorial identity considered inherent or 'grounded' in a broad but definable area Commissioners have also shown some flexibility in the extent to which they apply the Act's criteria to all members of a 'local group' constituted by 'descent' (Merlan 1994: 24; see also Hiatt 1984: 19).

Differences of interpretation confirm the importance of Woodward's initial attention to the particular nature of indigenous relationships to land; and the capacity of the Act to be inclusive (see Scheffler 1984: 41-2, in particular for discussion of claims argued for groups larger than the clan).

However, while rights other than descent have emerged as contingent to property rights, the ALRA has been able to accommodate these because in practise such rights are always ranked; some are seen as contingent or conditional (such as usufructuary rights) while others, are understood as core or generative rights. Generative rights stem from descent and membership of the patriclan.

Scheffler's discussion of rights in country captures something of these differences when he suggests that although Aboriginal claimants will make clear their wish to reside on their country as of a right, they have no wish to be compelled to live there. In their view, it should also be possible for other Aboriginal people (such as family and friends) to live there. The view of many Aboriginal claimant groups is that

in their view, land and its resources are as much or more public as they are corporate-clan goods. Yet, again in their view, the duty of the clan (where that is the relevant social unit) to protect and enhance the value of the land for the public good must entail a right to exclude others from use and occupation of it (Scheffler 1984: 42).

Neate (1989: 77-9) also comments on the issue of entitlement to forage and the fact that it is a right which often requires the consent of the land holding group and is descent-based.

The Act is expansive in its recognition of land rights because it is based on entitlement as understood under Aboriginal tradition. Neate succinctly explains how this works in terms of rights in land:

The Act also confers legal rights and benefits on Aboriginal people other than the traditional Aboriginal owners. The rights relate to the land, the use of the land and dealings with other people wishing to gain an interest in or make use of Aboriginal land ... title to Aboriginal land is held for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of the land concerned,

whether or not the traditional entitlement is qualified as to place, time, circumstance, purpose or permission ... There is statutory recognition that in Aboriginal law an entitlement to the use or occupation of land may carry restrictions of gender in the case of particular sites, ... The notion of an entitlement qualified as to permission seeks to reflect an obligation which is to some extent social. Even though a person is entitled to go on to land there are people in authority who should be told first (Neate 1989: 357).

Woodward appreciated that traditional Aboriginal rights in land were grounded in religious obligations and duties. Thus, he recommended that the legislation recognise that indigenous relationships to land were religious as well as secular. As Williams notes 'The terms of the Land Rights (Northern Territory) Act determined that Aboriginal interest in land would be put in terms of religious ties to land' (Williams 1988: 204).

The dual basis of traditional land tenure is reflected in the requirements under the Act for claimants to demonstrate membership of a local descent group, common spiritual affiliations to sites on the land, and a primary spiritual responsibility for sites on that land. They also had to confirm that in accordance with Aboriginal tradition they had the right to forage over that land (see ss.3(1) of the ALRA).

It is evident that traditional Aboriginal mechanisms of land ownership (such as regulated access to land, responsibility for land including care of sacred sites, and control of natural resources), were acknowledged and encapsulated in the Act. This occurred not simply through the definition of 'traditional owner' and 'descent group', but in the grant of 'inalienable freehold title' (described elsewhere) to land under the Act; and in Woodward's recommendation of consent provisions for any form of commercial development, including mining. Woodward identified traditional land owners, together with 'any community likely to be affected by a substantial mining development' within a 60 kilometre radius of the mine site, to as those who must consent to project approval (Woodward 1974:106 para 585). In effect this mechanism not only tied in with the expansive nature of entitlement under Aboriginal tradition, but maintained the core principle that the Act should be beneficial to a wide group of Aboriginal people (defined in these circumstances to a 60 kilometre radius).

Recently the inconsistency of native title rights under the *Native Title Act 1993*, (NTA) and land rights under the ALRA has been pointed out (see Reeves 1997, Attachment C). Commentary is increasingly available on the differences and similarities of these two pieces of legislation as they impact on Aboriginal people (Merlan 1994; Neate 1995). In a case brought to the Federal Court of Australia, *Pareroultja & others v Tickner & others* many of these issues were at the heart of the dispute (Edmunds 1994: 38). However, Reeves is unlikely to focus on the interaction between these two Acts in the current review (Reeves 1997: 17 para 77). Nevertheless, it should be noted that the ALRA recognises 'native title' in its many forms as rights in country and that like the NTA, it too emphasises the importance of customary law ('rights and interests') as evidence of practice.

However, a marked difference between the two Acts is that where the ALRA provides for evidence of title according to a stipulated criteria, the NTA is open-ended (partly because native title remains undefined in statute law). As Merlan (1994: 13) notes:

The Northern Territory legislation was of course formulated at a time when 'Native Title' was not seen to be enactable: it was thinkable but found not to exist at common law in the Gove case (1971). Both pieces of legislation presuppose the notion of Aboriginal rights in land, but while the *LRA* gives this force at law through a land grant and the carving out of proprietary rights from the Crown's radical title (see Neate 1989: 22), the *NTA* states that the common law 'recognises a form of native title that reflects the entitlements of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands' (Merlan 1994: 13).

It is entirely possible that greater gains in land rights will be available to Aboriginal people through the ALRA than under the NTA, at least in the Northern Territory.

Review of the '*Aboriginal Land Rights (Northern Territory) Act 1976*', Issues Paper

Reeves' comments in the Issues Paper indicate an intention to conduct the current review with a clear vision of what he considers to be 'the purposes of the Act' (Reeves 1997: 3 para 21). He explicitly rejects the Northern Land Council (NLC) proposition that 'core principles (should be) guiding the review' and cites a lack of federal ministerial direction as support for the rejection (see Reeves 1997: 5 para 28, 29).

I infer from this background that the Minister made a considered decision not to require the reviewer to conduct the review according to, or guided by, a set of core principles or fundamental rights (Reeves 1997: para 38).

Reeves sees no compulsion to exempt from inquiry what the NLC consider to be 'core principles or fundamental rights ... [which] should be a guaranteed 'benchmark' of the rights held by Aboriginal people under the Act (and) which principles or rights are immutable and therefore not open for consideration in this review' (Reeves 1997: 5 para 30). Certainly, the present review is not the first occasion when foreshadowed changes to land rights legislation might entail a reduction in established rights for Northern Territory Aboriginal people (see Altman and Dillon 1985).

The core principles or fundamental rights identified by the NLC are listed below:

- No diminution of the rights and benefits of Aboriginal people in the region of the operation of the Act.

- The Act to remain within Commonwealth jurisdiction and any change to this arrangement should only occur through a plebiscite of Aboriginal people in the areas affected by the Act.
- A commitment to the Coalition's election policy of no changes to the so-called 'veto' provisions of the Act, except with the agreement of the Aboriginal people currently affected by the Act.
- Aboriginal land under the Act to continue to be held as inalienable freehold title.
- All Aboriginal sites to be protected and no reduction in the protection which is currently afforded by the Act.
- Maintenance of the access to mining royalties arrangements, or the equivalent or better alternatives(s) which will enhance the economic independence of the Aboriginal people whilst protecting their social and cultural heritage (these core principles as raised and articulated by The NLC and listed by Reeves 1997: 4 para 25).

Woodward was aware that land councils were likely to have an increasingly important interstitial role for Aboriginal people. Altman and Dillon observed in 1988:

both Territory and Federal Governments ... continue to emphasise that the land councils' statutory roles are to merely act as agents for traditional owners of land. However, land councils are operating increasingly as guardians of Aboriginal interests and representatives of Aboriginal people's views and aspirations. This is partly a consequence of the inability of Australian political institutions to meet the specific needs of Aboriginal people. There is little scope for Aboriginal interests to be recognised and satisfied within the NT political system (based on political parties, formal elections and so forth) because this majoritarian system invariably leads to outcomes favoured by the mainstream ... Aboriginal interests are very frequently different from majority interests (Altman and Dillon 1988: 126).

Reeves defers to Neate's summation of the purposes of the Act as a position with which he, as reviewer, is comfortable. These purposes, or themes, as summarised by Neate from the first and second reading speeches during the Bill's introduction to Parliament are:

- to give recognition of traditional Aboriginal land rights in land;
- to grant to Aboriginal people secure title to certain categories of land;
- to give Aboriginals control over activity on their land; and
- to achieve these aspirations after balancing Aboriginal aspirations and the competing interests of the wider Australian community (Reeves 1997: 7 para 38).

For Reeves the review is an opportunity to explore notions such as 'secure title' or 'control over activities on the granted land'. Consequently, differences of purpose are problematised as questions of interpretation. Speaking of the differences in position as to fundamental principles of the Act, Reeves says:

I believe they differ in at least the following respects:

- whether secure title to land means inalienable title;
- whether control over activity on their lands, means among other things, the so-called 'veto'; and
- whether Aboriginal land can be compulsorily acquired if it is to meet the interests of the wider community (Reeves 1997: 9 para 45).

The fundamental principles and aims Woodward saw as critical to the development and operation of the ALRA are cited in the Issues Paper. Woodward's Second Report (Reeves 1997:6 para 33, 34, 35) is mentioned in this regard. Woodward expected land rights to be achieved through identified principles (Reeves 1997: 6 para 33, 34). Reeves denies that beneficial aims underlie the legislation and these aims should be immune from consideration in the present review. This attitude is surprising since Woodward acknowledged that one of the 'aims underlying recognition' of land rights was 'the maintenance and, perhaps, improvement of Australia's standing among the nations of the world by demonstrably fair treatment of an ethnic minority' (Woodward 1974: 2).

Justice Toohey also operated with an appreciation of certain principles as integral to the Act. In his introduction to the review of the ALRA seven years after its implementation he began with the set of principles identified by the Federal Government as integral to the legislation. Toohey's conducted the review

in the light of certain principles seen by the Government as fundamental in relation to Aboriginal land rights. Those principles are:

- (1) Aboriginal land to be held under inalienable freehold title;
- (2) protection of Aboriginal sites;
- (3) Aboriginal control in relation to mining on Aboriginal land;
- (4) access to mining royalty equivalents;
- (5) compensation for lost land to be negotiated (Toohey 1984: 1).

These principles are also listed by Reeves (1997; 5 para 27) but he fails to mention the areas of reportage and recommendation set out for Toohey. He was expected by the Federal Government to report and recommend amendments where appropriate with respect to [among other things]:

- (3) reducing any detriment to Aboriginals which might result from the provisions and operation of the Act;
- (4) reducing any areas of conflict or inconsistency between administration of the *Northern Territory (Self-Government) Act 1978* and the Act (Toohey 1984: 1).

The NLC listed core principles or fundamental rights to be achieved by granting Aboriginal people land rights. One of these principles is the interrelated matter of continued access to mining royalties, the associated control and protection of sacred sites and the consent provisions on Aboriginal land. In consideration of why he saw the so-called 'veto' as so important, Woodward (1974) wrote the following in his Second Report:

I have set out the mining industry's submissions in some detail, because, while accepting many of the points made, I am unable to accept the main result contended for. I believe that to deny to Aborigines the right to prevent mining on their land is to deny them the reality of their land rights. I find it quite impossible to inspect developments on Groote Eylandt or the Gove Peninsula or proposed works on uranium deposits in Arnhem Land and to say that such developments, without consent, could be consistent with traditional land rights for Aborigines.

The key words here, of course, are 'without consent'. I think it is likely, particularly in the longer term, that consent will generally be given. But this should be for the Aborigines to decide—with the one qualification that their views could be over-ridden if the government of the day were to resolve that the national interest required it. In this context I use the word 'required' deliberately so that such an issue would not be determined on a mere balance of convenience or desirability but only as a matter of necessity (Woodward 1974: 103–4).

Further, as Neate explains it, Woodward saw a direct and necessary correlation between land rights and payment of royalties. In his view there seems

little point in recognising Aboriginal claims to land unless the Aboriginal people concerned are also provided with the necessary funds to make use of that land in any sensible way which they wish (Neate 1989: 10).

Woodward argues that the traditional landowners' consent must be given before mining can commence. However, communities in the 'areas affected' had to be consulted, although their consent was not mandatory. Woodward stated:

In addition to the consent of the traditional owners of the land, I think it is necessary that any community likely to be affected by a substantial mining development should also consent (Woodward 1974: 106).

The provisions for the veto and the payment of royalties correspond with the importance Justice Woodward gave to consultation, informed consent, and autonomy for Aboriginal communities in decision-making and choices about their 'manner of living'. He adopted the view that land rights was realised in the capacity to make decisions about land use and lifestyle choices and that this would not be possible without the capacity to exercise a veto over access to, and control of, industrial developments on Aboriginal land. However, Hasluck introduced institutional mechanisms for mining royalties on Aboriginal reserves in 1952 and these were paid into the Aborigines Benefits Trust Fund (ABTF). There were two mechanisms operating under the ABTF.

First, the new provisions allowed for royalties from mining on reserves to be earmarked for the use of Aboriginal people, irrespective of the fact that neither statutory nor common law, at that time, recognised Aboriginal land ownership; Aboriginal people then neither owned the land nor the minerals, but they were allocated the royalties. Second, if mining occurred on Aboriginal reserves then the statutory royalty was doubled from 1.25 per cent of the value of minerals to 2.5 per cent. Under these provisions, mining companies were penalised for mining on reserves, a disincentive that the Minister for Territories intentionally created to

discourage insignificant development that would unnecessarily impinge on Aboriginal people. On the other hand, the Minister was adamant that, if mining occurred on reserves, Aboriginal people would benefit (Altman 1996: 2).

In looking to a future when the performance of the legislation would be reviewed, Justice Woodward was concerned that any scrutiny be situated within the complexities of traditional landownership, and with respect to the rate at which socioeconomic change might realistically be achieved. He cautioned 'land rights is no simple matter. It raises a number of complex questions, to many of which there is a choice of answers' (Woodward 1974: 133).

Woodward was realistic about the time frame for achieving the goals of the legislation. He put this caveat in his Second Report:

There will be no immediate and dramatic change in the Aborigines' manner of living. In truth, the granting of land rights can only be a first step on a long road towards self-sufficiency and eventual social and economic equality for Aborigines.

But it is an essential step, even though its outcome may not be fully apparent for many years. The next step will be the fresh assertion of personal and community identity by Aborigines. This will come because they will have a secure territorial base and control over their own lives. They will be able to regulate for themselves their contacts with the dominant society and come to terms with it in their own way and at their own pace.

There is every reason to believe in the long-term benefits of recognising Aboriginal land rights now. It is important both for Aborigines and others not to expect too much too soon and then, in disappointment lose sight of the ultimate goals (Woodward 1974: 133).

Contrary to the position proposed by Reeves, Woodward was not equivocal in his assessment that Aboriginal advancement must be established on the basis of secure title to land and control over decisions about the use and development of that land. As described by others 'inalienable freehold title' and the veto should be seen as closely correlated inter-dependent processes. Woodward was certainly adamant about the relationship between the two. Without such linkage, land rights would not be a reality for Aboriginal people. The importance of the veto is its capacity to enable Aboriginal people to make decisions about commercial developments (in particular, mining) on their own land (Woodward 1973, 1974; Reeves 1997).

However, some interest groups have sought to present the veto as a grant of excessive power to traditional Aboriginal land owners. As Rowland carefully

This so called power of veto is really the right of the Aboriginal owners (through the Land Council) to refuse consent to the grant of a mining interest (Rowland 1980: 8). Indeed there are specific cases when consent is not necessary, although an issue of a mining grant would still depend on forging an agreement (Rowland 1980: 8–ff).

As Altman and Peterson (1984: 50) point out, other commercial activities on Aboriginal land (such as large-scale forestry and tourism) are controllable through entry permits. The social impact of large-scale mining, first seen at Yirrkalá, alerted Woodward to the need to make specific provision for regulation of mining. However, Woodward did not grant Aboriginal people sub-surface mineral rights. Instead, he

decided that minerals and petroleum on Aboriginal land should remain the property of the Crown. However, he attempted to defuse this critical issue by introducing the new concept of the 'right of veto'... he recommended therefore that Aborigines should have the power to prevent exploration for minerals on their land. However, two provisos were included. Firstly, the power of veto could be overridden if the government decided that the 'national interest' required such action. ... Secondly, the power of veto applied only to exploration. Once Aborigines consented to exploration, there was no possibility of preventing subsequent mining operations if mineral deposits were discovered (Altman 1983: 39).

What core principles did Woodward identify as the basis of the ALRA?

Woodward concluded his commission with a view that core principles should be encapsulated within the Act.

- To begin with, the Act had to be beneficial legislation for its Aboriginal recipients (for discussion of this point see above).
- Second, land rights were worthless in the absence of any consent provisions for Aboriginal decision-making about commercial developments on Aboriginal land. Further, Aboriginal people were to have an economic base and thus the royalty provisions were included.
- Third, Aboriginal people needed land councils as a means of representing their interests in commercial negotiations; by providing access to independent advice and developing policies about land matters; as a means of protecting the interests of traditional landowners, and in general, to serve as a professional organisation capable of assisting Aboriginal landowners to practically implement land rights.
- Fourth, consideration of flexibility in the act in order to accommodate change (see Woodward 1974: 68–69, para 357–359).

The veto and royalties

Woodward was conscious of the importance of linking land rights to control of access to land, and the necessity for decision-making over Aboriginal land to be based on consultation with Aboriginal people and informed consent. The consent provisions can also be seen as a legislative mechanism foreshadowed in customary law; namely, that Aboriginal owners have the right to regulate the access of other Aboriginal groups to the natural and spiritual resources of clan land. Woodward appreciated the need of, and importance for, Aboriginal people to

be able to exercise decision-making in their relations with the wider Australian society, not least as a means to protect their sacred sites on Aboriginal land (see the discussion in Woodward 1974: 117–19; see also Berndt 1981; Hiatt 1981; Altman 1985).

Woodward had understood the importance of a consent mechanism to deal with commercial developments as a result of his professional experiences in the Nabalco case on the Gove Peninsula, and from his observations of mining on Groote Eylandt. In the past such negotiations proceeded on assumptions about the lack of property rights enjoyed by Aboriginal people, and thus there was no compulsion for consultation about access to land by industry with Aboriginal parties.

Altman and Peterson (1984) reviewed some of the major industry stakeholders' arguments for diluting the Aboriginal veto on mining and associated royalty rights under the ALRA. Aware of the continuing pressures from various industry stakeholders and government sectors to revise these provisions they wrote:

The right of Aboriginal land owners to assent to, or dissent from, any proposed development on their land has always been an integral cornerstone of the Act. In the Second Report of the Land Rights Commission that immediately preceded the drafting of land rights legislation for the Northern Territory, Mr Justice Woodward (1974: 108) noted, in an oft repeated sentence, that 'to deny Aborigines the right to prevent mining on their land is to deny the reality of their land rights'. This direct correlation between the right of veto and meaningful land rights has subsequently been supported by two further independent inquiries by Mr Justice Toohey in 1983 (Toohey 1984) and Paul Seaman Q.C. in 1984 (Seaman 1984) (Altman and Peterson 1984: 44).

Altman and Peterson developed an additional argument in favour of continued use of the veto provision and payment of royalties in the expectation that providing land to Aboriginal people was an opportunity for them to develop an economic base. However, Altman and Peterson argued additional factors 'which provide an even stronger case for paying mining royalties' (Altman and Peterson 1984: 51). They made a case for royalty payments on the basis of addressing systemic socioeconomic disadvantage stemming from the structural relationship between Aboriginal people and the wider Australian nation:

Because many Aboriginal people live in areas that are remote, not just geographically but economically, socially and culturally from the rest of Australian society, and because they are without wealth, their ability to alter the relationship, or to take an active role in changing their circumstances, is extraordinarily circumscribed ... As Rowley (1978) has long emphasised this structural dependency can only be broken when Aboriginal people have something to make decisions about. Only property rights can draw non-Aborigines into negotiating with Aborigines on equal terms. Given that Aboriginal land is inalienable, and largely only of economic interest to mining companies, any rights that do not give at least some control over (and interest in) mining would make no significant difference at all. Further, real

transformation of the relationship of Aborigines to Australian society has to include the transfer of assets, which inalienable land is not, in any ordinary sense, as it can only be leased The right to royalties could be seen as disadvantageous to Aborigines, although advantageous to the wider society, since it is a powerful incentive to people who are poor to agree to mining, as recent events have demonstrated. Royalties are the counter balance to the right of veto (Altman and Peterson 1984: 51).

Land councils

Woodward referred to the lack of formal submissions received from Aboriginal people during his initial inquiries into the effectiveness of the ALRA. Nevertheless, he saw his task as being, 'firstly, to find out what Aboriginal claims and wishes are, so far as land in the Northern Territory is concerned' (Woodward 1974: 2). To achieve this, he made a point of personally visiting 20 different centres of Aboriginal population, speaking with authoritative people among the populations of reserve communities and holding consultations with Aboriginal people living in Darwin and Alice Springs. His contact with Aboriginal people resident on cattle stations was, however, limited (Woodward 1973: 1). In spite of the lack of written submissions, Woodward was clearly satisfied by his informal consultation process: 'the resulting discussions have been lengthy, detailed and very helpful to me in understanding Aboriginal attitudes to land' (Woodward 1973: 1).

He realised that the lack of formal Aboriginal submissions was not an indication of a lack of Aboriginal interest, but 'merely evidence of a lack of contact and information' (Woodward 1973:1 para 4). As part of the solution to this, Woodward recommended that two regional land councils be established. He outlined the reasons for his preference for larger rather than smaller land councils (Woodward 1973: 414) and the importance of the land councils in providing the means 'through which Aborigines could make their views known' (Maddock 1983; 62) while also receiving independent advice (Woodward 1973: 2).

From Woodward's First and Second Reports (Woodward 1973, 1974) it can be argued that he saw the importance of land councils in serving the needs of Aboriginal constituents in land matters and providing them with the necessary machinery to do so. Under the ALRA land councils were expected to operate in accordance with statutory functions. They were also expected to act as intermediaries between Aboriginal and non-Aboriginal interests in land. For various and sound reasons the land councils have developed into much more than simply serving the interests of traditional land owners (see Peterson and Langton 1983; Altman and Dillon 1988).

Woodward envisaged the land councils as providing a crucial forum for the expression of traditional leadership and traditional rights in decision-making (Woodward 1974: 65 para 337). Toohey repeated the importance given to tradition and decision-making. He saw the essence of the land councils' position as operating on two interrelated levels:

The Act seeks to implement two principles. One is to ensure that the traditional owners understand and consent to any action that may affect the land. The other is to interpose a land council between the traditional owners and those who wish to deal in some way with Aboriginal land (Toohey 1984: 56 para 380, also 56–60).

Flexibility

Finally, some reference must be made to the issue of change and the importance of flexibility in the legislation. Woodward realised that the circumstances he observed of Aboriginal lives during his commission would be subject to change; indeed, land rights itself would ensure such a process. Toohey's review of the Act and research on specific aspects of the functioning of the Act since 1976 are mentioned elsewhere in this submission (Toohey 1984). Together, this literature indicates that successive evaluations of the Act have occurred in the context, first, of the local circumstances of Aboriginal lives, and second, in respect of the relationship between Aboriginal people and the wider society.

However, there is no indication from Woodward (1973, 1974) that he anticipated changes to traditional land tenure and its mechanisms of entitlement. If anything is to be said on this point it is that the Act has been incorporative of change. Merlan recently discussed changes in 'tradition' in relation the ALRA.

'Tradition' has been a cover term under which evidence concerning change has proceeded. Commissioners have been willing to accept arguments put by anthropologists that 'tradition' is what claimants' evidence shows regularised social forms to be, if those conceptions can be seen as not in conflict but consonant with the Act's criteria of traditional ownership.

This acceptance is not new: over twenty years ago Woodward commented that Aboriginal tradition is not, and should not be expected to be static; he also anticipated that the needs and aspirations of a community may change as a result of increasing contacts with the outside world, and accordingly that any scheme for recognition of Aboriginal rights to land should be sufficiently flexible to allow for changing ideas and needs among Aboriginal people over a period of years (Merlan 1994: 20).

Merlan (1994: 21–22) argues that any interpretation of tradition which accommodates change must also deal with the possible corollary that change can mean alienation from tradition. However, she concludes that the historical processes of change will still mean that

some Aboriginal people continue to define themselves as distinct from 'settler' at least partly in terms of the particular sense of the ties they say their ancestors had, or that they still have, to areas of country. Aboriginal people may retain a sense of 'home place' not always as clearly rooted in observable forms of practice such as Toohey was seeking ... (in the Finnis River claim) ... but in deeply felt and strongly held emotions. 'Tradition' can at no time be seen as a bunch of cultural items or customs just out there and discoverable:

it always has the 'intrinsic double aspect' that Geertz (1966: 8) identifies, the quality of reflexivity or self-monitoring (in historically changing modes), and of dialectical invention in relation to shifts in the nature of social reproduction. There are thus no fixed parameters to which resort can be had to resolve the question of the degree of flexibility that may be allowed within this notion, with respect to a particular issue like land rights (Merlan 1994: 22).

How effective has the legislation been?

Maddock summarises the aspirations held for land rights:

The main achievements (for better or worse) of the Woodward inquiry were, first to show how land rights could be based on tradition, and second, to show how the rights could be exercised for Aboriginal advantage in the midst of an economy and legal system vastly different from the traditional world ... it is clear from the letters patent establishing the inquiry that Aborigines stood to gain a great deal (Maddock 1983: 61).

Justice Toohey broadly considered the question in his review of the Act and related matters in a report entitled *Seven Years On* (Toohey 1984). Other commentators too, have examined and re-examined aspects of the ALRA from different perspectives (see Berndt 1981; Altman, 1983, 1985, 1994; O'Faircheallaigh 1986, 1988; Altman and Smith 1994; Manning 1994, 1997; Marshall 1994; Stead 1994). A comparative discussion of specific differences and similarities between the ALRA and the NTA is also available in the literature (see Merlan 1994; McKenna 1995; Stead 1995; Altman 1996).

The question of the purpose of the legislation and its effectiveness is considered here under four headings—legislation, economics, cultural and social concerns. It should be added that the question of the effectiveness of the legislation to achieve its purposes is contentious and has been variably argued according to the particular perspective of stakeholders with different interests in Aboriginal land (Neate 1989: 386–88).

Legislation

The ALRA provided Aboriginal people in the Northern Territory with full legislative recognition and protection of their traditional rights in land. In keeping with this recognition, the legislation was designed to be beneficial to Aboriginal land owners. Thus, consent provisions enabled Aboriginal landowners to exercise access rights to country and in relation to commercial developments. Such a provision acknowledged a pre-existing right in the indigenous system, but was now also recognised within the wider Australian legal system. In Woodward's view, the consent provisions (or veto) had to be an inseparable part of the land rights legislation. This was one of his core principles.

Toohey also acknowledged that the purpose of the ALRA was to provide beneficial legislation. Indeed, this intent is revealed by the full title of the ALRA;

'An Act providing for the granting of Traditional Aboriginal Land in the Northern Territory for the benefit of Aboriginals, and for other purposes' (Toohey 1984: 1).

Altman's (1996) assessment of the relationship between Aboriginal economic development and land rights in the Northern Territory addresses the central question of what benefits Aboriginal people have gained from the legislation.

The ALRA incorporated, in large measure, progressive social measures recommended by Mr Justice Woodward to facilitate economic development for Aboriginal people. These included financial provisions for mining moneys to be channelled to indigenous interests in order to facilitate the empowerment of land councils and the independent funding of the land claim process; to support regional economic development and the amelioration of the negative impacts of mining; and to assist general improvements in the socioeconomic status of Aboriginal people throughout the Northern Territory (Altman 1996).

Others, such as Manning (1994, 1997; and Turnbull 1980), have examined the question of benefits in a wider context and based on a criteria not central to Woodward's recommendations or a notion of core principles for the legislation. Manning for example, discusses the question of purpose using a cost-benefits analysis of the ALRA in relation to the Northern Territory economy (Altman 1996: 11).

Land rights legislation has also provided Australia with the opportunity to improve its international standing with regard to treatment of its indigenous people. Woodward specifically articulated this point as an underlying objective to be realised through recognition of traditional land rights (Woodward 1974: 2 para 3 (v)). Neate offers a critique of this objective and other aims of the legislation and whether land rights achieved its goals (see Neate 1989: 386-8).

Economic

Altman argues that the crucial importance of the ALRA is the window of economic opportunity it represents for Aboriginal people; although this potential is yet to be fully realised. In 1996, with 42 per cent of the land in the Northern Territory under Aboriginal ownership, a sound basis exists for future economic strategies.

Whether the ALRA is the economic success story in Aboriginal affairs policy of the last 20 years, as I will argue, will be judged with greater fullness of time; certainly recent events and the current [1996] inability of the *Native Title Act 1993* to transfer land to Indigenous Australians suggests that land councils may have been prescient in focusing so intently on claiming land during what future historians may term a 20-year window of opportunity. In the next 20 years, the institutional structures of the ALRA will need to increasingly adapt from a focus on land claim to land development (Altman 1996: 7).

Altman's comments should be set in the context of Woodward's understanding that land rights was to help achieve a change in the very low socioeconomic status of Aboriginal people relative to the wider community. In this sense, land

rights was an opportunity to develop an economic basis and independent sources of capital in circumstances where previously they had no options for achieving a normal Australian standard of living (Woodward 1974: 2 para 3 (iii)).

In a report to the now defunct Australian Council for Employment and Training, on the economic viability of Aboriginal outstations and homelands, Altman and Taylor pointed out:

- the economic success of the homelands movement onto Aboriginal land when compared with other opportunities for economic benefit available to Aboriginal people in remote Australia;
- outstation residents have the opportunity and choice of participating in subsistence activities, market exchange and in artefact manufacture. Such activities have a high cultural value. They also have a cash benefit and 'imputed' income above welfare entitlements; and
- earlier reports such as the Miller Report and the Blanchard Homelands Report indicated bipartisan support for increased government support for these communities (Altman and Taylor 1987: ix).

The Miller Report (Miller 1985) alerted government to the importance of developing employment generating programs for Aboriginal people. The Aboriginal arts and crafts industry was identified as an area where opportunities for Aboriginal people were under-utilised. The significance of this arena was heightened when the Blanchard Report (Blanchard 1987) showed that for the 5–10 per cent of the Northern Territory Aboriginal population living in homelands, the Aboriginal arts and crafts industry was the major source of cash incomes at outstations that was independent of the public sector (Altman 1989: 2).

Land rights has enabled Aboriginal people to leave the centralised settlements established under the Northern Territory Ordinances and to return to traditional lands. They have established residences on traditional country where sites can be protected, land managed and cultural practices maintained. Land rights has also enabled Aboriginal people to participate not only in subsistence activities, but also in the management and protection of wildlife resources; many species of which are culturally significant to Aboriginal people. Issues of land management and conservation are increasingly of interest and importance to non-Aboriginal people (see Bomford and Caughley 1996).

Heatley (1986) first signalled the lack of specific research attention given to the economic implications of land rights for northern development. He observed that

across the NT's political spectrum it is generally agreed that the expansion of the primary sector and tourism is essential to economic growth. These activities are all land extensive (Heatley 1986: 238).

Altman and Dillon have taken up Heatley's point. They examined the nature of the challenge for land councils to participate in the economic development of the Northern Territory while 'ensuring that the rights of those Aborigines who do not want 'development' [on Aboriginal land] are protected' (Altman and Dillon 1985:

145). Research has also focused on the implications of mining royalties and self-sufficiency under Aboriginal land rights (see Turnbull 1980).

Blanchard (1987) and Altman and Taylor (1987) discussed the potential of the indigenous subsistence economy to foster self sufficiency on Aboriginal-owned land in the post-land rights era. Scholars have also carried out studies to quantify the value of subsistence production and how different regionally-based indigenous groups (Arnhem Land as compared with Central Australia for instance) are able to engage in self sufficiency through subsistence exploitation (see Meehan 1977; 1982; Cane and Stanley 1985; Altman 1987). More recently, others have examined the nature of sustainable exploitation and management of wildlife species, including on Aboriginal land (see Bomford and Caughley 1996).

Researchers found that in practice, a regional imperative impacts on the potential to become self-sufficient through subsistence exploitation. However, the lack of a standard measuring device for estimating the value of subsistence foods makes it difficult to put an absolute value on food gathering in the informal economy.

It is important to note that there is a definite regional bias in available information on subsistence production at outstations, with the two most detailed studies having been undertaken in the tropical Top End of the NT in Arnhem Land ... The imputed monetary value of subsistence production can vary considerably depending on how subsistence is defined and on the factor prices used (Altman and Taylor 1987: 14–5).

Blanchard recognised that 'the re-establishment of a hunting and gathering economy has been an important element of the homelands movement' (Blanchard 1987: 132). Altman's (1987) research at Momega outstation in Arnhem Land showed evidence of a very positive role for subsistence foods (see also Cane and Stanley 1985). Altman found that

bush foods accounted for 46 per cent of kilocalories and 81 per cent of protein intake of people in the outstation over the period of the study. ... Altman's data indicate that hunting and gathering activities make a crucial contribution to this above average diet (Blanchard 1987: 132).

Meehan's (1982) study on seafood in the subsistence economy was also conducted in Arnhem Land. Her conclusion, after a systematic dietary study over four representative months, was that

bush foods contributed about 49 per cent of total kilocalorie intake and 82 per cent of protein intake. The total diet, including the bush foods and bought food, was considered by Meehan to be a good one as 'it provided an excess of the recommended intake of energy including an abundant supply of protein in various forms' (Blanchard 1987: 133).

Altman applied the concept of social accounting by way of estimating the economic value of the subsistence economy of Momega outstation in Arnhem Land. Social accounting, 'as a formal economic technique [was] devised to measure productive activity in primarily market or capitalist economic systems'.

To quantify the value of the productive activity of Aboriginal residents on Aboriginal land, the study focused on two major production sources; subsistence exploitation for local consumption, and artefact production for exchange (Altman 1987: 47–57). Altman concluded:

it is only by utilising the social accounting approach, that the relative significance of non-monetary or subsistence production can be gauged. In the Momega case such an exercise clearly identified that the production of foodstuffs for use, which accounted for sixty-four per cent of total cash and imputed income, remained the mainstay of the economy (Altman 1987: 57).

Apart from the socioeconomic value of the subsistence economy, the Northern Territory Government has not suffered simply because Aboriginal owned land exists. In terms of mining exploration and exploitation since the granting of land rights evidence contradicts a view that land rights has led to a 'locking up' of land development. Dodson writes:

In the N.T. for example, in the year to June 1984, the value of mineral production reached a record high of \$716 million. A fact that is never recognised is that the vast majority of this production took place on Aboriginal land and that this ensures productivity benefits remain within the Northern Territory (Dodson 1986: 1.1).

Following the implementation of the ALRA and consequent increase in ownership of Aboriginal land, environmental research has focused on the nature of Aboriginal land management practices and conservation/exploitation strategies. These issues have also received public attention as a consequence of Aboriginal ownership of pastoral stations. The outcomes of Ledger's (1985) research offer a positive model for development of the pastoral industry on Aboriginal land. He pitched his discussion at practical recommendations for successful pastoral management by describing the steps in such a process. Examining case material from Bulman in southern Arnhem Land tested the validity of his model. Ledger's model gives special emphasis to the integration of indigenous sociocultural and decision-making processes with established indigenous land management and environmental practices. The opportunity to operate according to indigenous practices is increasing as Aboriginal people increase their land ownership.

Griffin and Allan (1985) also support the importance of indigenous land management strategies on Aboriginal land. They suggest that the spread of the outstation movement and a return to subsistence use of country will increase the imperative for a role for fire stick farming in land management regimes. In many situations, mosaic burning is already a desirable strategy, while differentiation between vegetation types (such as mulga from spinifex) requires specific burning strategies.

The recent outstation movement by Aborigines has, we believe, re-introduced the traditional fire management strategy in a limited way. We suggest that an expansion of the area covered by this fire management is warranted

principally for the stability and conservation of ecosystems that now support the bulk of the Aboriginal population (Griffin and Allan 1985: 2.6).

McGlasson (1985) critically analyses the processes by which Aboriginal people are funded for primary industry enterprise developments on their country (such as in the establishment of a pastoral property) and the decision-making and planning processes surrounding the use and management of Aboriginal land. She questions the notion that 'expert European advice' is all that is necessary for commercial success; or that European models of economic exploitation of land and its resources are necessarily the most appropriate options for Aboriginal people. McGlasson argues that expert advice offered to Aboriginal landholders about land use and land management is often limited and its implementation restricted by erratic funding processes. For these reasons, McGlasson urges the need to work more intensively within the scope of indigenous decision-making frameworks, while also recognising that Aboriginal land is subject to a range of legal constraints on land use which non-Aboriginal pastoralists and landholders in the Northern Territory are free of.

Phillpot (1985) raises similar points to McGlasson in relation to the issues surrounding the development of Aboriginal owned cattle stations. He begins with the point that although the wider society of the Northern Territory assumes Aboriginal and non-Aboriginal economic interests are likely to be divergent and mutually exclusive, there is an expectation that Aboriginal-owned cattle properties should and must be run according to established European models ('the conventional wisdom'). However, the danger in this, according to Phillpot, is that little systematic data is available for analysis on the value of the conventional wisdom as a successful and sustainable land management strategy. Phillpot further suggests that apart from making systematic critiques of performance models, there is an additional need to understand the wider market forces that impact on all cattle properties, irrespective of the race of their owners. Until such a conceptual shift in evaluation is realised, too much emphasis will continue to be given to the projected impact of micro-factors on wider outcomes.

Cultural

Specific benefits have accrued to Aboriginal people from land rights. Woodward acknowledged the importance of maintenance of spiritual links to land and protection of sacred sites. 'The spiritual link with his own land which gives each Aboriginal his sense of identity' (Woodward 1974: 2) has been preserved and sustained through the homelands or outstation movement. In short, direct psychological benefit has come from Aboriginal ownership of traditional lands. As Neate summarised the benefits:

Spiritual and psychological benefits may flow both from the legal right to use the land for ceremonial and domestic purposes, and from the opportunity in some cases to move from centres of population to land where a more traditional way of life can be pursued (Neate 1989: 309).

ATSIC's Office of Evaluation and Audit also drew attention to the benefits for Aboriginal people of ownership of their traditional country. In respect of the ALRA they wrote:

Those same statutes affirmed the central cultural function of land to traditional Aborigines, particularly through defining social roles and responsibilities within Aboriginal society. The restoration of land as a policy was largely about the restoration of social power within Aboriginal society. There is some evidence that many of the land-owning Aboriginal communities in the Northern Territory and South Australia, secure in their culture, are now making considerable gains in self-management (Aboriginal and Torres Strait Islander Commission 1992: 1)

Perhaps one of the most important cultural and social outcomes of the ALRA for many Aboriginal people has been secure title to their traditional lands. McGlasson (1985: 2.2) argues that the form of title is especially secure when compared with that of pastoral leasehold. This enables Aboriginal land managers to operate with a different degree of certainty than their non-indigenous neighbours. On the other hand, freehold title only provides security to community groups and not to individuals. Nevertheless, the value of secure title to Aboriginal communities cannot be dismissed. As Neate explains:

Inalienable freehold title is the most secure form of title possible. Unlike a leasehold or similar interest it cannot be resumed by or forfeited to the Northern Territory Government. Those Aborigines for whose benefit title is held enjoy the right to use or occupy the land—new legal rights where the land was previously unalienated Crown land, and more substantial rights where the land was previously held under lease by or on behalf of Aborigines. ... With security of title comes the capacity to control, and in some cases refuse, the use or occupation of the land by others. This new power means that decisions about what happens on and to the land, and the social impact of such activity, are no longer in the hands of people who might otherwise have no regard to matters of particular significance to local Aborigines. In other words, those Aborigines can see that they are able to deal with others who want to use the land on an equal basis, rather than having to sit on the sidelines and observe things going on with which they may disagree. Owners are also able to control access to and use of sites on the land, both to protect the sites from desecration and the trespassers from harm (Neate 1989: 308).

An underestimated value of Aboriginal land ownership, and the consequent return to country through the outstation movement, is the opportunity for Aboriginal people to participate in ritual and ceremony, particularly that associated with maintenance of country and its resources. McGlasson (1985: 2.2) draws attention to how important ritual performance is in land management strategies. In regard to the cultural values associated with subsistence foods, Altman's study of bush foods and their role in maintaining cultural systems (through taboos, exchange cycles, authority and status of males and elders groups) suggests that despite change, many of these mechanisms continue to operate in outstation life to regulate social relations (Altman 1987: 175–207).

Although the Arts and Craft Industry review was driven by an industry focus, the committee was acutely conscious

that the Aboriginal arts and crafts industry is not just another industry. On one hand, it is by definition, the only industry in Australia that is totally dependent on Aboriginal producers. On the other hand, the industry's outputs are cultural products that almost invariably embody elements of a living Aboriginal cultural heritage (Altman 1989: 7–8).

Land rights has encouraged Aboriginal artists to continue to draw cultural and artistic inspiration from their country, while expanding the mediums through which these cultural ideals are realised. Estimates of the present status and economic value of the Aboriginal arts and crafts industry indicate its continued growth. Creative Country, the review of the ATSIC Arts and Crafts Industry Support Strategy (ACISS), concluded that:

- The \$4 million of ACISS funding allocated for 1997–98 will generate \$12 million in sales and \$6 million in returns to artists;
- These outposts feed into and stimulate a wider indigenous arts and crafts industry with an estimated value of more than \$100 million.
- Around 17% of the populations serviced by remote area art and craft centres are involved, regularly or occasionally, in art and craft production.
- There is an estimated 5000–6000 practising indigenous artists and craftspeople involved in exchanging products for money.
- Art and craft centres and production are frequently the only source of *new wealth* (i.e. not welfare or other government transfers) generated in remote indigenous communities (Mercer 1997: 3).

These data are an Australia-wide figure and should be examined for the contribution of the Northern Territory. But given that the majority of Aboriginal artists live in the Northern Territory, potentially the greater proportion of these returns will be financial gains to the Territory.

ATSIC's National Aboriginal and Torres Strait Islander Cultural Industry Strategy (1997) estimated that the indigenous art and craft market was valued in the vicinity of almost

\$200 million per annum. Half of the sales are related to the tourism market. ... The production of arts and crafts provides many indigenous artists with a valuable source of income. In most cases the money is shared among families and the community to provide basic commodities. ... The Australian Tourism Industry draws heavily from indigenous culture in terms of marketing and product (Janke 1997: 26).

Desart Inc. (an association of Aboriginal art centres in Central Australia) estimated the increasing financial value of the Aboriginal arts and craft industry to the Territory's economy in these terms:

The last ten years has seen a spectacular increase in the sales of Aboriginal arts and craft throughout Australia, there has also been an increase in the number of active artists and craftspeople and in individuals and organisations buying and selling Aboriginal art. The estimated total retail sales of Aboriginal art and craft for 1995/1996 in the Northern Territory was 29.2 million dollars. This represents, over the last 8 years, a significant increase in sales of

769%, as total sales in 1988 were estimated at \$3.8 million for the Northern Territory (Rockchild and Wright 1997: 4).

Cultural tourism on Aboriginal land (especially the major national parks such as Uluru/Kata Tjuta and Kakadu) has been a major income generating industry for the Northern Territory Government. Indeed, the Northern Territory Government promotes and markets Aboriginal cultural tourism (see Northern Territory Tourism Corporation brochure, 1997 'Experience Aboriginal culture in Australia's Northern Territory').

The joint management processes between Aboriginal owners of the national parks and government(s) in the Northern Territory have been of symbolic value. They have resulted in groundbreaking precedents for joint land management, conservation and decision-making processes (see Woenne-Green et al. 1995: 272–98); not least because it now provides for an effective, rather than simply an advisory level, of participation. Yet

all four jointly managed national parks were created amidst the ongoing political controversy concerning Aboriginal land rights, uranium, tourist development and, above all, the issue of Northern Territory/Commonwealth prerogatives. All four parks owe their existence, directly or indirectly, to the Commonwealth's *Aboriginal Land Rights (Northern Territory) Act 1976* which came into operation less than two years prior to the Northern Territory achieving self government in 1978. Each park was established on Aboriginal land following agreements with Aboriginal groups which were formalised under the Commonwealth (Kakadu and Uluru) or special Northern Territory legislation (Gurig and Nitmiluk) (Woenne-Green et al. 1995: 273).

Counter arguments to Aboriginal ownership and control of national parks have been suggested on the grounds that the Northern Territory Government on behalf of the wider community best manages them. Blowes, writing of such arguments in the 1980s, offers a persuasive economic argument for retention of Aboriginal ownership:

The arrogance in the arguments against Aboriginal ownership and control of national parks in the Northern Territory was compounded by hypocrisy wherein even those wedded most firmly to the arguments would readily concede that a substantial component of the heritage values of the parks is their Aboriginal cultural heritage values—values which could be, and are, exploited most effectively in the promotion of the parks for the economic benefits of tourism (Blowes 1992: 149–50).

Social

Land rights offered a legislative opportunity to grant social justice and a measure of equality to Aboriginal people in the Northern Territory. As Woodward said, the recognition of land rights would be 'the doing of simple justice to a people who have been deprived of their land without their consent and without compensation' (Woodward 1974: 2 para 3 (i)).

The return to homelands is a dramatic example of the kind of positive social change Woodward saw as a consequence of land rights. In many claims, the possibility for Aboriginal people resident in towns or settlements establishing an outstation on their traditional country has been an important vehicle for continuity with, and reproduction of, traditional practices. It has also enabled Aboriginal people to live intentionally insulated from the wider society. A move from fringe dwellers on the edges of towns (where Aboriginal people represented a substantial financial and social cost) and a return to traditional country (where most negatives have been replaced by active engagement in the informal economy) has to be seen as a positive social outcome of land rights.

Based on a case study approach at least one professional health researcher, among other professional voices, has argued a beneficial link between Aboriginal psycho-social health and ownership and residence on traditional country.

Many people have advocated the decentralisation, or outstation movement for the large settlements and missions. In reference to Aboriginal health, Hamilton suggested that 'the present large groups be broken up in to smaller ones of a traditional size'. Cawte proposed that such a process would improve mental health 'by reducing social disintegration and its psychological concomitants of dependency and delinquency'. Preservation of the option of a traditional life style by assisting decentralisation moves initiated by Aborigines was strongly recommended by Coombs and Stanner in their report for the Council for Aboriginal Affairs. ... it is just possible that the opportunity it [the outstation movement] provides for a reintegration of individual and group identity, and for heightened self-esteem, will encourage Aborigines, in Friere's terms, to begin posing their own problems in the confidence that they are able to find solutions to them (Morice 1977: 9).

These benefits (smaller community; access to bush tucker; lower populations and lower rates of contagious disease) must be offset by the detrimental aspects of environmental health in remote areas. However, as Blanchard pointed out, many of these problems are remedial since they represent the outcome of locational disadvantage which has been ignored by governments reluctant to provide adequate services because of the costs involved (see Blanchard 1987: 258-59). Irrespective of these limitations, Blanchard held firm to a view of the benefits of residence on Aboriginal land:

The final significant feature of the homelands movement is the opportunity it presents for homelands people to achieve a greater degree of economic independence and self-reliance than was available to people in the major communities. The keys to this change are the use of an extensive land base that is available to homeland communities to tap traditional subsistence resources and engage in a range of possible projects as contributions to their economic well-being. ... Above all the autonomy of homeland communities, which places them in a position to make decisions about their future economic situation, has provided the opportunity to homeland communities to assert a substantial degree of economic independence (Blanchard 1987: 260).

Land rights have empowered Aboriginal people. Through secure title to their traditional land, an independent base to generate additional income and the means to cultural reproduction, their culture and traditions have flourished. This would have been impossible without recognition of land rights. Land rights provided Aboriginal people with control of access to land and consent provisions to commercial development on traditional lands.

Conclusion

What would be the costs of the diminution of existing land rights? Woodward cautioned that the outcomes of land rights would be achieved neither simply nor overnight. However, Aboriginal people have gained control and secure title to much of their unalienated and Aboriginal-owned traditional lands, and implicitly, also gained recognition for the customary system of law underpinning the notion of land rights in the ALRA. Such a base has enabled them to socialise the next generation to reproduce their cultural views, and to develop facilities to service and maintain these worldviews. In social terms, land rights have empowered Aboriginal people in an incomparable way.

On the other hand, the Northern Territory Government and industry stakeholders are likely to want less Aboriginal control over land and less Aboriginal ownership of land. These interest groups would stand to gain financially and politically at least in the short term, from dismantling the present ALRA.

A strategic shift for the land councils will be to orientate their vision to the enhanced economic development of Aboriginal land, especially in commercial development through tourism, pastoralism and mining (Altman 1996: 7–11). This is already occurring (see for example Northern Land Council Strategic Plan 1995). Indeed, the Northern Territory Government has seen a major income-generating industry develop on the basis of Aboriginal land rights and land ownership with financial benefits to the Territory. International tourism to Aboriginal-owned land (such as the national parks) has occurred, together with the creation of an internationally recognised indigenous art and craft industry produced on Aboriginal communities on Aboriginal land. The spin-off benefits (positive externalities) that generate to many non-indigenous commercial interests are enormous, but rarely quantified (see Heatley 1986).

If enhanced economic development is to occur both in the Northern Territory and in Australia generally on Aboriginal land, then there are very sound reasons why land councils should be retained as the professional service bodies for Aboriginal landowners and communities. As Woodward (1974) foresaw, Aboriginal people need independent advice for decision-making and competent land council staff to negotiate their positions with the commercial and government sectors. Many of the peak industry bodies have also recognised that negotiation with Aboriginal parties is best handled through peak Aboriginal organisations capable

of supplying the necessary professional competence, staff expertise and skills, and transparency and accountability in administration. A plethora of small, incompetent and under-resourced 'representative' agencies has little to recommend them (see Parker 1995).

Finally, the matter of Australia's commitment to the principles of equity and social justice with respect to an indigenous minority must be upheld in legislation; not least because subsequent legal decisions (such as the Mabo Judgement No. 2 and the Wik Judgement) will make it impossible to do otherwise with impunity. Australia is also a signatory to international human rights conventions that involve scrutiny and accountability on these matters from outside agencies (see Clarke 1997: 24-5).

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