Regionalisation of Northern Territory land councils

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No. 192/1999

ISSN 1036–1774
ISBN 0 7315 2627 9

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November 1999

Foreword

This is the second Discussion Paper to emerge this year from the involvement of the Centre for Aboriginal Economic Policy Research (CAEPR) in debates over reform of the *Aboriginal Land Rights (Northern Territory) Act 1976*. The other, *CAEPR Discussion Paper No. 191*, dealt with the management of mining royalties. Both are a result of CAEPR's leading participation in what might be called the second phase of academic response to the review of the Act carried out for the Minister for Aboriginal and Torres Strait Islander Affairs Senator John Herron by Mr John Reeves QC in 1998.

The Reeves Review report met with an immediate and powerful critical reaction. In the academic domain, this took the form of a two-day conference, 'Evaluating the Reeves Report: Cross–Disciplinary Perspectives', jointly convened by the Centre and the Department of Archaeology and Anthropology in Canberra in March 1999. Most papers to that conference were published as CAEPR Research Monograph No. 14, *Land Rights at Risk? Evaluations of the Reeves Report*, to which CAEPR staff contributed five chapters covering the costs and benefits of land rights, financial provisions, local organisations, and regionalisation of land councils. These papers were also made available to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HORSCATSIA), which had been given a brief by the Minister to report on the recommendations of the Reeves Report.

Following this phase of critical reaction, the concern of interested parties turned quickly to the task of formulating an alternative set of reform proposals, in what I referred to above as the second phase of the academic response. During this phase, CAEPR staff twice appeared at HORSCATSIA hearings prior to the publication of that Committee's Report, *Unlocking the Future*, in August 1999. In addition, the Northern Land Council (NLC), conscious of the need to move beyond critique and encourage constructive thinking about the next generation of land rights, in consultation with the Central Land Council and with the assistance of the Aboriginal and Torres Strait Islander Commission (ATSIC), contracted CAEPR to prepare options papers on a set of central issues.

This Discussion Paper is an outcome of that research. David Pollack looked at costs and workloads in the regions for the conference on the Reeves Report, and reviewed past proposals for regionalisation under the Land Rights Act. David Martin's later thinking on regionalisation models was presented at a one-day workshop at The Australian National University attended by representatives from the NLC and ATSIC, CAEPR staff and other interested academics in June 1999. Robert Levisus combined and expanded the work into a draft that was further circulated and discussed, and submitted to HORSCATSIA during the final stages of its Inquiry. Following release of HORSCATSIA's own Report on 30 August, the paper was substantially expanded again.

HORSCATSIA's treatment of the regionalisation issue is the least prescriptive of any of the recent contributions, and its recommendations widen the range of policy options. Those options are now being considered within the bureaucracy as part of a submission for amendments to the Act for government consideration. Drafts of this paper have been provided to assist that process. Publication now allows wider access to the authors' sceptical re-thinking of the impetus towards regionalisation, an impetus that has up to now attracted widespread, but uncritical, support.

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Summary

The dispersal of the powers exercised and functions performed by the two major land councils has been a subject of debate and recommendations on a number of occasions since the *Aboriginal Land Rights (Northern Territory) Act 1976* came into effect. The Reeves Review of the Act in 1998, and the subsequent Inquiry into that Review by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HORSCATSIA) this year, have raised the issue to prominence again and ensured that it will be dealt with in the coming round of statutory amendments.

This Discussion Paper considers the steps that have been taken towards regionalisation under the current provisions of the Act, and compares models for further regionalisation proposed by David Martin, the two land councils, and HORSCATSIA. These proposals, while more moderate than that of Reeves in that they all presume the continued existence of the Northern and Central Land Councils, differ on a number of points. Regionalisation within, or outside, the existing land council structures, provision for local initiative in seeking devolution, and the role of the Minister, are among the matters at issue in an attempt to secure both increased local or regional autonomy and improved land council efficiency. Funding of regionalised bodies also demands attention, given the criticisms directed at this aspect of the Reeves model.

This paper goes on to express concern that regionalisation has been accepted as a self-evidently desirable policy, and that insufficient critical attention has been paid to the advantages expected to flow from its implementation. We begin our critique by distinguishing between 'administrative' regionalisation and 'decision-making' regionalisation of land council functions and powers. We then separate out the real process of decision-making from the formal act of decision-taking in the scheme of the Act. Most importantly, we point to the already localised character of decisions by traditional owners under the informed consent provisions, and argue that the primary danger posed by regionalisation is that the regional decision-takers will trespass upon the decision-making prerogatives of the traditional owners.

While in our view this problem is a threat to the fundamental distribution of authority under the existing Act, and is sufficiently serious to call into question the rationale for moves towards greater regionalisation, the breadth of opinion, including local Aboriginal sentiment, in favour of more localised autonomy, needs to be accommodated. We therefore argue for a number of measures in mitigation. Establishing regional areas of sufficiently large size, each represented by a committee or council of sufficiently small size, and serviced, in the case of internal land council regionalisation, by professional staff employed through the central organisation, are steps intended to protect the informed consent procedures of the Act. Some formal certification witnessing the adequacy of those procedures in each case should also be introduced as part of the conditions attaching to the affixing of the land council common seal to agreements. As only some of these measures are available in the case of independent, or 'breakaway', land councils, some caution is due in approving more of these, especially in assessing the spread and depth of popular support.

Acknowledgments

The authors would like to thank Katy Haire and John Roberts of the Northern Land Council for providing the opportunity for us to develop our thinking on regionalisation, and for critical and thoughtful comments at various stages of our work. Jon Altman also commented on an early draft, and the participants at the University House workshop, and our colleagues at CAEPR offered an interested and responsive environment in which ideas could be discussed. Editorial assistance was provided by Linda Roach and Hilary Bek, with layout by Jennifer Braid.

Introduction

The responsibilities discharged and powers exercised by Aboriginal land councils have been a subject of discussion since Northern Territory land rights were first formulated into a statutory scheme. Criticism has been directed at the degree of centralisation in land council structure and operations, and at the capacity of the Northern Land Council (NLC) in Darwin, and Central Land Council (CLC) in Alice Springs, to respond to local needs and priorities within their respective areas. Proposals for reform have included the establishment of more land councils over smaller areas, decentralisation within the existing land councils, and transfer of powers to other agencies such as Land Trusts or Aboriginal communities.

The scheme of two large land councils, originally proposed by the Aboriginal Land Rights Commission (Woodward 1973: 41), was an attempt to balance considerations of scale and effectiveness. Justice Woodward thought a single body for the entire Northern Territory would be likely to prove unwieldy, cause increased difficulties for travel, and be unable to devise solutions to land rights problems appropriate to the diverse circumstances of peoples from the north and south. Smaller councils raised problems of marking sensible boundaries between communities and of the provision of adequate advice and support staff across multiple regions.

As early as 1978 senior NLC officials acknowledged a need for legislative amendments to provide for regional councils (Reeves 1998: 191). In 1980 Turnbull and Rowland separately considered the issue, each recommending forms of dispersal of powers from the central councils in Darwin and Alice Springs. Turnbull (1980: 44) recognised pressures for 'new and smaller Land Councils with more intimate constituencies' and, consistent with the ideological thrust of his report towards a Territory political economy of privatised and local control, favoured delegation of all intra-Aboriginal land management functions to regional bodies (Turnbull 1980: 42, 44). Rowland (1980: 55) wanted to give local owners and communities or Land Trusts the power to hire their own advisors and conduct their own negotiations, with some monitoring and arbitration functions vested in the land council or Minister.

Justice Toohey took up the matter again in his 1983 review of the Land Rights Act. Toohey (1984: 49) distinguished between, on the one hand, the administrative functions of land councils, which he thought required the size of a central organisation for efficiency and effectiveness, and on the other, the function of giving or withholding formal consent with respect to proposals affecting Aboriginal land, which he thought could be delegated. He saw value in a system of regional committees empowered to identify traditional owners and to give or withhold formal consent. Under this proposal, such a power was still to be subject to the informed consent provisions of the Act. These provisions, contained in s.23(3), prohibit a land council from doing anything in relation to Aboriginal land unless the traditional owners understand and consent to the proposed action, and any other affected Aboriginal group has been consulted and had the opportunity to express its views. In other words, in Toohey's 1983 scheme, the delegated formal consent function was to remain dependent on the substantive consent of the relevant Aboriginal people.

Fifteen years after Toohey, the Land Rights Act has again been subject to a general review. The Report of John Reeves QC proposes a different order of change. It recommends abolishing the NLC and CLC and instituting a model of 18 regional land councils across the Territory (Reeves 1998: chapters 10 and 27) which would ascertain and articulate Aboriginal wishes with respect to land management, and a Northern Territory Aboriginal Council (Reeves 1998: chapter 28), exercising umbrella control over social programs, finances and investment. Criticism of this report will not be reviewed here, but it has included specific critiques of these proposed structures (see Altman, Morphy and Rowse 1999, especially papers by Galligan, Pollack, Martin and Mowbray).

Most recently, the Report of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HORSCATSIA 1999), *Unlocking the Future*, gives significant space to this issue. HORSCATSIA (1999: 40) recorded overwhelming rejection of the Reeves

regionalisation model in its submissions and hearings, and consequently recommended it be rejected. The Committee (HORSCATSIA 1999: 26–29) was, however, sympathetic to the desire expressed in some regions to be allowed independence from the major land councils by different means. Its recommended reforms are discussed further below.

The prominence that has been accorded to the regionalisation issue by both the Reeves and HORSCATSIA Inquiries ensures that it will be addressed in whatever package of amendments emerges at the end of the current process. Given the substantial and well-published critical reaction to Reeves in both the academic and political domains, and HORSCATSIA's rejection of Reeves' regionalisation proposals, this Discussion Paper does not further consider his model. It seeks, rather, to contribute to debate on the more moderate policy ground to which matters have now returned. Firstly, it considers the present state of the issue by reviewing the degree of regionalisation so far achieved, and by considering and comparing models for further regionalisation which presume the continued existence of the two major Northern Territory land councils. Secondly, it considers the advantages that have been claimed in favour of regionalisation and argues for caution in taking further steps in that direction. In particular, it refers back to the first principles of land management under the Act, emphasising the centrality of the informed consent provisions of s.23(3), and considers the way in which proposed forms of regionalisation might impact upon the application of those provisions. It points to a need for safeguards against any subversion of informed consent that may be entailed in steps towards further regionalisation.

While the concerns expressed here are specific to the operations of the Land Rights Act, it might be noted that the continuing impetus towards regionalisation in the debate on land rights reform contrasts with an official trend nationally in Aboriginal affairs towards amalgamation (see, for example, Aboriginal and Torres Strait Islander Commission (ATSIC) 1995: 36–7), apparent earlier this decade in the reduction in the number of ATSIC Regional Councils, and currently in the possible amalgamation of Native Title Representative Body areas.

Steps towards regionalisation

The delegation powers in the Land Rights Act have allowed the two large land councils to proceed some way down the path of regionalisation. They have both established a number of regional committees[1] across the Northern Territory, each committee being made up of those members elected to the land council from the committee's region. S.28(1) of the Act, however, limits committees to dealing with proposals with respect to Aboriginal land that have effect for two years or less, or involve total payments of $100,000 or less. Consistent with Toohey (1984), the NLC has submitted that regionalisation should now be advanced by removing these restrictions, and that Full Council should reserve to itself only those powers it holds under s.35 (the distribution of mining royalties), s.28 (delegation of powers) and s.19(4) (transfer or surrender of Aboriginal land), and the power to endorse mineral exploration agreements by a conditional affixing of its common seal (Reeves 1998: 206). According to its last published annual report, the CLC (1998: 58) appears to have applied a more cautious strategy of using its regional meetings to discuss matters for referral to Full Council, but was at that time contemplating a formal delegation of powers. The land councils have moved towards implementing this model in a context of pressures both from local interests for institutionalised recognition of separateness from the centre, and from the Northern Territory Government for dispersal of the powers of the Full Councils.

The other means currently offered by the Act to accommodate regional demands for separateness, is independence. Since the passage of the Act, the Minister, acting under s.21(3), has twice approved this course by establishing the Tiwi Land Council in 1978, and the Anindilyakwa Land Council on Groote Eylandt in 1991. A number of other 'breakaway' attempts, or local regionalising proposals, have been made (Reeves 1998: 193–99). It is significant to note that in formulating recommendations to the Minister, ATSIC, and its predecessor the Department of Aboriginal Affairs, found that, in all cases except for Tiwi and Groote, these attempts at

independence failed on the first criterion of substantial majority support in the region concerned (see, for example, HORSCATSIA 1999: 23 footnote 9).

The Martin models

In view of the difficulties posed by independent regional councils—boundary disagreements, supply of specialist staff, diseconomies of small scale—and the inconclusive histories and circumstances of breakaway movements, Martin (1999a: 164) argues that the power under s.21(3) to establish separate land councils should be abolished, and the procedures and structures of regionalisation be rethought. Martin's work has produced two models. In a report to the Minister for Aboriginal Affairs on an application to establish a North East Arnhem Land Ringgitj Land Council, Martin (1995) revisits the idea of devolution to regional councils within the existing land councils. The proposal, presented again recently (Martin 1999a: 162–5), combines a high degree of local voluntarism with externally assessed standards of viability.

Under an amended s.21, an application for a regional council would be sent by interested local people to the Minister, setting out the area constituting their proposed region. The Minister would test the proposal against a number of criteria intended to verify the need for, and workability of, a regional council. These would include the extent of local support, the geographical size of the area to be represented, the appropriateness of the boundaries, the presence and roles of other local structures of self-determination, and administrative capacity. Such criteria could be specified in the Act, and might be formulated to encourage regions to organise themselves in certain ways, for example, to ensure a certain minimum geographical size. An assessment of administrative capacity could be made by reference to the past performance of existing Aboriginal organisations in the region: their record of grant acquittals, financial reporting and asset management, considered with respect to the size of their servicing area and population. Approval could be limited only to certain powers according to the Minister's assessment of the region's capacity for self-management. This model shares important elements with that proposed by the CLC, which favours Ministerial discretion in the devolution of powers, and degrees of devolution according to local capacity and wishes (Reeves 1998: 206).

In the context of the Reeves and HORSCATSIA Inquiries, the NLC proposed that regionalisation should be pursued by a further internal delegation of powers to its regional committees (see above). In response, Martin (1999b) has devised a 'hybrid option' (see Appendix Figure A1) that combines the present committee system with his 1995 model. This option suggests that further empowerment of a region should require a structural step up from a regional committee to a regional council, and that this could be instigated either, as before, by local application, or by land council submission to the Minister to reconstitute one or more regional committees into a regional land council. Steps towards a regional land council would ordinarily be instigated by land council submission, but the model retains an opening for local initiative where the existing land council is resistant to it.

Given that a regional land council is conceived within this hybrid model as a body that necessarily has more autonomy than a committee, there would not fall to the Minister the same degree of discretion as in the 1995 model as to the range of powers to be vested. If greater empowerment were thought inappropriate, then the region's representation would remain at the committee level. Given also that steps towards a regional land council would occur within a Northern Territory already divided into bounded committee regions, it might be more difficult for the determination of boundaries to develop in the same 'organic' way as envisaged by the 1995 model. A regional land council might just have to fit into the established divisions, or at least, retaining provision for negotiated boundaries will require a capacity for mutual adjustments with neighbouring committees or councils. Further, the Minister may have regard to a number of additional criteria in assessing an application, beyond those suggested in the 1995 model. These might include:

- whether the existing regional committee is satisfactorily carrying out its present role;

- the funding and organisational implications for the land council from which devolution is proposed; and
- the implications for the effective discharge of functions by the land council from which devolution is proposed.

Where a local application is made, the Minister might further consider:

- whether the proposed regional land council would satisfactorily perform its functions (similar to a determination for a Native Title Representative Body under the Native Title Act);
- the number of Aboriginal people affected by the proposal;
- as a matter of degree as well as extent, the level of support for the proposed regional land council among those with traditional affiliations to the region; and
- the views of the existing land council.

The NLC's regionalisation proposals and the Martin hybrid model gain sharper focus from some points of comparison:

i. The NLC seeks to retain the regionalisation process within the land council. While delegation to a regional committee may be introduced or increased in response to local demand, it is a decision of Full Council. Martin externalises the process by reference to the Minister, and allows local sentiment an avenue of direct access to that office.

ii. The NLC proposes a single organisational structure within which the extent of delegation can vary; it contemplates a gradation of committee powers. Martin proposes a two-level system, in which an intention to delegate further powers would bring a region to the threshold tests discussed above, necessary for the step up from committee to council. A question remains as to whether there could still be varying degrees of delegation or devolution to committees or councils. Given the powers that the hybrid model vests in Full Council with respect to committees and in the Minister with respect to regional land councils, there seems no reason in principle that such discretion could not be exercised in either case, but in practice the latitude for such variation would be constrained within those sets of powers that the model contemplates as appropriate for each type of organisation. In other words, an assessment by the Minister on matters of consent, cost and competence that a regional land council is justified, would carry with it devolution of a certain minimum bundle of functions and powers. If the Minister believed that any part of that bundle was best withheld, then the threshold between committee and council would not have been crossed.

iii. Under s.29A(1), a committee of Full Council must be made up of members of Full Council. A regional land council under an amended s.21 would not be thus restricted in its membership.

iv. The NLC and Martin models are similar in reserving certain powers to Full Council even at the stage of maximum delegation or devolution. Those reserved under the NLC model relate to mining royalties, transfer or surrender of Aboriginal land, delegation of powers, and the endorsement of mineral exploration agreements (Reeves 1998: 206). Martin lists these (except for delegation), and adds the conciliation function under s.25. His model further provides that staff remain employed by the central organisation, but work under the direction of the regional body, subject to arbitration of disputes by Full Council (see further below).

The HORSCATSIA report

HORSCATSIA, in its recent Inquiry into the Reeves Review, encountered a widespread and critical reaction against Reeves' proposal to dismember the two major land councils into 16 smaller councils. Alongside that rejection, however, HORSCATSIA also recorded a continued concern among some regional Aboriginal interests to achieve greater independence. In formulating its response, the Committee had before it all of the approaches to regionalisation reviewed or mentioned above—those of the NLC, CLC, Martin, and Reeves himself.

HORSCATSIA's concern with problems of institutional design in the Land Rights Act was also motivated by its own members' interest in opening a wider range of political futures to the Aboriginal people of the Northern Territory. The Committee's response to the issue is therefore diverse. In part, it has endorsed the NLC's model of increased internal regionalisation (HORSCATSIA 1999: 40–2), allowing expanded delegations from Full Council to regional committees, subject to particular conditions and reserving some powers to the centre. It has then moved beyond that model in two ways, and in so doing has declined to confine the political representation of Aboriginal land interests within the existing land councils, as advocated by the models reviewed here. Notably, HORSCATSIA (1999: 44) has refused to close off the option of independent, or 'breakaway', land councils, but has recommended amendment of s.21 to provide a more rigorous and transparent procedure for dealing with such movements.

Beyond that, the Committee (HORSCATSIA 1999: 45) wants the Act to allow for free association and representation, by making provision for traditional owners to speak for themselves, alone or in association with other groups, outside of any land council. This last expansion of the modes of representation available to Aboriginal land interests seems to flow from the liberal concern evident among Committee members that the law should not impose intermediary structures where they are not required or wanted, and an expectation that there will be an increasing number of traditional owners in the Northern Territory who will neither require nor want them. That expectation presumes an historical trajectory among such people towards political competence and a sentiment of localised, even privatised, control. It does not, however, presume any diminution of the anchoring of decision-making in traditional ownership (HORSCATSIA 1999: 45, and see further below). In this the HORSCATSIA Report contrasts both with Reeves (1998: 146–8, 209–11), who argued that a shift from traditional ownership to regional control better recognised cultural reality, and with Woodward (1974: 72), who anticipated a shift from tradition to community as a matter of natural evolution.

Funding

A principal criticism of Reeves' regionalisation proposals was the total cost, estimated by Pollack (1999: 149–50) at around $20 million annually for 18 independent councils. This, however, included the costs of dispersed specialist and administrative staffing (Pollack 1999: 147–9). The delegation and devolution models advocated by Martin and the land councils entail a degree only of regionalisation in staffing. The maintenance of a certain level of centralised staffing and services in Darwin and Alice Springs would constrain costs. If, as suggested above, regional land councils expanded their memberships beyond the subset of Full Council members that make up regional committees, then there might also arise the costs of another set of elections. This could be avoided either by extending the power to co-opt members, currently available to Full Council under s.29, to the regional councils, or by having general elections only for members of regional councils, and members of Full Council elected by them from among their number.

Any model of further internal regionalisation will nevertheless be costly, and will depend on removal of the budgetary ceiling placed on land councils by the Financial Management Strategy. Reference should be made to *CAEPR Discussion Paper No. 191* (Altman and Levitus 1999), which offers new proposals for land council funding in the post-land claims era. The additional real income available to land councils under these proposals is intended in part to meet what are generally conceived as substantial, but finite, costs of further regionalisation.

An important point of difference exists between the funding of land councils on the one hand, and budgetary allocations to regional committees or councils within the land councils, on the other. One of the disadvantages of present and proposed land council funding formulae (Altman and Levitus 1999: 6–9) is that they are not directly related to the full range of councils' functions. By contrast, that is the only basis on which regional budgets should be prepared. The radical variations in, for example, the mining-related work that would fall to regional committees or councils can be seen from the Table prepared by Pollack (1999: 145) (see Appendix Table A1). The corollary of a workload-based funding regime is that increased devolution may not of itself

increase funding entitlement, beyond an increase in sitting fees and travel costs in the case of regional councils. Funding and staffing based on operational activity mean that prior assessment of requirements beyond some uniform minimum is difficult and that requirements in any region will vary over time.

Budgets for regional committees or councils will have to be negotiated with the central Full Councils. The necessarily political character of this process could become problematic. One of the motives for a local application for devolution of powers to a regional council might be factional dissatisfaction with the representation of regional interests or interest groups on Full Council. The institutionalising of such dissatisfaction in a regional land council might incite Full Council members to discriminate against their regional opponents in the budgetary process. It should be incumbent on the Minister, in the first instance, to ensure that the push for a regional land council is not simply a factional strategy. This could be done by application of those threshold criteria that address the area of the proposed region, and the extent and degree of regional support for the proposal. Once established, the internal land council funding process itself may need to be insulated from political pressures emanating from members of Full Council. A transparent process should include measuring the competing bids of regional committees and councils against negotiated and public spending priorities within the land council as a whole.

HORSCATSIA's intention to allow new independent land councils raises again the funding problems of the Reeves model. The Committee (HORSCATSIA 1999: 32–3) accepted evidence of the excessive costs of his proposed 18 councils. Its solution to this appears to lie in its requirement for a public discussion paper regarding any proposal for a new council, which must include 'estimates of the cost involved in establishing and operating the new land council; . . . and relevant details establishing that it will be economically viable, and able to satisfy the requirements of the Act' (HORSCATSIA 1999: 44). The full terms of this recommendation indicate that, with respect to these last two matters—economic viability and ability to satisfy the requirements of the Act—the Minister must not only be informed but also satisfied. Thus, while HORSCATSIA (1999: 43, 146) is keen to reduce the power of Ministerial discretion in favour of Aboriginal autonomy both generally within the Act and specifically with respect to establishing new land councils, it appears that new land councils will not be allowed unless they can pay their way.

Decision-making, decision-taking, informed consent and efficiency: why regionalise?

Administrative and decision-making regionalisation

Discussions of internal land council regionalisation, including some of those cited above, often make a distinction between administrative regionalisation and decision-making regionalisation. Administrative services include research, consultation, advice and management with respect to anthropological, legal, financial and land development and conservation issues. As Toohey (1984: 49) pointed out and the land councils have recognised in their staffing practices (Reeves 1998: 205–6), the decentralisation of such services should be limited in order that a critical mass of professional resources can be centrally maintained for the benefit of the organisation as a whole. There is a need to maintain central repositories of data and precedent, and to keep professional staff in touch with one another and with the intellectual environment and facilities of the metropolis.

Administrative regionalisation therefore involves deciding which servicing staff can be permanently placed in the regions, and how to ensure adequate regional access to those others who remain based at the centre (see CLC 1998: 58). Thus, administration of the permit system has been extensively regionalised, anthropological services much less so and legal services less again. As noted above, even in the more devolutionary context of Martin's proposed regional land councils, professional staff should continue to be employed through the centre.

Decision-making and decision-taking

The issue that remains for discussion regarding these proposals for internal regionalisation is therefore about a process that has been called 'decision-making' regionalisation. This refers to the choices that are made regarding the use of Aboriginal land, including permissions for mining exploration and other development projects, construction of public infrastructure, management by outside authorities, research and conservation projects, and general public access. Procedures in the Act for dealing with such matters are built around the cornerstone of s.23(3), which requires a land council to consult with traditional owners of, and other Aborigines interested in, the relevant land, and not to act unless it has obtained the informed consent of the traditional owners and heard the views of other affected Aboriginal groups. This provision applies to any function a land council has to discharge with respect to any Aboriginal land in its area. It creates a direct nexus of instructions from the traditional owners to the land council which, in the scheme of the Act, provides the point of articulation between the fluidity and complexity of local Aboriginal political processes and the formal policy and administrative procedures of Australian public life. It is intended to ensure that nothing is done on Aboriginal land without the traditional owners understanding and agreeing to it. In effect, then, the Act already requires land councils to act locally in arriving at decisions affecting Aboriginal land.

In view of this existing nexus, there is an argument to be made that 'decision-making' regionalisation is an inappropriate term, that its inappropriateness is in effect recognised by the NLC (1999a: 13), but that its continued use has clouded matters. In order to better characterise the process required by the Land Rights Act for reaching decisions over Aboriginal lands, some more specific terminology is needed. The heading of this section uses two terms: decision-making and decision-taking. Decision-making refers here to a substantive process of receiving information about an issue, considering its implications, weighing and discussing the pros and cons, and arriving at a view about the best way to proceed. Within the procedures of the Land Rights Act, it encompasses all those steps that should precede the giving or withholding of informed consent by the traditional owners. They are the decision-makers.

Decision-taking is seen as an act, not a process. It is the receiving and ratification of the outcome of the decision-making process by some entity that is required to do so in order to give the decision formal or legal effect. On issues involving the management of Aboriginal land under the Land Rights Act, the land councils, either as Full Councils or their delegates, are the decision-takers. Their responsibility, under ss.23(3) and 28(4), to ensure that both the traditional owners and other affected peoples have been adequately consulted is part of the act of decision-taking. If that has not been done, the councils should not receive the decision that has purportedly been made. The only respect in which their role takes on an aspect of decision-making is in their responsibility to ensure that a proposed agreement is fair and reasonable (see NLC 1999a: 13). On this, they may engage in their own substantive deliberations.

The Martin and land council models

If this is an accurate characterisation of the way land matters are properly decided under the Act, then certain problems can be posed with respect to proposals for internal regionalisation. With respect to increased delegation to regional committees, the land councils have argued that these committees offer greater ease and convenience, and one might add cheapness, with respect to travel and meetings. Their restricted memberships, being subsets of Full Council,[2] make it unlikely (but not impossible) that they would take upon themselves a role as decision-makers, because most local traditional owners would not be represented. However, by way of safeguard against improper execution of the expanded powers that are being proposed for them, the NLC (Reeves 1998: 206; NLC 1999b: 2) suggests, and HORSCATSIA (1999: 42) agrees, that certain conditions apply to the affixing of the land councils' common seal to agreements approved by these committees (see further below).

The details of those conditions have not been set out, thus no assessment can be made of how onerous their application might be. This, however, is a matter that goes to the question of

that greater efficiency in the operation of land councils that regionalisation is said to offer. The National Institute of Economic and Industry Research (1999: 115–16) has recently recommended delegation of agreement-making powers under the mining provisions of the Act to regional committees, subject only to approval by the Minister, in order to avoid the delay of waiting for a Full Council meeting to give approval. HORSCATSIA (1999: 100–1) has endorsed such a delegation and preserved the role of the Minister in this instance, but this recommendation by the Committee appears to be subject to its prior recommendation (HORSCATSIA 1999: 42) that conditions apply to the affixing of the common seal.

Any such conditions will need to be applied by Full Council or its delegate (Reeves 1998: 206), thus regionalisation will not then have removed that supervening level from the overall process. Rather, all that has occurred is the addition of a new level to the process, the regional committee. Whether the greater ease and cheapness of committee operations represent any net efficiency gain must therefore depend on the balance between that and the complexity of the monitoring role reserved to Full Council. Delegation of responsibility for affixing the common seal to the Director or Chief Executive Officer of the land council would, of course, meet the problem by allowing the affixing to occur within the run of daily administration.

With respect to Martin's regional land councils, the restriction on membership imposed by s.29A(1) does not apply. It would therefore be open to the Minister to allow for a larger membership, indeed it is likely that such an increase would be perceived as properly concomitant with the devolutionary process. This would reduce the advantages of convenience and cheapness enjoyed by the committees. Such a larger membership, moreover, contributes to the more serious problem arising from the distinction between decision-making and decision-taking. Decision-making involves a consultation phase, in which anthropologists or field officers inform, advise and listen to traditional owners and affected peoples. That consultation phase will be in danger of being compromised by the de facto transfer of some part of the decision-making process to the deliberations of memberships of regional councils. This is evident, for example, from the passage cited in Reeves (1998: 196) from the proponents of a breakaway Marthakal Land Council for north-east Arnhem Land who state:

> One of the advantages of a regional Land Council is that there would be a commonality of language and customs, so that the conduct of the Land Council meetings would take place in a transparent communal-based, directly accountable forum so that all traditional owners could be involved in open and frank meetings and discussions.

While this sounds self-evidently desirable, it is, for the reasons set out above, a problem. Moreover, it is more of a problem the smaller the regional land council areas are conceived to be under the Martin models.[3] The closer these councils are to the level of local land management, the more dense will be the representation of local interests in their memberships, and the greater will be the tendency to blur the distinction between the decision-making and decision-taking functions. It may, of course, be that a regional land council membership will include the senior persons relevant to a particular issue, and that there is general deferral to their views, but that cannot be assumed. It is only at a highly localised level of organisation, around the scale of an Arnhem Land royalty association, that a reasonably comprehensive representation of traditional interests might be expected within a regional land council membership. This is not a realistic level at which to pursue a regionalisation policy.

HORSCATSIA

In deference to such concerns, and in marked contrast to Reeves, HORSCATSIA's Report includes generous recognition of the structural centrality of traditional owners (1999: 36–9) and the procedural centrality of their informed consent. The Committee (HORSCATSIA 1999: 21) understands the distinction presented here between decision making and decision taking, describing the latter rather as a ratification of traditional owners' decisions by Full Council. Moreover, consistent with its recommendation (1999: 8) that the informed consent provisions apply to implementation of its own Report, it specifically requires (1999: 42, 43, 44) that they

apply to its recommendations for regionalisation, whether internal to, or independent of, the existing large land councils.

Nevertheless, HORSCATSIA's approach to the issue does not fully answer the concerns expressed here. In its discussion of the problems attending the Reeves model, the Committee (HORSCATSIA 1999: 35) accepts that, in the absence of informed consent provisions that formally privilege and protect the position of traditional owners, small organisations on the scale of a regional land council can easily become dominated by strong personalities. A little later, the Committee (HORSCATSIA 1999: 38) further acknowledges that, leaving aside questions of impropriety, the model would, in principle, allow equal influence to residents and traditional owners, and in practice allow authority to coalesce around a small and 'permanent concentration of decision-makers'. These imbalances, says HORSCATSIA (1999: 41), can be avoided by the retention of the informed consent provisions, and the intended effect of those provisions can be ensured through the mechanisms of administrative and Parliamentary review.

Preserving informed consent

Our argument is that such protection is not sufficient. Even with a legal requirement of informed consent, regionalisation carries the risk that the totality of local interests represented in the membership of a regional or independent land council, though at best an incomplete reflection of the traditional interests relevant to a particular issue, will be tempted, by such familiarity with and interest in the issue as they have, to abrogate to themselves the decision-making role that properly belongs not in the meeting room, but in the camps and households of the traditional owners. Administrative and Parliamentary review are at best ex post facto and delayed remedies, and will in many cases be simply unavailable to the "little people', those who stand in the back row politically' (Sutton 1999: 7), who have no awareness of or access to such processes and institutions.

Other measures, installed within the system itself, are needed to mitigate this problem. We mention a number of such measures here. The first is intended to prevent too dense a representation, within a council's membership, of localised interests that may be relevant to any particular issue. Thus, the membership of the council should be small in number and drawn from diverse areas, and/or the geographical size of the region represented should be sufficiently large, and perhaps include some minimum number of major communities, in order to reduce the temptation for members to stray beyond their properly confined decision-taking role. Indeed, from this perspective, the size of the major land councils' existing regional committees, and their geographical areas of responsibility, may already be appropriate. The second measure, relevant to internal land council regionalisation, is to have professional staff employed by the centre, to assist in preserving the integrity of the consultation phase, as well as that of general administration.

A third measure can be located within a reform already proposed by the NLC and endorsed by HORSCATSIA. With respect, again, to expanded internal delegations to regional committees, they suggest that conditions might be introduced to govern the affixing of the common seal by Full Council to agreements reached between those committees and other parties (see above). In its submission, the NLC provides no details concerning the conditions being contemplated, but one appropriate to the issue under consideration here might require independent certification to Full Council that the action of the committee is consistent with the outcome of the consultation and decision-making phase involving the relevant traditional owners. The professional officer who consulted with, or briefed and observed a meeting of, those traditional owners would need to certify to that effect. The independence of certifying officers would be underwritten, as previously proposed, by employment through the central office, and they might also be given a right to attend regional committee meetings as advisors and observers.

Of these three suggested measures, only the first is available in the case of independent land councils, and it must be attended to at the time of establishing the new council. It is therefore difficult to suggest ongoing means of ensuring observance of the informed consent provisions. The record of the two existing island land councils may be a source of reassurance

here (Reeves 1998: 100–1), though we are aware of no close independent study of their performance in this respect.

Conclusion

In the debate over land rights reform, regionalisation seems to have become a motherhood concept, presumed to be necessary and desirable. This is apparent at a number of points in the HORSCATSIA report, where regionalisation is said 'to provide a local forum for the discussion of regional issues, and to increase the efficiency of decision making' (HORSCATSIA 1999: 22), to deliver 'greater self management to Aboriginal people at the local and regional level', and 'improve the operations of the CLC and NLC' (1999: 27), and to bring 'decision making about development proposals and other land management issues closer to the people involved', so that 'land councils will achieve greater efficiency and the operation of the Land Rights Act will be improved' (1999: 40).

This paper has taken a sceptical view of such claims. We have, instead, sought to consider the issue by explanation and comparison of the prevailing models of regionalisation, and by setting those models against the existing fundamentals of the Act. The outcome of this exercise points to the difficulty that what appears, and is popularly argued, to be the main advantage of regionalisation, that it brings decision-making closer to local Aboriginal constituencies, is based on a misunderstanding of the statutory role of land councils in land management matters, and is a threat to the authority of informed consent under s.23(3). Of further but secondary significance is that the argument as to efficiency of land council operations has not been demonstrated.

Whatever the strength of that analysis, it is plainly to the long-term advantage of the major land councils that regional populations are incorporated within their umbrella on terms that those populations find acceptable. Internal regionalisation is thus not only a technical question of localised service delivery and formal autonomy, it is a problem of embedding the legitimacy of a metropolitan organisation within regional and local Aboriginal polities. In that regard, however, the failure of a number of breakaway movements to demonstrate sufficient regional support to receive official recognition needs to be noted. It justifies caution when assessing the strength and breadth of locally-based Aboriginal demands for greater structural recognition of separateness. Nevertheless, a procedure, such as that proposed by HORSCATSIA, needs to be available for those instances where real popular support for independence can be shown.

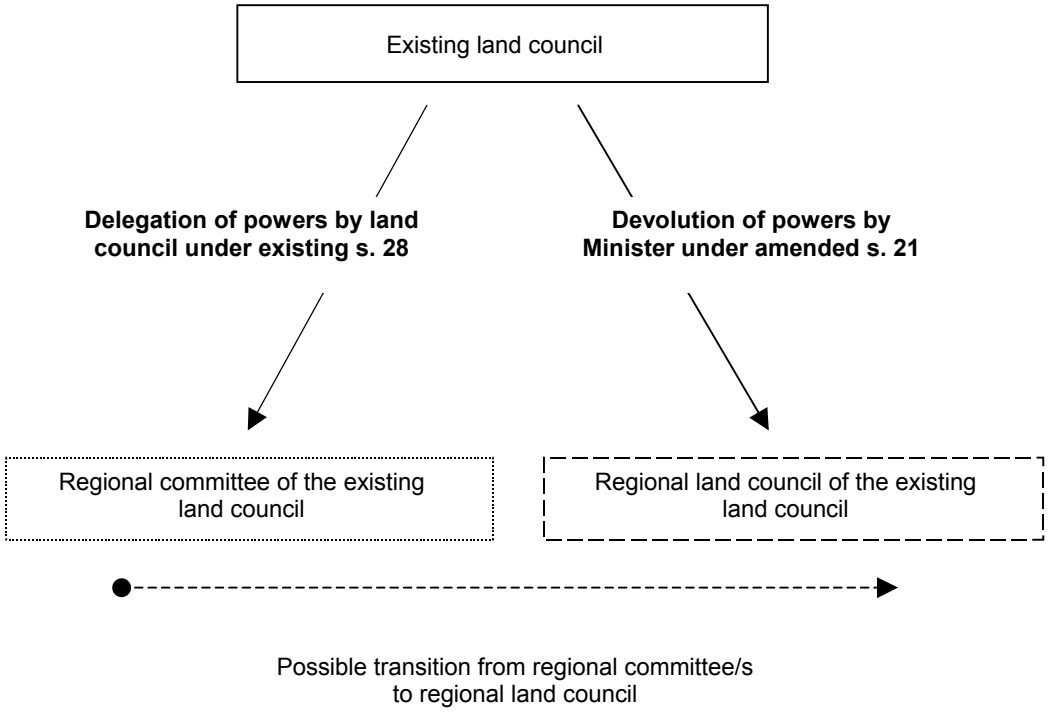
If, then, persistent local sentiment requires greater voluntarism and choice between regional political futures either within, or independently of, the major land councils, then the task is to protect the informed consent procedures at the same time. This paper has aimed to place that concern at the forefront of debate, and to suggest some means by which it may be met.

Notes

1. We use the term regional committees to refer to those bodies that the NLC and CLC call their Regional Councils, set up under the delegation power in s.28 which also uses the term 'committee'. This usage is necessary to distinguish them here from the regional land councils proposed by Martin (1995, 1999a, 1999b) and discussed below.
2. The number of members representing each region of the NLC varies between six (VRD) and 16 (East Arnhem) (NLC 1998: 10–11). The number representing each region of the CLC appears to vary between six (Eastern Plenty and Anmatyerre) and 14 (Alice Springs and Tennant Creek) (CLC 1998: 3–6, 11–12).
3. As discussed above however (p. 10), the Martin models have an inbuilt procedural bias towards the recognition of larger, rather than smaller, regional land council areas.

Appendix

Figure A1. The 'hybrid model' of internal land council regionalisation



Source: Martin 1999b.

Table A1. Comparison of land council regions

Region	Pop-ulation	Area km²	Aboriginal land					
			Km²	Prop-ortion (%)	Mines operating	No. land/sea claims	Explorat. Licence Applicat. [c]	
Darwin/Daly	10,189	43,780[a]	19,290	44	No	21	33	(33)
West Arnhem	3,442	62,987		77	Yes	10	72	(67)
East Arnhem	4,359	22,977	22,977[b]	100	Yes	3	34	(30)
Ngukurr	1,790	53,245	31,202	59	No	4	36	(29)
Borroloola-Barkly	1,375	199,108	18,075	9	No	12	21	(19)
Katherine	2,864	48,628[a]	18,733	39	No	10	23	(20)
Victoria River	658	104,251	8,096	8	No	7	11	(6)
Tennant Creek	2,434	133,310	79,788	60	No	10	38	(33)
Eastern Sandover	1,793	47,573	3,247	7	No	1	2	(1)
Anmatyere	1,078	34,273	28,109	82	No	2	16	(5)
Alice Springs	5,162	50,655[a]	13,048	26	No	15	15	(13)
South Western	1,329	170,206	58,998	35	No	10	34	(28)
Tanami	2,211	171,272	154,984	90	Yes	0	237	(229)
North Western	557	50,600	8,367	17	No	1	10	(4)
Western	1,049	42,840	36,202	85	No	1	40	(36)
Eastern Plenty	505	75,531	17,921	24	No	4	3	(2)
Tiwi	1,802	7,450	7,450	100	No	0	1	(1)
Anindilyakwa	1,356	2,526	2,526	100	Yes	3	5	(5)
Total	43,953						631	(561)

Notes: a. Non-urban land only.

b. Area does not include islands such as Elcho and the Wessel Islands.

c. Actual exploration licence applications within a region: figures in parentheses are those totally enclosed within a region and which do not overlap.

Source: Pollack 1999: 145.

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