The proposed restructure of the ALRA financial framework: a critique of Reeves

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Introduction

This paper sets out to explain the genesis of, tensions and complexities inherent in the current financial framework of the *Aboriginal Land Rights (Northern Territory) Act 1976* (henceforth ALRA). It then considers the validity of the critique of the operations of this framework made by John Reeves QC in his review of the ALRA (Reeves 1998). Reeves's proposals for major reform of the current framework are examined and rejected for being poorly grounded, historically inappropriate and fundamentally unworkable: in short, they constitute bad public policy. In conclusion, some options are presented to facilitate amendment of the ALRA's financial framework in several areas where there is widespread agreement, evident in government, land council and independent submissions to the Reeves Inquiry, that reform is needed.

In the interest of full transparency and accountability, I preface my presentation with the following comments:

- While I have undertaken research on financial aspects of the ALRA throughout the 1980s and 1990s and have twice been involved in reviews of the Aboriginals Benefit Trust Account (ABTA) in 1984 and in 1989, I have also been highly critical on many occasions of what I regard as fundamental ambiguities and shortcomings in the statute with respect to financial matters that have resulted in poor performance. I can hardly be labelled an apologist for the status quo;
- Many of my concerns were summarised and published as a separate section of Reeves's issues paper of November 1997 (Reeves 1998: B36-39); and
- In March and April 1998, I was commissioned by Reeves to prepare a brief consultancy report 'Financial Aspects of Aboriginal Land Rights in the Northern Territory'. I retained full intellectual property rights in that research, undertaken with David Pollack, which was subsequently published as CAEPR Discussion Paper No. 168 (Altman and Pollack 1998). Few of the substantive issues in that report were addressed by the Reeves Review; its recommendations for reform were largely ignored; and consequently this presentation differs little from that earlier work.

Understanding the ALRA's Financial Framework

The ALRA's financial framework is a complex, but conceptually well-considered and constructed model broadly based on largely uncontested recommendations made by the

Woodward Land Rights Inquiry (Woodward 1974). The model accepted and accommodated historical precedent, and then addressed some highly contested and inter-related issues in Aboriginal public policy, even at that time.

Just as Reeves was not reviewing the ALRA in a policy and political vacuum, so Woodward in 1973 and 1974 was constrained by history. Indeed the architect of linking indigenous property rights in land (then reserves) to income generated by that land was then Minister for Territories, the late Paul Hasluck in 1952. Under the then extremely radical and progressive Hasluck Model (or Nexus):

- statutory royalties paid for mining on Aboriginal reserves were levied at double the normal rate; and
- these moneys were earmarked for all NT Aboriginal interests to be used for their socioeconomic betterment via a new institution called the Aborigines (Benefits from Mining) Trust Fund (ABTF).

However, even in the early 1950s there were potential problems. Even though the argument for levying a double royalty on reserves was couched in compensatory terms for those directly affected, there was no statutory provision to prioritise affected interests. Hence while the rationale was compensatory, in effect the ABTF was primarily a mechanism for socioeconomic advancement created at a time when government was not allocating any discretionary public resources to Aboriginal advancement. The Hasluck Model was a form of rent sharing, with the Commonwealth government forgoing its access to statutory royalties on reserves and the private sector also contributing 50% through the payment of a double royalty.

By the time of Woodward, there were two fundamental and important changes. First, on Groote Eylandt in the early 1960s the Church Missionary Society (CMS) had negotiated a private deal with BHP that resulted in the Groote Eylandt Aboriginal Trust (GEAT) receiving substantial non-statutory (that is, private) payments from the mining company. Second, policy shifts based on persuasive Aboriginal representation and an acknowledged shortcoming in the Hasluck Model allowed 10% of statutory royalties raised on Aboriginal reserves, with respect to a particular mine, to be paid to groups deemed affected by that mine, but with the remaining 90% being available to the ABTF to make grants or loans to NT Aboriginal people generally, or to be accumulated. (An additional, and somewhat anomalous change driven by broader developmental policy shifts, was the levying in 1968 of a royalty well below Hasluck's double rate for bauxite mining at Gove under a special NT Mining Ordinance.)

Woodward recognised and openly debated some fundamental fiscal tensions that emanated from his desire to accommodate historical precedent (the Hasluck legacy), while also recognising Aboriginal property rights in land. While Woodward's letters patent empowered him to consider the provision of full property rights in minerals to Aboriginal land owners (rights not available to other Australians), he stopped short of such reform, instead recommending a weaker form of property in consent provisions (or what is frequently called 'the right of veto'). Consent provisions are a form of property

because they can be traded in much the same way as mining leases on Groote Eylandt were traded with BHP in 1963 for a negotiated royalty. Even if additional payments could not be negotiated, the existence of consent provisions (which did not exist under the Hasluck Model) meant that traditional owners of land would require some guaranteed incentive to allow mining of that land.

Woodward recognised three key tensions that would result from the payment of moneys raised from the development of Aboriginal land. These can be summarised as follows:

- Are the diverse range of moneys (from statutory royalties, negotiated commercial deals, rentals and lease payments) raised on Aboriginal land public or private moneys or both?
- Are these payments intended as compensation (to people affected, to other Aboriginal people without land?) or as a form of rent sharing between Aboriginal land owners and mining, tourism and other commercial interests? And
- Should these moneys be applied for community purposes or be reserved for the private use of corporate land holding groups?

Conceptually, and arguably, these three issues can be represented in the following way along a private to public spectrum and this is much the way that Woodward (1974) conceptualised these payments in his second report.

Public	**Private**
Statutory payments	Negotiated payments
Community purposes	Private purposes
Compensation	Economic Rent

Woodward's major focus was on the public moneys and in particular on the statutory royalties paid to Aboriginal interests. Careful consideration of many factors including historical precedent, a desire for balance between regional and wider indigenous interests, a new recognition of traditional ownership of land and a recognition that new indigenous institutions (land councils) needed guaranteed and relatively independent resourcing resulted in the Woodward Model:

- 30% of statutory royalties were to be guaranteed to incorporated communities and groups in areas affected by a particular development;
- 40% of all statutory royalties were to be available to statutory land councils to meet their administrative expenses; and
- 30% was to be retained by a new institution, the Aboriginals Benefit Trust Account (or ABTA), for investment or wider distribution to Aboriginal people of the NT.

The Woodward Model has a very distinct logic which can be explained as follows. The 30% of royalties paid to areas affected were non-discretionary, intended for community benefit and an increase (after representation from regional Aboriginal interests especially at Gove) from 10%. However, Woodward was conscious that those fortunate enough to own mineral-rich land (despite possible social and other disruptions) should not be overly

compensated, hence the channeling of 70% of royalties away from areas affected. The 40% payable to land councils to meet their administrative expenses was based on estimates of likely costs made in 1974. But these payments were also regarded as broadly compensatory because they would finance the means to claim additional land. The 30% to be retained by the ABTA was a residual similarly regarded as broadly compensatory; it was not specified how these moneys should be utilised except to or for the benefit of Aboriginal people in the NT.

The Woodward Model was, by and large, incorporated in the ALRA, but with modifications with policy significance, some of which have occurred following later legislative amendments:

- Statutory royalties were never paid to the ABTA; these were paid to governments (Commonwealth and NT) with their equivalents being paid to the ABTA from consolidated revenue, although paradoxically from 1979 these payments were taxed at source;
- Checks and balances resulted in land council budgets being ministerially scrutinised and approved, but a mechanism was introduced in 1978 to ensure that if 40% of royalty equivalents were inadequate to allow land councils to fulfil their statutory functions, then supplementation could occur; and
- 30% was never earmarked for the ABTA; in the ALRA amounts retained by the ABTA for granting or accumulation are a residual.

The Reeves Evaluation of the ALRA Financial Framework

Ignoring Woodward's (1974: 138) warning that land rights will only be a first tentative step along a long road towards eventual social and economic equality for Aborigines, Reeves (1998: ii) expresses disappointment that land rights moneys have not, in his opinion and very arguably, been strategically applied to the social and economic advancement of Aboriginal people of the NT and have not delivered measurable socioeconomic improvements over a 20-year period during which time the Aboriginal land base has expanded greatly.

This disappointment overlooks a wide range of historical, political, structural, locational and cultural barriers to rapid economic development. It also overlooks considerable success in many economic, social and cultural areas be it in the Aboriginal arts and crafts industry; or participation in vibrant sectors of the NT economy, like national parks and tourism; or the outstations movement and the growth of sustainable subsistence economies; or the maintenance of Aboriginal cultural traditions.

There are three fundamental problems with the overall linkage Reeves makes between land rights and economic advancement. First, economic development is only one of a number of reasons for land rights. Second, Reeves makes no serious effort to rigorously test if land rights has made a difference, for example, by cross-sectionally comparing the socioeconomic status of land owners with non-land owners; or longitudinally comparing the socioeconomic status of a group or community (like the Jawoyn) pre- and post-land

rights. Third, Reeves (1998: 614) highlights that between an estimated $448 million and $738 million per annum is spent on Aboriginal welfare in the NT annually, but fails to explain why the $35 million of mining royalty equivalents (less than 10% of the total) should be charged with making a significant difference.

It is too easy to get diverted to debate macroscopic issues in the Reeves Review; the aim here is to disaggregate and focus on his evaluation of the use made under the ALRA of the royalty equivalents broadly divided between so-called royalty associations ($116 million received over 19 years or $6.11 million per annum); land council administration ($202 million over 19 years or $10.63 per annum) and the balance ($69 million) granted, saved or used for administrative purposes by the ABTA (now called the Aboriginals Benefit Reserve or ABR). This evaluation is contained in Chapters 15 and 16 of the Reeves Report somewhat confusingly called 'Aboriginals Benefit Trust Account (Aboriginals Benefit Reserve) and the Royalty Associations – Operations Described' and 'Aboriginals Benefit Trust Account (Aboriginals Benefit Reserve) and the Royalty Associations – Main Issues'.

Reeves's evaluation of the use made of statutory royalty equivalents is broadly negative, but within the overall context that he defines the aim of the ALRA's financial framework as being established to deliver socioeconomic betterment. Specifically:

- Reeves criticises royalty associations for making payments to individuals (his words are 'largely dissipated in cash payments to individuals') and for lacking accountability to registrars-general, land councils and their memberships;
- He criticises land councils for expending too much on the land claims process that while successful in expanding the Aboriginal land base from 19% of the NT in 1977 to 42% some 20 years later, has done so at a cost beyond the Australian Valuation Office's estimate of the value of that land. This excessive administrative expenditure has resulted in the Woodward 40/30/30 Model becoming a 52.5/30/17.5 ALRA Model; and
- He criticises the ABR for lacking a clear statement of purpose and for not holistically managing all 'its' mining royalty equivalent and investment income.

A Critique of the Reeves Evaluation

The Reeves evaluation of the ALRA's financial framework has many shortcomings. At the broadest level, it appears that Reeves fails to appreciate the clearinghouse role of the ABR (which to date has accounted for 82.5% of its royalty equivalent income) from its granting and investment roles. Similarly, Reeves has a poor appreciation of some key differences between land rights law and the Woodward Model. For example, while Woodward recommended that 30% of royalty equivalents be maintained by the ABTA (now ABR) this recommendation was not included in the statute. Consequently, it is unfair to benchmark the working of the ALRA's financial framework against a recommended formula that predates the ALRA. As the ABR Annual Reports consistently indicate, the residual 30% can be expended on grants (s.64(4)), ABR administrative expenses (s.64(5)) or supplementary funding of land councils (s.64(7)), where the

minister is satisfied that s.64(1) payments are insufficient to meet their administrative expenses (ABR 1998: 5). Third, while able to describe political conflict (both within the Aboriginal domain and outside it) and its financial cost, Reeves wants to assume that such conflict can somehow be magically dissipated, as we shall see below, by the creation of new institutions; it is as if history and politics disappear with new institutions Finally, Reeves seems to lack an understanding both of lines of authority and of checks and balances in the ALRA.

Critiquing Reeves's evaluations more specifically, it is clear that his concern with royalty associations was primarily their lack of accountability to him when seeking information about their operations. In reality, Reeves undertook no in depth assessment of any royalty association preferring instead to use secondary information such as the review of the Gagudju Association (Altman 1996b) that was undertaken at one point in time in the Association's 18 year history. Reeves makes mistakes in failing to differentiate various incorporation forms (trusts versus Aboriginal associations); in failing to differentiate between private and public moneys (deciding rather idiosyncratically to define all moneys raised on Aboriginal land as public); and in choosing to define payments to individuals as wasteful (irrespective of purposes to which moneys are applied) and failing to recognise important differences like the Ngurratjuta/Pmara Ntjarra Aboriginal Corporation's distribution according to a per capita formula (but for community purposes) as distinct from per capita cash payments (see Ngurratjuta/Pmara Ntjarra Aboriginal Corporation 1998).

Reeves provides no evidence of wholesale lack of compliance by royalty associations with incorporations law and in fact found a high rate of compliance by those reporting to the NT registrar. And even if compliance was a problem, this would suggest that incorporations law might require stricter enforcement rather than amendment of the ALRA. Interestingly, Reeves does not refer to representation from the NLC (1998) (again reiterated in NLC 1999) that greater royalty association accountability to land councils is required. Indeed the NLC sought amendment of the ALRA so that it would be empowered to act effectively on non-compliance.

The Reeves critique of land councils expenditures is similarly misdirected and misconstrued. First and foremost, Reeves chooses to overlook that land councils are statutory bodies with statutory functions that are funded from a fundamentally unstable source: mining royalty equivalents. What is also overlooked is that land council budgets are approved annually by the Minister for Aboriginal and Torres Strait Islander Affairs. Land councils are highly accountable to the Minister, ATSIC, the Australian Parliament and efficiency monitoring bodies like the Australian National Audit Office.

Reeves highlights that the land claims process has been expensive, although his selective quotation of some rough estimates I have made of cost of claiming land fails to furnish the proviso that this estimate assumes all land council expenses (including that of the non-claiming Tiwi Land Council and Anindilyakwa Land Council) are used to finance land claims (Altman 1996a: 6). By comparing my highly qualified estimate of $685 per sq km with the Australian Valuation Office's unimproved capital value of pastoral

properties of $154 per sq km (Reeves 1998: 559), Reeves argues that land council dollars would have been better spent acquiring land. But this observation is fraught with bad economics and a discard of the nature of the land claims process. Unalienated Crown land available for claim is not available for sale; the statutory functions of land councils do not extend to using their budgets to purchase land; and there is limited correlation between the AVO's valuation of properties at one point in time and their market price over time. Interestingly, even when the ABR strategically followed the land purchase option, Reeves not only criticises it, but also suggests that it was the land councils that spent this money and that it was not spent for the benefit of Aboriginal Territorians (Reeves 1998: 331, 358).

The cost of the claims process has been largely due to NT Government opposition to almost all claims and a public interest in accurately identifying the correct Aboriginal traditional owners of land before the Aboriginal Land Commissioner. Both political processes have generated costs, but it remains unclear how the claims process might have been undertaken more cheaply under land rights law. Interestingly, the only time Aboriginal people have been able to exercise a choice to allocate resources to supplement land council administrative costs in 1978-79, they did so via ABTA grants, but this was ruled as an illegal source of funding of land councils and consequently supplementary funding was introduced (Altman 1983: 98-99).

Reeves's criticisms of the granting operations of the ABR do not extend to an analysis of the nature of these grants (as was done in some detail in the review of the ABTA in 1984, see Altman 1985). Rather, Reeves is concerned that the ABR does not have an overarching charter guiding its granting operations under s.64(4) of the ALRA. This perspective overlooks the fact that the ABR Advisory Committee considers granting priorities regularly, openly advertises for applications and makes grants after an assessment process. As Reeves notes, in 1997/98 a policy meeting was convened and resources were allocated to ceremonial (cultural), outstation, family, small project and major enterprise purposes. Because the ABR operates under a ministerially-imposed fiscally-responsible Financial Management Strategy which limits grants to $5 million per annum, the $11 million allocation had to be spread over two years, a point that Reeves (1998: 329-30) fails to appreciate. In practice, over the last 20 years, the balance of funding in the ministerially-controlled ABR has been utilised for a diversity of purposes in an increasingly disciplined, and at times strategic, manner avoiding the very substitution funding (ABR substituting for government) that Reeves is keen to facilitate.

The Proposed Reeves Model

Reeves heroically assumes that <u>all</u> moneys raised on Aboriginal land are public and echoing a dominant theme in current government policy argues that all these moneys should be targeted to improvements in indigenous health, housing, education and so on, as defining parameters within which indigenous prioritisation will be allowed. The Reeves Inquiry proposes a 'radical' restructuring of the ALRA's financial institutions that have some striking similarities with the Hasluck Model of 1952 and might today be better termed 'reactionary'.

Reeves recommends (1998: 368) that the formula for distribution of ABR funds should be abolished; instead distributions should occur within a clear statement of purpose defined within the ALRA. The proposed Reeves Model has the following features:

- Instead of the existing four land councils, there will be 18 regional land councils (RLCs) and one Northern Territory Aboriginal Council (NTAC). These 19 councils will have much enhanced functions, but will be run so cost-effectively that they will only require an estimated 29% of statutory royalty equivalents according to Reeves;
- The rights and existing commercial and regional interests of current incorporated organisations in areas affected by mining, irrespective of accountability and performance, are overridden by the allocative discretion provided to NTAC and RLCs; and
- The role of NTAC and the ABR are to accumulate reserves at the rate of $7 million per annum (until $350 million is in a capital fund) and to spend the balance (an estimated $18 million per annum) on Aboriginal priorities, but largely limited to health, housing, education and so on and to compensate groups in areas affected, if net detriment from development can be demonstrated.

A critique of the Reeves Model

The proposed Reeves Model is fundamentally flawed primarily in my view because it does not address or comprehend the complexity of, and intentional tradeoffs in, the current ALRA financial framework based on the Woodward Model described above. The Reeves Model is counter to Aboriginal interests, is inconsistent and is based on speculative assumptions that are unpersuasive. These three broad assertions are supported by the following illustrative examples.

The Reeves Model is counter to Aboriginal and wider interests:

- While seeking to maintain right of consent provisions, it strips away any incentive that traditional owners may have to allow commercial development on their land. In short, from a traditional owner's perspective, the de facto property rights inherent in the consent provisions are weakened. This is directly counter to recommendations made by the Industry Commission (1991) to strengthen the mineral rights of traditional owners by making them de jure. In particular, Reeves recommends that all the economic rent, private negotiated payments described above as being a consequence of the political and economic leverage provided by the right of consent, should be redefined as public moneys payable to the ABR and with NTAC discretion to RLCs. This weakened incentive structure will have potential ramifications not just for Aboriginal interests, but also for the mining industry, other commercial interests and, ultimately, Australia as a whole; and
- 30% of statutory royalty equivalents and all negotiated payments to royalty associations, irrespective of legal agreements, would cease. This would undermine the existing commercial interests and service delivery functions of existing royalty associations irrespective of performance.

The Reeves Model is inconsistent on at least three grounds:

- While it claims to aim to empower regional interests with the creation of RLCs, it simultaneously centralises economic power in NTAC that will have control of the ABR and that will be run initially by an unrepresentative Board nominated by party-political governments;
- While Reeves articulates a desire for Aboriginal fiscal empowerment and enhanced decision making powers, he recommends that the ABR's statement of purpose is stipulated in statute; and
- While he recommends the abolition of the statutory formula for payments out of the ABR, he then recommends a 29/20/51 formula, with 29% earmarked for NTAC and RLC administrative costs; 20% earmarked for ABR investment and 51% earmarked for an economic and social advancement program. Not much mention is made of moneys from a variety of other sources, these being relegated, perhaps, to the too-hard-basket.

The Reeves Model is highly speculative. In particular:

- Reeves assumes that the administrative costs of NTAC and RLCs will be limited to 29% of royalty equivalents received by the ABR, despite the fact that that these new institutions will have greatly enhanced statutory functions that will overlap and duplicate those of a number of Commonwealth and Territory agencies. It is instructive that in 1974 Woodward (1974: 69) estimated that the then two land councils would each cost $300,000 per annum to operate or 20% of royalty equivalents each. By 1997-98, this cost had grown to $8.7 million for the Northern Land Council and $6.26 million for the Central Land Council (in current dollars) or 44% of royalty equivalent income (ABR 1998: 6). It is also instructive that Reeves's Model overlooks diseconomies of small scale that has influenced recent Commonwealth Government decisions to amalgamate, rather than fragment, Native Title Representative Bodies (see ATSIC 1995); and
- Reeves assumes that ultimately the Commonwealth and NT Governments will contribute substantial program resources, possibly running to hundreds of millions of dollars per annum, to NTAC. The only justification for such a transfer is that it will be important for the 'partnership' that is the proposed centrepiece of brand new institutional arrangements and that it will prove an effective anti-substitution funding mechanism as all funds will be pooled in the ABR under NTAC control.

Ultimately, the Reeves Model is bad public policy. It assumes, rather than persuasively demonstrates, that the creation of a new unrepresentative institution NTAC will, ipso facto, deliver better outcomes to NT Aboriginal people, presumably because its NT and Commonwealth Government appointed members will be better able to work with the NT Government. Interestingly, while at face value Reeves states that he seeks to depoliticise the ALRA's financial framework (1998: iii), in reality he will enhance the politicisation of the proposed peak Aboriginal body.

And Reeves provides no rationale for why the diversity of moneys raised on Aboriginal land should be statutorily earmarked for Aboriginal socioeconomic improvement. Nor does he explain why or how the estimated $35 million generated in statutory royalty equivalents from Aboriginal land will result in socioeconomic improvement when the combined resources of the Commonwealth and NT governments (estimated at minimum at over $400 million per annum) have not (according to Reeves). It remains my view that the political and economic leverage provided by land rights will be a more effective mechanism for structural socioeconomic change than the equivalents of statutory royalties raised on Aboriginal land (Altman 1996a).

Reviewing Financial Aspects of the ALRA: An Opportunity Lost?

Reeves does not provide a convincing case that the ALRA's status quo financial framework is fundamentally flawed nor that proposed new institutions will be more efficient, effective, equitable or accountable, either to Aboriginal people or the wider Australian public.

On face value the Reeves Review appears well intentioned with its futuristic title 'Building on Land Rights for the Next Generation' and its concern with Aboriginal socioeconomic disadvantage. But this paper argues that the proposed Reeves Model is a dangerous leap of faith that should not only be opposed for diminishing long-established indigenous property and commercial rights, but should also be opposed for constituting bad public policy that will result in:

- Unnecessary institutional duplication, with RLCs undertaking many of the political and administrative functions of ATSIC regional councils and regional offices, as well as of other government agencies, like the Commonwealth Departments of Education, Training and Youth Affairs; and Employment, Workplace Relations and Small Business;
- Likely substitution of legitimate government expenditure by NTAC's economic and social advancement program;
- A high degree of Aboriginal disempowerment that will prove extremely costly to indigenous and other Territorians and all Australians; and
- Lower commercial investment on Aboriginal land owing to highly circumscribed incentives for traditional owners to allow exploration, mining and other development.

One of Reeves's fundamental critiques of indigenous institutions created by the ALRA is their lack of accountability. But the accountability of the Reeves Review; its expenditure of significant public moneys (and the additional resources that will now be spent in debunking many of its fanciful recommendations); and its overall poor quality must all be challenged. This paper concludes that there is a very high risk in adopting the new, untested, poorly-constructed and highly-flawed Reeves Model. This is not to say that the ALRA's current financial framework is faultless. It is not, and there is need for considered and well-balanced reform for improved outcomes in a number of acknowledged areas like:

- Better statutory definition of the role of royalty associations and greater accountability to existing land councils for their operations;
- A need for the ABR to strategically plan its granting operations and to have an overarching operational plan, with transparent goals and mechanisms to monitor performance;
- For land councils to maintain budgetary discipline as currently required under the ministerially-imposed Financial Management Strategy so that they continue to operate cost-effectively; and
- The need for NT Aboriginal interests to decide if the fiscal base of the ABR should be enhanced; if it should fundamentally change from operating as a clearinghouse; and how its Board should be appointed

Ultimately, while the existing financial framework of the ALRA is not perfect, it has an inherent logic, it balances competing interests, it is bedded down and it is highly workable. Good public policy would suggest that the role of review is to negotiate with all interests, indigenous, non-indigenous, private sector and government, to improve an existing statutory framework. By failing to politically negotiate such a path and instead unilaterally proposing a model that will prove unworkable and costly, the Reeves Review of the *Aboriginal Land Rights (Northern Territory) Act 1976* represents an important and expensive opportunity lost for Aboriginal and non-Aboriginal Territorians, and for all Australians.

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