Submission to the

House of Representative's Standing Committee on Aboriginal and Torres Strait Islanders Affairs

INQUIRY INTO THE REEVES REPORT

Nicolas Peterson
Australian National University

I make this submission in the light of my involvement with the original inquiry that prepared the report on which the *Aboriginal Land Rights (Northern Territory) Act 1976* (here shortened to the Act) is based and an on going interest in the circumstances of Aboriginal people in the Northern Territory since that time.

Radical versus organic change

The Reeves Report proposes radical change to the Act following the end of the period of major land acquisition because he sees it as a major obstacle to economic development and self-determination. While no one could be unsympathetic to Reeves's general desire to hasten improvements in Aboriginal economic and social wellbeing there are two key general questions his views raise:

- Has he correctly identified the Act as a, or even the, major obstacle to Aboriginal economic and social development in the Territory?

- Is the Act the appropriate vehicle for hastening the economic and social development of Aboriginal people in the Territory?

I believe that the answer to both questions is no. A full justification of these views would be a large undertaking so I only make a few key points here.

The crux of his argument about the first question is that the statutory definition of traditional owners and their place in the structure of the Act has undermined self-determination and is anthropologically inappropriate. It has prevented the emergence of regional land councils and self-government and instead allowed the two major land councils too much centralised power leading to a strident oppositional political culture.

The obvious point to make about the factors inhibiting Aboriginal economic advancement are that they are primarily due to the geographical location of much of the Aboriginal population and its educational status. The Act has very little to do with either of these. It is a major weakness of the Report that there is no substantive analysis of the distribution and location of the Aboriginal population nor of the cultural and social obstacles to economic and social change.

Reeves's misperception of the obstacles to economic and social development seem to arise from two factors. First, because the Act generates income of about $35million a year from 'royalties' for Aboriginal people (as against the approximate $800 million spent on them by government annually) the Act is seen to be concerned with economic advancement. Second, because Reeves believes development, particularly in the area of tourism and mining, is being inhibited by the Act.

It is clear that 'royalty' income at 4.4% of what is currently spent by government on Aboriginal people annually in the Territory cannot make a dramatic difference to the economic circumstances of Aboriginal people there. It was never intended to. It was intended to be discretionary income used within statutory limits **as additional to** normal government expenditure, to give people, who are uniformly poor by national standards, a modicum of independent financial leeway and some independence of government by using a portion of the funds to finance their own institutions (NLC/CLC).

Reeves's proposal is to use the 'royalty' income to supplement government expenditure on normal service delivery of the kind that is a citizenship right of all Australians. This is unequivocally inappropriate and, indeed, inequitable.

Others are much better equipped than myself to consider the extent to which the Act may or may not have inhibited mining in the Territory but getting at

the truth of this matter is complex given the way all parties, miners, government and Aboriginal people, have used and represent the situation. It is clear, however, from the location of new mines and of exploration activity that many Aboriginal people are supportive of mining. It is also clear that having a mine and associated mining town in close proximity to an Aboriginal community can bring high social costs as well as benefits. Assessing the extent to which the Act has hindered economic advancement, when all of the social as well as economic costs are taken into account, is clearly difficult.

On the second question raised above as to whether the Act is the appropriate vehicle for a radical platform of economic and social advancement I think it is already clear that it is not really appropriate. If locational, cultural and social factors are central to slow progress in these areas then there is not a great deal this Act can do about it. If there is a good case for it creating some paarticular difficulties then these difficulties should be addressed.

Overall then I do not think there are any strong grounds for a radical program of change but rather the need for a more organic development.

Recommendation

- That any changes proposed to the Act by the Committee be organic, building on existing institutions and arrangements wherever possible.

The Act: not just about property rights

As the long title of the Act makes clear its purpose goes beyond simply recognising property rights to benefitting Aboriginal people. If the concern now is simply with property rights then it would, on the face of it, make sense to move to native title since that is just about property rights. This would be a grave mistake in my view.

Statutory rights, of the kind provided by the Act, are better than native title rights in a range of ways but particularly because there is great flexibility in what can be done. In particular a statutory approach allows for the recognition of the fact that worldwide land rights has always been as much about the restoration of some of the autonomy that was lost with colonisation, as about property rights alone. The quality of land rights

legislation is judged not just by the property rights it grants but by the combination of property and empowerment rights. The Act recognises this better than other legislation in Australia in the way it sets up and funds the two main land councils whose function is not only to help Aboriginal people to aquire land and to administer it but also to advance their interests as land holders.

Land councils, or some similar kinds of institutions mediating between Aboriginal society and the encapsulating Australian society, are essential for both parties. This is because in giving recognition to Aboriginal property rights we are giving recognition to a radically different system of rights and interests that is not easily compatible with the dominate system. In order for the two to be articulated in a workable fashion new institutions need to be put in place appropriate to the task. This is particularly necessary given that there are no appropriate indigenous institutions to work through. Neither the patrilineal clan nor the regional level of organisation identified in the Report are provide appropriate indigenous structures to work through.

Briefly, the reasons for this are as follows. Accepting, for the sake of argument, the anthropological appropriateness of identifying the patrilineal clan and estate as the key to the traditional land holding system, there are a number of difficulties with this as a possible basis of institutional arrangements. These include the costs and problems associated with surveying the several hundred estates and defining and incorporating the membership of each clan. Such a codification would entrench boundaries which derive from a completely different set of economic and social circumstances to those prevailing today resulting in large tracts of land being divided up into many small inalienable areas. This can become problematic because the number of people with interests in each area, or claiming interests, usually increases over time, in the absence of any willing or market mechanisms for redistributing land, making the reaching of consensual decisions more difficult as time goes on especially in the absence of any other level of organisation.

Is, then, the recognition of the regional community as proposed by Reeves more anthropologically appropriate? In its First Report the Commission made essentially the same proposal as the Reeves Report is now making. It proposed that the holders of title should be community councils (see 1973:45-6) but this proposal did not eventuate in the Final Report for the following reasons (1974:12-13):

- the difficulty of drawing lines between communities
- the difficulty of providing for small new communities
- the undervaluation of the clan structure
- the unwarranted interference with the Aboriginal authority system if the role of the community councils were to be extended to land holding

These reasons for rejecting the regional council level of title holding depend primarily on whether the clan level has been correctly identified as the key level of indigenous organisation and authority in relation to land. Although in accepting the clan level the Commission might be seen to have aligned itself with the Finke River Mission, its position was quite different.

The Commission's recognition that the clan level had to be allowed for, because it is central to Aboriginal life, is still borne out by anthropological analysis. The problem facing the Commission was how to recognise this level but avoid the problems referred to above. It adopted the general principle of avoiding codification but safeguarding Aboriginal rights by placing a protective legal shell around Aboriginal land which would allow for the maximum internal flexibility in the present yet keep the way open for transformation and change in the future.

In order to ensure that the two centralised land councils remained accountable to the people on the ground with rights and interests in particular areas of land it developed the role of traditional owner and entrenched the requirement in the Act for the land councils to get their approval of any use of land while at the same time also consulting with the residents in the region, before signing off on agreements.

I believe that this arrangement still has enormous merit. Recognising this merit does not mean, however, that there should not be some devolution and/or delegation of powers to regional land councils. The challenge is to develop the appropriate structures, procedures and checks and balances, given all that we know about the Aboriginal domain.

I believe that the two main land councils are important for an additional reason besides those already given. The two land councils with their large professional staff are not only a much more efficient use of resources but they provide checks and balances within the Aboriginal domain because of

the professional culture of their staff and because of the Act's requirement that they deal directly with traditional owners. They also enhance the possibility of attracting staff of good calibre as they provide a career path and a stimulating intellectual environment that a multitude of small bodies in remote localities never could. This is greatly to the benefit of both Aboriginal and non-Aboriginal people. It probably does make sense to seek to coordinate/integrate the two land councils in someway but given the cultural differences between northern and central Australia and the distances involved a major office like that which already exists in Alice Springs will be essential.

Recommendations

- That there be some overarching coordination of the work of the two existing major land councils.

- That a process for regionalisation be developed that recognises and preserves the flexibilities and strengths of the existing arrangements.

'Royalties': public versus private interests

By 'royalty' monies I am referring to both statutory royalty equivalent monies and negotiated monies. There are several issues that need attention in respect of the management of royalty payments but there is only one important one I will address here: this is the matter of a statutory financial policy for royalties. It was a weakness of the Woodward Report in this area that it did not recommend a statutory financial policy(ies) for the treatment of 'royalty' monies beyond the 30/30/40 division.

Such a statutory policy was considered in the light of the kind of financial policies that were integral to the James Bay and Northern Quebec Agreement of 1975 where 50% or more of the compensation monies paid to the Cree had to be invested. However, it was felt that Aboriginal groups and organisations should be free to determine their own level of investing. This was naive. It was naive because there is enormous pressure on the various money holding bodies to make individual distributions and to maintain these by pay outs from accumulated capital if the source of funds for individual pay outs is declining.

Statutory royalty equivalents: In respect of statutory royalty equivalents, I have set out the general rationale for the government imposing a financial regime on Aboriginal people (see Peterson 1983). Statutory royalty equivalent monies have their origin in foregone public monies. They were, presumably, granted to Aboriginal people because it was hoped that they would make a difference, helping to improve their economic and social situation. While the immediate use of the money, particularly on consumption of various forms has, no doubt, brought many short term benefits to people who are poor, especially in regard to land and sea transport, opportunities for a longer term impact on their economic situation have been missed. Any economic transformation requires several kinds of change but not least structural change for which capitial accumulation is central. Enchance accumulation would allow Aboriginal organisations to extend their purchase of equity interests in businesses and other economic development projects and initiate their own projects without always having to seek funds from elsewhere. To inhibit accumulation is to ensure that royalties have little or no longer term impact on Aboriginal economic status.

Such accumulation is also vital to ensuring independence of government. The financial independence of the land councils is a crucial aspect to the Act for both the Aboriginal land owners and, I would argue, the Northern Territory government. For the land owners it provides an independent structure which ensures they have a clearly heard voice and representation of their interests in the public affairs of the Territory. For the government they provide the authoritative representation of land holders interests.

While I believe that the existing general treatment of statutory royalty equivalents, rents and lease monies is properly structured - viz: rents and lease monies to traditional owners; 30% of statutory royalty equivalents to area affected; 30% statutory royalty equivalents for the benefit of Aboriginal people Territory wide; and 40% statutory royalty equivalents to run the Land Councils I believe that there should be a restriction on individual payouts. The difficulty with individual payouts is not just that they prevent accumulation but also that the regular payout to individuals increases dependency on unearned income. However, in the light of the importance of land and sea transport to improving Aboriginal people's quality of life in remote regions, I think it is important that the ABR and the royalty associations continue to have some discretionary monies that can be spent on vehicles and the like.

Negotiated royalties: I believe that there is also a public interest in negotiated royalties although there is some considerable confusion about these. The idea that negotiated royalties should be treated differently from statutory royalty equivalents arises because of a lack of clarity over whether Aboriginal access to them comes on the basis that they are rent rather than compensation? I believe that they have to be seen as compensation and not rent on grounds of equity with other citizens. It seem that this is how they are seen in the eyes of public policy even if this is not how the native title holders see them.

Generally speaking minerals are owned by the crown in Australia (far too much is made of a few limited exceptions to this). Negotiated royalties stem from a right that, by and large, other citizens do not have. This right was granted for several purposes but, in essence, to allow Aboriginal people to control mining on their land particularly because of the damage it did to the surface of the land and because of the social trauma that often accompanies it for Aboriginal communities nearby. It was well recognised at the time of the Woodward Commission that that it could also bring economic benefits to Aboriginal people. On this basis there is a clear public interest in these monies and, therefore, no impediment to a statutory financial regime being imposed on the use of these monies as well.

Other royalty issues: Those keen to see mining and other development regardless of the wishes of the Aboriginal people and the social consequences (which are usually costly for Aboriginal people and for government) may feel that the enticement of pay outs directly to individuals, is the way to ensure Aboriginal land is quickly opened up to mining developments, in particular. This is clearly the view of the Industry Commission which in its 1991 report on 'Mining and Mineral Processing in Australia' recommended that Aboriginal interests should be vested with full property rights in minerals on Aboriginal land. This raises major equity issues with other citizens and would be a source of considerable tension and resentment. I believe, therefore, that there should be no move in this direction.

Royalty recommendations

- That there be a statutory bar on payouts to individuals from statutory royalty equivalents and negotiated royalties or at the very least a low per annual statutory cap.

- That there be a statutory requirement for at least 50% of annual income to royalty associations to be permanently invested

- That the Land Councils continue to be funded from statutory royalty equivalents. That 50% of statutory royalty equivalent monies should be compulsorily kept for investment *after* meeting the running costs of the land councils and paying the 30% areas affected monies.

Anthropology and the Act

I do not think there is a substantive intellectual case for arguing that the best mediating institutions and legal arrangements are necessarily those that conform as closely and accurately as possible to present indigenous arrangements. That is to say, challenging arrangements simply on the grounds of their perceived anthropological appropriateness is mistaken and misconceived. This is for a number of reasons some of which have already been mentioned. The legislation is beneficial legislation which has among its purposes not only the recognition of indigenous property rights but also creating institutions that facilitate the articulation with the wider society. Further, any recognition of Aboriginal rights by the Australian legal system, however this is organised, is inevitably an intervention into Aboriginal arrangements, transforming them as it recognises them. Even the kinds of codification that recognition of native title requires could only claim to be more appropriate than statutory rights and not to be culturally neutral. Not only does native title deliver inferior rights than the Act but it is much less flexible and forward looking.

I believe that anthropological understanding is central to establishing what is most likely to be workable in revamping the Act and to helping maximise the various beneficial goals of the legislation. In particular anthropological knowledge about the organisation and working of communities, the nature of internal social structures and processes and the impediments within the Aboriginal domain to the functioning of articulating institutions all have a vital role to play in ensuring its success.

<u>Recommendation</u>

- That the Committee acknowledge that institutional arrangments based only on arguments about anthropological appropriateness are flawed and should, therefore, be avoided.

Conclusion

The most important fact about Aboriginal people and the Northern Territory is that they make up more than a quarter of the population. There is, therefore, more than a moral imperative behind meeting the reasonable aspirations of Aboriginal people in relation to land and the need to meet their legitimate grievances. The future well being of the Territory depends, on legal, economic, social and, importantly, self-determination arrangements relating to Aboriginal people that are morally just, workable and good public policy. The Act has provided an solid foundation for the future which meets these criteria. Undoubtably it needs some fine tuning but this should be in the form or organic rather than radical change.

References

Peterson, N. 1983. Foreword. In *Aborigines and mining royalties in the Northern Territory* by J. Altman. Canberra: Australian Institute of Aboriginal Studies. Pp.v-viii.

Department of Archaeology and Anthropology
Australian National University
ACT 0200

The Chair
HORCATSIA
Parliament House
ACT 2000

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Dear Mr Lieberman

I attach a submission to your Committee in rrelation to the Revees Report.

I would be happy to appear before the Committee to expand on the issues touched on in my submission, and other matters, if you feel it would be helpful.

Yours sincerely

Nicolas Peterson
Reader in Anthropology