THE AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES

SUBMISSION

to

House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs

Inquiry into the Reeves Report on the Aboriginal Land Rights (Northern Territory) Act

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SUMMARY

This submission outlines some aspects of the Australian Institute of Aboriginal and Torres Strait Islander Studies and its relations with anthropologists and others involved in the land rights debate. The submission addresses anthropological issues related to the proposal to create regional land councils. In particular it is critical of Reeves' findings in relation to:

- Anthropological understandings of local organisation, suggesting that Reeves does not adequately demonstrate that the anthropological models upon which the *Aboriginal Land Rights Act (NT) 1976* (ALRA) are based were either inadequate or wrong;
- The Gove case and the decision of Justice Blackburn; stating that reference to the decision further obscures principles of land ownership which the ALRA was designed to address;
- The spiritual dimension and Indigenous ownership of land; arguing that Reeves in downplaying this fundamental aspect of traditional land ownership, fails to grasp the essential elements of Indigenous ownership which his proposals will ignore, and;
- The concept of the 'regional community', arguing that there is little conclusive anthropological evidence for the existence of such a regional corporate entity, so its adoption cannot be justified on grounds cited by Reeves.

The submission also addresses the permit issue and argues for its retention because of the special nature of title to land contemplated in the ALRA and because the ALRA was enacted to both restore and secure that title to Aboriginal traditional owners.

Finally, and in conclusion, the submission notes that the incorporation of substantially non-Indigenous systems of control of Aboriginal land will inevitably result in dispute and, for developers and miners, uncertainty and potential litigation.

INTRODUCTION

This submission addresses two of the Terms of Reference of the Review, the first and the fifth, providing views in relation to:

- the proposed system of Regional Land Councils, including
  - the extent to which they would provide a greater level of self-management for Aboriginal people, and
  - the role of traditional owners in decision making in relation to Aboriginal land under that system;

- proposals concerning access to Aboriginal land including the removal of the permit system and access to such land by the Northern Territory government.

The Institute recognises that the report *Building on Land Rights for the Next Generation: The Review of the Aboriginal Land Rights (Northern Territory) Act 1976* (the Report) by John Reeves covers an extensive range of issues, including the creation of a single Northern Territory Aboriginal Council along with substantial changes to the way in which royalty equivalent and negotiated payment could be allocated. However, as a research organisation, the Institute's submission focuses on the anthropological and related matters with a view to making a positive contribution to the ALRA both now and in the future.

THE AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES

The Institute is a Commonwealth government statutory authority first established in 1964 by the *Australian Institute of Aboriginal Studies Act* which was replaced by the current act in 1989. The Institute is governed by a Council of nine persons, of which five are appointed by the Minister for Aboriginal and Torres Strait Islander Affairs. The Act requires that one member appointed by the Minister is a Torres Strait Islander person and the remainder are other Indigenous Australians. Four Council members are elected by the membership of the Institute. Two of these elected members are currently Aboriginal or Torres Strait Islander persons. The principal business of the Institute is the undertaking and promotion of Aboriginal and Torres Strait Islander studies. This is effected through research, publication and funding of Australian Indigenous studies and the collection and development of a cultural resource collection of books, manuscripts, papers, film, photographs and audio tapes of materials relevant to Australian Indigenous studies.

As a leading national research organisation in Aboriginal and Torres Strait Islander studies the Institute has had a long-term involvement in field research in such disciplines as anthropology, archaeology and linguistics. Research staff of the Institute have had a close involvement in the land claim process in many jurisdictions, including the Northern Territory. The Institute has not only provided researchers, particularly in the early phases of

the land claims process, but numerous academics and scholars have either been employees of the Institute or have had close academic, scholarly or institutional ties to the organisation. As a consequence the Institute is well placed to provide expert comment on the Reeves review as a whole, and in particular on those aspects of it that relate to cultural and anthropological issues upon which Reeves bases much substantial analysis.

THE CONTEXT OF ANTHROPOLOGICAL INPUT TO THE INQUIRY

The Institute acknowledges the considerable contribution made by the research community with respect to this Inquiry and to Reeves's review. This has included submissions by professional organisations and individuals as well as the papers presented to a workshop held on 26th and 27th March 1999, organised by the Centre for Aboriginal Economic Policy Research and the Department of Archaeology and Anthropology, both of the Australian National University. This submission seeks to build upon, rather than duplicate, these earlier contributions and reference is made in what follows to a number of papers and submissions to the Inquiry as well as to material cited by Reeves.

It is noted that the Inquiry will be listening to the views of a number of stake-holder bodies, including many Indigenous organisations, most of which are directly affected by the operations of the ALRA. The Institute considers that the views of Indigenous stakeholders are critically important to the Inquiry. The discipline of anthropology has, however, over the decades, been able to provide important understandings and interpretations in relation to the incorporation of Indigenous systems of law and governance into Australian legal systems. This contribution is acknowledged by Reeves and indeed the Report seeks to build upon that body of knowledge to support numerous proposed changes to the ALRA. It is thus quite appropriate for the profession of anthropology in this country to comment on these aspects of the report. It is further fitting that the Institute, as the Commonwealth's statutory body charged with the undertaking and promotion of Aboriginal and Torres Strait Islander studies and a leading research organisation in this field, also provide critical input to the Inquiry.

THE PROPOSED SYSTEM OF REGIONAL LAND COUNCILS

Reeves recommends the creation of 18 Regional Land Councils (RLCs) that would be responsible for 'all land use matters in their regions and for regional co-ordination, in conjunction with the new Northern Territory Aboriginal Council' (NTAC). This latter body is proposed to replace the Northern Land Council and Central Land Council (Reeves 1998, 594[1]). The RLCs will have as their members any Aboriginal person, who has a traditional affiliation to an area of land within the region or who is a permanent resident of the region (595) and no one would be able to belong to more than one RLC. The principles behind this recommendation lie in Reeves' discussion of decision making and dispute resolution (202-213). He states that the RLCs will be representative 'at the regional level' and will accommodate 'decision making processes that accord with their traditions, as they interpret them' as well as 'dispute resolution that accommodates Aboriginal traditional practices and processes' (203).

[1] Henceforth numbers in parenthesis refer to the Reeves Report.

Under the current ALRA the category of traditional owner plays a pivotal role in the decision making process as it might relate to Aboriginal land. A Land Council cannot take any action with respect to Aboriginal land without the consent of the traditional owners (section 23.3 of the ALRA) and it is also required to consult a wider range of persons identified in the ALRA as 'affected people' (section 23.3.b). Legal title to Aboriginal land is held by a Land Trust, comprising Aboriginals living in the area of the land (section 7.6 of the ALRA). A proportion of royalty equivalent payments (currently 30%) are distributed to the traditional owners, although other affected people may also be financial beneficiaries of this process (Altman, 1999, 3).

Reeves' proposals do away with the concept of traditional owner altogether and substitute for it the concept of 'regional representative bodies'. This is legitimated by forwarding the view that anthropologists, some of whom Reeves acknowledges paid a formative role in the drafting of the ALRA, failed to identify a corporate group within Aboriginal tradition as the "owners" of traditional lands (202). Proof of this failure lies in two arguments. The first is the literature on the nature of Aboriginal local organisation, which 'suffer[s] from a lack of definition and agreement among anthropologists about what should count as "ownership"'(145) and a general ignorance or neglect of 'Aboriginal traditional practices and processes in relation to the control of land at regional levels' (146). The second is a part of the land claims process. The Land Commissioner was able to adopt a broad construction of the definition (of owners) only because there was, in fact, no corporate land holding group in Aboriginal tradition that could be the natural counterpart of the definition of traditional Aboriginal owners, constituting a local descent group, in the Act (202). Despite these argument that purport to discredit the concept of 'traditional owner' Reeves recommends it be retained for the land claim process. This apparent inconsistency would need to be addressed. Either the term has validity or it does not. It cannot be valid for one process (land acquisition) but invalid for another (land management) for the two activities are inter-dependant and should be underpinned by the same principles identifying control and ownership.

In his Report Reeves spends considerable time addressing the first of these arguments. His review of the anthropological literature is extensive though not exhaustive (Morphy 1999; Sutton 1999, 21-41). Reeves states that anthropologists were mistaken in their understandings, apparently following a model that was not supported by the ethnography and perhaps misled by ideas first promulgated by Rev. Fison and Mr Howitt in the 1880s. Reeves concludes that 'regional populations' were and are linguistically cohesive and formed communities that maintained cultures and ways of life at a regional level (147). The local descent group, Reeves concludes, was a single and often ephemeral part of an aggregation of connections with land that together combined to make a regional group the corporate entity with respect to land ownership.

Extensive and scholarly discussion has been provided to the Inquiry on Reeves' discussion and critique of the anthropology that underpins the ALRA. In particular Professor Howard Morphy has addressed many of the issues in detail (Morphy 1999) and Dr Peter Sutton has provided a detailed analysis of many of the issues raised by Reeves (Sutton 1999). Both scholars are highly critical of Reeves' conclusions. These views, shared by many other anthropologists, cannot be lightly dismissed. It is not the purpose of this submission to retrace ground already well covered by other experts in the field. However, several points are worth highlighting.

Anthropological understandings of local organisation

The various developing views and ensuing debate about Aboriginal local organisation is well known and addressed in part by Reeves. As the views of anthropology and anthropologists matured a keener understanding developed about the particular nature of land owning systems. This is not to say that there had not been some confusion on the part of early writers on the defining characteristics of the band, horde and clan, local group or local descent group – all technical terms of the discipline and used over the years in a variety of ways. However, this development of thought over time should not be mistaken for continuing confusion. By the time Stanner and Peterson came to provide their input to the ALRA some fundamentals had been more or less agreed. This included the concept that the principal rights in an estate were held by members of a descent group (variously described) who had a particular spiritual relationship with that land. These members also exercised usufructory rights in their estate. However, the right to forage was accorded to others who also used the land as members of a land using group (band or sometimes horde) and the band comprised members of two or more descent groups. This model is accommodated within the ALRA. The fact that anthropologists (particularly those writing late last century or early in this one) may not have understood this model as clearly as they might if writing today does not invalidate the current understandings of the discipline but may serve to illustrate how this present position was arrived at.

The Gove case and the decision of Justice Blackburn

A second point follows from this. Reeves cites Blackburn in support of his contention that the local descent group is not easily definable because it does not have clearly differentiated usufruct rights in the estate (131). This develops from a fundamental misunderstanding of Aboriginal rights in country and the way Indigenous people organised their ownership of country. Because it did not accord with Australian European concepts of ownership, Blackburn was able to find that the Yolngu clans (the decent groups) did not hold proprietary interests in land (131; Morphy 1999, 10). It was this failure to accommodate Aboriginal concepts of ownership that the ALRA was designed to remedy: to provide simple justice and compensation to a people dispossessed by an alien rule of law. Reeves' conclusion is one that may be considered as coincidental with that of Blackburn and depends for its defence on a failure to differentiate the land holding body (the local group, or owners of the estate) from the users of the country (Morphy 1999, 10). Rights to use country were generally accorded to a wider group than members of the local group because subsistence activities involved members of several local groups (a husband, a wife, siblings, affines and so on). However, rights to the fruits and produce of the estate were always available to members of the local group. The ALRA seeks to accommodate these understandings of Aboriginal land ownership by defining owners as members of a local descent group having 'common spiritual affiliations to a site on the land' and having a primary spiritual responsibility for that site and for the land' (ALRA section 3). The right to forage (ALRA section 3) is an inclusive rather than an exclusive right, that is to say traditional owners have it, but so too may others without detriment to the definitional status of the traditional owners.

The understandings developed by anthropologists over several decades have been carefully situated in the ALRA in order to accommodate a legal framework which can reflect an

Indigenous system of land ownership. Reeves considers that it is flawed because it does not accord with Blackburn's interpretation of law as it could be related to Australian law; the very reason for the passing of the ALRA in 1976. Consequently the argument that the anthropologists identification of the local descent group as the primary land owning group is a fiction is flawed because Reeves cites the lack of exclusive use rights as indicating a lack of ownership. Aboriginal land ownership did not operate in the same manner as European Australian law and it had to be understood in relation to its own norms and values. That is what the ALRA attempted to do. Much of the evidence, particularly that evinced in the lengthy land claim process indicated that the land ownership model set out in the ALRA accorded well with the principles of Indigenous land ownership, not withstanding the wide variety of circumstances, dispossession, cultural variation and geographic diversity of the people to whom it was applied.

The spiritual dimension and Indigenous ownership of land

Much has been written about the particular nature of the relationship that existed between Aboriginal people and their land (for example, Berndt RM, 1970; Maddock 1983, 131-137). Reeves concedes that 'localised relationships to land mediated through sacred sites' (146) were important. However he fails to understand the essential underpinnings of the metaphysical dimensions in Aboriginal land owning system. Instead he concentrates on how the land was used, seeing the spiritual dimension as peripheral to the issue of ownership (147). This would appear to be one of Reeves' greatest errors. To understand the Indigenous system of land ownership is, first and foremost, to understand a series of principles that relate people to their land in a bond that makes frequent reference to a metaphysical connectedness. This connectedness has various manifestations which includes the whole complex domain of the sacred, exemplified as ritual, song, body decoration, ritual objects and the whole of the landscape as well as special places within it. While it is true that a person inherited ownership rights in the country of his father and his mother too, the acquisition of rights is believed to be a concomitant of a metaphysical relationship between a person and the land, where the individual is believed to be the embodiment and manifestation of the essence of the land itself. Consequently a traditional owner is one who has a common spiritual affiliation to the land and concomitant responsibilities for the land. This understanding of the relationship to country is not easily accommodated in Australian notions of legal ownership. The ALRA sought successfully to incorporate this thinking and belief into the process. Reeves does not consider it as a principal issue.

The concept of the 'regional community'

Having dismissed the anthropological views of traditional land ownership as being inadequate, Reeves takes a leap of faith in concluding that the concept of the 'regional community' has the potential to provide the structural basis for decision making on Aboriginal land. This idea is derived in part from the selected writings of a few anthropologists (notably Meggitt, 1962, 51-52) and has been squarely addressed by Morphy (1999, 2) and Sutton(1999, 29-34) in submissions to this inquiry. The fact is that there is very little evidence for the existence, at least at a political or corporate level of such bodies and assertions that regional groups are linguistically cohesive or uniform is clearly wrong (Morphy 1999, 22). It also follows from much of what has been stated above, that the role of the community, however it is to be defined, in relation to the land for which it may have,

under Reeves' plan, statutory responsibility, will be complex, divisive and fraught, because legislated responsibilities will inevitably cut across traditional responsibilities.

PROPOSALS CONCERNING ACCESS TO ABORIGINAL LAND INCLUDING THE REMOVAL OF THE PERMIT SYSTEM

Anthropological issues

Reeves' takes issue with the CLC submission that permission was required before people could enter land belonging to another local group (305). Reeves concludes that while some forms of protocol were observed and people might be directed as to where they might go, 'Aboriginal custom did not appear to include a commonly acknowledged right to exclude others from lands, except sacred sites' (*ibid.*). There has been considerable debate in the literature about the nature of permission and the extent to which it is indicative of the rights of an owner (e.g. Williams 1986, 81-86; 1982). Submissions to this Inquiry have also addressed the issue and Morphy, in particular, has put forward the view that only those who have the right to forage can do so (Morphy 1999, 20). Bearing in mind that traditional land ownership requires an articulated differentiation between land use and land holding, the giving of permission and the requirement that it be received is necessarily complex. Exclusion and inclusion in territorial and resource matters is dependent on numerous considerations; environmental, climatic, geographical, ecological and of course political. Over the Northern Territory different regimes of permission granting almost certainly operated. There is some evidence that the better watered northern areas, particularly those adjacent to the coast, developed a more territorial regime than those desert areas further south. However, there is much evidence that traditional rights of ownership also included the prerogative of exclusion. It may be that the right was seldom invoked, but as a potential sanction it existed all the same.

Other Issues

Reeves suggests that the permit system is a hang-over from the paternalistic days when Aborigines needed a permit to leave the Reserves, while non-Aboriginal people required a permit to enter them (298). While half of the system was discarded, the other half was not. Invoking the NT trespass laws is seen by Reeves as a viable alternative which would do away with a divisive, expensive, burdensome and racially discriminatory measure, which many Aboriginal people oppose (308). Woodward noted that one of the important proofs of ownership of land is the right to exclude those who are not welcome. (Woodward, 1974, para 109). It followed from this that he recommended the adoption of the permit system for entry on to Aboriginal lands.

The argument that the remedy of trespass, available to all Australians is a sufficient remedy also for Indigenous peoples under the ALRA assumes several things that should not be assumed. It assumes that the relationship between Indigenous Australians and their land is of the same order as the relationship between non-Indigenous people and land. As we have noted above, the fundamentally spiritual nature of the relationship creates a series of obligations and responsibilities between Aboriginal people and their land which includes a need to control and direct those who wish to cross that land. This is often best understood in relation to sites and places of particular spiritual importance, some of which are believed

to be spiritually dangerous. Land owners have a responsibility to both protect the land and people from spiritual harm that could eventuate as a consequence of ill-informed or unauthorised entry.

Reeves' proposal also assumes that Aboriginal people have the resources, the social influence and knowledge to pursue legal action in suits of trespass. Many areas of land owned by Aboriginal people are remote and hard to police. Placing the onus of proof for trespass onto Aboriginal people reverses the current situation where the would-be visitor to Aboriginal land has the responsibility to gain permission. The permit system helps to enforce and enhance proprietorial rights of dispossessed peoples and this was seen as one of the important principles underlying the passing of the ALRA in the first place. To change the permit system would significantly detract from those foundation principles which received bipartisan support in 1976.

Finally, Reeves' proposal also assumes that Aboriginal freehold land, as acquired under the ALRA is regarded by many Australians with the same degree of respect as is all other freehold land. Clearly, given current social views, it is not. There persists a view openly espoused by many that Aboriginal land is *really* public land which has been appropriated to a minority. This revisionism is unfortunately a reality, particularly in many remote areas of Australia. This alone indicates a requirement for the retention of the permit system.

Reeves' considers that the abolition of the permit system will result in greater local autonomy in the process whereby decisions are made about who can and who cannot enter private land. It is hard to see how this can be the case when the current system relies heavily on the permission of local bodies (community councils and the like) before the NLC or CLC will issue a permit. However, one option might be to allow for a system where local communities who currently control access could decide to continue or discontinue the permit system.

CONCLUSION

Embracing change and welcoming improvements develops from well thought out evaluations of current systems. Reeves has suggested, with regard to those matters addressed in this submission, a radical departure from existing practices and a substantial reformulation of the principles underpinning the ALRA. Despite clear advice and submissions from anthropologists and other practitioners to the contrary, Reeves has adopted a proposal for a fundamental rethink of the constitution of the land owning group that holds land under that Act. It has been argued here that many of his assertions are ill founded or incorrect. Reeves has suggested that the present system of decision making with respect to traditional owners is unmanageable, inconsistent and inefficient. Yet, his arguments are based on a doubtful critique of the anthropology and on assertions about present practice which are not justified. The Land Councils have been proactive in seeking change, in effecting regionalisation programs, while the ALRA itself has proved to be flexible in practice and has accommodated a large variety of differing circumstances. Most importantly, despite the inevitable difficulties and conflicts, which are bound to be a part of any political process (Peterson 1998; cited in Reeves, 1998 143), the ALRA appears to have successfully accommodated the fundamentals of the Indigenous system of land law. This has been true not only in the numerous land claims but in the administration of Aboriginal land in relation to mining, development and other enterprises. The basic concepts of the

ALRA as they relate to ownership of land have proved themselves to be flexible, while reflecting a reality which accords to fundamental principles of Aboriginal land ownership (Morphy 1999,17).

The principal outcome of adopting the Reeves suggestion that regional bodies be given effective control of Aboriginal land will be the delivery of uncertainty. Once the traditional system of rights to land is discarded, people will be asked to make decisions about land which, according to traditional practice, they have no right to make. Not only will this place them in an invidious position, but people will be tempted to traverse the boundaries of Indigenous responsibility and make decisions which will contravene Indigenous practice and principles. The result will be division, disputation and potentially, litigation. Once the accord between Indigenous law, skilfully reflected in the ALRA, and Australian law is broken, there will be an inevitable conflict between one set of values and rights and another. Not only will this subvert the original intention of the ALRA, but it will result in developers and miners being required to work in an increasingly uncertain environment, as those who are recognised in traditional law seek to remedy decisions made by those who are not.

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