INQUIRY INTO THE REEVES REPORT ON THE ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) ACT

Submission by Sir Edward Woodward

1 In making this submission I should make it clear that I am unable to assist the Committee on the events of recent years in the Northern Territory. Although I have maintained a general interest in the subject ever since my Royal Commission of l972-73, I have not been involved in any detailed way since the late 1970s and have not visited the Territory, except briefly as a tourist, since about 1985. I did, however, attend the 20th anniversary celebrations, in Canberra, of the 1996 Act.

2 I should also say at the outset that I welcome this review of the workings of the Act - which is entirely in accordance with my original recommendation for such reviews to take place at regular intervals (Reeves p 4) - and I am anxious to do anything I can to help.

3 Mr Reeves QC came to see me in Melbourne towards the end of his task and we had a two-hour discussion in which I gave my opinion on a number of questions he put to me. They were largely concerned with the reasons for certain recommendations I had made, and my views on several matters not dealt with in my reports. I was impressed by Mr Reeves' grasp of the many problems involved and with what seemed to be his even-handed approach to these problems.

4 I am equally impressed by the thoroughness of his Report. As far as I can tell, it states the necessary facts objectively and gives a fair account of the different views that have been put to him. From my rather distant perspective, it seems that many of his recommendations for change are reasonable and appropriate and should be implemented.

5 I would particularly endorse his recommendations for the speedy conclusion of remaining land rights claims; taking steps to ensure that royalty monies are directed towards community purposes and not to assist particular individuals or families; with appropriate safeguards to prevent misuse of power, making Aboriginal land subject to compulsory acquisition by governments on just terms; the application of specified Northern Territory laws to Aboriginal land; the effect of the Land Rights Act and Pastoral Land Act (NT) on Native Title claims; and the need to rationalise provisions concerning Aboriginal associations.

6 All that having been said, I am bound to say that I have strong reservations about some of his recommendations, including two that are central to his proposals. These relate to the identification of 'traditional Aboriginal owners', and their place in the scheme of the Act; and the future of Land Councils in the Territory. I shall deal with these and other less important comments under appropriate headings.

Traditional Aboriginal Owners

7 Although Mr Reeves recommends that the definition should not be changed, for good pragmatic reasons which I endorse very strongly, he is not happy with it and says,

> *"...the focus on traditional Aboriginal owners within the scheme of the Land Rights Act did not, and does not, adequately reflect either the state of anthropological understanding, or the reality, of Aboriginal traditional practices and processes in relation to the control of land. It is deficient because it pays too little regard to the dynamics of Aboriginal tradition within the wider regional populations to which these smaller localised groups belong"(Reeves p 119).*

8 This statement underlies a good deal of Mr Reeves' thinking, and thus his recommendations, on other matters. Accordingly, I think it is desirable that I should explain my purpose in recommending primacy for traditional Aboriginal owners, as narrowly defined, in the scheme which is now enshrined in the Act.

9 I did so because I believed that I should give effect, as closely as possible, to what I believed to be the Aboriginal law on the subject, which Justice Blackburn in the Gove Case had said was a system which could be called 'a government of laws not of men'. He said,

> "*My task is to examine the relationship of the clan to territory associated with it and to decide whether that association is a matter of property*".

10 In the result, His Honour's finding was that,

> *"...it seems easier, on the evidence, to say that the clan belongs to the land than that the land belongs to the clan"(Reeves p 25).*

11 In other words, Blackburn J found that the relationship between Aboriginal people and land was one of obligation rather than ownership, but he made this finding in relation to the clan. His assertion of the requirement of a proprietary interest satisfying common law criteria has, of course, since been overruled by the High Court.

12 As senior counsel for the Aboriginal plaintiffs, I had put the case to Justice Blackburn on the basis of the clan, because that was the evidence I was able to call from the two pre-eminent anthropologists of the day, Professors Stanner and Berndt. It was also the clear instruction I had from my Aboriginal clients. Throughout all the preparation for and hearing of that case, I heard no other view put by any Aboriginal or anthropologist.

13 Thus, when I approached my task as a Royal Commissioner, I began with the presumption that the clan stood at the heart of an extraordinarily complex system of Aboriginal land ownership - at least so far as Arnhem Land was concerned. As I took oral evidence from Aboriginal people in other parts of the Territory, in carrying out my Commission, I found no reason to depart from my initial view. They never showed any doubt as to the ownership of any feature that we passed (usually squatting in the back of a utility). A typical description would be - 'That hill is my country and my father's; the country you can see beyond is my mother's; to the left of the road is Jimmy's as far as the river; after that it is Nipper's'.

14 However, I was fully aware of all the other subtle relationships which existed and I did my best to record them in my first report, under the heading 'Aborigines and Their Land'. I attach that short section as Appendix A to this submission. As the Royal Commission continued, I heard nothing from Aboriginal witnesses to contradict what I had written and I can recall no later submission from any anthropologist which cast any doubts upon it.

15 Accordingly I took the view that it was impossible to legislate to protect all those different rights and entitlements given by Aboriginal law, and that the best course to take was to recognise the authority of the elders of the clan which was the primary owner of the land, and rely on them in their turn to recognise and respect the lesser rights of others in that land. I am not persuaded by anything in the Reeves Report that that was the wrong approach at that time, though I readily concede that a different approach may now be preferred in the light of over twenty years' experience.

16 I believe that the view I took of the centrality of the clan (referred to by Prof Radcliffe-Brown alternatively as a 'local group' and later as a 'horde'; by Prof Stanner as 'a patrilineal descent group' and by Prof Berndt as 'a local descent group'- Reeves pp 125-133) is supported by all those eminent anthropologists.

17 Prof Radcliffe-Brown, however, did not appreciate the difference between the land-owning clan and the land-using band (as I have called them). He spoke of the land-owning group as having exclusive rights to the produce of the land. It is a pity that Mr Reeves consistently speaks of Prof Radcliffe-Brown as representing the traditional anthropological view with which he contrasts his own conclusions. Profs Stanner and Berndt would have been more appropriate and more difficult targets for his criticisms.

18 Profs Stanner and Berndt accepted the distinction between the land-owning clan and the land-using band, an extended grouping of family and friends which lived together while hunting and gathering food, but which could be added to or subtracted from at any time by new arrivals or departures. These comparatively small bands always consisted of members of more than one clan - necessarily so because husbands and their wives had to come from different clans.

19 However, in Prof Stanner's opinion, which I accepted, there would always be an identifiable segment of one clan at the core of each band, and the band would spend some, but not all, of its time on the land of that clan.

20 The Reeves Report (pp 130-1) has a section headed 'Professor Stanner's theory rejected in Gove Land Rights Case'. I would make two comments about this section. In the first place, I think that heading is unfair to Prof Stanner. The only point of his evidence which was not accepted was whether each band had a core from a particular clan.

His Honour accepted the existence of clans (see para 9 above) and of their spiritual connections to particular land and their ritual obligations to it. He declined, as a matter of law, to designate those factors as a proprietary interest, and the High Court has now found that such a designation is unnecessary.

21 So far as the relationship between the clan and the band is concerned, Justice Blackburn relied on the fact that

"...not one of ten witnesses who were from eight different clans, said anything which indicated that the band normally had a core from one clan...".

22 In saying this His Honour was probably unaware of the difficulty of counsel in trying to direct the minds of uncoached and elderly witnesses, giving evidence through interpreters (who were strong either in English or in the relevant native dialect, but seldom in both), to a subtle point about the strength of particular clan members in the bands they remembered in their childhood or had been told about by their fathers.

23 The task was made more difficult by the narrow view which His Honour took about how far counsel could go in directing the mind of a witness to a particular issue before the question became an inadmissible leading question, and by the problems of terminology when one could never be sure how the idea of a band or 'territorial group'(Stanner) or 'co-resident group'(Berndt) would be translated into any particular Aboriginal dialect.

24 It is also quite possible, though I cannot remember, that counsel did not realise the importance which Blackburn J would attach to this point, and did not even try to ask the right questions of some or all of the witnesses.

25 In any event, I submit that the opinion of experts who have made a life-time study of a very complex anthropological issue should be preferred to that of a judge - even one as fair-minded and meticulous as Blackburn J - limited as he was by the rules of evidence. Prof Stanner's views are very fairly set out by Mr Reeves at pp 127-130, particularly at p 130.

26 I would also point out that the various judges who have been Land Commissioners have had no difficulty in applying 'entitlement to forage as of right' as one of the tests of ownership by local descent groups (Reeves pp 166-170).

27 Under the heading 'Criticisms of the classical model' (p 133) Mr Reeves purports to set out what he regards as

" the state of the anthropological understanding, [and] the reality of Aboriginal traditional practices and processes in relation to the control of land"(para 7 above).

28 In doing so he refers first to Miss Olive Pink and her work on 'kurtungurlu'. He says,

"...she discovered that the clan sites were confined to 'totemic' sites and the land in between was 'no man's land' common to 'the tribe, but never to any individual estate' .
Miss Pink said that men and women organised the men's and women's rites, respectively, of their mothers' estates" (Reeves p 135).

Mr Reeves then goes on to detail the role of 'kurtungurlu' more fully.

29 I can only say that neither of these concepts represent new thinking for me or for those whose advice I took.
I have always accepted that concepts of ownership revolved around totemic sites - so long as it is understood that these could include a river valley, a mountain range or a length of coastline - and that there were some stretches of country in which no-one had any interest. Certainly the Aboriginal people I knew never thought in term of borders or boundaries between their land and that of their neighbours. I confess that the idea that this land of no interest was in any sense 'owned' by the 'tribe' is new to me, but I very much doubt if Miss Pink was saying that.

30 So far as 'kurtungurlu' (which has as many names as there are distinct dialects in the Territory) is concerned, this phenomenon has been well-understood for a long time and I referred to it in para 28 of Attachment A.

31 Mr Reeves next relies, for his statement in para 7 above, upon Prof Meggitt (see pp 135-37). Prof Meggitt refers to what I have called clans as 'patrilines' or 'cult-lodges' (I am not clear as to the distinction between the two). He says,

"Although the patriline has a local reference in that its lodge is ritually linked with identifiable dreaming sites, it is not in itself a local residential group; the members do not exclusively occupy a defined territory.....Despite the wide dispersal of family units during much of the year, the degree of localization of the patriline is sufficient for the men to maintain fairly frequent face-to-face contacts and to act as a corporate group...[They] gather together to perform revelatory and increase ceremonies and to assist other lodges in such affairs.....Neither the patriline nor its associated lodge 'owns' a defined tract of land on which its members reside or hunt to the exclusion of other people, but when all the ritual relationships between lodges and dreaming sites are summed, they constitute in part the community's title to its country and the resources of that region."

32 Prof Meggitt, in the passages quoted by Mr Reeves, does not indicate in what way - if at all - the ritual relationships between lodges were 'summed' by Aboriginal people, or what he means by constituting 'in part' the community's title. It may be that, in the case of the four separate Walbiri groups which he was studying, each 'community' did consist of a set of clearly identifiable patrilines or lodges to the exclusion of other Walbiri people and of people from other language groups, though I would be surprised if that were so.

33 Dr Peterson, for whose opinions I have a high regard, pointed out that,

"the community itself had no totem, lodge site or exclusive rituals relating it directly to the landscape"(p 137).

Mr Reeves says of this statement that Justice Blackburn did not share the implied assumption that Aboriginal law required such signs as evidence of ownership. But because His Honour rejected the existence of common law ownership, he made no decision as to what was required by Aboriginal law to evidence communal title. His suggestion that the whole Aboriginal population of a wide geographic area might be able to claim 'communal native title' to that area on the basis of a form of mobile occupation rather than ownership, is not to the point in the present context.

34 Mr Reeves next refers to Dr Hiatt, and quotes him as finding that, among the Gidjingali people whom he studied, there were 19 'land-owning units and their estates, each comprising a cluster of named sites and the surrounding country side'. (It will be noticed that on this point Dr Hiatt seems to differ from Miss Pink, who referred to the sites themselves as the limit of clan estates.) Dr Hiatt went on to say that, of the 19 units, 13 consisted of one patrilineal descent group, three of two such groups and three of three groups.

35 I do not find it at all surprising that, with the upheaval which European settlement represented, some of these small groups would leave their land and ally themselves with the land of a related group and, over time, loose their ties with their original country and be accepted as joint owners by the receiving group. It would be interesting to know what distances were involved and what numbers were in the respective groups. I suspect the numbers of those groups which deserted their traditional lands would have been small - possibly verging on extinction.

36 Dr Hiatt is also quoted as saying that, in legal proceedings under the Act,

"...patrifiliation has been accorded an undue pre-eminence in the definition of land ownership, at the expense of other cognatic links (especially matrifiliation) and of criteria such as putative conception-place, birth-place, father's burial place, grandfather's burial place, mythological links, long-term residence and so on.'

37 Dr Hiatt also makes

"...the theoretical point that in pre-European times multiple criteria for affiliation to land-owning groups may have constituted a set of credentials enabling individuals to gain access to a wider range of physical and metaphysical resources...."

38 Dr Hiatt might be right in this speculation, but it hardly justifies Mr Reeves saying, as he does at p 140,

"That is to say, the priority initially accorded in anthropology to Aboriginal statements of principle, such as the principle of patrilineal descent groups, was misplaced. It was, at best, a one-sided reflection of traditional Aboriginal processes and practices.....Furthermore, the willingness of anthropologists to accept these expressed priorities as a representation of social reality reflected a preference, within anthropology, for simple explanatory concepts, rather than complex, dynamic, and multi-faceted processes. In my view the Land Rights Act has inherited this one-sided reflection of Aboriginal processes and practices by proclaiming a simple definition of traditional Aboriginal owners and by according them a special status and various benefits, compared with other Aboriginal people who had traditional affiliations to land. In the same process, it has overlooked the group that best represents the complex, dynamic and multi-faceted facts of Aboriginal traditional practices and processes in relation to the control of land : the regional community."

39 I leave aside the gratuitous reference to anthropology's preference for simple concepts, apart from saying that I never detected any trace of it in any of the anthropologists with whom I worked. I reject, however, any suggestion that the possibility of using 'the regional community' as the basic unit for land rights purposes was 'overlooked'.
In fact, I considered it very carefully and rejected it for several reasons, which I set out in paras 76 to 89 of my second report.

40 The first of these was the difficulty of defining, or even describing, such communities. It might have been possible, though difficult, to arrive at a definition which could apply to Prof Meggitt's Walbiri communities (Reeves p 136), but how could one apply such a definition to the 'communities' in the townships of Maningrida or Yirrkala, or the people living on the Todd River in Alice Springs? Such 'communities' included unrelated groups who had been enemies in earlier times. They also represented floating populations of people who moved to and from outstations, which were 'communities' in their own right.. These problems would have applied wherever Aboriginal people had come from long distances to live, at least most of their time, near a mission or government settlement, where food was readily available, along with education and health facilities.

41 The other main problem I had with such a concept was that I could see no justification for saying that 'communities' which had come together simply as a result of European incursions into Aboriginal country, could be recognised as having 'the traditional rights and interests .... in and in relation to land' which my Commission required me to find means of recognising and establishing. To recognise such community councils, in preference to tribal elders, would have flown in the face of Aboriginal traditions.

42 However, I left it open for communities to make applications for land under a trust system(second report para 88; Reeves pp 174-5) and saw a time in the future when such community-based land ownership could become more appropriate than a trust system (Reeves p 144). Whether that time has yet arrived I am unable to say of my own knowledge, but I doubt it. On the other hand, I see no difficulty in a group of related traditional owners, as presently defined, joining together to bring a single claim for their combined areas of land. This could well apply in the Walbiri example, or others like it (see what was said by Toohey J, quoted at Reeves p 153).

43 Of the other anthropologists referred to by Mr Reeves, I have no difficulty with Dr Sutton's tentative view that 'a small-scale land-holding group' (which he accepts does exist) does not hold its land 'against the rest of the world', and that

"members of their wider regional group may be said to have an underlying or 'residual' interest in all the small estates of the region."

44 Of course there are other related groups with hunting and gathering rights over the land, and some with very important 'kurtungurlu' rights and responsibilities.

45 Dr Sutton goes on to say,

"On this basis, and according to context, regional group members may be entitled, under indigenous customary law, to play a part in decision-making about land use in large sub-areas of their region's land or even those lands as a totality..."(Reeves p 141).

46 He could be right in this tentative and qualified speculation, but I would be confident that it would be the views of the local descent group, and perhaps the 'kurtungurlu' group, that would carry the day about their particular land.

47 I entirely agree with the passages quoted from Prof Williams (p 141) to the effect that local descent groups have proprietary interests in land and that the sharing of religious myths between such groups provides checks and balances in the making of 'any otherwise

unilateral decision affecting land or resources', and that this is particularly true in the case of 'certain uterine relatives', which I take to be a reference to 'kurtungurlu'.

48 Dr Peterson's description (p 142) of wider Aboriginal groupings than the local group or band, which he calls 'drainage division based culture-area populations', I find particularly interesting. I am not sure how well his ideas march with the division of the Territory into geographical regions, as proposed by Mr Reeves (see below). I completely agree with the other references attributed to him by Mr Reeves at pp 142-4.

49 Prof Merlan is the last of the anthropologists dealt with by Mr Reeves in this section (pp 144-5). She speaks of

"the inappropriateness of identifying any single definitively bounded group associated with a particular tract of land in a single way that is relevant to all purposes.....the character of Aboriginal modes of land tenure lies in the multiplicity and specific kinds of relationships, their use and relativisation to each other in practice, and the development of a vivacious politics around all this".

50 Apart from uncertainty as to the meaning of 'a vivacious politics', I have no quarrel with these statements. Prof Merlan also said,

"...it is now clear that political solidarity and corporateness are not to be understood as continuous and absolute properties of groupings however small; and that labels such as 'clan' designate particular ways in which people can see themselves as belonging to localised collectivities rather than solidary entities that function in a completely corporate manner."

51 Of course what I have called 'clans', and others have called by different names (I am not sure what Prof Merlan means by the term), do not 'function in a completely corporate manner'. Their members are scattered among different bands, and they only come together, along with other interested and welcome people, for ceremonies to renew their land and its fruitfulness. Even then, some members of the clan would inevitably be missing for one reason or another.

52 I do not understand how the last quotation from Prof Merlan enables Mr Reeves to say that she 'rejected the notion that there are any corporate groups in Aboriginal tradition'. She simply said that clans did not 'function in a completely corporate manner'.

53 Prof Merlan is finally quoted (p 146) as advocating,

"...explanation of regionally relevant ways of making relationships to given areas and consideration of the constituencies that may arise from such modes of relationship."

I do not envy the task of anyone trying to give such an approach legislative form.

54 Having cited Prof Meggitt, Dr Hiatt, Miss Pink, Prof Merlan and Justice Blackburn as authorities for the view he expressed in para 5 above (which, I submit, takes them beyond what they have said), and rejecting the opinions of Prof Stanner, Prof Berndt, Prof Williams and Dr Peterson. Mr Reeves goes even further.

54 He says, at pp 202-3,

"...the anthropologists had attempted, but had failed, to identify a corporate group within Aboriginal tradition as the 'owners' of traditional lands.....However , the attempt was misconceived because there were no such corporate land-owning groups in Aboriginal tradition. This should have been evident after Justice Blackburn's decision in the Gove Land Rights case. ....In attempting to identify a corporate group of 'owners', too little regard was paid by anthropologists to the dynamics of Aboriginal tradition within the regional population of which these groups were part."

55 I can only say that, for the reasons I have given, I disagree entirely with these statements. I also reject Mr Reeves statement, at p 203 and elsewhere, that

"...the focus on statutory traditional Aboriginal ownership within the bureaucratic and legalistic framework of the two large Land Councils has led to irreconcilable disputes about traditional Aboriginal ownership."

57 Putting aside the pejorative adjectives , I can see no reason to assume that 'irreconcilable disputes' would not have arisen under any community-based system that might have been devised in 1973. Mr Reeves' comparison with the smooth settlement of issues on Groote Eylandt and Bathurst and Melville Islands is simplistic because, as he himself recognises,

"...it is probably not co-incidental that these two new land councils are island populations whose lands are defined by natural boundaries and who have a largely homogenous cultural base."

Summary of this section

58 The points I would like to emphasise about traditional Aboriginal owners are as follows:

(a) Aboriginal laws and traditions relating to interests in land are highly complex and made difficult to ascertain by the effects of European settlement. Anthropologists have long recognised these facts and made allowance for them in their research and publications. However, one of the earliest of the great anthropologists, Radcliffe-Brown failed to recognise the difference between land owning and land use, which later generations have clearly seen. Mr Reeves does less than justice to the reputations of other great anthropologists such as Stanner and Berndt and reads too much into some of the statements of a few more recent practitioners.

(b) It is impossible to translate the totality of Aboriginal interests in land into Australian legal language in order to protect them.

(c) Just as ownership of land in European law consists of a bundle of rights, so does Aboriginal ownership.
The clear central right (and obligation) was that of performing the ceremonies which renewed a particular area of land and made it fertile. This right and obligation was held by a particular local descent group (usually, but not necessarily, patrilineal) which often performed it with the guidance and assistance of a related group. The members of the land-owning group had close spiritual ties with their land, including a belief that their spirits came from that land and would return to it after death.

(d)These same groups had undisputed rights to hunt and gather over the land in question. Their members normally did so in small bands, which always included some members of other clans, at least as a result of marriage. Members of the relevant clan could also be in a minority in such a band. Some friendly bands which contained no members of the clan could also forage over the same lands with permission or by custom.

(e) Blackburn J, in the Gove case, accepted the clan relationship with its land, but declined to classify it as proprietorial, which he saw as a necessary element of communal native title. He was also unconvinced by the Aboriginal evidence about the degree of involvement of clan members in the bands which traversed their lands. This served to support his view that ownership, as distinct from spiritual connection, was not established. The usage connection was not clearly made by those witnesses.

(f) When required by my Commission to find a way of translating Aboriginal law and traditions into English legal terms, I fastened on the undisputed (as I saw it) connection between the local descent group or clan and its land, and relied on the elders of that group, through the legal concept of a trust, to deal with any land entrusted to them in accordance with the requirements of Aboriginal traditions and customs, giving appropriate recognition to any other interests. I confess to being disappointed at the high level of

intractable disputation that has occurred. I accept the statement by the CLC (Reeves p 175) that,

"Disputation and conflict were part of traditional life. But colonialism, population dispersals, life in settlements, wholesale deaths of senior generation members, stolen children, royalties and the like have fuelled and exacerbated the situation.'

(g) I regarded the only possible alternative basis, of grants to communities, as much less appropriate. Most such communities were European constructs, having no place in Aboriginal traditions. It seemed too difficult to distinguish between them and those other communities which had stayed on their own lands and maintained substantial elements of their old habits and lifestyles. Larger language groups were too widely scattered to represent suitable landholding units and, in any event, I had no evidence of such tribal ownership of land under Aboriginal law.

(h) I maintain that the emphasis I placed on the local descent group was right at the time and that Mr Reeves is wrong to suggest otherwise. I believe that it is still right today, though I foresaw and now willingly concede that times are changing and, as true spiritual ties weaken, it may be appropriate to put greater emphasis on communities, particularly in cases such as the Walbiri described by Prof Meggitt.

Land Councils

59 Mr Reeves has recommended that the Northern and Central Land Councils should be done away with and their places taken by some 16 to 18 regional land councils. While I can understand his reasons for making this recommendation, and have some sympathy with them, I would counsel caution and suggest a less drastic solution to existing problems.

60 My reasons for such a submission can be summarised as follows:

(a) I do not believe Mr Reeves has made out a sufficient case for such a radical step.

(b) In particular, his strong and repeated reliance on the examples provided by the regional councils on Groote Eylandt and Bathurst and Melville Islands is unwarranted.

(c) To do as he suggests would constitute a long leap in the dark, which could have very serious consequences.

(d) Desired results could be achieved by a staged process which would not have the same great risks.

(e) It would be strange to create many new regional councils in the Northern Territory, where two strong Councils covering wide areas are firmly established, at the same time that the Commonwealth Government is, according to newspaper reports, moving to consolidate regional councils in the States.

61 I shall deal with these points in turn, except for the last, which needs no elaboration.

<u>Reasons for abolishing the Northern and Central Land Councils</u>

62 Probably the chief reason for this recommendation is that it fits neatly with Mr Reeves' view that regional populations represent "the level at which Aboriginal culture is reproduced and at which the land was occupied, used and 'owned' " (p 148). As I have already indicated, I do not believe that this sweeping statement, whatever the reference to culture may mean, is any more true of the region than of the linguistic group or 'tribe', the community (in Prof Meggitt's sense as applied to the Walbiri), the band or the clan. One only has to read Mr Reeves' careful descriptions of the 'cultural factors' and 'conclusions' applying to each of his proposed regions, in Appendix H of his Report, to realise that many of their populations are far from heterogeneous.

63 Another reason is that the two big Land Councils are said by Mr Reeves to have become 'bureaucratic and legalistic', remote from the ordinary Aboriginal communities. The tasks of the Councils over the years have been immense and highly complex. It is inevitable that they would build up considerable staffs, but those staff members must have developed a deal of expertise and experience, as well as becoming used to working as teams in their various areas of responsibility.
To cast them all adrift, perhaps to seek employment under a new regional system, would be very disruptive for them personally and at least as disruptive of the system. Any requirement to make them more regionally oriented could be achieved without disbanding the Councils.

64 A third reason appears to be the tensions that have developed between the Councils, particularly the NLC, and the Northern Territory Government (Reeves pp 67-8, 101-2). These are to be regretted and I entirely agree with Mr Reeves that a new sense of partnership needs to be established. But my impression is that the responsibility for these tensions lies largely with government, which seems to have tried to place obstacles in the path of land claims right from the outset. I note Mr Ian Viner's description of this at p 67, where he says,

" The political attitudes of Northern Territory Governments over the last 20 years have been a disgrace, in their constant and unremitting opposition to land rights claims...".

65 In the face of such an approach by government, it is not surprising that the Council officers, over the years, have become suspicious and resentful of governmental attitudes and in return, no doubt, somewhat intransigent themselves. This hardly seems to be a reason for scrapping the Councils - particularly since many, if not most, of those officers will have to be re-employed to staff the new entities to be created, and may well be even more resentful about the disruption to their lives.

66 Yet another reason is the suggestion, in the case of the Northern Land Council, that the Chairman has become over-powerful, and his family and his people have received excessive benefits from mineral royalties as a result. If this is so, and I cannot comment on the factual situation, there are other ways of dealing with such a problem than winding up the Council. Indeed, other recommendations of Mr Reeves, which I strongly support, such as widening the range of recipients of such royalties and ensuring that they go to community projects, would go a long way towards solving any such problems.

The Tiwi and Anindilyakwa Land Councils

67 I have already indicated my long-held view (see para 58 of Appendix A) that the Tiwi people are a special example of homogeneity. In Appendix IV to my first report I described what I called their 'cultural isolation' from the mainland. Although the situation on Groote Eylandt and Bickerton Island is a little more complicated by relationships with the mainland, the people are (or were at the time of my first report, see Appendix IV) almost all Anindilyakwa speakers, so once again there would probably be few problems or disputes about land.

66 I note, however, that Mr Reeves is concerned about the way mining royalties have been distributed on Groote Eylandt (p 354). Decisions, of whatever nature, by regional boards, which favoured local leaders at the expense of the community generally, would be very difficult to challenge when those boards were completely autonomous.

69 It is, in my view, simply not possible to extrapolate from these two special cases to make assumptions about how well regional councils would work in other areas. Mr Reeves has relied on these precedents at pp 100-1, 118, 185-7, 190-3, 200-1, 203, 207 and 612.

70 In this connection, I note the reference by the Northern Territory Government (Reeves p 545) to 'the difficulties experienced in larger communities where multiple clan and language groups congregate'. All my experience suggests that these difficulties are very real, and it would be unrealistic to expect a local board to resolve disputes satisfactorily with no outside assistance.

The leap in the dark

71 Mr Reeves' proposals for regional councils involve

(i) determining and defining regional boundaries and, in some cases, allocating particular communities to regions which are not geographically obvious - for good cultural or historical reasons (Reeves p 209);

(ii) once the regions have been established, the members of each region will be called upon to decide how their governing boards of directors will be constituted and selected;

(iii) when that task has been completed, the boards will select their CEOs (to be approved by NTAC) who will have the sole responsibility (it would seem) for determining what staff are required and then finding and hiring suitable people - it must be assumed that nepotism will not be a problem, or that a board could and would dismiss the CEO if obviously inappropriate appointments were made;

(v) it will then be necessary to constitute the NTAC, by making ministerial appointments (from Aboriginal nomination lists) of a number of council members (to be determined) who will hold office for an uncertain period of years, and who will select a CEO from a list to be provided by ministers; that CEO will have the same absolute control of staffing as the CEOs of the regions;

(vi) finally, it will be necessary for all the existing land trusts to be reconstituted, so that some or all of the members of the regional boards become trustees for the Aboriginal land in each region. In this connection, I note the view of Pastor Albrecht, apparently speaking for the Arrente people, that 'there must be no

amalgamation of discrete parcels of land into larger land trusts' (pp 111-2).

72 All this will take considerable time, at least many months, during which the Aboriginal people of the Territory will probably have no united and effective voice. It could hardly be expected that the NLC and CLC would continue to operate effectively while awaiting dissolution, with no real mandate and staff members having to seek other employment to secure their futures.

73 The transition to regional councils could thus be guaranteed to produce a substantial period of disruption. But even after that was over, there would still be great risks.

74 One of these is the dominance of some councils by powerful individuals (see, for example, Reeves pp 193, 196). Another is the possibility that outside influences, perhaps governmental or religious, might become dominant (Reeves p 197)

75 I also have concerns about the proposal that each regional council should be able to adopt "the decision-making process that it considers most accurately accords with Aboriginal traditional processes" and that these may vary with circumstances (Reeves p 210). Apart from the fact that this would hardly cover telephone conferences, for example, if Councils are left at large to devise informal methods of decision-making, this may work well for the granting of short-term licences, as Mr Reeves suggests, but what if an important decision, involving special benefits to one person or group is made, or alleged to have been made, in some informal way without general consultation? It could prove very difficult to challenge. Even if it were clearly in breach of Aboriginal tradition, there could be no resort to a court of law (Reeves pp 212-3). (On this point, I would have thought that the courts might well be given the same limited powers of judicial review of administrative decisions which apply in the wider community to governmental decisions).

76 No doubt Mr Reeves would argue that the NTAC would have power to deal with any improprieties or abuse of power by regional boards, but this would only apply to major decisions or agreements. He speaks of a need for 'strategic supervision' in such cases (pp 211, 605, 608-9), but this would take the form of a request to the Minister

to direct the board to review its decision. He also recommends that the Northern Territory or Commonwealth Ombudsman should have the same power to investigate a complaint about a regional board that he or she has for government departments.

77 All this leads me to ask what is to be gained by abolishing the Northern and Central Councils in favour of a Territory-wide council, however constituted. There is a natural divide between the Top End and the Centre, and the respective Councils must have become thoroughly familiar with the needs and wishes of their constituents. Presumably the NTAC would meet in Darwin and all the representatives from the Centre would have to make long and expensive trips to attend. Decisions would then be made by a body in which only half the members would have any great knowledge of local circumstances and the history of any particular issue.

78 Mr Reeves acknowledges that he found 'almost unanimous support amongst Aboriginal people at the community meetings held by the Review for the retention of [the] political role for the two large Land Councils' (p 102). It may be doubted if there would be the same level of support for an NTAC consisting of members appointed by governments, even though from a list supplied by Aboriginal sources.

79 There is also no persuasive evidence that the large Land Councils have not performed their functions appropriately. Mr Reeves quotes many and varied criticisms that were made to him (pp 105-116), but says he is not able to determine the rights and wrongs of these accusations. Many of them sound as though they come from people who have not got what they wanted from the Councils; it is inevitable that unsuccessful parties to a dispute will look for some person or body to blame.

80 The Councils have had to become involved in some very difficult matters, such as the Wagait dispute (pp 180-3), which sounds as though it has been handled very responsibly. Mr Reeves' description of the NLC's approach to dispute resolution (pp 183-5) sounds very sensible, and his belief that a small regional council would do the job better, without assistance from lawyers or anthropologists, and with no real appeal on the issues which would normally decide disputes, is completely untested - apart from the

atypical cases of island communities. One can only wonder what a smaller local council, perhaps with board members taking different sides, would have made of such a problem as the Wagait dispute. The NLC was at least disinterested and at arm's length from the parties involved.

81 For these and other reasons which would be advanced, such as suspicion of motives and fear of outcomes, I suspect that the abolition of the Northern and Central Land Councils would be strongly opposed by Aboriginal organisations both in the Territory and nationally. The vital task of reconciliation would be seriously retarded and, in my view, all for very little purpose.

A better approach

82 In my submission a better approach would be to follow the thinking of Justice Toohey, set out by Mr Reeves at p 205, and firmly establish regional committees of the existing Land Councils. These need not be limited in their powers so far as land rights questions are concerned. They could be given, as Toohey J suggested, "wide powers with regard to Aboriginal lands within [each] region".

83 Mr Reeves says that

"*...both of the large Land Councils made it clear...that they wished to retain the ultimate decision making power within their full Land Councils.*" I

would not read their submissions (p 206) in that way. The NLC seems to me to be referring to the need to affix its seal to agreements for reasons of certainty and security. Mr Reeves sees a need for NTAC to have oversight of major agreements (p 608-9), so there seems to be little difference here. The CLC actually suggests that the extent of powers to be regionally devolved could be left to ministerial decision. That does not sound like an intransigent attitude.

84 The creation of regional committees of the large Land Councils would not preclude some of them from becoming fully autonomous over time, if it became clear that there was a majority of informed

local opinion in favour of it, and if it was sensible from the point of view of convenience and cost (a decision which might have to be made by the responsible Minister). I refer to 'informed local opinion' in the light of the work of Dr David Martin (Reeves pp 194-5) and Mr Stead (pp 193-4 and 196) which indicated that many people who had expressed an opinion in favour of regional autonomy did not have a full understanding of the issues involved or had not heard both sides of the argument.

Other lesser matters

Preamble (p 77)

85 I believe this is a good idea, though the first dot point would need to be reworded to make it clear that 'the people of the Northern Territory' include Aboriginal people. I also think there should be specific references to education and health, the needs of which Mr Reeves rightly emphasises on a number of occasions in his Report.

Delegations to Northern Territory ministers (pp 492-3)

86 Although this is a logical step to take at the right time, I do not think it should happen until there has been a significant period of better relations between the Northern Territory Government and its Aboriginal constituents than has been the case so far. In building up the partnership approach which Mr Reeves so rightly advocates, I believe there should be a period during which the Commonwealth Government continues to have a central role, while the NT Government and representative Aboriginal bodies try to conciliate their differences.

Administration of ABR (pp 368-9)

87 I accept the need for better and more transparent and accountable distribution of royalty monies, which are, as Mr Reeves points out, public monies. In the absence (if my submissions were accepted) of an NTAC, I would suggest that a small committee be established, using the method proposed for the initial appointment of NTAC board members, with a very small permanent staff and out-sourcing the necessary accountancy work, investment advice and auditing. The same services should be available to regional committees or boards in handling their affairs.

Land Trusts (p 486)

88 Instead of a wholesale transfer of trustee responsibilities from traditional owners to regional boards or committee members - which I believe would create more problems than it solved - it should be made possible to transfer such responsibilities to a representative corporate body wherever there is general agreement, or clear and informed majority approval, for such action.

Mining agreements (p 534)

89 Smaller Land Councils, and regional committees of the two large Councils, should have the powers suggested by Mr Reeves. In the absence of an NTAC, 'strategic oversight' of the regional committees -and perhaps of the smaller Councils - would be in the hands of the relevant large Council. If that Council was unable to conciliate any differences with a regional committee or small Council, the matter should be referred to a responsible authority for determination - rather than merely seeking an order that the local body review its previous decision. The responsible authority could, for example, be a Land Commissioner or a delegate of the Minister.

Congress of Regional Land Councils (p 599)

90 Mr Reeves has recommended the establishment of such a Congress, consisting of one representative from each regional Council. It would determine its own 'structure and processes', but I am not clear about its powers, given the existence of a proposed NTAC. If my submissions were to be accepted, I would see no need for such a body in the short term. However, it would be incumbent on the two large Land Councils to include any smaller Councils in their deliberations at any time they purported to speak for Territory Aboriginal people generally. If more smaller Councils were created over time, there could be need for a more formal arrangement, such as the Congress.