COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS

Reference: Reeves report on the Aboriginal Land Rights (Northern Territory) Act

WEDNESDAY, 10 MARCH 1999

CANBERRA

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS

Wednesday, 10 March 1999

Members: Mr Lieberman *(Chair)*, Mrs Draper, Mr Haase, Ms Hoare, Mr Katter, Mr Lloyd, Mr Melham, Mr Quick, Mr Snowdon and Mr Wakelin

Members in attendance: Mr Haase, Ms Hoare, Mr Katter, Mr Lieberman, Mr Lloyd, Mr Melham, Mr Quick, Mr Snowdon and Mr Wakelin

Terms of reference for the inquiry:

The Committee shall inquire into and report on the views of people who have an interest in the possible implementation of recommendations made in the Reeves Report. In particular the Committee will seek views on:

(1) the proposed system of Regional Land Councils, including

  (a) the extent to which they would provide a greater level of self-management for Aboriginal people, and

  (b) the role of traditional owners in decision making in relation to Aboriginal land under that system;

(2) the proposed structure and functions of the Northern Territory Aboriginal Council;

(3) the proposed changes to the operations of the Aboriginals Benefit Reserve including the distribution of monies from the Reserve;

(4) the proposed modifications to the mining provisions of the Act including the continuing role of government in the administration of these provisions;

(5) proposals concerning access to Aboriginal land including the removal of the permit system and access to such land by the Northern Territory government; and

(6) the proposed application of Northern Territory laws to Aboriginal land.

The Committee shall make recommendations on any desirable changes to the proposals made in the Reeves report in the light of the views obtained.

WITNESSES

Committee commenced at 5.06 p.m.

CHAIR—I welcome everyone to the first public hearing in Canberra of our inquiry into the recommendations of the Reeves report. I will make some comments now for the benefit of those who were not in Darwin when the committee commenced its hearings. The minister, John Herron, has asked the committee to seek the people's views about recommendations in the Reeves report. We are approaching this inquiry in a very challenged way. It is a very important issue, and we are keeping an open mind. We are very keen to encourage submissions from all interested parties, whether they be for or against or halfway. We are very keen to hear advice and views from both Aboriginal and non-Aboriginal people.

We hope that there will be a spirit of cooperation that will lead to the committee being able to make some very worthwhile recommendations. We are consulting widely. We have visited Darwin and Bathurst Island. We are going on an extensive visit to Central Australia next month and to other parts of the territory later. We hope to keep the committee on track to report to parliament by August this year.

This hearing is open to the public and a transcript of what is said will be made available. If anyone would like details about the inquiry or transcripts of the inquiry, the committee staff will be happy to help you. I now welcome witnesses from ATSIC to give evidence, some of whom we have already had the pleasure of meeting and talking with.

[5.09 p.m.]

CRAWSHAW, Commissioner Josie, Alternative Deputy Chair of ATSIC and Commissioner, Northern Territory Northern Zone, ATSIC

CURTIS, Commissioner David, Commissioner, Northern Territory Cental Zone, ATSIC

DHAMMARANTJI, Mr Jeffrey Malawa, Deputy Regional Chairperson, Miwatj Regional Council, Northern Territory, ATSIC

JACK, Mr Tony, Chairperson, Garrak Jarru Regional Council, ATSIC

WILLHEIM, Mr Ernst, Visiting Fellow, Faculty of Law, Australian National University

CHAIR—Although the committee does not require you to speak under oath, you should understand that these hearings are legal proceedings of the Commonwealth parliament. Giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Hansard will be taking a record of what is said today. From time to time I would ask you to help us by spelling names that perhaps are not familiar to the Hansard reporters and the poor old chairman so that details are recorded accurately. Before we ask you questions, do you have a submission that you wish to table?

Ms Crawshaw—Yes, Mr Chairman, we do have a submission and part of that submission that we will be tabling today is an opening statement.

CHAIR—Is it the wish of the committee that the submission tabled today by ATSIC be accepted as evidence to the inquiry into the recommendations of the Reeves report and be authorised for publication? There being no objection, it is so ordered. Do you wish to make an opening statement?

Ms Crawshaw—Yes, Mr Chairman. In making these opening comments to the committee today, I convey the apologies of the ATSIC Chairman, Mr Gatjil Djerrkura. It was not possible to find a time which suited both the committee and Mr Djerrkura.

We met with the committee one week ago in Darwin. The primary purpose of today's meeting is to provide to the committee a formal submission on the Reeves report. However, I must stress that we do not see this as our final word on the Reeves report. As I indicated in Darwin, we wish to reserve our right to make further submissions to the committee in the light of ongoing analysis and further consideration by the ATSIC elected arm and the Aboriginal community of the Northern Territory.

In these comments, I wish to emphasise a number of points which ATSIC considers to be of importance. We want the committee to take careful note of these matters. Firstly, there is the ongoing importance of traditional law and custom in respect of Aboriginal decision making about land. There are two issues here. One is that in the Northern Territory Aboriginal law and custom by and large remain central to how decisions are made, and that to flout such law and traditions is not acceptable. The other is that this fundamental fact of

Aboriginal life should be reflected in the land rights legislation. If it is not, we should not call this land rights legislation at all. At present, the land rights act gives traditional owners primacy in decision making. Under the Reeves proposal, this would no longer be the case. The committee will find that this is a consistent theme when it meets with Aboriginal communities and people, and also in submissions from leading experts.

Evidence taken by this committee at Bathurst Island last week made very clear that ultimately decisions about the use of Aboriginal land can only be made by the traditional owners of that particular land—by the clan responsible under Aboriginal law for its control and management. There is no getting around this fact of Aboriginal law in the Northern Territory. Sure, there are all sorts of responsibilities held by all sorts of people, depending on the nature of the decisions to be made. In the last resort, only certain people can speak for what we call 'country'—and this is the basis of Aboriginal law and custom. What we are saying is that the necessary connection in legislation between decisions about land and traditional ownership must not be broken. Unfortunately, this is exactly what Mr Reeves proposes.

ATSIC therefore calls on the committee to explicitly and unanimously reject the Reeves report in this regard, otherwise we will have a regime which is directly hostile to Aboriginal culture. In these circumstances, we will be back to the discredited policy of assimilation which caused so much pain and suffering. Australia will stand condemned for disregarding the fundamental human rights of its indigenous people to live and act in accordance with their law and culture.

I now turn to the circumstances surrounding the development of the Reeves report. We discussed some of these matters in Darwin, but ATSIC is concerned that the committee should squarely confront these matters. It is not just that there may have been some problems with the way the report was developed, but that we should now get on with looking at the recommendations.

In the case of the Reeves report, the problems are so significant that they have to be addressed. These problems start with the unsuitability of the reviewer: a single Northern Territory barrister, who had limited experience in the area of land rights and who had a strong political involvement in the life of the Northern Territory, was clearly an inappropriate choice. There is a perception, rightly or wrongly, of bias and of an agenda set by the Northern Territory government. The significance of this is that the report lacks credibility, as will any amendments to the act based on it.

As well, there are the huge problems in the consultation process followed, and where there was no consultation in relation to major recommendations in the report. The fact that the report was developed with virtually no input from the steering committee which had been set up to guide it needs to be noted and considered, and ATSIC suggests questions should be asked. The huge costs of the exercise, now in excess of $1.3 million, should also be noted, given the enormous problems facing us in Aboriginal health and housing. What we are asking the committee to do is to confront and consider these basic flaws in the Reeves report. They are too important to be skipped over.

ATSIC is also concerned that the deliberations of this committee will similarly be based on inadequate consultation processes. Already there are worrying signs. It is simply not sufficient to visit some communities for a few short hours and consider that any accurate view of Aboriginal responses to the Reeves report can be obtained. There needs to be adequate time and resources; there needs to be a recognition that the hearing process is foreign to many Aboriginal people and it is very difficult for them. In this case, these difficulties are compounded by the absurdly complex Reeves report.

It must be remembered that very few Aboriginal people in the Northern Territory have formal schooling beyond a basic primary or junior high school level and that for many people English is a second language which is both poorly understood and a difficult medium of communication, especially at the level of legislation and policy. These cross-cultural and language difficulties are to some degree inevitable, but the committee should be aware of them, do everything in its power to minimise them and realise it should be cautious in its approach.

One obvious way to respond to this situation is to be prepared to spend more time with more communities. For example, what sort of consultation process in the Northern Territory can leave out the whole of the gulf region? The questions here are: whose timetable is important; why is there a rush; would it not be better to have a more inclusive process, even if it took a little longer? Remember, Aboriginal people will be living with the consequences of these changes for a long time.

There are some specific issues which ATSIC wants to draw to the attention of the committee. One is our legal view that there are significant legal problems in respect of a number of the proposals in the Reeves report. These legal issues are summarised in the submission we are presenting today. These concerns are serious enough to put a major question mark over a number of the central proposals in the Reeves report. The committee should take careful note of these legal concerns, which cover constitutional problems, problems with the Racial Discrimination Act and problems of natural justice and of established legal policy. We would be prepared to expand on these problems at a later date; for the moment we have identified where the major problems lie.

I turn now to the proposed abolition of land trusts and the transfer of Aboriginal land from the trusts to the regional land councils. In Darwin, chairperson Mr Jack spelt out for the committee how wrong Mr Reeves had been in saying that these trusts do little. ATSIC wishes the committee to take particular note of the issue of land trusts. To ATSIC, the proposed abolition of the land trusts represents an unjustified and inexcusable expropriation of property. It would generate compensation claims. More importantly, it is hard to imagine the hurt and bitterness which would result.

All those claimants who over the years since 1976 have been successful in getting their land granted, having trusts established and being provided with the deeds to their land would see this all taken back. Their title would be handed over to regional land councils which might, or might not, include or represent the traditional owners. This would be a cruel blow and a betrayal of trust beyond imagination. It would make a mockery of all the processes which have taken place for land claims under the act.

If anything, the role and functions of land trusts should in fact be strengthened in the land rights act. ATSIC and others have made clear their opposition to the proposal to set up 18 regional land councils. ATSIC acknowledges that in some areas there are concerns about the large land councils and a desire either for a greater degree of devolution or the formation of new land councils.

It seems evident that the existing provisions of the act allow for these circumstances, and, as has been pointed out, two land councils have been set up under these provisions—the Tiwi and the Anindilyakwa land councils. Nevertheless, to the extent that problems are perceived with the current provisions of the act providing for new land councils or for the devolution of functions, let us examine them and see whether some modifications or improvements are required. ATSIC could do this in consultation with the four existing land councils and the minister.

There are two further issues which ATSIC believes should be dealt with and disposed of now, so as not to waste the time and resources of the committee and other interested parties any further. One is the proposed Northern Territory Aboriginal Council. We have gone to some length in our submission to show that Mr Reeves has gone outside his terms of reference and exceeded his mandate in the report. This is nowhere clearer than with the proposal for NTAC. It should be clear by now, following the hearings in Darwin and Bathurst Island last week, that this proposal is completely unacceptable.

Mr Reeves has proposed a structure for land rights which would in effect be a new set of institutional, administrative and financial arrangements in respect of programs for Aboriginal social and economic development in the Northern Territory. Under the Reeves proposals, the land rights act becomes the vehicle for Aboriginal affairs in the Northern Territory. The proposed Northern Territory Aboriginal Council is to become the primary coordinating agency for Aboriginal programs and funding, subsuming the Aboriginals Benefit Reserve, Northern Territory government, and Commonwealth and ATSIC programs.

In respect of ATSIC, it should be noted that NTAC is clearly designed as the way to replace ATSIC in the Northern Territory by taking over its programs. We will see the elected ATSIC regional councils sidelined under the new NTAC and regional land council models proposed by Reeves. This development clearly has implications wider than the Northern Territory. Regional land councils funded by NTAC from ATSIC's appropriations will deliver CDEP, housing and other programs. Such organisations will be land councils in name only.

What we are seeing is the first stage in the dismantling of ATSIC nationally and its replacement by regional bodies under the control of government appointed or influenced bodies such as NTAC. Such a development will mean a significant retreat from Aboriginal self-determination in this country. In the Northern Territory it will signal a return to the paternalism of welfare branch days.

NTAC is an idea which should never have surfaced in this report. It would be an organisation which was opposed by virtually all Aboriginal people. To dispose of this proposal at the earliest stage would certainly assist in focusing on the operational provisions of the land rights act. Another is the proposed abolition of the permit system. The rejection of this Reeves proposal is strong—take the evidence given by Aboriginal people so far,

including the strong support for retaining the permit system in evidence given at Bathurst Island last Wednesday.

The proposal to abolish the permit system is unrealistic and unworkable. It smacks of cheap populism. If there are problems with the permit system—and this remains to be seen—they can be attended to without scrapping this essential element of land rights.

In respect of permits at Gove, ATSIC was asked by the committee chair to make a response to concerns raised in Nabalco's submission to the committee. Although there has not been time to investigate the matter fully, the following comments are provided for the committee's information.

As far as the issue of access and the permit system, on page 9 of the Nabalco submission, there is more to this matter than the Nabalco submission would suggest. Pressure to use the land to meet the recreation needs of residents of Nhulunbuy began after the gazettal of the Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968.

In 1975, clan leaders and community members agreed to designate 15 areas of recreation and established a permit system for access. These permits were originally issued by government departments and subsequently by the Northern Land Council. Degradation of areas used for recreation became noticeable as early as 1980.

CHAIR—The House of Representatives is now calling for a division. With your indulgence, I will adjourn the meeting.

Proceedings suspended from 5.26 p.m. to 5.37 p.m.

CHAIR—We will now resume. Thank you for your patience. Would you please proceed.

Ms Crawshaw—I was just up to the part about the Nabalco question that we took on notice from last week. Degradation of areas used for recreation became noticeable as early as 1980. It was clear that the concerns of the Aboriginal people about the cultural and environmental health of the land were not always echoed by similar concerns from those seeking to use it for recreation. There were difficulties with the existing permit arrangements because they were not supported by a sustainable management regime. Consequently the clan leaders established Dhimurru Land Management as their natural and cultural resource agency in 1992.

Dhimurru took over the issuing of permits to some 20 designated recreation areas and, supported by permit fees, undertook a series of environmental rehabilitation and monitoring programs with the Yolngu rangers. Nabalco suggests that designated areas have been withdrawn or temporarily closed from time to time. However, it should be noted that where this has occurred it has usually been in response to direct and repeated infringement of permit conditions. Also, this is accepted land management practice where there is land degradation.

But the point to be made here is that the landowners are entirely within their rights, both under Aboriginal and European law, to offer or deny access to any parts of their land. That

is a right enjoyed by all other landowners in Australia. Simply put, Nabalco is still living in the time of Judge Blackburn and the Gove decision. Nothing that has happened since then—not the Woodward report, not the land rights act, not Mabo and not Wik—has got through to Nabalco.

In concluding these opening remarks, I wish to point out that ATSIC is opposed to the thrust of the Reeves proposals. We see this as a fundamentally flawed report, and invite the committee to confront this fact. As others have said, this has been a lost opportunity for review and reform of the land rights act.

ATSIC believes that Mr Reeves's proposals to fundamentally rewrite the land rights act must be rejected outright. The nexus between traditional owners and decision making must be retained. There is no excuse to diminish either the statutory or common law rights of Aboriginal people in the Northern Territory.

ATSIC is happy to cooperate in reviewing the workability of the land rights act. ATSIC is opposed to its wholesale destruction, as proposed by the Reeves review. We believe this committee has a heavy responsibility to restore balance and commonsense to the review of the land rights act in its consideration of the Reeves report and its report to the government.

Thank you, Mr Chairman. Before I ask my fellow representatives if they want to make a comment, I would like to ask that the two media releases that we have here be accepted as evidence.

CHAIR—I have not had a chance to read them yet. The media releases are issued in this case by ATSIC to the public and the community.

Ms Crawshaw—They are old ones.

CHAIR—I will just put it aside for the time being, if you do not mind, as I wish to read them to see whether they need to be admitted as exhibits. They are in the public arena already. Would you like to hand over now to your other members?

Ms Crawshaw—Yes. One of the parts of the review that we would particularly like to address today is the legal aspect. I will hand over to my fellow colleague here to undertake that, and then to any of the other representatives who would like to make a comment before questions, if that is okay.

CHAIR—Thank you. Before you do that, I am conscious of the time and I am just trying to get an understanding of what is ahead of us. Are the matters to be covered by the members who are now going to make comments already written in the detailed submission which I have only just got and not yet read, or is it an additional piece of information that those members are going to address?

Ms Crawshaw—The legal aspect we did not cover at all last week, and we ask if we could actually put that on the public record.

CHAIR—Yes. I am not against its going on the record; I am trying to work out whether it is already in these pages.

Ms Crawshaw—Yes, and we would like to put in a further submission on the legal aspects. So this part is just to give you some understanding.

CHAIR—That is fine. Just so that we understand one another, I was going to suggest, without wanting to be discourteous, that your members do not canvass or read matters that are already in the pages that are here. But if you wish to amplify or add some additional material, please do that. In that way we will get through okay, but if we just go through reading what is already here, that will cut out the time that we need to have an exchange of information. Do you understand? Can you help me by doing that?

Mr SNOWDON—I would personally welcome you to canvass the specific items addressed in terms of the legal aspects of this submission and explain them to me, thank you.

Mr MELHAM—Flesh them out.

CHAIR—That is what I thought I said I would do.

Mr QUICK—Are they going to read out from pages 9 to 20?

Mr MELHAM—No, they are not.

Mr QUICK—I am asking whether they are.

Ms Crawshaw—No, we were not intending to do that.

CHAIR—You are going to add additional matter, as I understand it, to the written material in this document?

Ms Crawshaw—We would like to summarise the legal aspects and just bring the main points out.

CHAIR—The chair is anxious to proceed. Would you please go ahead and do that. Thank you.

Mr Willheim—Thank you, Mr Chairman. I will try and take note of those observations. The recommendations in the Reeves report are very, very extensive and, essentially, most of them would require implementation by legislation. The point of drawing attention to the legal issues is that some very significant legal questions arise in relation to legislation to implement the report. They arise in relation to possible breach of Australia's international obligations and questions of constitutional validity.

I will try and touch on those two areas without reading through what is in the submission. I draw to the attention of the members of the committee that there is a summary of some of the legal issues at pages 14 through to 16 of ATSIC's written submission. It is a

summary of some advice that I am preparing for ATSIC. Commissioner Crawshaw has authorised me to say that it is ATSIC's intention to make that advice available to the committee when it is completed. It will be a little time yet before it is completed.

I said that there were both international and domestic issues. It may be convenient for the committee if I begin with some of the international issues. They arise in relation to Australia's obligations under the International Covenant for Civil and Political Rights and the Convention for the Elimination of All Forms of Racial Discrimination. I begin with the International Covenant on Civil and Political Rights. The key article in that covenant is Article 27, which provides:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own language, or to use their own language.

I do want to emphasise that this is a legal obligation that Australia has accepted by becoming a party to the covenant and individual Australians can make complaints to the Human Rights Committee established under Article 40 of the covenant in relation to alleged breaches of the obligation. The covenant itself has been the subject of interpretation by the Human Rights Committee which has made it clear that the covenant establishes positive obligations on states to protect minority culture. I particularly draw attention to one formal comment by the committee which will be in the written material and will be part of the formal advice. Article 27 recognises the existence of a right and requires that it shall not be denied:

Consequently a state is under an obligation to ensure that the existence and exercise of this right are protected against denial or violation. Positive measures of protection are therefore required, not only against the acts of the state party itself, but also against the acts of other persons.

That statement goes on to say that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting. The enjoyment of those rights may require positive legal measures of protection to ensure the effective participation of members of minority communities in decisions which affect them.

The committee will see in the summary of issues under the heading 'Cultural Protection and Racial Discrimination Issues', on page 15, under the subheading 'International Covenant on Civil and Political Rights' the proposition that:

Implementation of the following recommendations—

in the Reeves report—

either individually or cumulatively—

that is seen together—

could give rise to breach of Australia's obligations under the International Covenant on Civil and Political Rights

Some examples are listed there. They include, for example, removal of the current prohibition of entry onto Aboriginal land; removal of the current protection against Northern Territory laws which are inconsistent with Aboriginal tradition; removal of the protection against compulsory acquisition; the proposed reservation to the Crown of all living fish and native fauna, which obviously has implications for hunting and fishing rights; and the amendments to make provision for licences to enter Aboriginal land for reconnaissance exploration.

The committee will recall that the proposal there is that those licences be issued by the Northern Territory government. There is no provision for the land councils to be involved in the issuing process. There is no veto. The total new system for holding land, with the transfer of land into regional councils with provision for participation on the basis of residence rather than traditional association with the land, would change the traditional basis of decision making in relation to Aboriginal land.

CHAIR—May I just ask you to clarify that? Would you say that would be a breach or would you say that it would have to be examined for its impact before you could determine whether it would be a breach?

Mr Willheim—In answer to your question, Mr Chairman, these are questions of fact and degree. Not every interference with the right of a minority necessarily constitutes a breach. But it is my opinion that collectively, at least, these proposals would involve so substantial a diminution of the existing rights that they would amount to a breach of Australia's obligations under Article 27. It is quite likely that some of the individual proposals would also give rise to a breach. The committee will understand that there are questions of fact and degree involved. The written opinion will go through the individual recommendations in more detail and indicate my views both in relation to the individual recommendations and the recommendations collectively.

Particularly important, of course, in this area are questions of racial discrimination. What are relevant there are both the Racial Discrimination Act and the Convention for the Elimination of All Forms of Racial Discrimination. From an Australian domestic law point of view, legislation to implement these proposals which would be later than the Racial Discrimination Act would therefore prevail. In that sense, the question of inconsistency with the Racial Discrimination Act is at least in the first instance a political rather than a legal question, although many people see the Racial Discrimination Act as establishing a quite fundamental set of values which it would be inappropriate to override. But that is a policy issue.

However, it is my view that implementation of some of the recommendations would also breach Australia's obligations under the Convention for the Elimination of All Forms of Racial Discrimination. I will illustrate two. The first relates to the proposals on land. The current land-holding system is that land trusts hold an estate in fee simple. The proposals, as I understand them, would involve expropriation of land from the land trust and the giving of title to a new body to be established by legislation.

It is quite clear that only Aboriginal people would be subject to expropriation of their land. The approach is one that is confined to Aboriginal people and it seems to me to be quite straightforward that it is racially discriminatory.

CHAIR—Would it be if the transfer to a new entity was an entity that was solely and bona fide representative of Aboriginal people?

Mr Willheim—If the transfer were at the request of Aboriginal people—and that would be a very, very important and quite fundamental reservation—then clearly there would not be a problem. It is not a legal issue, but it is my understanding that factually that is not the case.

CHAIR—You mean the Reeves recommendation?

Mr Willheim—As I understand it, Aboriginal people oppose the transfer of land from the land trust to these proposed new regional land councils.

CHAIR—The chairman might too.

Mr Willheim—The chairman of the land trust?

CHAIR—No, the chairman of this committee. We have an open mind in these matters. That is why the government asked us to seek views. Keep going.

Mr MELHAM—Through you, Mr Chairman, about the point in relation to whether it is a breach: I think you are talking, Mr Willheim, in terms of the consent of the individuals involved.

Mr Willheim—Exactly.

Mr MELHAM—So the chairman is really irrelevant; it is a question of a group of individuals. If they do not consent and it is imposed, it could be in breach of the conventions.

Mr Willheim—If the people who are the current titleholders—

Mr MELHAM—That is the key.

Mr Willheim—consent, then there is no problem. But if the people who are the current holders of freehold title do not consent, this is an expropriation which is confined to expropriation from Aboriginal people. No other Australians are proposed to be treated in this way and it is clearly an expropriation.

Mr MELHAM—If they were to do it to all Territorians, then that would not be discriminatory. That is the point you are making, isn't it?

Mr Willheim—Yes. If one could find a way of doing that, that would probably not be discriminatory. It seems an inconceivable proposition.

The other, somewhat similar recommendation, is the recommendation for the taking over of the assets of the royalty associations. These are incorporated bodies—some incorporated under Northern Territory law, some under Commonwealth law relating to incorporated associations. The proposal is to take over their assets, to take over income, contractual rights and so on. And again this proposal is not one to take over all the assets of all incorporated associations; it is assets of incorporated associations of Aboriginal people. Clearly that is discriminatory and would give rise to breach, in my view, of Australia's obligations under the international convention.

CHAIR—Unless there were consent.

Mr Willheim—Yes, of course—

CHAIR—That principle runs through.

Mr Willheim—if there is consent. But again my understanding is that there would not be consent. That takes one then to a larger issue: not only would this give rise to breach of Australia's obligations under the Racial Discrimination Convention, but it may also put at risk the constitutional validity of the Racial Discrimination Act itself.

The reason for that is this. The constitutional peg for the validity of the Racial Discrimination Act is the external affairs power. The Commonwealth parliament has the power to legislate to give effect to Australia's obligations under international conventions.

Putting this in broad terms: the legislation must be appropriate and adapted to giving effect to the treaty. It must conform with the treaty. The racial discrimination convention is expressed in quite absolute terms: a party undertakes to take steps to eliminate all forms of racial discrimination. You cannot implement the convention 'except in relation to Aboriginal people' or 'except in relation to property rights'. That really follows from the nature of the convention.

So if Australia were in a position where later legislation implementing these recommendations in effect so amended the Racial Discrimination Act that Australian legislation no longer gave effect to Australia's obligations under the convention, then the Racial Discrimination Act itself might no longer be valid. Of course, a challenge to the validity of the Racial Discrimination Act can be brought in many ways. It could be brought, for example, by a company which was under investigation for discriminating in its employment practices.

It was perhaps a little ironic that the challenge to the enforcement provisions of the Racial Discrimination Act, the Brandy challenge, was brought by an Aboriginal person. If the validity of the act were thrown into doubt, anybody who was at risk of a complaint under the Racial Discrimination Act or who was the subject of a complaint, such as a company, could challenge the validity of the act. It would be a very serious thing indeed if the Racial Discrimination Act were found to be invalid.

I might turn to some of the domestic issues. Some of the proposals raise questions in relation to chapter 3 of the Australian Constitution. A core requirement of chapter 3 is that

only courts established under chapter 3 can exercise the judicial power of the Commonwealth. I have indicated in the summary two recommendations which may infringe that. One is the recommendation that the Aboriginal land commissioner have regard to detriment, which would result in the Aboriginal land commissioner becoming involved in giving, effectively, policy advice to the government. In the light of the High Court's decision in Wilson against the Minister for Aboriginal and Torres Strait Islander Affairs, the challenge to the appointment of Justice Mathews to conduct the Hindmarsh Bridge inquiry, it would seem that that would be a function that is incompatible for a Federal Court judge.

There are recommendations relating to dispute resolution, that regional land councils exercise dispute resolution functions—these would deal with questions of law—and that there be an appeal on a question of law to an Aboriginal land commissioner sitting as commissioner. So the contemplation is that regional councils and the Aboriginal land commissioner deal with and resolve questions of law, contrary to requirements in chapter 3 that only courts exercise the judicial power of the Commonwealth. They are perhaps not fundamental aspects of the report—they do not go to the heart of some of the recommendations as others do—but they are an illustration of many legal issues that arise.

Many of the recommendations would appear to give rise to an acquisition, requiring the payment of compensation on just terms. There is a question concerning the application of section 51(xxxi) of the Constitution—that is the acquisition power—in the Northern Territory. The position now appears to be, as I understand it, that if legislation in the Northern Territory is supported by a power such as the race power, section 51(xxvi)—and the land rights act would be supported by the race power—then the just terms requirement applies. That is in brief form my understanding of the outcome of the divided High Court in the Newcrest decision.

If that requirement applies, then in relation to any acquisition there is a requirement to pay compensation on just terms. That is a very important and potentially a very expensive requirement. I would add that, whether or not that is a constitutional requirement, one would expect that the Commonwealth would wish to apply the principles of the Racial Discrimination Act and, in fact, if there is an acquisition, provide just terms compensation.

I have listed under the heading 'Acquisition issues', some examples of the kinds of recommendations that might give rise to an acquisition requiring the payment of just terms compensation. The first and obvious one is, of course, the expropriation of land from the land trusts, and I have dealt with that already so I will not go over that again. There are proposals for extensive modification of rights attaching to Aboriginal land. The view I take is that the land rights act establishes a special form of statutory title, with some special attributes attached to that title which are found in the land rights act, and that the proposed extensive modification of those would in fact collectively amount to an acquisition of those rights.

CHAIR—So you are saying that it establishes a title that has some of the characteristics of fee simple, but it has other characteristics special to the land act?

Mr Willheim—Yes, indeed—for example, the protection against acquisition, the permit system, the protection against entry of non-Aboriginal people, the protection from the

application of Northern Territory laws that are inconsistent with the exercise of traditional rights, the right of veto in relation to mineral exploration activities. These, as I see it, are part of what I would loosely call the 'bundle of rights' attaching to Aboriginal land, the special form of statutory title. The Reeves proposals, if implemented, would take away a substantial bundle of rights. And collectively to take away all those rights in my view would constitute an acquisition of some of the bundle of rights attaching to Aboriginal title.

CHAIR—But if those same rights were still available, but there were different entities managing the land or holding it in trust, then that may or may not be the case?

Mr Willheim—There are two separate recommendations that I have sought—obviously not very clearly—to address in turn. The first recommendation was the expropriation from the land trusts. The second concept that I was addressing, which is quite independent, is to substantially diminish the actual bundle of rights that attaches to Aboriginal land.

CHAIR—Yes, I accept that diminution would be the thing. Mr Melham has a quick question. I did not want to stop the flow but—

Mr MELHAM—No, but it is consistent with this, Mr Chairman, if I can have your indulgence. Mr Willheim, in Newcrest, the court found, in a split decision four-three, that, in relation to Coronation Hill, the Commonwealth's acquisition of some of the mining leases—and they were merely mining leases themselves—was an acquisition of property on unjust terms—

Mr Willheim—Yes.

Mr MELHAM—and struck down parts of that acquisition by the Commonwealth.

Mr Willheim—Exactly.

Mr MELHAM—Which one would have thought—and tell me if I am wrong—is a much more vulnerable title than what we are talking about here in terms of the Northern Territory.

Mr Willheim—Yes. And there is extensive authority that acquisition does not have to be the whole of the title. That applies to what I think in the banking case was referred to as 'innominate and other interests'. Some of the authorities on that will be included in the written advice. I can expand on that at this stage but I think it is probably a question of technical detail.

CHAIR—That special statutory title that you are talking about, the creation of the act itself, if you like, has factored into it a recognition that there is a regime involved around the land—that is, a land trust, a royalty association, a land council and the possibility of changing the land council and making new ones. Would you agree with me, in the general sense, that those sorts of statutory beings are part of the statutory title?

Mr Willheim—Yes, indeed. There is, of course, provision for amalgamation of land trusts.

CHAIR—Yes. Is this clarified—

Mr Willheim—At the heart of that—and this is a fundamental point that I think I should make—is that, for example, amalgamation of land trusts can take place with consent.

CHAIR—Yes, with consent, under the present act.

Mr Willheim—The changes that are proposed here are changes that would be imposed without the consent of the Aboriginal people concerned. At least, that is the basis on which my views are being expressed.

Mr MELHAM—And the consent factor is something which, from an international perspective in relation to whether it conforms, is very relevant, isn't it?

Mr Willheim—Exactly.

Mr MELHAM—So it is not just a domestic situation; from an international perspective and the convention, consent is a vital issue.

CHAIR—There is a division in the House, so I will adjourn the hearing for a few minutes.

Proceedings suspended from 6.11 p.m. to 6.36 p.m.

CHAIR—We will now resume after the division.

Mr Willheim—Thank you, Mr Chairman. I was dealing with the question of acquisition. I was dealing with some examples of proposals that would give rise to an acquisition, giving rise also to a requirement to provide compensation on just terms.

This is perhaps an appropriate point to mention that, as I indicated when introducing this subject, there is some uncertainty about the application of section 51(xxxi) of the Constitution to legislation in the Northern Territory. If legislation which constituted an acquisition provided for just terms compensation, that could potentially be very expensive. That is, of course, not a legal problem; it is a practical problem. If the legislation did not provide for just terms compensation and that was constitutionally required, then the legislation would be invalid.

It would, of course, be possible for the Commonwealth to legislate without providing for compensation and to take the risk that the legislation would be invalid. The problem with that is that it would create enormous uncertainty, and one of the objectives in the whole of the land rights, native title area has been to remove uncertainty. I think that it would be quite unthinkable that the Commonwealth would in this area legislate in a form that would deliberately create—

CHAIR—If the Commonwealth did decide, after this committee's deliberations and report, to move some sorts of amendments to the existing law, it would probably also insert in those amending bills just compensation provisions.

Mr Willheim—If that was the agreement of the cabinet, those members of the cabinet who were involved with Finance and Treasury would undoubtedly have very substantial concerns about open-ended provisions for compensation. But the point I was making is that it would be inconceivable that the parliament would legislate to create uncertainty—that is, to legislate in a form that may give rise to an acquisition without providing for compensation.

CHAIR—It looks like the government has been pretty wise to ask us to inquire into the report.

Mr Willheim—Indeed. Some of the other examples of acquisition include the proposals that grants under the land rights act and grants under the pastoral land act should extinguish native title. I do not think I need elaborate on that. Clearly, statutory extinguishment of native title would constitute an acquisition giving rise to a right to compensation. Clearly, there is some uncertainty about the measure or the magnitude of that compensation, but there would be a right to compensation.

I have referred previously in the context of the International Covenant on Civil and Political Rights to the recommendations to take over the assets of royalty associations to reserve ownership of living fish and native fauna. Again, there is an acquisition issue. There is a relatively small recommendation about correction of what is described as an error in relation to the Elliott stockyards and my understanding of what is proposed there is that that would be an acquisition also.

CHAIR—When will your detailed opinion be available?

Mr Willheim—Perhaps in two to three weeks, as a guide, Mr Chairman.

CHAIR—I do not want to be rude but I am conscious of the fact that it is 6.40 p.m. and I probably cannot maintain a quorum beyond 7 o'clock because members have other commitments. It might be advantageous to everybody, and fairer to the outcome, if we knew that we were going to get your final opinion, through ATSIC of course, within three to four weeks. That would be an appropriate thing to do.

Mr MELHAM—Mr Willheim, are you available to come back during a parliamentary sitting week, after your opinion is available? Did you say you are at the ANU?

Mr Willheim—Yes, I am available to about 9 April when I go overseas for about two months. I am quite happy to come back before then.

CHAIR—So your written opinion would be available before 9 April?

Mr Willheim—Yes. And I would then be available from the middle of June on, if the committee is still sitting.

CHAIR—Could I be so bold then as to suggest, on the understanding that we will have the benefit of your full written opinion before 9 April, that the committee will digest that opinion and then it can arrange, hopefully, to revisit those matters with you, if it wants to. It

may be that your written opinion is persuasive enough anyway. We will do that. Is there any other matter that you feel you should draw to our attention now?

Mr Willheim—The other major matter is the question of public moneys where, in my view, the analysis that Mr Reeves makes is legally flawed.

Mr MELHAM—Where is that raised in the submission?

Mr Willheim—It is on page 15. He does not, in my view, give sufficient weight to the change in statutory regimes. The moneys start off in the public account; they are in the Aboriginal Benefits Reserve. At that stage they fall under the Financial Management and Accountability Act and they are public moneys. They are then paid out of that reserve to the land councils and held in trust by the land councils, essentially, for the royalty associations.

The significant point is that at that stage they come under a quite different legal and accounting regime—they come under the Commonwealth Authorities and Companies Act. At that stage they are not public moneys. They are when they are governed by the Financial Management and Accountability Act, but they are two quite distinct legal regimes. They are not public moneys when they are governed by the Commonwealth Authorities and Companies Act.

The parliament did not have to interpose the land councils between the Aboriginal Benefits Reserve and the royalty associations. It could have provided for the money to be granted from the reserve direct to the royalty associations, but it has interposed another body. In my view, Reeves simply has not recognised the legal effect of that, nor has he recognised what the parliament has done from a policy point of view by interposing the land councils.

It may assist if I perhaps try to illustrate that by an example—completely away from Aboriginal matters. Assume the parliament established a statutory body to encourage the export of a commodity and it granted funds to that body to be made available to individuals and companies for the promotion of export purposes. The question that arises here, and what concerns Reeves, is accountability. Assume there was a question of whether a company director used some of the grant to take his wife with him—in other words, abused the money. One would look to the statutory body which was disbursing the funds to be publicly accountable for the way it had disbursed those funds. One would not call the company director to be accountable to the parliament. The situation here is much the same. The land councils disburse the funds, and it is the land councils whom one would ordinarily regard as publicly accountable.

Mr MELHAM—They give annual reports to the parliament as a requirement under the act.

Mr Willheim—But what Reeves is saying is that, notwithstanding the interposition of the land councils, the royalty associations should also be publicly accountable. That, to me, would be a quite unique legal structure. He reaches that viewpoint because I think he simply has not understood the legal effect or given weight to the policy of the parliament in interposing the land councils.

CHAIR—You would have to have consequential amendments to make it public money.

Mr Willheim—You would have to apply the Financial Management and Accountability Act to the land councils, to which it simply is not designed to apply. There is a whole complex framework of who authorises the issue of money, the taxation regime and so on.

CHAIR—You would have to have consequential amendments.

Mr Willheim—Yes. It is simply incompatible.

Mr MELHAM—Mr Willheim, I appreciate the evidence you have given to date. Before we move to other witnesses, I would be interested—it might be of benefit to the committee—if you could outline your background experience, the positions you have held in the past.

Mr Willheim—Yes, I can certainly do that. I am currently a visiting fellow in the Faculty of Law at the Australian National University. That is primarily a research position. I do a small amount of teaching at the postgraduate level in constitutional law. I was, from 1967 until the middle of last year, an officer of the Attorney-General's Department. I was a Senior Executive Service officer from 1973 and was at the division head level from 1983 until the middle of last year.

I have at various times headed the Advisings Division—Office of General Counsel. I think I was the first head of that office under that name. I headed a range of policy divisions. From 1991 to 1998, I was special counsel and, in that capacity, I appeared as counsel for the Commonwealth clients in all the superior courts. I appeared in the High Court, the Federal Court, the Family Court, the Industrial Court, the Supreme Courts—or the Courts of Appeal of Queensland and New South Wales—appearing primarily in constitutional cases.

I have appeared in quite a number of cases involving an Aboriginal element, ranging from the definition of what constitutes an Aboriginal person to cases such as Pareroultja and Tickner, which involved the land rights act and the Native Title Act; in Wilson, which was the challenge to Justice Mathews; a range of Aboriginal heritage matters relating to the Swan Brewery, the Broome crocodile farm; and I argued the appeal in Hindmarsh Bridge. I have represented the Commonwealth in negotiations with Aboriginal people—for example, in relation to Macarthur River, which was the first major mining project after the Mabo decision. At the international level I have led numerous Commonwealth delegations to international conferences, including in the human rights area. So my experience covers constitutional law, international law and legal policy matters.

Mr MELHAM—Thank you, Mr Willheim.

CHAIR—Were there any other final matters to add? Josie, you did say other members wanted to make additional statements. Is that your intention?

Ms Crawshaw—They were more just to maybe make an emphasis on a point that we might have raised last week. I am not quite sure whether you wanted to ask questions. We have got 10 minutes.

CHAIR—We would have wanted to, but the problem is I am going to lose my committee at 7 o'clock.

Ms Crawshaw—I think with the Nabalco issue you have actually asked us to take that on notice. My colleague is from that region and can tell you about the access situation from his island, and where the permit system has not actually been a problem. Maybe Jeffrey might want to just expand on that.

Mr Dhammarantji—Last year we had a lot of yacht racing from Cairns to Darwin. We have given them permission to stay on one of these islands where I come from, and the permit system is working with the traditional owners. So the Dhimurru Land Council and the land council at Nhulunbuy were consulting with people from that area. They stopped at the safe haven at one of the islands. About 50 yachtsmen were going through that way in our country.

CHAIR—And it works happily and in harmony?

Mr Dhammarantji—Yes. They used the facilities at one of the outstations up there. They had a hot shower and all that, and stayed there for a night. There was a ceremony, dancing and then next day they moved on to Darwin.

CHAIR—Did you charge them any anchorage?

Mr Dhammarantji—A little bit of a fee.

CHAIR—Did you make some money?

Mr Dhammarantji—A little bit, yes.

CHAIR—That is good. And do your people get some work and employment out of it?

Mr Dhammarantji—Yes.

CHAIR—That is good. That is great.

Mr Dhammarantji—Thank you.

CHAIR—Thank you for that. We are visiting. For the record, Josie, you said that you were worried about the committee in its consultation process, for example, and you asked, 'How can we leave out the whole of the gulf region?' I do not know who told you we were going to leave them out. Quite the contrary; we are going to be visiting the gulf region.

Ms Crawshaw—That is good to hear. We thought you were just going to Tennant Creek, so I do apologise.

CHAIR—No, that is fine. I just wanted to make that clear. But we will not be able to go everywhere, as much as we would like to. That is the practical thing about this crazy life of ours, but we are going to do our best. We will make provision for those people who cannot see us. We have asked for submissions. For those people that cannot for language reasons cannot do it themselves, with my secretary's excellent assistance, we are going to offer to have them recorded in their home base. That can be sent and we will have it translated. So we are doing our very best to do our best, and that is the spirit in which we are doing our job. Do any of my colleagues like to ask some questions before I do?

Mr WAKELIN—In terms of Mr Reeves and his work, my understanding is that Mr Reeves has a long experience of the Northern Territory. He has been a resident there for many years. He would have significant understanding of the range of issues with Aboriginal people. Would you agree that he would have a great knowledge of the Northern Territory over a long period of time?

Ms Crawshaw—I know Mr Reeves personally. His involvement was when he was in the Labor Party—very much at that political level—and then as a private barrister there. What is surprising in the Northern Territory is that you will often get the comment that, as much as land rights has been there since 1976, the majority of people still actually hold the belief that their backyards can be taken. It goes to show that, even if you do live there for a long time, if you have not actually acknowledged that you have got a rich culture on your doorstep, you will never, ever get to know the intricacies; how it actually works.

Mr WAKELIN—Mr Reeves is a learned man. He would not believe that, would he?

Ms Crawshaw—From the report and everything that he actually defines about how Aboriginal decision making happens and the fact that he tries to define traditional owners, that is the major flaw and misunderstanding. There is not the basic understanding; that you cannot speak from someone else's country. Even if you walk out the door here and you spoke to an Aboriginal person and said, 'You can have a position if you live up in Darwin or anywhere in the Northern Territory and you can actually be a decision maker and say what happens in the development of country,' the standard response would be, 'I could never ever do that. I can't speak for someone else's country.' How could he not have that understanding after all those years?

Mr WAKELIN—Do you think Mr Reeves did not have that understanding? He did not have that basic understanding?

Ms Crawshaw—Not in terms of his report. He has actually run that whole line. He has redefined someone else's culture; how they see themselves, how their law is structured and the decision making process. I think he has been a very brave, stupid man in another way. It would be like me going to somewhere overseas and trying to tell them culturally and traditionally what their customs have been.

Mr WAKELIN—So you just regard Mr Reeves as a stupid man?

Ms Crawshaw—I would say that the report has no credibility. I think you will find with all the submissions that will come in, every expert in this field will show that the man has a

total lack of understanding of this whole area to be able to present the report that he has. There are legal flaws in it. Even from a legal point of view, the man is not too bright.

Mr WAKELIN—In the interests of time, perhaps I need to ask a couple of things quickly. In your submission you acknowledge that there clearly was a need for a review of the operation of the act. That seems to be clearly accepted from ATSIC—that it is time for a review of the act. I am just trying to get—in the spirit that the chairman has described—to where there might be some common ground.

We need to try and understand whether you, speaking on behalf of ATSIC, believe that there was a genuine need for the review of the act. I will pick one area, and it is this issue of the 18 councils, which really, as I understand it—particularly with the Central Land Council and the Northern Land Council—are regions which are defined already. In that one area, in terms of genuine representation of Aboriginal people, could we say that was one area where there was genuine need for review?

Ms Crawshaw—Our submission actually talks about that. Obviously, when Mr Reeves went around he would have got some concerns from people that the major land councils may not have been representative enough. If that is an area of the act that needs to be looked at, we are saying that there are provisions in the act. If you were to set up new land councils, and they happen as a result of a number of people from an area being affected who request to have their own land council, the provision in the act allows that to happen. That is how we have said the two smaller land councils have come on. So, we do not understand why he has to fundamentally change the whole thing, because that is one of the parts of the act.

Mr WAKELIN—I have a last question on councils. Do you accept that there are seven regions of the Northern Land Council currently?

Ms Crawshaw—It is my understanding that they say they break into seven regions, yes.

Mr WAKELIN—Are they recognised by the Northern Land Council in those seven regions?

Ms Crawshaw—The Northern Land Council actually holds their subcommittees in those seven regions and designed those.

Mr WAKELIN—Thank you.

Mr MELHAM—I wanted to follow up the qualifications of Mr Reeves. Ms Crawshaw, are you aware whether he was briefed by any of the land councils in terms of land rights cases in the Northern Territory?

Ms Crawshaw—I went to the actual major consultation that happened at Yirrkala at which Jeffrey was also present. The land councils assisted Mr Reeves to bring all the people in.

Mr MELHAM—That is part of his report. In terms of his speciality in law in the Northern Territory, does he have a reputation for appearing either for the Northern Territory government or the major land councils in land rights act cases?

Ms Crawshaw—I cannot actually answer that. I thought he has represented on both sides but I am not sure of that.

Mr HAASE—You mentioned in your evidence and it is contained in your submission that the acts contained in the Reeves report would destroy Aboriginal self-determination. Very simply, I would like your explanation as to your understanding of the definition of self-determination in the manner that you used it.

Ms Crawshaw—In the land rights act, as it is now, the fact that traditional owners have to be consulted and give consent to any access or any activity on their land is a form of self-determination. If you took it to its broadest sense in international law of self-determination, all people have a right to be self-determining. Clearly, because there has been no treaty, there is no sovereignty. We have not got that full international sovereignty, legal term of self-determination. At the level of land rights in this country, especially in the Northern Territory, the fact that you have to get consent to access land and have activities on land is a form of self-determination.

Mr HAASE—You are using it exclusively in that sense. You are not referring to the fact that this report will effectively destroy self-determination in an international sense. Do you discount the use of the term in an international sense as you have explained it?

Ms Crawshaw—We do not have self-determination in this country. Aboriginal people do not have self-determination in an international sense. We have the Commonwealth government. We have the Queen of England that is the sovereign Crown of this country. That is how I define self-determination.

CHAIR—Do you seek it?

Ms Crawshaw—It does destroy self-determination. He even proposes to take ATSIC's funds from a democratically elected group of people—he is taking away the decision making there; and the proposal of the whole NTAC, where they can override. They have overarching powers of the regional councils. There are people appointed by the federal minister and the NT government. They can be overridden. The land claim process will not be done by land councils. It will be controlled by this native title representative body; there are no self-determination powers there.

Mr HAASE—I must pursue this: are you saying that you are not referring to your desire to have self-determination in an international sense as in self-government, sovereign right? My specific questioning is along this line: are you saying that, without the influence of the Reeves report or the acceptance of the Reeves report, in the long term, you would aspire to self-determination with regard to sovereign rights? Are you prepared to discount that?

Ms Crawshaw—No. ATSIC's point of view would not, in my view, be going to the absolute extreme of taking on sovereignty in its full capacity as sovereign owners of this

country. They would know that that would not get up, for instance. However, ATSIC just did a review of the ATSIC Act, and a lot of groups around the country are looking at regional autonomy, regional authority, forms of self-government. There has been talk for many years. We have had people travel to the United States and Canada and many places looking at forms of self-government and relationships there with the government of the day, as well as being able to have trade relations with other groups. They have looked at places like the Cook Islands, the Sahara Desert, the Saami government in the top part of Finland, and the Scandinavian countries. So we have looked at many models, and the section 26 review, which is with the minister now, is actually saying, 'Let's pilot some of these to see whether there is a possibility for some people to have some forms of self-government, some form of self-determination.'

Mr HAASE—Thank you. I do have one more, and I will just take a one-word answer, with regard to your quite clear objection to NTAC. This is possibly hypothetical, and I would put it another way and more directly if I could. Say the situation was that the proposal had been for an umbrella group; same name perhaps but with a different definition of its structure inasmuch as it was perhaps formed from the 18 land councils. Let us say it was an upward representation, perhaps with the removal of the clause regarding nomination of members by the government, but a group nevertheless that had umbrella control over the 18 land councils made up of representatives from each land council, with possibly a chair selected by the group and approved of by the minister. Would that possibly be a model that ATSIC could comment on and perhaps approve of? Your opinion.

Ms Crawshaw—At the moment, the minister has actually asked us to develop a discussion paper on regional autonomy. Whether it could actually say there would be one body for the whole of the Northern Territory is very debatable. Where it is clear that probably regional autonomy could work is places like Arnhem Land, where they are the major owners and there is no-one else that owns that land that they could form self-government on.

Where I come from in Darwin and come from the stolen generation group, there are many Aboriginal people that live off a land base and have not been able to still link up with land. That is where ATSIC comes in. You would have to take into consideration all of those types of people and whether they would consent to having all the powers being given to an overriding body to deal with running education, health and housing and having all the money put into that. They are models, and that is a paper that ATSIC actually has to undertake at the moment at the direction of the minister.

Miwatj region, for example, have actually been calling for regional autonomy. They were one of the ones in the section 26 that would like to actually have more control over all of the government moneys coming in and to have decision making happening there and more employment happening there, instead of people in ATSIC living in Darwin or Nhulunbuy trying to service these people. Once you had a form of autonomy, they then would have those people living in their regions working for them. All the money and all the Aboriginal affairs budget at the moment gets spent by everybody living in Darwin, travelling out on an untold number of light aircraft. Who gets the money: the BP service station for the petrol—and there is no money left to run programs.

So regional autonomy is very important for Aboriginal people. It is the only way they would be accountable, for no government at the moment, especially through the grants and aid, has been able to make any other government accountable for the money. It just does not reach the people.

Mr HAASE—I thank you, Ms Crawshaw.

Mr WAKELIN—Can I have your opinion on the recommendation that any other Northern Territory law should apply to Aboriginal land other than to the extent that the law is directly inconsistent with the land rights act? Of course, that would include environment protection, public health, safety, supply of essential service, maintenance of law and order and the administration of justice. How do you feel about that recommendation?

Mr Willheim—The existing legislation provides that Northern Territory laws can apply except to the extent to which they are inconsistent with Aboriginal tradition. The recommendation would in substance reverse that. It would enable Northern Territory laws to apply, notwithstanding that they are inconsistent with Aboriginal tradition. The view I have expressed from a legal point of view—and obviously it is not my place to comment on the policy—is that to remove the protection against inconsistent Northern Territory laws and to enable Northern Territory laws to apply, notwithstanding that they are inconsistent with Aboriginal tradition, would constitute an infringement of Aboriginal cultural rights.

Mr MELHAM—Have you some examples of that in terms of the current situation? Are you able to give us some examples of Northern Territory laws that currently do not apply? I am just lost as to what Mr Reeves is talking about.

CHAIR—The broad band—the criminal law?

Mr MELHAM—No, I think the criminal law applies.

CHAIR—That is the point. For the record, it does.

Mr MELHAM—What is he trying to address in that recommendation?

Mr Willheim—I guess he is trying to address the examples that appeal to the Northern Territory government. I am not sure to what extent they are good examples. I have not practised law in the Northern Territory, so perhaps I am not the best person to ask. Let us say that there was a problem in relation to stock diseases and that, under the powers under that act, an area was quarantined and that prevented people going to a sacred site for ceremonial purposes. You would have a clash. I am not sufficiently familiar with the practice of Northern Territory law to say whether that is a good example, but there may be many reasons why there would be a clash between a Northern Territory law and traditional activities such as science, the conduct of ceremonies and so on.

Mr WAKELIN—The recommendation is on page 412 and on page 413 there is that direct inconsistency to the act.

Mr MELHAM—Unfortunately, I do not know if there is an enumerated example and that is the thing that worries me.

Mr WAKELIN—Perhaps it is something we can take up another time.

Ms Crawshaw—We would be happy to provide some of those examples.

CHAIR—Thank you very much. Before we wind up, can I ask if ATSIC would urgently provide the committee with a statement of ATSIC's understanding of the number of land trusts currently in existence in the Northern Territory under the legislation; the activities, functions, responsibilities and programs being delivered or administered by those land trusts; ATSIC's opinion as to whether the registered names on those land trusts are people who have been accepted by traditional Aboriginal people as being the appropriate legal trustees to perform their functions under the act. You will get this list in the transcript, of course.

Mr MELHAM—Would it be more appropriate, Mr Chairman, if there is a series of these, that we do a written communication?

CHAIR—I will not be long. Moving to the land councils, I would like ATSIC's comments in response to the same questions with respect to activities, functions, duties and programs. I would respectfully ask ATSIC if they could also provide a list of the current functions, duties and programs administered and delivered by ATSIC in the Northern Territory in the areas covered by the land councils under the act.

Mr MELHAM—Is this within the terms of reference?

CHAIR—Yes.

Mr MELHAM—Which term of reference?

CHAIR—The impact of the recommendations of Reeves on the operation of the whole act.

Mr MELHAM—We may get some advice on that. I think you are outside the terms of reference.

CHAIR—I do not believe I am, but ATSIC, I am sure, would not mind—

Mr MELHAM—It is not an inquiry into ATSIC.

CHAIR—ATSIC will not mind providing that for me, I am sure.

Ms Crawshaw—Mr Chairman, I would have thought that the land councils would be describing their functions, activities, what percentage of mining has happened on land, there are annual reports—

CHAIR—Can I just interrupt you. I understand that may well be the case, but my question is respectfully asked of ATSIC to provide me with its understanding of those matters. That is the reason that I am asking for that.

Ms Crawshaw—I do not know what timing you are going to give us for this because that is a huge task and I hope we are going to get a million dollars to help provide you with that information.

CHAIR—We will deal with that if it is necessary, but I think it is very important that I get ATSIC's understanding because ATSIC has given a detailed submission to this committee on what it believes should be the case in respect of the operation of the act and the Reeves recommendations, so I need to know what ATSIC understands about those matters.

Ms Crawshaw—Could I just ask for clarification on what I think was your last point? You said you want a current list of the organisations that are in the land council regions, of their functions and activities.

CHAIR—No, of the land trusts' activities.

Ms Crawshaw—Only of land trusts, not of other organisations?

CHAIR—No, the land trusts' activities—

Ms Crawshaw—Yes, that was the first one.

CHAIR—and the land councils' activities, and I respectfully asked if ATSIC could tell me what ATSIC's functions, responsibilities and programs are currently in the Northern Territory in the areas covered by those land councils.

Mr MELHAM—Can I ask, with the greatest of respect, Mr Chairman, under which term of reference are we asking this of ATSIC? This might be something that we should be asking the land councils to provide rather than ATSIC, in some instances.

CHAIR—I intend to. You must be seeing into my mind. I intend to ask all of the government agencies and statutory authorities—

Mr MELHAM—And I am wondering if this might be better coming in writing from you, Mr Chairman.

Ms Crawshaw—Certainly on that last one, on where ATSIC funds activities, in our programs and functions, that cover those land council areas, would our annual reports be sufficient?

CHAIR—I cannot tell you that, but I am asking ATSIC—

Ms Crawshaw—I would say they would be.

CHAIR—Let me just indicate to you that the terms of reference require the committee to seek views and to make recommendations on the proposed structure and functions of the Northern Territory Aboriginal Council and the changes to the ABR and other matters. It is my view that the present activities and functions of the statutory bodies, including ATSIC, have relevance, because I believe that the committee, to do our job properly, have to have a very good understanding of what the activities and functions are of the people who are responsible in various ways for the property management decisions, policy matters and interfacing with government's programs for Aboriginal people.

It is not a trap question. It is a simple matter of logic that this committee needs to have a thoroughgoing understanding of all of that and of what the other players believe those functions to be as well. It may well be that they all are of exactly the same mind. But that is the reason for pursuing it. It is not a sinister question; it is one put to you in the hope that we can have a good basis to consider our recommendations in what is a very difficult and complex matter.

Mr MELHAM—Could I just say on that, Mr Chairman—I am not trying to be disrespectful—that some of the things you have asked for might be out of ATSIC's area. It may well be that it is the land councils themselves that have to supply this. May I suggest that qualification if it is—

CHAIR—ATSIC's response can tell me if it does not know what the land councils functions and activities are.

Ms Crawshaw—We will do our best to provide that information.

CHAIR—Of course you will. I am very confident you will give me the information I want. Thank you very much.

I thank everybody for their attendance. Particularly, I thank Hansard, the secretariat and everybody else here for being patient with the divisions and all that. I look forward to receiving the legal opinion and wish you well in your overseas studies and journeys. I look forward to further discussions on this challenging matter. Thank you.

Resolved (on motion by **Mr Wakelin**):

That this committee authorises publication of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 7.22 p.m.