COMMONWEALTH OF AUSTRALIA

Official 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, 9 JUNE 1999

CANBERRA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

INTERNET

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is: **http://www.aph.gov.au/hansard**

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS

Wednesday, 9 June 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, 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

MORPHY, Professor Howard, Senior Research Fellow, Australian Research Council, Archaeology and Anthropology, Australian National University 594

PETERSON, Dr Nicolas, Reader in Anthropology, Australian National University . 594

VINER, Hon. Robert Ian, QC (Private capacity) 567

Committee met at 4.58 p.m.

VINER, Hon. Robert Ian, QC (Private capacity)

CHAIR—Ladies and gentlemen, I would like to welcome everyone to this public hearing which I declare open. This is a further hearing of the committee into the recommendations of the Reeves Report on the Aboriginal Land Rights (Northern Territory) Act. As many of you will know, the committee is conducting this inquiry at the request of the Minister for Aboriginal and Torres Strait Islander Affairs, Senator John Herron, who has asked us to seek the views of the people before he decides his views in respect of the matters that he will take to the Prime Minister and cabinet and to the parliament.

Members of the committee are conducting the inquiry with an open mind. We are talking with all interested parties. We are interested in the views of everyone; we do not wish to confine ourselves to hearing the views of just one side. We are genuinely looking for the views of everyone on this matter and we are consulting very widely. We have been to the Northern Territory on a number of occasions and we will return again next week. We have literally spoken to hundreds of people in this matter and their help has been invaluable. The hearing is open to the public and transcripts will be made by Hansard. The transcripts will become part of the public record and anyone who would wish to obtain a copy is most welcome and should give their details to secretariat staff who are here today.

Before calling the witness who has kindly offered to provide evidence to us today, I would like to just give the general statement that is given by all chairs of committees of this parliament to all people coming before the committees. Although the committee does not require witnesses to speak under oath, witnesses should understand that these hearings are legal proceedings of the Commonwealth parliament of Australia. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. Hansard will be taking a record of what is said today and from time to time I would ask witnesses to assist Hansard and ourselves by spelling place names or other names that might be difficult to record accurately unless that is done.

I would like to welcome the Hon. Ian Viner QC, who has been waiting very patiently because of proceedings in the House of Representatives today. Welcome, Mr Viner. Once again I would apologise to everybody for being late due to the proceedings in the parliament. We understand there will not be any other divisions, although there is never any guarantee. If we do have to leave for a few minutes it is because of our requirements to attend.

Mr Viner, I think we all know of your impressive background and record and the role you have played as a former minister of the Crown in the federal parliament in relation to the matters that we are inquiring into. We are indeed very fortunate. Last week we were fortunate to have Sir Edward Woodward come and see us—it was Woodward in retrospect and prospectively. It was quite an experience and very helpful to us. Today we have the former minister who introduced the legislation. I should say, Mr Viner, that we already have on the public record an article that one of my colleagues, Daryl Melham, produced at a hearing in Darwin under your authorship.

Mr MELHAM—It was Warren Snowdon.

CHAIR—It was Warren, was it? Okay. I think that has already been published as a submission and is part of the public record. In addition, we have had references to your good self, and I must thank the Centre for Aboriginal Economic Policy Research, representatives of whom are here today, for making available to us their book *Land Rights at Risk: Evaluations of the Reeves Report*, which has a chapter in it contributed by none other than the Hon. Ian Viner. That document has not been exhibited yet. I would ask that it be received as an exhibit and, accordingly, recorded in the records for that purpose. It is so ordered. Mr Viner, would you like to make some comments before we turn to questions?

Mr Viner—Yes, I would, if I may, and thank you for the introduction, Mr Chairman, and thank you for the invitation to come along and address the committee today. The article that was referred to and which Mr Snowdon presented to the committee has now been published in volume 4, 99 Australian Indigenous Law Reporter, and there has been some editing of that original article in preparing it for publication. I do have a photocopy of that article, which I can leave with the committee, which will vary not in substance but in some detail with the one that Mr Snowdon presented.

Resolved (on motion by **Mr Snowdon**, seconded by **Mr Melham**):

That the document be received as an exhibit and be marked accordingly.

CHAIR—That will mean that there will be two documents on record. I will state clearly now that the second document received today is substantially the same as the first document that was received in Darwin but with editing and is the one that should be referred to by all of us hereafter. Is that the correct way to deal with it?

Mr Viner—Yes, that is agreeable. It will be seen that it has footnotes and references and so on. It is a more complete document in that sense.

CHAIR—Thank you.

Mr Viner—If I may, I would like to present to the committee my own submission to Mr Reeves. He contacted me and invited me to make a submission to him, which I did in writing, which is dated 7 May 1998.

Resolved (on motion by **Mr Quick**, seconded by **Mr Lloyd**):

That the document be received as an exhibit and be marked accordingly.

Mr Viner—Thank you, Mr Chairman. You will see I have been busy writing. I have made the point in the paper that is published in the CAEPR Research Monograph No. 14, the booklet that you have, that in my analysis and evaluation of the Reeves Report I was careful that my study of it and what I wrote was not, and would not, be seen as simply a nostalgic journey back to the act which I introduced into this parliament or that there was any sense that nobody should tamper with my act. I have attempted to be both objective and forthright in what I have written and what I have now presented to you.

I have attempted to be forthright because the Aboriginal Land Rights (Northern Territory) Act is an act of profound importance to Australia, in Australia's national interest, and to the

Aboriginal people of the Northern Territory. It is also of profound importance to indigenous people beyond the Northern Territory, because of its symbolic importance at the time that it was enacted, in 1976, and as the first legislation of the Commonwealth parliament granting land rights to indigenous people of Australia. Also, the profound importance of the act to Australia internationally should not be lost sight of. Australia has drawn international attention recently over the Wik amendments to the Native Title Act, and likewise the parliament should expect this committee's recommendations and any amendments proposed to the act as a result of Reeves to draw considerable international attention.

When the act and the Woodward report were under consideration there was really bipartisan support for the introduction of land rights in the Northern Territory. The Whitlam government introduced a bill which was being debated in, if not actually passed through, the House of Representatives just before the dissolution of parliament in November 1975. I then became minister and immediately commenced work on the bill and implementing the Woodward report because, in opposition, the coalition parties went to the 1975 election on the basis of support for land rights and support for the recommendations of the Woodward royal commission.

There were some differences in approach between the coalition government, as it became after the 1975 election, and the opposition, most notably that a decision was made by the Fraser government not to include in the Land Rights Act provisions relating to the grant of land or the provision of land on a needs basis. The policy decision was made that the act should deal with traditional land, both land which had already been preserved by way of reservation and land which was unalienated and could be applied for under the act to the Aboriginal Land Commissioner. The coalition policy was to deal with needs based land claims separately from the grant of traditional land under the Land Rights Act. Subject to that there was a large measure of bipartisan support for the grant of land rights in the Northern Territory. I would hope that in the present parliament, and in the response to Reeves, that there will be the same kind of bipartisan consideration of any amendments to the act.

Woodward mobilised Aboriginal opinion in the Northern Territory in a way in which it had not been mobilised before. He did that particularly by creating the Northern Land Council and the Central Land Council, both to collect Aboriginal opinion and to provide advice to the commission. The opinions and advice that were received by Sir Edward formed the basis of the recommendations which found their way into the Land Rights Act. So those land councils were very, very important Aboriginal bodies right from the inception of the royal commission and from the inception of the act. If the committee is minded to read my second reading speech delivered on 4 June 1976, and a second speech that I made on 17 November 1976 before the bill was fully debated in the House of Representatives, they will see that the coalition government, along with the opposition, as a matter of policy placed the two land councils in a central and prudent administrative and executive position for the operation of the act.

Since that time I have not changed my opinion as to the importance of those two organisations as collective and representative organisations of Aboriginal opinion in the Territory and as central administrative bodies. I do not put aside the two smaller land councils that were established after the act came into force, the Tiwi Land Council and

Anindilyakwa Land Council. Indeed, I was the one who accepted the request by the Tiwi Land Council that it be formed as a separate land council and was present in informing the Bathurst Islanders, the Tiwi people, of that decision. Because it is relevant to your consideration now, I might say that there were misgivings in some Aboriginal quarters as to the creation of a new land council, but provision was deliberately made in the act, introduced by me, to permit the creation of new land councils if over time that should appear necessary.

Can I just quickly identify the key features of the act which it is important to remind ourselves of. Firstly, the act was the product of Aboriginal wishes and Aboriginal opinion. It was based, as Woodward was, on expert legal and anthropological knowledge and support which devised the system of traditional land ownership within Australian law and, in doing so, recognised Aboriginal customary law for the first time as part of Australian law. Of course, Mabo No. 2 and the Native Title Act also recognised Aboriginal customary law in that way, but the Land Rights Act was the first one to do it legislatively. It accepted fee simple as the basis of the land title to traditional land, it accepted inalienable title to traditional land and it granted title by way of land trusts. Many in the committee are probably familiar with the ancient concept of trusts, and that was adapted so that traditional title could be held in a way understood within the Australian legal system.

It placed the traditional owners of traditional land in a key position under the act, recognising their role and status within Aboriginal customary law, and it provided a means for distribution of what have now become known as royalty equivalents from mining which up to that time had been allowed to take place on what became Aboriginal land under the act. It provided for mining access in the way in which the Woodward report recommended—that is, that there should be no mining access without the consent of the traditional owners—but with one qualification, and that was, that to break any deadlock there could be arbitration and there might be, as Woodward acknowledged, a need for the national interest to prevail. Woodward was very strong on the reality of land rights requiring the power of the Aboriginal owners to withhold consent to mining if they so chose. That, of course, has been changed by the 1987 amendments and would be changed even further by the Reeves recommendations.

The act enabled the creation of lessor legal interests in traditional land if the traditional owners desired that to happen. Importantly, the act also provided that there should be no power of compulsory acquisition by the Northern Territory government. Of course, the constitutional authority of the Commonwealth parliament under the Australian Constitution could still prevail, with the important distinction that under the Constitution that had to be acquisition on just terms. It also provided for Aboriginal control of land use. I believe all those fundamentals to be as necessary and correct today as they were in 1974, and then 1976 when the act was passed.

The Woodward report also made a very important recommendation which I think is pertinent to this committee's consideration and the way in which the Reeves inquiry was conducted and the terms of reference that were given to it. Woodward never envisaged a review of the kind which has been undertaken by Reeves, or terms of reference being given to someone such as has been given to Reeves, or a committee of the parliament being put in the position which this committee has been put in. Probably more significantly, Woodward never envisaged that the Aboriginal people of the Northern Territory would be put in the

position that they have been by the Reeves inquiry: being put in the position of being defendants of their own land rights and the rights that were given to them by the act, of having, some 25 years later, to justify what was accepted in 1974 and by the parliament in 1976.

Woodward recognised that there would be a need for periodic review, but he saw it as a conference between the land councils and the Commonwealth government. At that time the Commonwealth had a department of Aboriginal Affairs. Now there is no such department, but in its place there is ATSIC. If the Woodward recommendation was followed, there would be no Reeves inquiry or terms of reference such as Reeves received; there would have been a review in conference between the land councils and ATSIC looking at anomalies, looking at the way in which the act had operated and putting forward those changes which the Aboriginal people themselves wanted, not changes which would be imposed upon them either by a recommendation—such as we have from Reeves—or by the government of the day seeking to pass legislation to change the act against the wishes and the consent of the Aboriginal people themselves. I regard that as probably the most fundamental of all propositions. I also regard it as unchallengeable that no change should be made to this act without the consent of the Aboriginal people of the Northern Territory.

In 1987, changes were made to the mining provisions. They were imposed upon the land councils and the people of the Northern Territory, and I know, having talked to those who were involved at the time, that they still feel considerable chagrin at the position in which they were placed in having to agree—not consent, but agree—to those 1987 changes.

So the Reeves review is not the kind of review which was recommended by Woodward or ought to have been expected by the Aboriginal people of the Northern Territory. I believe that Aboriginal consent to any change is, as I have said, fundamental to the Land Rights Act. The consent to change should be informed consent in the fullest sense of that by way of translation to traditional languages of what is proposed, by explanation in traditional language, as well as English, and then by the expression of choice by the people themselves. You will see, Mr Chairman, in one of the papers that I wrote that I asked the question: how is the committee to go about informing the Aboriginal people of the Territory of the thousand pages of the Reeves report, the recommendations that he has made and the implication of those recommendations?

I recall an experience which I had in Broome when the joint committee of parliament, under the chairmanship of Mr Entsch, was considering the Wik amendments and Aboriginal people made their presentation to the committee in their traditional languages. When I received the *Hansard* I did not see any of that in Hansard; there was just, I think in brackets, the words, 'Not spoken in English'. I made certain representations that that would be rectified. But I asked in simple terms: how could the members of that committee have understood, without a translation, the submissions being made to them? Likewise, I make the point: how can this committee be sure that all the recommendations and the implications of Reeves are known and understood by the Aboriginal people of the Territory without a proper translation of those recommendations and explanation in their own languages?

The Land Rights Act made a very distinctive and fundamental change in the relationship of the Australian people to the Aboriginal people of the Northern Territory, and also a funda-

mental change between this parliament and the parliament of the Northern Territory and those Aboriginal people, by the passage of the Land Rights Act. That change was that no longer could or should the parliaments of the Commonwealth or the Territory legislate for those Aboriginal people as if those parliaments know best for them, most notably concerning the land rights which the act had granted to them, and what should be done with and how their traditional lands should be managed and controlled. That change in relationship came from the fact that the Land Rights Act became their act, decisions about traditional land became their decisions and changes to legislation affecting that land should be their choice and with their informed consent.

Against that background, when one reads the Reeves report and recommendations one finds that the Reeves inquiry and the recommendations are in themselves diametrically opposed to that fundamental proposition and the other propositions that I have stated. It is not unexpected, therefore, that there should be such severe challenges and criticisms of the intellectual basis of the Reeves report as there have been, as reflected in the publication which you now have, the CAEPR Research Monograph No. 14, and the papers contained in that publication, the most severe intellectual challenges to the legal, the anthropological and the public policy aspects of the Reeves Report. I would ask the committee to put aside the self-interest of the Northern Territory government, the mining industry, the fishing industry and the politicians—and also, I would add, the social engineers. You will see from the CAEPR publication how it became clearly acknowledged by advisers to Reeves that their recommendations were an act of social engineering of the Aboriginal people of the Northern Territory.

The challenge has been to not only the intellectual basis of the Reeves' analysis but also the practicality in Aboriginal terms of his recommendations. By this I mean the practicality of his recommendations in terms of Aboriginal tradition, customary law and Aboriginal decision making, because his recommendations are again diametrically opposed to Aboriginal tradition, customary law and decision making. For myself, I do not think I have ever come across a public document which is so inadequate in its analysis and its attempt at public policy. It is so inadequate—and I say this seriously—that this committee should reject the Reeves' recommendations completely. What I would ask the committee to do is to look at the way in which the Woodward report recommended reviews of the act be undertaken and proceed from the fundamental proposition that only those changes which have Aboriginal consent should be made to it. That may be anathema to the committee as a group of practising politicians, a group of legislators—

CHAIR—Why?

Mr Viner—I said it may be.

CHAIR—And I asked why.

Mr Viner—The reason being that I think politicians and legislators, if I can draw on my own experience, tend to think—I do not say always do, but tend to think—that they ought to legislate as they think is best.

CHAIR—Not this committee. Let me assure you that this committee does not think that way at all; quite the opposite.

Mr Viner—I am very glad to hear that. If my remarks, as they have, have drawn that from you, Mr Chairman, I am very pleased to hear it because, if I might put it this way, it does require a reversal of traditional roles of politicians and legislators, reversed in the way in which I have indicated. And I express it this way in regard to the Land Rights Act: if you were to look at your role as serving the interests of the Aboriginal people as they see their interests, not as others see it, but as they see it. I would also express it in this way: that you and the parliament adopt a post land rights approach to land rights and not a pre land rights approach to land rights, and there is a fundamental distinction in that. Prior to land rights, Aboriginal people were regarded and administered and governed in a position of dependency—

CHAIR—You mean they are not now?

Mr Viner—But they are not now.

CHAIR—Do you mean they are not now?

Mr Viner—They are not now; they were.

CHAIR—Are you seriously saying that, that they are not now?

Mr Viner—No, I am not saying that they are not now, because there is still too much of that approach around.

CHAIR—Of course.

Mr Viner—I am requesting to the committee that you adopt a thorough-going post land rights approach to the Reeves' recommendations. I am asking you to reject those and put them aside and recommend to the parliament that the process of review of the Land Rights Act be looked at entirely differently and from the perspective of the Aboriginal people first so that the parliament then cooperates with them in making such changes as they think should be made.

Mr MELHAM—Do you do that on the basis of actually talking about 'their rights' and 'these are their rights'—

Mr Viner—That is right.

Mr MELHAM—So they have them already and that is why you really need informed consent before you vary them?

Mr Viner—That is right, exactly. In fact, I think the time is right for this committee to take a far-sighted approach—radical, if you like—to sit down with the land councils and ATSIC to remove the ministers and the government and government administration from the act, remove it from the act so that land councils, royalty associations, community councils,

which are all incorporated bodies, can stand independently of government, managing and controlling traditional lands, carrying out their own responsibility according to Aboriginal tradition and in accordance with Australian domestic law, their responsibility for accountability within the law, not as agencies of government but like any other corporation, acting in accordance with the law.

I think that as corporate bodies you will find most of them are incorporated under the Aboriginal Councils and Associations Act 1976, which was deliberately enacted at the same time as the Land Rights Act so that it would complement the act and provide a vehicle for incorporation of Aboriginal communities and councils. But as well as the act there may be a role for the Corporations Law, which applies to all corporations, to also apply to Aboriginal bodies operating within the purview of the act, and also the application of general trust law.

I know there is a lot of debate about the position of royalty associations. Reeves recommends that they become agencies of the government and that land councils effectively be agencies of the government and that royalty equivalents be treated as government money, simply because it passes through consolidated revenue and so on, but the royalty associations and bodies who receive royalty equivalents, or non-royalty equivalents, are all trustees for the distribution of those moneys. In the same way as the trust laws apply to members of the committee and me in our affairs and the corporate laws apply to me and my companies and family trusts and so on, there is no reason why the laws which apply to you and me should not apply to Aboriginal organisations in the same way without the necessity for them to be treated as agencies of government and, therefore, having to come under all the special laws of the Commonwealth. In that way Aboriginal organisations operating under the Land Rights Act carry responsibility in accordance with Aboriginal tradition and Aboriginal customary law at the same time as they carry responsibility under Australian law. If together with informed consent that approach was adopted, you would be fulfilling the policy objectives which began with Woodward and continued with the Land Rights Act.

That may be thought to be radical thinking by some, but I do not think it really is. I think it is fundamentally consistent with land rights, with the cultural identity of Aboriginal people, with their special position and place within contemporary Australia, and within Australian domestic law. As I pointed out in my submission to Mr Reeves, when the Land Rights Act was drafted and written, and indeed when the Woodward recommendations were made, we were still living in an era when administration of Aboriginal affairs was moving out of that state of dependency and government paternalism and administration through a period where Aboriginal people were becoming free to exercise their traditional rights within Australian law.

If the act was now approached in the way in which I have suggested, you would be fulfilling that underlying social objective in the granting of land rights. It would be a very significant move and I would think one which would be heralded throughout Australia, and also internationally, with considerable acclamation and approval. Regrettably, I know that the present government has some difficulty with the concept of self-determination—I really do not know why because when I was in government we had no difficulty with it—but my recommendations would be true acts of self-determination. If you want to give them the description of self-empowerment, call it self-empowerment, but in reality it is self-determination recognised by Australian law. Then I think you would really get somewhere, and much

further than we have been able to get so far, in dealing with social disadvantage—those unfortunate areas of poverty, health, housing, education, employment and economic development—because you would be releasing to the full to the Aboriginal people the opportunity to use and manage and control their traditional lands in the way in which they want to in accordance with Aboriginal tradition, in a way in which they are accountable within Australian domestic law, and for which they have responsibility under Australian domestic law.

One of the very basic mistakes of Reeves was to look at land rights as a matter of social policy to deal with the social disadvantage of the kind that I have referred to. When the committee, as I hope it will, reads my submission to Reeves, you will see how I exploded a couple of propositions that he put forward as to the purposes for which the Land Rights Act was passed and the omission of a statement of policy for the Land Rights Act in terms of economic and social development. As I pointed out, the Land Rights Act was intended to do, as Justice Woodward—as he was then—said, 'Simple justice to the Aboriginal people of the Territory by returning to them the traditional lands of which they had been largely dispossessed.' I say 'largely' because you had the great reserves deliberately set aside in the twenties and thirties for Aboriginal people.

Social policy in terms of the eradication of poverty, overcoming ill health and providing better education, housing, employment and business opportunities are matters of government policy and government action separate from land rights and it ought to be seen in that way, but everybody recognised—Woodward, me, the Whitlam government—that the granting of land rights was a step along the road to overcoming the social disadvantage that the Aboriginal people of the Territory had been suffering.

CHAIR—In what way? In what way did you anticipate—

Mr Viner—Because it gave them a secure land base in which they could exercise their tradition and live according to their traditions in the way they wanted to, fulfilling their own destinies the way they wanted to, making use of their land in any economic way they wanted to, not in a way government wanted to impose upon them, but in a way they wanted to use it. You will see in the Woodward report discussion of forestry, fishing, mining and tourism, all those things that we talk about today.

CHAIR—With a view to overcoming disadvantage—

Mr Viner—No, with a view to improving the economic and social position of the people.

CHAIR—And therefore?

Mr Viner—And therefore, to the extent that it can, overcoming disadvantage, but not to the exclusion of the responsibilities of government. One can read into Reeves a very heavy emphasis on use of Aboriginal traditional land in a way in which the government—the Northern Territory and the Commonwealth government—thinks it ought to be used to generate income to substitute for government subventions for social policy.

CHAIR—I looked for that last phrase, the word you said, 'substitute', in Reeves several times and I could not find it. I know that the suspicion is there, and I will acknowledge that, but I could not find words that say what you just said.

Mr Viner—I think it is a clear implication.

CHAIR—You have read them into it. I am not saying you did it incorrectly, but they are not there in words.

Mr Viner—He does not say it in words.

CHAIR—Okay, I accept that that is on the agenda for debate, but I certainly could not find where Reeves recommended any substitution.

Mr Viner—No, he does not say 'substitute it for', but I believe the clear implication is that there will be a substitution.

CHAIR—Unless the parliament and the Aboriginal people agree that it should not be.

Mr Viner—That it should not be?

CHAIR—Yes, substitution.

Mr Viner—I do not think Aboriginal people would agree that it be a substitution for the responsibilities of government. Indeed, in our own wider society we do not expect government to withdraw from their social responsibilities simply because we own private property, and the same approach should be taken to Aboriginal land.

CHAIR—I know you are proceeding, but in the context of what you are saying the recent release by the Aboriginal Reconciliation Council of its discussion document, which unfortunately I did not bring with me today, says, particularly in the accompanying notes, that the object is to achieve a relationship and a partnership between all Australians, indigenous people and non-indigenous, that there ought to be equal rights, equal application of the law, and that—I think I am right—responsibilities should be shared equally. Do you remember those—

Mr Viner—One cannot—

CHAIR—You do not disagree that that is not a bad objective anyway.

Mr Viner—I do not disagree with that objective. In fact, I was very heavily involved when I was on the council in developing those ideas, and in particular the equality of service delivery, but also we emphasised on the council equality of outcomes.

CHAIR—Hypothetically, if we advanced our minds to a conference between Aboriginal representatives and government representatives, as envisaged by Woodward—say it was happening tomorrow—do you think a legitimate issue to put on the agenda would be the issue of what are the mutual responsibilities and obligations of all Australians to each other

in relation to how they use their resources and their time for the benefit of the nation and their communities and for the disadvantaged in their communities?

Mr Viner—It is not comprehended within the Woodward recommendation as to review of the act, and this I think is an important distinction to understand. A conference to look at changes to be made to the act is not a conference about the delivery of health services to Aboriginal people in remote parts of the Northern Territory.

CHAIR—But surely it would include an examination of the contemporary relevance of the act and what objects ought to be in the act or not in the act?

Mr Viner—This is where one can move easily into the social engineering of the kind which Reeves has undertaken, because he said that the purposes of the act should include social and economic purposes. He saw the act as something different from the grant of traditional title to traditional land to the traditional owners and those having traditional interests in that land. I consider it is a very important distinction to make because if you do not make it you will fall into the Reeves trap, if I can put it that way, of wanting to develop a social policy to overcome poverty, ill health, bad housing and so on.

CHAIR—To help overcome?

Mr Viner—Well, even to overcome it. All right, say to help overcome it.

CHAIR—Do I read into what you are saying then, contemporary, that the mechanisms that parliament might provide for Aboriginal land in the Northern Territory for the future should be purely those mechanisms which Aboriginals want and consent to and ask for that are solely to do with management of land and nothing else, leaving all other policies to be determined in the way in which governments and communities in Australia have up to now and decide to in the future? Are you advocating a pure land management structure as all that is needed?

Mr Viner—I do. It is a land grant and a land title, management and control legislation.

CHAIR—And accountability?

Mr Viner—Well, accountability, but then again it depends what you mean by accountability.

CHAIR—Not ripping off your shareholders.

Mr Viner—That is where I would have said, 'Put the Aboriginal people in terms of their organisations in the same position as all other Australians.'

CHAIR—I am sorry to interrupt you, but it is important that I keep the momentum going. Are you saying that the majority of Aboriginals in the Northern Territory, who are what I call community bona fide residents of parts of the Northern Territory covered by existing land council boundaries, although in the majority, because the traditional land owners are in the minority but have the legal recognition that the legislation gives them, that

from hereon in and in the future—both non-traditional and residential bona fide regional Aboriginals—should be treated equally?

Mr Viner—Again I would throw the question back to you: when you say 'treated equally', equally in what sense?

CHAIR—Let us start up with the dream first and we will do the detail next. The dream: should they not be treated equally?

Mr SNOWDON—Can I perhaps—

CHAIR—No, please, just a minute, Mr Snowdon. I am asking the question.

Mr SNOWDON—It depends on—

CHAIR—You do not have to help the witness; he is very able to answer for himself.

Mr SNOWDON—But you completely misunderstand—

CHAIR—Order! Order! Mr Viner, I am sorry, I apologise for that. I am asking the question and you are answering it.

Mr SNOWDON—But it is based on a false hypothesis.

CHAIR—He does not need your assistance, Mr Snowdon. Do not get nervous because I am asking about an important issue that the public is interested in hearing about.

Mr SNOWDON—But it is based on stupidity.

CHAIR—You may have your own agenda to protect—

Mr SNOWDON—But it is a stupid question.

Mr Viner—If I can come in this way: first of all, I believe it is wrong to speak in terms of majority and minority.

Mr SNOWDON—Exactly.

Mr Viner—The traditional owners are traditional owners in accordance with Aboriginal tradition.

CHAIR—Sure, I understand that.

Mr Viner—They and, as you say, others resident within that land council area may be either people who have traditional rights and interests in respect of that land, without being a traditional owner, or residents who have come into that geographic areas whose traditional land is somewhere else in the Northern Territory. Those who have traditional rights and interests without being identified as traditional owners have equal rights according to

Aboriginal customary law. That is something that is frequently overlooked, and indeed it is not acknowledged by Reeves and his advisers.

CHAIR—Nor is it expressed in the existing act.

Mr Viner—With the greatest of respect, it is.

CHAIR—Whereabouts? Can you help me with that?

Mr Viner—Yes, it is in the definitions of Aboriginal tradition. You have Aboriginal tradition, as defined, and you have the functions and duties of land councils.

Mr MELHAM—It is section 23.

CHAIR—I am looking for the equal rights provision in the statute.

Mr Viner—That is the equal rights provision.

CHAIR—Would you read it to me, please? Read me the words that say there are equal rights.

Mr Viner—It reads:

(1) The functions of a Land Council are:

(a) to ascertain and express the wishes and the opinion of Aboriginals living in the area . . . as to the management of Aboriginal land . . . and as to appropriate legislation concerning that land;

(b) to protect the interests of traditional Aboriginal owners of, and other Aboriginals interested in, Aboriginal land in the area of the Land Council;

(c) to consult with traditional Aboriginal owners of, and other Aboriginals interested in, Aboriginal land in the area . . .

Subsection (3) says:

(3) In carrying out its functions with respect to any Aboriginal land . . . a Land Council shall have regard to the interests of, and shall consult with, the traditional Aboriginal owners . . . and any other Aboriginals interested in the land . . .

and so on, including, in subsection (b):

any Aboriginal community or group that may be affected by the proposed action . . .

CHAIR—This is a very important issue to me, but does it not go on in (a) to say 'not to do anything'—and these are my words—'unless the traditional Aboriginal owners consent'? Does it not have that overriding proviso?

Mr Viner—Well, subsection (3)—

CHAIR—As I read it, it does, but you might assist me and say that I am reading it too narrowly.

Mr Viner—Section 23(3) requires the giving of consent.

CHAIR—That is right. I am wanting to be instructed and assisted, I am not saying I know; I am genuinely wanting to know what you believe as a matter of law, on the question of the contemporary act and maybe any changes in the future on the concept that you are outlining, that it be a land management type structure, recognising the traditional owners and traditional law, but dealing with the concern that I am putting on the table, and that is that in physical numbers there is a majority of Aboriginals who are not, as I understand it, regarded in the legal sense as traditional owners but who are permanent residents and making their homes there. I am asking you, on the question of reform: how do I deal with that inequity, or potential inequity, if I am proposing to the parliament and the minister that this committee move and take your suggestions and advice and adopt a new structure which is purely Aboriginal, not white man's, but which is on land management, leaving all the other issues to be determined in other ways?

Mr Viner—I just make the first point: it is not a land management structure; it is an Aboriginal traditional land title system. That is where you start from.

CHAIR—I accept that.

Mr Viner—Because it is traditional Aboriginal land in which all those who have a right or interest according to Aboriginal tradition have a legal right to enjoy that land. That combines both Australian domestic law, by force of the act, and Aboriginal customary law. It is that second aspect that we non-Aboriginal people find difficult to conceptualise and understand. Exactly the same situation arises under native title. The High Court in Mabo No. 2 recognised that as part of the common law of Australia you have Torres Strait or Aboriginal customary law. And the other concept—and this is relevant to your question about equality—is that those who have traditional rights and interests in Aboriginal land granted under the Land Rights Act have equal legal rights. In other words, they can have recourse to the courts of Australia to enforce their customary rights in respect of land for which title has been granted under the act and in respect of which the traditional owners have the rights and responsibilities under the act.

CHAIR—Can I illustrate with an example. If I have a family of Aboriginal people living in the Northern Land Council area—and I just use that as an example—and they are not traditional owners but they are bona fide long-term community residents, and they apply for an allocation of land by some lease, sublease or whatever, to build a house for their family, and the council wants to grant that to them but the Aboriginal traditional land owners say, 'No, we will not agree,' do I understand the present provisions of the act would therefore prevent the Northern Land Council from concurring and granting the land and that family would not be able to get the house that they want where they want it? Am I right in conceptualising the legislation into that example?

Mr Viner—First of all, there are three categories of people that you need to consider: (1) those you identify as traditional owners; (2) those who would have traditional rights and

interests in the land but who are not traditional owners; and (3) those who have come from outside the area and have no traditional rights.

CHAIR—So we will call them category A and category B, the non-traditional. I am not talking about the traditional; I am talking about the two categories you last mentioned. Take a family representing each of those categories wanting to build a home for their family and applying to the Northern Land Council and the Northern Land Council are very sympathetic. The Northern Land Council consults the traditional owners who say no. Is that the end of the matter under the present act?

Mr Viner—It would be the end of the matter. If the traditional owners, in accordance with Aboriginal tradition, say no, that is the end of the matter, and the reason for it is of the decision making processes under Aboriginal tradition, not under our concept of—

CHAIR—Can I then move to another hypothetical scenario. Those families want to be housed, they are disadvantaged, they are homeless. They ask the government to help them, as other Australian citizens do who are disadvantaged in seeking public housing. The government says, 'Yes, we have a duty of responsibility to provide housing for you.' Under the present act, if the government in the Northern Territory could not persuade the traditional owners to consent, they would be unable to provide a housing estate for that family in that area of the Northern Territory and would have to offer them accommodation in another part of the Northern Territory. Is that not right?

Mr Viner—As I have said elsewhere about something in Reeves, I think you have erected a straw man.

CHAIR—Explain. Why?

Mr Viner—Can you tell me of a situation in the Northern Territory where traditional owners or Aboriginal communities have refused to allow housing to be built?

CHAIR—No, I cannot.

Mr Viner—Then what is there to be worried about?

CHAIR—Because it is our responsibility to report to the parliament on the operation of the act and any changes that might be desirable, in the same way, Mr Viner, as you are proposing that this 23 or 25 years of legislation should be catapulted into a radical—and I must say superficially very attractive—new model, leaving the Aboriginal people to look after their own affairs, as you as an Australian believe they should have been left to do many years ago. I have a lot of sympathy for what you have just said. I am now trying to conceptualise it. It is all very well to make radical recommendations but you have to be responsible. I am now trying to conceptualise how that would work as a matter of equity for the many thousands of Aboriginal people who would not have, as I understand it—and I believe I have correctly understood it now—these same legal rights catapulted into the new legislation; it would just be the existing legal rights. How do I protect them as a matter of equity, or do I throw them to wolves and say, 'Sorry, you're part of the Aboriginal

community. Too bad, you're not traditional. You work it out yourself. I'm turning my back to that'? Is that what you are saying the government should do?

Mr Viner—No. Again you say 'not traditional', and again I say you must understand it in the fullest sense of it.

CHAIR—I think I do.

Mr Viner—Except that you constantly use the term 'traditional owners' and refer to them as a minority.

CHAIR—In terms of numbers they are. That is the only context that I use the word 'minority' in. I do not use it in any discriminatory sense.

Mr Viner—I would hope not because—

CHAIR—I think if you knew me better you would not even think I would. So let us just erase that from our minds. They are in fact a minority in number.

Mr Viner—Yes; but, if I might say with respect, we as politicians tend to think in terms of the numbers game. If you think in terms of Aboriginal tradition and that the land is traditional land granted to the Aboriginal people of the Territory for secure title, that is the foundation of what the act is all about.

CHAIR—Yes, I understand that, but you have not answered the question about how I am going to look after the interests of the Aboriginal people who are not traditional owners.

Mr Viner—You are going to look after them because up to now, and into the foreseeable future, what you have been talking about has been accommodated within all Northern Territory land granted under the act, and housing programs have been funded by the Commonwealth ever since my time, and before my time, and—

CHAIR—But Reeves suggested that there should be a limited right for the Northern Territory to have the right to resume land for public purposes, and you are saying throw it all out.

Mr Viner—Yes, and I was going to carry the logic of your proposition to the point of compulsory acquisition because the next step in what you were putting forward was to give the Territory the power to compulsorily acquire.

CHAIR—I am asking the question whether it should have that power.

Mr Viner—And I very definitely say, no, it should not.

CHAIR—Even if it is to provide a housing estate and public housing for disadvantaged Aboriginal people?

Mr Viner—Because very simply the Northern Territory does not need to acquire Aboriginal land in order to put housing on it.

CHAIR—Explain.

Mr Viner—Because those with a traditional interest in the land can consent and there is no need for the Northern Territory government to have any legal interest in the land in order to put housing there. There is no need for the Northern Territory government to acquire a lesser than fee simple interest in order to put an electricity generating station there, or to put water there, or to put roads there, or to put a school there. It is a fallacy to think that the Northern Territory government has to have the power of compulsory acquisition in order to do that.

CHAIR—Yet, and I am not arguing against what you are saying, in all other parts of Australia the states have power to resume land from land owners.

Mr Viner—And the reason—

CHAIR—Why the difference, having regard to the reconciliation objectives of equal laws, equal obligations?

Mr Viner—No, there—

CHAIR—Why the difference?

Mr MELHAM—Let him answer.

CHAIR—Why the difference?

Mr Viner—There is a very fundamental difference, and this is the point at which it needs to be acknowledged that this is Aboriginal traditional land. It's a simple answer. That was the simple act of justice that Woodward recommended and the parliament of the Commonwealth implemented. This land is not the same as the house that I own in Perth.

CHAIR—Even though it is 50 per cent of the surface area of the Northern Territory?

Mr Viner—Absolutely. It does not matter if it is 75 per cent.

CHAIR—So you do not see any—

Mr Viner—And I do not take any notice of those maps that were put up on television; they are irrelevant.

CHAIR—I do not know to which maps you are referring.

Mr SNOWDON—Ask the Prime Minister.

CHAIR—So you say that in a modern Australia there is no need to have a reserve power to be able to acquire land for public purposes that are needed, justified, because the land is traditional land and it should be exclusively quarantined off from any future need by an elected government to provide something on those lands for public purposes?

Mr Viner—Yes.

CHAIR—You say that that is the case and it ought to be preserved?

Mr Viner—Yes.

CHAIR—Okay, that is fine.

Mr Viner—That is why the act presently does not permit compulsory acquisition. The other great danger which I think needs to be recognised is the movement by state and territory governments to use their compulsory acquisition powers to benefit private persons, third parties. As I think the committee would know, that created great consternation with regard to the Wik amendments and native title.

Mr MELHAM—And it has found its way through in Queensland at the moment with the state development bill.

CHAIR—Of course, the classic example of the transference from public intervention into private rights, and then benefiting the private, is the beautiful city of Canberra where many of the 200,000 or 300,000 people, whatever it is, now have titles to—

Mr SNOWDON—They are leases.

CHAIR—They are leases, yes, but—

Mr MELHAM—They are leases.

CHAIR—But how did they come to get those? By government intervening in the first instance and then transmitting what they resumed and acquired into private rights.

Mr SNOWDON—But they have never recognised traditional law. Can I just make the observation, Mr Viner—I had the opportunity to read your submission—that I think it presents a very compelling and persuasive argument and it has my total support. I will not on this committee be a party to agreeing to any of the propositions, whether they are put up as just hypothetical examples or not, that have been put up by the chair, and I make that very clear.

CHAIR—You are resigning now, are you?

Mr SNOWDON—No, but I am telling you that I will not be supporting any recommendations—

CHAIR—Don't get hysterical for goodness sake. You should understand that intelligent conversations between people of good will is an example of how you might just get some ideas on the record and then transmit them into good policy.

Mr SNOWDON—Exactly. Can I finish what I was about to say. We have been having this discussion for some weeks and I have alerted you to section 23 of the Land Rights Act before, I have alerted you to section 19 of the Land Rights Act before and either you have not read them or you do not understand them. I think Mr Viner has properly elucidated what those parts of the act mean and it seems to me that—

CHAIR—If you had been listening, I said I agree with him. Why did you not listen to that? Your problem, Mr Snowdon, is that you go around the Northern Territory and Australia trying to shut people up.

Mr SNOWDON—No. You can say what you like, mate, but I am just telling you that I do not agree with you.

CHAIR—One of the reasons why Aboriginal people are disadvantaged in this country is people like you try and suppress intelligent debate between people of good will.

Mr SNOWDON—Can I now make a comment. You have had your say, now give me a free kick. Firstly, I take objection to that statement, and I want you to understand that I regard that as an insult. I regard myself as being a proper representative of the people of the Northern Territory. I acknowledge, and I have acknowledged publicly before, my commitment to land rights in the Northern Territory and my belief in the Land Rights Act; I make no bones about it. I have also made it known to you publicly, and I will say it again here for the public record, that I think that this document, as described elsewhere by Mr Viner and other critics of it—

Mr MELHAM—Name the document for the record.

Mr SNOWDON—The Reeves report—is a put-up political stunt, and I do not mind saying it and I repeat it. I think any government of any political persuasion who believes that these recommendations stand up to any objective analysis is fooling themselves, because any reasonable person understanding the Land Rights Act, having any regard at all for the rights that Aboriginal people currently express and enjoy, would understand that this is a flawed document from go to whoa. There may be one or two recommendations in this document that are reasonable, but it is not as a whole a worthwhile document. I have said this before and I will say it again: I am flatly surprised that this committee is wasting its time discussing it, frankly. I would have thought the propositions that have been expressed by Mr Viner this afternoon and Sir Edward Woodward last week have made it self-evident why we should be exploring a different avenue. To have you insult me in the way you have done I think demeans your position and demeans my role in this parliament. You can take that as you like, but if you think that I am going to support any recommendation that comes anywhere near what you have proposed in terms of the hypothetical question to Mr Viner you are dead wrong.

Therefore, I put it to you that if you want a consensus decision to be around this issue on this committee you are going the wrong way about it, because if you pursue that course and recommendations along that line I will definitely be putting in personally, if I am not joined by others, a minority report. I can tell you again that under the present construct of this parliament, despite whatever the minister might think, they will not get one piece of legislation which reflects any of the major recommendations of this document through this parliament. So I would suggest to you that a proper course for us to adopt is to put down the guns and start to talk reasonably to people. I regard your job as chairman, where you have insulted me in such a way, as demeaning your position.

CHAIR—Mr Viner, we will proceed with questions from members.

Mr MELHAM—Does Mr Viner have time constraints? Do you have time constraints, Mr Viner?

Mr Viner—No, I was going to meet a senator about a native title problem.

CHAIR—Mr Wakelin, you have the call.

Mr WAKELIN—Thank you, Mr Chairman. In 1976 when you had the privilege of serving in this place as a minister—which I imagine would have been quite exciting times, quite innovative, a fairly special time in the House; and you mentioned the bipartisan nature of that legislation—not to put too fine a point on it, and I am sure you will help me out in terms of the detail, the only difference between the parties at the time was to do with the various categories of land. It was fairly unanimous. Can you just remind me of the difference?

Mr Viner—I mentioned one difference and that is provision of land on a needs basis: those who had lost their traditional land because it had been alienated. But there was a need for land, whether a mechanism for that was to be provided for in the Land Rights Act or outside the act. The coalition government at the time decided to keep that out of the Land Rights Act and deal with it separately. As time has gone on, that is being dealt with under the Indigenous Land Fund. We had other sources of money that were being provided for those land needs through different channels. The second difference was what is called scheduled lands. All that land which had been set aside by way of reserves Woodward recommended—

Mr WAKELIN—Arnhem Land and—

Mr Viner—Yes, Arnhem Land and down in the centre and so on. Woodward recommended, and we accepted, that that immediately receive title without having to go through the land commission process. Woodward recommended some other pastoral property lands, for example, Woolara, Utopia and so on, should be scheduled land. We said, 'No, keep the scheduled land to reserves, let the other land go through the land commissioner process,' which is what they did, and, as we expected, they all were granted.

Mr WAKELIN—Did you have an expectation of the dimensions from 1976 through to now—as you know, the sunset clause came on, et cetera—that it would split about where it did?

Mr Viner—We did not have the expectation that the volume of land which has now become Aboriginal land would be as great as it is, and the reason for that is that there were not so many Aboriginal owned pastoral properties at that time. The effect of the Lands Right Act has been that, as what was regarded formerly as alienated land—that is, had been leased as pastoral leases—was not available for grant under the act, when it became Aboriginal owned pastoral properties it did become available under the act. That was the main reason. The unalienated land at that time did not grow and we expected that all or most of that could be granted under the act. The growth has really been through Aboriginal owned pastoral properties.

Mr WAKELIN—Fine. The vexed issue of Aboriginal health, Aboriginal advantage, Aboriginal opportunity, Aboriginal employment—all of those things—if I have you right in terms of the land, you believe is all a separate matter. My dilemma, which I seek your guidance on, is that much of the source of our wealth and our opportunity—all of those things, all of the things that Aboriginal people aspire to: the Toyota, the house or the television; the material comforts, if you like, that are aspired to by Aboriginal people as well—can be supported only by an economic system which comes from the land. Much of that basis is in the land.

From what you have said—and you are very clear about the land: it stays as Aboriginal controlled land—is there not something there? You would say that in negotiation that land can be put to, if you like, modern day use for economic wellbeing, but you are just so very stringent in saying that no compromise can be made. You can see where I am coming from. We need the economic benefit, but it is very strict and it has to be at the basis that only the traditional owners can approve it. I just worry about that rigidity. It is not that I am opposed to the concept of land rights, but can you help me in terms of the reconciliation that you are well familiar with?

Mr Viner—I believe I can. Aboriginal people, as 25 years of land rights has shown, have not turned their back on exploitation of their land for economic purposes. There are many mining agreements and tourism agreements. If you read the annual report of the Tiwi Land Council, you can see what they are doing to exploit, in an economic sense, their land rights, but in an Aboriginal way and in a way in which they consent, not in a way which is imposed upon them by a public developer—that is, the government of the Territory—or a private developer. If you like to call that rigidity, the rigidity that I have is that Aboriginal consent is required to the exploitation of their traditional land.

Mr WAKELIN—But it is not the same basis of right that a non-Aboriginal person would have, is it? It is totally different to myself as a land owner in that sense, in mining and fishing.

Mr Viner—Fundamentally it is not, in a sense.

Mr WAKELIN—I am not being critical, I am just trying to deal with it, and you understand better than I do the tension in the community about these sorts of issues.

Mr Viner—For example, in Western Australia farmers, not pastoralists—remember there is a very clear distinction between a farmer and pastoralist, and if you look at our West Australian Land Act you will see that distinction very clearly; likewise in Queensland and other places—whose land is cultivated or pasture laid down, have an absolute veto over it. No miner can come in and peg that land to exploit it for mining.

Mr WAKELIN—I was not aware of that.

Mr Viner—Yes, my word.

Mr WAKELIN—It is not the same in South Australia.

Mr Viner—The National Party snuck that one in on the Liberals, I might say. But, on the other hand, a pastoralist does not have exclusive ownership of his land; he has only a right to run his cattle or his sheep under a licence or a lease. So a miner can come in and peg that land and then have a right to exploit it for minerals. So what is said to be rigid about my approach in fact has equal approaches in the wider community.

Mr WAKELIN—This is where I will finish because others will want to talk to you because of your vast background in it. I have to be able to look Australians in the eye, black and white, and say, 'We are fair dinkum and we live in this place together and we share and we work together on the issue.' I think that is the ideal and I have to be able to do that. Whilst we may differ around the margins, I think you have given me some opportunity to understand your point of view on that. You can understand where I am coming from: I have to be able to look people in the eye.

Mr Viner—If I may put it this way, you can look people in the eye when you say to them that the difference is that this is Aboriginal land and I, Barry Wakelin MP, am accepting and respecting the distinctive cultural identity of the Aboriginal people of Australia in respect of their traditional lands. That is the proposition.

Mr WAKELIN—Thank you.

Mr SNOWDON—Just to further explore this process, perhaps you could elaborate on the comments which you make on pages 4 and 6 of your submission in which you talk about collateral aspects of the grant of land rights. I think your comment about that would be worth while exploring.

Mr Viner—My submission or—

Mr SNOWDON—No, the submission, on page 6.

CHAIR—You said page 4.

Mr SNOWDON—Page 4 deals with the question of balance and economic development.

Mr Viner—Then I talk about the primacy of tradition and routes and so on.

Mr SNOWDON—That is right, and then you talk about the collateral issues, on the bottom of page 6.

Mr Viner—You mean the paragraph beginning, 'To suggest therefore that these are economic matters'?

Mr SNOWDON—Yes.

Mr Viner—Reeves, in his issues paper, purported to identify within the purposes of the Land Rights Act a main theme, being economic development, but that the act did not provide for it. I pointed out that Woodward recognised that the provision of a secure land base would provide economic opportunity to the Aboriginal people. I pointed out in my second reading speech that I acknowledged that was what land rights would do. As I have said to the chairman and others, that does not mean that Aboriginal land cannot be exploited in an economic sense, it can be, as we know it has been, but it ought only be exploited with the consent—

Mr SNOWDON—Informed consent.

Mr Viner—The informed consent of the Aboriginal people who have traditional interests in that land. That is the point. So I move on from there and point out that when I was minister we had programs for housing, for health, for economic development support, promotion of business opportunities and so on, but they were all government funded and designed programs building upon land rights. That is the concept, and I think governments of today ought to pursue these areas of social disadvantage in the same way.

The other thing that I am saying in my paper is that, if governments will acknowledge land rights for what it is, I think you will then obtain a greater level of Aboriginal participation, as there ought to be as a matter of course, in both the design, the development and the implementation of programs to overcome these areas of social advantage. But, whilst Aboriginal people constantly feel that their traditional lands are under threat, as they have been, if I might say, from the politics of the Northern Territory for 25 years—

Mr SNOWDON—I have been experiencing it.

Mr Viner—They are not going to be ready to participate in the same way as they would be if governments proceed on the basis that we accept and respect and we are not going to interfere with their traditional land rights. That is why the absence of the power of compulsory acquisition of Aboriginal land is so important because, if you include it, it immediately puts all Aboriginal traditional land under threat and, governments being what they are, they will always want to take away what other people have and do with it what they think is best or give it to a private developer to use it for some private purpose. That is

why compulsory acquisition and the prevention of legislation against it is so fundamentally important. I know that you have other people who wish to address you.

CHAIR—There are other members with questions. My very patient Deputy Chair, Mr Quick.

Mr QUICK—On page 29 you say:

There is nothing, so far as I can see, constitutionally or legally to prevent the Commonwealth legislating to enable the royalties to be paid directly into the ABTA without passing through consolidated revenue.

Mr Viner—That is right.

Mr QUICK—Would that be easier in this model that you are proposing?

Mr Viner—Absolutely, no problem. The Commonwealth still has legislative authority, as I think people discovered over the euthanasia issue, over the Northern Territory. Historically, because it was Commonwealth land and the Commonwealth levied royalties, when the Gove development was going through Sir Paul Hasluck and Sir Robert Menzies said, 'Because this mining is on Aboriginal land, the Aboriginal people will get the royalties.' That is the origin of the royalty equivalent, and that was done by an ordinance of the Commonwealth in the days of Territory administration. So, in my view, there is no problem constitutionally of the Commonwealth passing a law saying that that royalty money shall go direct to the ABTA.

Mr QUICK—If that is the case, should there be an opportunity to renegotiate what is happening at Gove?

Mr Viner—Not necessarily. I think the Aboriginal people would like to, and I think they have made some legal attempts to do that, but the Commonwealth could legislate for what is in place now—

Mr QUICK—And then transfer it across.

Mr Viner—Yes, have it paid directly across to ABTA.

Mr SNOWDON—Can I just explore that quickly because it raises an issue. That would mean, would it not, that instead of getting the royalty twice into the Northern Territory government economy the Northern Territory economy would only get it once, because the Northern Territory collects the royalty and what we get is a royalty equivalent? So, in fact, if we were to pursue that objective and legislate the way in which has been suggested, the Northern Territory government would not get a royalty?

Mr Viner—You would—

Mr SNOWDON—Massage it?

Mr Viner—You massage it or you define the royalty money that is to go direct to the ABTA.

Mr SNOWDON—Yes, if that is what you want to do.

Mr Viner—That is right. All that happens now is it comes through consolidated revenue, so it is said, 'It is public money; therefore it has to be subject to public audit and accounting and so.' I am saying that that is not necessary.

Mr HAASE—Mr Viner, in the very beginning of your delivery you mentioned the fact that you had readily accepted the breaking away and creation of the Tiwi Land Council. Could you briefly outline why you accepted it and what the special circumstances were?

Mr Viner—I have not gone back into the papers; but, as I recall, because the Tiwi people were a distinct people traditionally and geographically, one could readily identify those people and the communities that lived on the islands there as people who could operate their own land council, bearing in mind of course that they also had their own land trust. So you have the land trust which holds title to their traditional land and you have a land council responsible for administration of that traditional land. Tiwi was, immediately and obviously, people and traditional land for which a separate land trust and land council could be established.

I have mentioned in my paper, and I think I commented in my opening—and you will see this through the working of my second reading speech and my second speech in November 1976—that I deliberately included in the act the power of the minister to create new land councils. We were grappling somewhat with this question of regionalisation, and so the policy approach that we took was that that will be something that will evolve over time amongst Aboriginal people and we should provide the mechanism by which it can happen. I know since then there has been one other land council, but I know that there have been a number that have not been approved. I was interested that Reeves does not discuss why those new land trusts and land councils were not approved by the minister.

Mr MELHAM—Can I just ask whether you think section 28 is sufficient in allowing delegation or whether you think that requires amendment to allow more flexibility. Is it too rigid?

Mr Viner—It comes down to a policy decision as to where the power should lie for directing a land trust to grant a mining interest or some other legal interest in land. The policy decision by Woodward, which we adopted, was that it was better to have that in a larger collective body than in a whole series of smaller bodies. Historically, and I think I have mentioned it in one of my papers, mining companies, for example, would love to jump over the top of land councils and go straight to traditional owners, and there has been an unfortunate history to that. So the land councils, as a larger collective body representative of the whole land council area, were seen as necessary as a kind of guardianship of Aboriginal interests. That is the way in which Woodward expressed it and the way we, as a matter of policy, saw it, at the same time accepting that in evolution you may be able to identify Aboriginal land and Aboriginal people with traditional interests in that land for whom a separate land council would be appropriate.

As to delegation, I think by and large section 28 probably allows enough flexibility, but if you adopted the conference idea that I have put forward that is something that the land

councils and ATSIC would sit down and work through and may find that something a bit more flexible would be to advantage. That is the way I see it happening.

Mr MELHAM—Thank you.

CHAIR—Are there any other questions?

Mr Viner—Can I just make one short point which is touched on in a policy sense in my paper but not in a legal sense. But that is admirably dealt with by Ernst Willheim in his paper in the CAEPR booklet that you have; that is, the very, very serious legal implications of some of the proposals that Reeves recommends. From your response I think you are well aware of those. It is simply impossible legally to do what Reeves proposes to be done with land that is already held by land trusts.

CHAIR—Without consent.

Mr Viner—Well, without consent, you cannot expropriate it, but also the assets of royalty associations. What he proposes is expropriation of assets and, if that is not enough, he proposes a third thing: the expropriation of income streams from the use of Aboriginal land—

CHAIR—Future income streams?

Mr Viner—Present income streams, for example access for tourism. He proposes that all of that—existing income streams, future income streams, in addition to royalty equivalents—will be expropriated to these new regional land councils. That is expropriation and it is rather mind-boggling that recommendations of that kind should have been made and the legal consequence not explored.

Mr WAKELIN—I have a quick question. A lot of this stuff always comes back to money.

CHAIR—Surprise, surprise!

Mr WAKELIN—On the issue of the royalties and the trusts and those sorts of things, there is some anecdotal evidence that it is not always spent, as some might judge it to be, in the best interests of Aboriginal people. There is debate about it and the distribution of it. Has it concerned you over the years that perhaps some of that money could have been spent a little bit better?

Mr Viner—Well, I would answer, rather tritely: who are we to say?

Mr WAKELIN—That is the answer we are getting in many ways. Do we say therefore that perhaps we do not necessarily have to accept that degree of responsibility for it in that sense, that it is a matter of learning, sucking it and seeing a bit and that type of thing?

Mr Viner—I believe so. Like any other part of our community, money will be wasted and money will be well spent. We have rules of accountability and transparency: apply those to Aboriginal organisations and Aboriginal money in the same way as we apply them now.

Mr WAKELIN—So let us test the system in terms of the general principles and they will suffice?

Mr Viner—I believe so.

Mr WAKELIN—Thank you.

Mr Viner—I will just give one example in our non-Aboriginal community. We are having very interesting litigation and public discourse in Western Australia over the Hancock millions. The Hancock millions simply are derived from getting a piece of paper out of the Mines Department in Perth. Who is to judge whether those millions have been wasted or well spent? I leave the point there.

CHAIR—Mr Viner, on that note it is my pleasure to thank you on behalf of the committee. I think we have been enriched and challenged by the submissions you have given us. As I have said as chairman, whilst we keep an open mind, we are very attracted to some of the proposals you make that have the effect of reinforcing to Aboriginal people that their land is their land and that it really might be better if they took over the running of it and white man backed off, which I think is a very attractive proposition. You also have been reminded, as a former distinguished member of this parliament, of the richness of debate in the chamber and how difficult it is to be in the chair.

Mr Viner—My word.

CHAIR—I thank you very much for your patience and good will and also record our appreciation to you as an Australian who has made, and continues to make, a very good contribution for the Aboriginal people of this country. Thank you, Mr Viner, we wish you well.

Mr Viner—Thank you, Mr Chairman, thank you for the opportunity. I apologise to those who were going to follow me that I have taken so much time.

[6.43 p.m.]

MORPHY, Professor Howard, Senior Research Fellow, Australian Research Council, Archaeology and Anthropology, Australian National University

PETERSON, Dr Nicolas, Reader in Anthropology, Australian National University

CHAIR—I welcome two very patient people, Professor Morphy and Dr Peterson, whom we have had the pleasure of meeting on other occasions in certain forums. I think we have a unique connection with Sir Edward Woodward, Dr Peterson. Would you like to just briefly say what that was.

Dr Peterson—Certainly. I had the privilege of working as his research officer on the royal commission. Since there was just him as the commissioner, myself and one other person working on the commission, I was very closely and deeply involved in the background research and work that went into producing the act.

CHAIR—We are very lucky to have you here today. Welcome. We have already received submissions from both of you and we thank you for that. They have been published as part of the public record and have been circulated widely. We also have the CAEPR book that arrived this week which contains papers from you. In view of the time, I am going to ask you to clarify anything that you would like and then members can ask questions.

Dr Peterson—Given the late hour, I will be very brief. Thank you for the invitation to come and speak to you. Following through my submission, I think the first issue I would just briefly touch on is the nature of land rights. I emphasise that it is in the nature of land rights worldwide that it is not just about property but about some restoration of the level of self-determination. We can see that from Canada where there is an inherent right to self-government recognised by the Canadian government as far as indigenous people are concerned; we can see it at the other extreme where in Sweden, as late as 1993, the Swedish parliament created a separate parliament for the Sami, the Lappish people in northern Sweden, for a mere 12,000 people. Of course, complete restoration of levels of self-determination that existed prior to the arrival of Europeans is impossible but some self-determination is important.

I think it is absolutely crucial to understand that the Northern Land Council and the Central Land Council have to be seen not simply and purely as managers of land on behalf of the traditional owners, but as people who represent the interests of the landholders, and that the more active and political activities of the land councils, which have been objected to by the Northern Territory government—and which of course Reeves makes reference to—come with the terrain. If the Northern Territory government was not uncomfortable about the land councils and if the mining companies were not complaining about them then there would be something quite wrong about the way that land rights has been established in the Northern Territory. That is not to say that the existing regime does not require some finetuning, but I think that contestation of itself is not evidence that things are amiss.

I think the second thing that is very important to emphasise about the Land Rights Act is that it is beneficial legislation. As beneficial legislation, in my view it is in many ways

superior to native title land rights legislation, or rather the recognition of native title. One has to recognise, though, that it is beneficial both for Aboriginal people and for non-Aboriginal people; that in recognising Aboriginal land rights we are correcting a legitimate grievance that Aboriginal people have that their property was taken away from them without consultation, and the nation is meeting that. It is recognition that land is important in terms of cultural support and provides some kind of economic base. But, as Australians, we also have a wider interest in this and that has to be catered for by land rights and by a statutory beneficial regime.

Presumably, removing legitimate grievance improves social harmony and, more importantly, it must articulate effectively their system of land tenure and their society with the needs of the wider society: if they want recognition of their rights, we have in some ways got to be able to recognise them and that requires accommodation on both sides. I think the point that stems from this is not one that would necessarily be appreciated by Aboriginal people particularly, but this means that the land rights legislation cannot be assessed only on the basis of Aboriginal perceptions or only on the basis of non-Aboriginal perceptions—there has to be an accommodation of interests. In some ways, of course, it is a compromise.

One of the very attractive things to many people about Aboriginal society is that it has many of the features of a genuinely anarchical society where people associate with each other by free choice and enter into agreement without external coercion, and there are no overarching government interests. That is enormously attractive, but that does pose certain kinds of organisational problems for Aboriginal people articulating with the Australian nation state. They do not have any overarching structures and they do not have any chiefs or headmen who can provide the kind of leadership and organise the articulation.

So the structures that were set up in the Land Rights Act, like the Northern Land Council and the Central Land Council, are indeed imposed and new institutions which are essential in the absence of such institutions in the indigenous society. But they are institutions that are essential to that articulation and they are institutions which are forward looking. There are certainly bound to be some kinds of tensions, and they will be ongoing for a very long time. Again, simply because there is criticism of the land councils by Aboriginal people does not necessarily mean that that criticism has to be accepted uncritically. We know that in Aboriginal affairs, particularly in remote Australia, there is a very constant strain to localisation and to trying to capture organisations within the kinds of family networks that people work within in their own society, and that in some ways has to be resisted in terms of wider interests.

Turning now to the issue of royalties, I think it is a great strength of the legislation that it provides independent funding to the land councils from government, and that is something that should be enormously strongly protected—I refer back to the remarks I was making very briefly about the dual nature of land rights as both property and self-determination.

CHAIR—Excuse me, Nicolas, I just want to see whether I heard you right: it provides—

Dr Peterson—It provides a certain independence of government.

CHAIR—Right, the income that comes to it is not taxpayer money; that is what you are saying?

Dr Peterson—I will come back to that point in just a minute. I am just saying firstly that I think it is very important that they do not have to petition the government every year for their budget: they get certain percentages and the 30:30:40 division basically lays out how statutory royalty equivalents are distributed.

CHAIR—So they do not have to worry about the commodity markets?

Dr Peterson—That is another issue too. It is complicated and the time is short—

CHAIR—It is more reliable than governments, I think you are inferring, and you are probably right.

Dr Peterson—I think it allows a certain independence of government which may irritate government, but that nevertheless is important. I think it serves a public function, and I do not say that frivolously. But I do think that it was a weakness of the recommendations of the commission that it did not propose any financial policy being built into legislation. When I went to North America on behalf of the commission to look at various kinds of arrangements, such as the James Bay Agreement that was being made with the Cree, in that agreement a financial policy required that at least 50 per cent of the funds that were paid to the Cree had to be invested and only the income could be used.

Of course, that is the sort of arrangement that is happening in New South Wales, where the land tax is paid to the Aboriginal people and a percentage of that has to be invested and only a certain per cent can be used on expenditure in the present. I think, as you have just indicated, that since most of the money coming to Aboriginal people is from royalties, and since obviously the commodity markets and the life of mines fluctuates, it is important that there is capital accumulation and that that is protected. There are enormous pressures on royalty organisations to disburse money, naturally, by people who are not particularly well off. I think that there should be a consideration of some kind of financial policy.

On the issue of whether it is appropriate for the government to be involved in the nature and the control and use of these moneys to some extent, I will just speak about my own view. My own view is that, particularly in respect of statutory royalty equivalents, there is a clear public interest because they are forgone public moneys. Of course, you might want to say that Aboriginal people own the minerals too and everything that is below the land surface down to the centre of the earth and, if Mr Justice Lee's decision in the Miriuwung Gajerrong case is upheld, obviously things may change. But given the nature of ownership of minerals across the continent in Australia, where by and large they are owned by the Crown—and I would beg to differ with Mr Viner, in that while it is true that there are certain areas where minerals are owned privately or people have some kind of de facto veto over them, I think far too much is made of that. As a general principle minerals are owned by the Crown and I see no particular reason why it should be different with Aboriginal people in terms of the ownership of those minerals. So we have to then recognise that if that is the case then the statutory royalty equivalents are forgone public moneys that have gone specifically into Aboriginal hands, and therefore there is a public interest—

CHAIR—Does that principle that you have just expressed extend therefore to the parliament's right to regulate how people can come and explore and what they have to do?

Dr Peterson—No. I think it is utterly fundamental that a veto over mining remain and I think that land rights would be largely meaningless were the veto removed. The reason for that is, as we know—

CHAIR—For exploration?

Dr Peterson—Yes.

CHAIR—Thank you.

Dr Peterson—Then there is the question of negotiated royalties. When I have been here I have noticed there has not always been a clear distinction made between statutory and negotiated royalties. Then the question arises of negotiated royalties which are in addition to statutory royalty equivalents: are they private moneys or public moneys?

Again, of course it is a matter of philosophy and how you wish to argue this, but on the basis of the argument I have just made that minerals are basically owned by the Crown in Australia, and other Australians by and large do not have the right to prevent mineral exploration on their land, that we have to say there is a public interest. That is to say that the money is granted to Aboriginal people for a purpose and therefore there is some grounds for there being a broad financial policy—and when I talk about a financial policy I am only talking about that in very broad terms; about some percentage of money being invested and preserved as capital. I am not talking about the regulation of what people do with that part that is not invested or with the income that is produced. But I do think that a financial policy is important.

Mr SNOWDON—Can I just interrupt very quickly. To make sure I have heard you correctly here, you are saying negotiated royalties, which are effectively as a result of the power to withhold consent, should be subject to some public scrutiny?

Dr Peterson—Yes, I am. I agree largely that the normal mechanisms of accountability that apply to all corporations should apply to Aboriginal people. But I am saying that if you adopt the kind of argument that I am putting forward about community ownership of minerals, and since Aboriginal access to a right to restrict access to those minerals is a privilege, therefore the public has forgone money and is granting these moneys for a purpose—that is in line with the beneficial nature of the legislation. It wants to see a difference made in Aboriginal life. For those moneys to be entirely consumed or for the legislation not to look to the future to ensure that there are ongoing supplementary income streams where there have been mines in the past is foolhardy—we should lay down some basic financial policy about the preservation of some proportion of this capital.

Mr SNOWDON—What about royalties which are not mining royalties but which are the result of agreements over other land use?

Dr Peterson—This really needs to be looked at in some detail. The general ideas that we worked with at the time of the commission was that rents and lease moneys and low level incomes would go to the traditional owners as a recognition of property rights and more or less surface rights, without getting into a technical definition of what you mean by surface rights, and that substantial income from mining and gas and all of those things would be treated in this other kind of way that is being suggested.

I think I would strongly endorse the kind of suggestion that Mr Viner was making that changes largely need to be negotiated. I think it has been a long hard struggle to establish the credibility of organisations like the Northern and Central Land councils with Aboriginal people and, of course, they are not entirely uncontested now and never will be entirely uncontested given the strain towards localism. Nevertheless, they have proved themselves to be enormously effective organisations, both for Aboriginal people and for the nation at large, and I believe that in any recommendations the committee wants to make for change it should only make recommendations which are organic and evolutionary and negotiated, not ones that are imposed and radical and disrupt the evolution and development of institutions which have taken a very long time to establish and which, whatever their weaknesses, on balance have proved themselves to be enormously effective.

Of course, there is so much rhetoric around land rights, both on the part of Aboriginal people and their representatives and on the part of government and their representatives, but one has to get way beyond that in seeing what is going on, and, on the whole, I think one can say that there are very good grounds for thinking they have done a reasonable job. I could say a lot, lot more but, given the time, I will not.

CHAIR—That is very helpful. Professor Morphy, do you wish to add something?

Prof. Morphy—I will cover slightly different ground than Nic has. I have written a series of submissions and papers on the Reeves report but I will look here at two issues. The first is the extent to which the conclusions reflect anthropological understanding, and the second is the issue of regionalism and the nature of the community and so on. I will be very brief on the first issue. I think that while the history of Australian Aboriginal anthropology presented in the Reeves report is a little eccentric, the main problem with it is that the anthropological conclusions do not support the recommendations of creating numerous small land councils to replace the NLC and the CLC. Indeed, I think you could say that the direction in which the anthropology goes supports the existence of the larger land councils, and that the history of the operation of the land rights legislation also suggests that the definition of traditional owner and the procedures that have been followed in the operation of the Land Rights Act have actually been very successful and largely uncontentious.

As far as regionalism is concerned, there is no doubt that most anthropologists would see traditional ownership as being vested really within a body of regional law, such that the traditional owners of particular areas of land have that ownership recognised by members of related groups. In many ways the wider the bodies that actually hold the land the better because that enables the traditional system to carry on in a flexible way. If you try to draw boundaries around what you might say are regional community areas, in the way that Reeves recommended, I think you will get involved in enormous disputes and there will be great problems. In particular, the concept of a community, while certainly there are actual

communities that are wider than the owning group—indeed, in every single case, whether it is a ceremonial case or hunting and gathering activity or anything else—people from a number of land owning groups will be combined together. But there is no convincing evidence that there is such a thing as community title or that communities are land owning groups.

In fact, I would predict that changing the title to community title would cause disputes and would be against the traditional system of land ownership. The very fact that the existing system of land ownership has not resulted in very protracted legal debates over the decisions that have been made provides a degree of support for it. The large regional nature of the land councils, for example the Northern Land Council and the Central Land Council, has enabled there to be a balance in the local areas between land ownership and land use which is very much a part of the operation of traditional systems of Aboriginal law. Again, there is certainly much to be said for the development of a regional sensitivity in the case of land councils. There is lots of evidence that not only are they required to by the legislation, which vests land in local trusts and requires the consent of traditional owners for all sorts of operations to take place, but also that they are themselves beginning to develop regional offices which will facilitate local operations and make them responsive to local concerns.

I think it is a remarkable achievement of the land rights legislation that it has allowed the smooth transfer of Aboriginal ownership without innumerable disputes and appeals. Nonetheless, Reeves is certainly right to point out that indigenous Australians still suffer enormous disadvantage in health, economic affairs and that those problems in part require different regional solutions. I think expecting the Land Rights Act to solve these problems is both inappropriate and bad policy.

It brings up obviously some of the issues that the chairman was addressing when I say it is inappropriate, partly because the Northern Territory Land Rights Act only applies to a small percentage of Aboriginal people in Australia as a whole. I suspect actually a large percentage of Aboriginal people in the Northern Territory benefit under the land rights legislation since they become traditional owners of some area of land or another. But it would be quite wrong to use the ownership of particular areas of land by Aboriginal people to solve the problem of Aboriginal people outside that particular province of ownership. If you extended it to other Aboriginal people in the Northern Territory then one could by logic say that the Northern Territory land rights legislation had a responsibility for Aboriginal welfare outside that state and beyond. The land rights legislation really has to be seen primarily as recognising a fundamental right of ownership of those people concerned.

So there are many other ways in which the disadvantage of Aboriginal people can and needs to be addressed. I think in the case of other areas that are concerned with community matters, community development and education, you can see that the development and empowerment of local communities could be desirable and could in fact overcome some of the problems that Aboriginal people themselves are coming out with at the moment. One of those is obviously the disputes that there have been over bilingual or bicultural education in the Northern Territory. This is something that quite clearly is of enormous concern to a large majority of Aboriginal people living in remote areas of the Northern Territory. If the budgetary control was regionalised as far as education is concerned, then it may be that those particular problems would not have come to a head.

I agree very much with what Dr Peterson has said about the need for regional structures to develop over time in an organic and an evolved way. The balance between land ownership and land use is something that is inherent in traditional Aboriginal systems of organisation, and people have been very good at ensuring, in the majority of cases, that the kinds of hypothetical examples you came out with are actually solved within. I think that by taking account of other Aboriginal interests the land rights legislation acknowledges that.

It may be that if sometime in the future this appeared to be a major problem in particular areas then it is something that in the kind of review that Mr Viner was suggesting—where you have a review that comes from the base of land councils together with ATSIC—that it may be possible for Aboriginal people to overcome those problems if they appear to be major problems. I think on the whole at the moment they do not appear to be general problems. Certainly in the areas where I have done most of my work—eastern Arnhem Land and the Roper Valley—traditional owners have actually been very generous in assuring that members of the community who are not actually owners of a particular place will get right of use, and that right of use includes things obviously like housing and equality of representation and other sorts of things. I think those are the main points that I have to cover.

CHAIR—Thank you. On that point—and Nicolas, you come in as well—the line of questioning I was pursuing with Mr Viner is based on the strong belief that I have that this committee has a responsibility in whatever recommendations it finally makes to ensure that the interests of all Aboriginal people are considered. If we make a recommendation or not about a certain model, I at least want to be satisfied as chairman that questions about the rights of people are canvassed and then the responsibility is accepted by us that we have to then take that on board and go ahead. But I have to get the advice of people like you and Mr Viner and others on those questions of equity, because it is a very big responsibility to take this act into the millennium and to help hopefully to shape it so that it does serve the interests of Aboriginal people. Regarding the comment you made about a possible review mechanism, I think what you are saying is perhaps the answer to the equity question which is on my mind, even though it is hypothetical. Thank for you for that. I have no further questions.

Mr MELHAM—I am just interested in Dr Peterson's comment about Aboriginal people not having the right to minerals, and you talked about Miriuwung Gajerrong, and that probably the Crown should. How does that fit in with the fact that Aboriginal people have never received sovereignty and, indeed, that what the High Court has found is that they were the original owners and inhabitants? What that means is that they own everything and, unless they have been properly dispossessed of that, why should they not still have that ownership not only above the ground but below the ground, if they can establish their native title in the purest sense?

Dr Peterson—I think those are really interesting issues and I think that the issues of equity are enormously important. The conventional liberal philosophical position on equity is that being equitable is to erase difference and treat everybody in exactly the same way.

Mr MELHAM—But is it really a question of equity or is it really a question of looking at the history of colonisation? We do not have a treaty similar to New Zealand, so is not an approach in relation to equity the wrong approach? If we were to sit down and generally

respect the High Court's decision in Mabo, what it found was that Aboriginal people were here first and that it may be that they were not dispossessed in parts of Australia. So the equity approach is not the proper approach because that does not have the proper respect for the proper settlement of this country.

Dr Peterson—I was going to go on and say that contemporary liberal theory now has moved away from that very simple position that equity is achieved by erasing difference by recognising that a limited recognition of difference is necessary for people to be treated equally. Of course, the classic case would be the one that feminists and women have made generally that for women to participate equally in the workplace they need to have state supported child-care facilities before they can sell their labour in the same way as men. At one level that is a very clear example of it. There is quite a substantial literature about the extent to which national minorities or indigenous people need a certain degree of distinctive rights in order to be able to meet the encapsulating society on equal terms.

Mr MELHAM—But if differential treatment is the only way you are going to achieve equality because it recognises that we do not come up to the table with equal—

Dr Peterson—Yes, with equal power, status, positions. But the question then is: how far do you go in recognising difference? And then you get onto philosophical positions: you know, you pay your money and take your choice. Presumably if you are an Aboriginal person you are going to argue the kind of position that you are arguing.

Mr MELHAM—But what I am trying to say is: isn't that the position now? It is not an argument, given the High Court decision in Mabo which recognises common law native title, that what they are actually saying is that terra nullius, we now put that to one side. That is why I am interested in the Miriuwung Gajerrong argument of Justice Lee and minerals and the whole range of things here. In an international perspective Australia is pretty unique when it comes to our colonisation: we do not have a treaty. We now have the High Court, 204 years on, recognising for the first time that Aboriginal people were here first and that there was a possibility that in parts of this country they have maintained a continuing and ongoing connection to land, so it is a recognition of ownership.

Why is it not possible in that system for there to be recognition as well that, if we are talking about ownership in the common law sense, we are talking about above the ground and below the ground, because they owned the lot before Europeans came here.

Dr Peterson—These are issues that are before the courts and they will argue about and they will reach some agreement. I am stating something more in the nature of a philosophical position and—

Mr MELHAM—I accept that.

Dr Peterson—I think in part in answer to the chairman's question, one of the great advantages of beneficial legislation over native title is that it is possible to constantly tinker with it. At one level you might say that is enormously dangerous for Aboriginal people because the rights can be constantly watered down, but if there is a reasonable degree of goodwill and if people seriously believe that achieving Aboriginal incorporation into the

society on equal terms is important to achieve as speedily and fairly as possible, then some problem comes up around the treatment of people who are historical people in an area or come from a long way away, then that is an issue that statutory legislation allows you to address and you can make an amendment.

Mr MELHAM—But what I am saying to you is that if you go back to common law native title, as recognised in Mabo, that is not something that the parliament gave them in terms of beneficial legislation. We are not talking about a creature of the parliament, a statute; what we are talking about is common law native title. It is a recognition of the courts. So in terms of that ownership level of minerals above and below the ground, and we are talking about vacant Crown land here or wherever native title is established, why is it not the case that that ownership to the minerals should extend to indigenous people, given that they owned it before the Europeans came here?

Dr Peterson—I guess it would be open to the committee to say, 'Look, scrap the Northern Territory Land Rights Act altogether and let these people just go under native title and see what happens under the law,' but I do not think it would be in the national interest at all.

CHAIR—They already have freehold title, which means—

Dr Peterson—Yes, but I am talking at a very theoretical level because I think that the statutory legislation has enormous benefits for the nation, both Aboriginal people and non-Aboriginal people, because it is something that is trying to go way beyond just property rights and recognises that some element of self-determination is fundamental to any kind of adequate land rights. It provides a mechanism and some structures for allowing that and provides some way of financing it. That is why Aboriginal people throughout Australia look to the Northern Territory as a kind of benchmark.

If you look abroad at places like Alaska and the Claims Settlement Act 1971, if you look at the James Bay Agreement, all of those incorporate elements of self-determination and independent funding. This is way beyond anything really that native title as such can do. These issues that you are raising will come up and they are going to have to be resolved in some way, but it is not my position to resolve them—I am just expressing a philosophical position.

Mr MELHAM—That is why I wanted to test that. Thank you for that.

Mr SNOWDON—There has been an economic rationalist perspective put on the same view by the Industry Commission some years ago, has there not, which argued that in fact Aboriginal people should have ownership of the minerals recognised?

Dr Peterson—Indeed, but that was because it was felt that they would get better signals from the market and—

Mr SNOWDON—That is right, it was an economic rent perspective.

Dr Peterson—But I think that in terms of a broader perspective, the thing that one can say is that while it is true to some extent that not all Aboriginal people are enthusiastic about mining, on balance and by and large they have tended to agree to prospecting.

CHAIR—That is what they have told me.

Dr Peterson—But with certain reservations. By and large, so far the nation has not been radically impoverished by land rights. If it were the case that the nation were being radically impoverished by the regime in the Northern Territory then it is open under a statutory system to negotiate some change, or even impose it if the nation felt that it was necessary.

CHAIR—Furthermore, Nicolas, on top of that, to confirm what you have just said, the nation has been enriched by giving people ownership generally. Is that not right?

Dr Peterson—I think that is right and—

CHAIR—That always works. It is only when you do not give people ownership that you get into trouble.

Dr Peterson—But I do think the other point that Professor Rowley used to make, and I think it is utterly fundamental, was: how are we going to incorporate Aboriginal people into the Australian community and policies? If people have property then they have something to make decisions about and other people have to ask them and enter into negotiation. These property relations are the basis on which Aboriginal people will be integrated effectively into the nation state. Because of the nature of the land, and for a number of other reasons, they are not the basis alone for ensuring economic development. But economic development is only one part of this package; it is also social and political integration. I think that land rights is primarily important for those two reasons.

Mr WAKELIN—In response to Mr Melham, I make the observation that I wonder whether the material below the ground would have had the same value before colonisation as post-colonisation. I think that is the debate that we end up with. Can I just come to one quick point to Professor Morphy in terms of the last sentence in your paper: people, autonomy, source of income, and able to set their own objective independently—that is the ideal, that is the direction I am sure that most would agree about. Some evidence has come to us that simply suggests that in terms of these royalty payments there are particular groups that have access in a particular way. Have you done any work in terms of having a look at the impact of some of the royalties, particularly in communities, because we have this picture of a fair degree of variation in the access to royalties?

Prof. Morphy—I have not myself done work specifically on that.

Mr WAKELIN—That is fine.

Prof. Morphy—I have worked in a community which is one of the main recipients of mining royalties—

Mr WAKELIN—Near Nhulunbuy or somewhere?

Prof. Morphy—Yes. Indeed, people have developed local mechanisms for the distribution of those payments.

Mr WAKELIN—You have observed that and you believe it has worked out relatively well, or satisfactorily? The tension would inevitably be there.

Prof. Morphy—I think that as soon as you are dealing with real issues of money then you are dealing with a situation in which people are going to be negotiating. Aboriginal people do negotiate in their own interests, perhaps to a slightly lesser extent than is often in other communities. I think the point that Dr Peterson made about anarchy also has to be complemented with the idea that there is a wide basis of community and a network that people have obligations to distribute resources through.

Mr WAKELIN—Yes, I really enjoyed that point and I took it up. It is an excellent point. Thank you, Chairman.

Mr HAASE—Professor Morphy, on the question of land ownership, it has been reprinted in the Reeves report as somebody's opinion that it was perhaps the case that more than land being owned by Aboriginal groups that the Aboriginal groups were owned by the land. Would you comment on that?

Prof. Morphy—I think that is a metaphor that signals the fact that Aboriginal people feel an enormous obligation to the land and to ensure its spiritual continuity and strength. It very much characterises in some ways the difference between Aboriginal concepts of land ownership and perhaps the concepts under some other systems of ownership. It is also very misleading because there is no question whatsoever that traditional Aboriginal landowners have what we would understand also as rights of ownership in that land, rights to exclude people, rights to deny people permission for entering the land, and so on. It merely means that there is an additional kind of responsibility and a conception of spiritual linkage to the land so that the land is very much a part of the people themselves. But that does not mean that because it is part of them they are not owning it. It characterises a particular kind of ownership.

Mr HAASE—I would suggest that perhaps the very term 'ownership' in the true Western world understanding does not have a counterpart in Aboriginal culture in the true sense of the word, and that perhaps we could speak of custodianship, stewardship, curator, caretaker, and all of those things, but not truly ownership. I would suggest to you that it was impossible, for instance, to specifically delineate the extent of ownership geographically and that if you did you would have to draw back from an area of movement and declare common areas, which would result in perhaps a correctly imposed traditional ownership claim on Australia having boundaries, wide boundaries, that were not claimed under Aboriginal ownership. Would you comment on that.

Prof. Morphy—That is a very wide question. I will answer the second part first. Certainly anthropologists would argue that boundaries around areas of Aboriginal land are often permeable, but it depends very much on where you are in Australia and in particular on the nature and density of the occupation of a particular place. So in areas of the Simpson Desert you will find that there is much more looseness in the way that boundaries could be

defined between adjacent groups than on coastal Arnhem Land. So if you go all the way along Trial Bay in north-east Arnhem Land you will precisely be able to tell within several yards when you have moved from the land of one clan into the land of another and there will be specific markers. So in parts of Australia there are very precise boundaries; in other parts there is more fluidity.

As far as ownership is concerned, you are asking a very anthropological question. Anthropologists specialise in not accepting that there is some universal meaning of a concept like ownership that rests in its meaning in the English language at a particular moment in time, but actually try and look at the more general nature of those concepts. Anthropologists are always trying to change in some ways the meaning of words: anthropologists look at things like marriage and show how different forms of marriage occur in different societies. Nonetheless, there is an enormous overlap so that when people are communicating between cultures they will actually say, 'Although marriage in X society is not quite the same and under exactly the same law as it is in Y, nonetheless we can recognise it as marriage.' This would apply very much in the history of our culture as well, so marriage in Victorian England was very different from marriage as it is today.

In the case of land ownership you would look for what the sorts of similarities are and the differences. In the case of Aboriginal ownership of land there are enormous areas of overlap in European conceptions of ownership and Aboriginal ones, partly because people will talk about, 'This is my land', 'That is their land', 'That is my mother's land', so people will talk about land in relation to particular categories of person. There is also the fact that people will have certain rights that are considered to be paramount in the way that people have access to land and can use land. So there are great areas of overlap between an Aboriginal conception of ownership of land and a white Australian one. There are also enormous differences within white Australia as to what conceptions of ownership of land are.

One of the things that anthropologists are involved in is, if you like, a dialogue across cultures that try to create concepts that exist in between. That is very much what the land rights legislation does. That is in a way why ownership of Aboriginal land under the land rights legislation is not exactly the same as ownership of land would be under the cases that Mr Viner was talking about in Western Australia, or the cases in Canberra. So Australia has many different forms of land ownership, and Aboriginal land under the Aboriginal Northern Territory Land Rights Act is one of those.

Mr HAASE—Can Aboriginal people traditionally in their lifetime be disposed of their land?

Prof. Morphy—Again I can only talk from the areas that I have experience with, and certainly not in north-east Arnhem Land. There are very precise rules of ownership and of succession, such that in fact there is often almost the opposite: there is a period of time in which the ownership of land is held after that group ceases to exist before that land is transferred finally to the ownership of other groups. So not in their lifetime.

Mr HAASE—So one of the things is that it cannot be bought and sold?

Prof. Morphy—Certainly not in north-east Arnhem Land. I do not know whether there are other areas in which land is bought and sold.

Dr Peterson—Certainly not bought and sold, but there are cases in areas where I have worked, for example western Arnhem Land, where one clan has given land to another clan and that has been passed on over the generations and it is acknowledged and known who gave it to whom. In the Croker Island area it is well documented.

Mr HAASE—I am aware of it happening offshore but I was not aware of it happening on mainland Australia.

Dr Peterson—Yes, and vice versa on the Cobourg Peninsula.

CHAIR—Thank you. Before I close the public hearing I would like to thank Hansard very much and staff for being so patient and staying with us so long. Of course, to our secretariat and staff, thank you very much once again for helping us prepare for the public hearing. I thank all the witnesses for their attendance and for their wonderul input to the hearing today.

Resolved (on motion by **Mr Melham**, seconded by **Mr Haase**):

The committee authorises publication of the evidence given before it at public hearing this day.

Committee adjourned at 7.35 p.m.