

Amended Land Rights Law will be Bad Law

By Jon Altman*

Since 1996, when first elected, the Howard Government has looked to amend the *Aboriginal Land Rights (Northern Territory) Act 1976* (henceforth ALRA). A decade later, the amendment package has finally been released and given the extent of public debate and negotiations, especially between the NT Government, land councils and the Commonwealth, the quality of the outcome seriously calls into question the capacity of the Australian policy making community to produce workable high quality Indigenous policy.

In 1997, Minister Herron commissioned John Reeves to review ALRA. The central message from the Reeves Review was that ALRA was not delivering economic development (as measured by mainstream social indicators) to Aboriginal land owners. The Reeves Report with the optimistic title *Building on Land Rights for the Next Generation* cost over \$1 million and was completed in 1998. It was itself the subject of two reviews. The first was by 16 experienced academics and ex Liberal politician Ian Viner. That volume titled *Land Rights at Risk? Evaluations of the Reeves Report* published in 1999 was highly critical of fundamentally all of Reeves proposals which looked to re-orient ALRA to deliver mainstream economic development to Aboriginal people in the NT. The second was by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander chaired by the Hon Lou Lieberman. The Committee's Report *Unlocking the Future* released in August 1999 was asked to consider Reeves's recommendations: it was more scathing than the academics, rejecting them all.

In the years since there has been little public debate about ALRA reform, but there was no shortage of material to inform policy makers on where Reeves may have gone wrong. And there seems to have been a common view held by major stakeholders that mining provisions contained in Part IV of the Act, also reviewed in the Manning report in 1999, needed some streamlining. The amendments proposed here seem reasonably uncontentious, if as the Explanatory Memorandum state a major aim of ALRA reform is 'to improve access to Aboriginal land for development, especially mining'—they might quicken processes for exploration and mining. However, alongside largely procedural changes to Part IV are a host of other proposals contained in 91 pages of amendments (and 59 pages of explanatory memorandum) that are about to be rushed through the Australian Senate. These include proposals to 'normalize' townships on Aboriginal-owned land, reform land councils, improve the accountability of so-called royalty associations and reform the Aboriginals Benefit Account (ABA), the institution to which the equivalents of mining royalty raised on Aboriginal land are paid.

In this critique, I want to focus on financial provisions of the ALRA, developed by the Woodward Land Rights Commission in 1974. These provisions aimed to ensure that commercial developments on Aboriginal-owned land would benefit Aboriginal people in the NT. This aim, it should be noted, must not be confused with the fundamental social justice aim of ALRA which was to return land taken without consent to its traditional Aboriginal owners. It should also be noted that these provisions themselves had a historical antecedent: in 1952, Minister for the Interior Paul Hasluck had

initiated laws that earmarked any royalties raised from mining on then Aboriginal reserves for Aboriginal benefit via the Aborigines Benefits from Mining Trust Fund, the precursor to the current ABA. The Hasluck law also required these royalties to be double the normal rate.

The 1976 ALRA modified the Hasluck schema somewhat with finely balanced and cleverly considered financial provisions: mining moneys paid to the ABA were to be divided to guarantee 30% to people in areas affected by mining; 40% to guarantee independent budgets to land councils; with an unspecified portion of the balance to be paid to, or for, the benefit of Aboriginal people anywhere in the NT. In 1974, Justice Woodward had not recommended that Aboriginal people be granted full mineral rights with land rights, but instead had recommended that traditional owners be provided with a right of consent (the so-called veto) on exploration or mining on their land. Instead of a de jure or legal property right in commercially valuable minerals, Aboriginal interests were granted what the Industries Commission in 1991 termed a 'de facto' property right in minerals that provided the leverage for negotiation with resource developers.

At the heart of this financial system lay two complex institutions. First, was the payment of statutory royalties usually paid to the Crown (or state) to Aboriginal people. This was done via mining royalty equivalents (MREs) with Commonwealth consolidated revenue appropriated to provide these equivalents as actual royalties were paid to the Crown not Aboriginal people. Second, was the ABA, a complex and poorly understood institution that has been run since its establishment in 1978 by the Commonwealth. In 1984, I chaired a review of the Aborigines Benefit Trust Account (as the ABA was then known) the old-fashioned way, with a working party from government, land councils and the ABTA itself, and the outcome a publicly-available report tabled in parliament. It recommended that measures be taken to enhance the capabilities of the ABTA Advisory Committee and that over a five-year period it should become an autonomous Aboriginal-controlled body. This never happened and it left the ABTA vulnerable to the machinations of the government of the day, although until 2005 there was the bicameral protection of the Australian Senate.

The amended ALRA will destroy the integrity of the ABA, as a unique institution of Indigenous Australia and will undermine the thoughtful balance embedded in the financial framework of the current ALRA. Very perversely, in my view, the amended ALRA will make exploration and mining on Aboriginal land less likely because it will weaken Aboriginal property rights and incentives. How will this happen?

It needs to be understood how the consent lever works as a form of property right. Traditional owners need to agree as a group to a proposal to explore and mine their land. In return, they are granted a minimum 30% of MREs from that mine (not to be paid to them, but to people in areas affected) but they can also negotiate additional benefits that are generally paid to regional incorporated organizations referred to as royalty associations. The incentive is there, but economists might argue that it is 'fuzzy' or indirect or risky from the perspective of traditional owners. Now though these incentives appear fuzzier, more indirect and riskier because the amended ALRA will ensure that traditional owners get no untied cash benefits from allowing non-renewable resources to be extracted from the land that they own and to experience possible negative social impacts of mining.

The amendments require that both areas affected moneys and any additional negotiated payments are only paid 'with a purpose' (that is are tied); such funds are to ensure benefit to the whole community not land owner groups. And royalty associations will need to be incorporated under Commonwealth legislation to ensure that they are directly accountable to Canberra. There are many potential problems here. History shows that when such payments are applied for community purposes governments cynically sit back and let these compensatory payments substitute for normal expenditure on citizen services.

And an assumption is being made that royalty associations cannot independently develop sound expenditure, financial and investment policies that will divide their income from mining and other commercial sources as they choose. Again there is historical evidence that the best associations not only have sound policy and practice, but also that Aboriginal investment has sometimes been the only investment in remote regions with iconic examples being the purchase of, and investment in, the Coinda Resort and the Crocodile Hotel in Kakadu National Park by the Gagudju Association. If there are royalty associations that need corporate governance capacity development then good public policy should address this issue. But the ALRA reforms are doing no such thing; instead over-regulation will undermine traditional owner incentives and undermine the autonomy of all associations, irrespective of performance and outcomes.

To exercise the leverage provided by consent provisions, traditional owners also need independent advice. The ALRA established land councils with independent, but ministerially-approved, budgets. Over the past 30 years Aboriginal land councils in the NT have evolved into statutory authorities with diverse objects: land claims, land management and political advocacy for their Aboriginal constituents. Land councils have had their efficiency audited by the Australian National Audit Office (ANAO) from time to time, most recently in 2002—land councils are hardly immune from external scrutiny. There are four land councils in the NT, two small councils with island (the Tiwi Islands and Groote Eylandt) jurisdictions and constituencies, and two large land councils the Northern and Central Land Councils that cover the NT mainland of about 1 million sq kms. As in all polities, there are pressures for regional and community autonomy, but the reality is that to date land councils have balanced regionalization with the organizational capacity that only comes from scale. The amendments will again raise the spectre of breaking up land councils with associated loss of capacity and risks for traditional owners. And the amendments will also break the nexus between land council budgets and guaranteed income from the ABA, instead allowing greater ministerial oversight on a performance basis, with objectives to be defined by Canberra, rather than Aboriginal people.

The ABA will also come under even greater ministerial control, with potential for the all Aboriginal membership, historically nominated by the land councils, to now be diluted by 1-2 experts nominated by the Minister and presumably accountable to him. And the amendments also empower the Minister to determine the financial policy of the ABA, he will have the capacity to build up its equity to ensure its viability. This is an interesting proposition first mooted in 1984 when there were concerns that a royalty revenue stream might decline over time. In reality this has never been the case, the ABA has always been in the black and under the Howard government its

equity has increased to over \$100 million, resources that Aboriginal land owners and land councils have regularly sought to access to allow enhanced resource management and development on the Indigenous estate. Already there are clear signs that the new Minister Mal Brough will be very open to raid the ABA with proposals now before the Advisory Committee to allow \$20 million from the ABA to fund Aboriginal housing in Alice Springs and Galiwinku, to provide services normally provided to poor Australians by the state in this case from revenues raised from the mining on Aboriginal land.

A new and additional Howard government agenda that has evolved since the abolition of ATSIC and the recent revived focus on Indigenous integration and mainstreaming has been a campaign to allow individualization of group-owned Aboriginal land. This is ostensibly to allow incentivisation to own and maintain houses and businesses in Aboriginal townships. The economic logic is that individual title might facilitate access to mortgage and commercial finance from banks. The reality of this has already been challenged by a report *Land Rights and Development Reform in Remote Australia* written by Craig Linkhorn, Jennifer Clarke and myself and published by Oxfam Australia last year. Under a proposed scheme, 99-year head leases for towns can be negotiated by an NT government entity, with payments to traditional owners capped at 5% of the town's approved capital value. The apparent aim of this proposal is to get debt-financed public housing into townships because decades of underinvestment by governments in grant-funded community housing has created a crisis. It is very unclear why an Australian government ideologically committed to the free market would want to cap the amount that Aboriginal land owners could charge to lease their land. This is especially worrying because there will be no cap on sub-lease charges, including rents that traditional owners might need to pay to live on the land that they own. Fortunately the scheme is voluntary—traditional owners will need sound commercial advice from strong, independent and well-resourced land councils to represent their interests.

Curiously, this new proposal will be underwritten by the ABA, with the 5% maximum head lease payments, and possibly the running of the NT government leasing entity (this is not clear) to be provided from its equity to an estimated \$15 million. This suggests that the ABA will be required to finance the so-called normalization of townships (this seems too unorthodox to warrant the term 'normalisation') by subsidizing the NT government without a sunset clause. What is proposed here needs to be carefully considered: revenue raised from mining on Aboriginal land will be used by the NT government to pay Aboriginal land owners for leasing their land. There is possibility that the same land owners will then need to pay this ABA-sourced money back to the NT entity to sub-lease a township block for an uncapped amount. And the leasing payments traditional owners receive will be tied (unlike for any other Australian land owners) and will need to be applied 'with purpose' for community benefit. This is because mining related and land use payments made by governments (even if from ABA funds) will face identical accountability requirements, again to Canberra. One wonders what the incentive to lease a township site might be, it is clearly unlikely to be financial.

How will the new ALRA work if passed by the Senate into Australian law? A priori this seems very unclear, time will obviously tell. I raise the following five broad concerns for consideration:

- Why would traditional owners of township sites, if properly advised, allow an NT entity to hold township headleases for 99 years in return for restricted and tied payments?
- If they do, will they lose control of what commercial and residential developments are allowed on their lands; and what will happen at the expiry of the lease?
- Outside townships, what incentives are there for traditional owners to consent to exploration and mining? Compensation payments will be heavily controlled by Canberra in a manner that is not applied to any other Australian landowner.
- How effectively and independently will land councils operate when their operations will be under ministerial directive, their budgets under direct ministerial control (with no minimum guaranteed) and with potential fragmentation a constant threat?
- And will money raised from mining on Aboriginal land that could be used to partially underwrite Aboriginal land management and restoration and development just be used, at ministerial whim, to fund the provision of services that are a state responsibility?

The new ALRA will further erode the already weak property rights that traditional owners hold. Australia is unusual for a rich settle colony because its land settlements with Indigenous peoples are provided without resource right settlements. Unlike in Canada, the USA and New Zealand, in Australia commercially-valuable resources like minerals, forests and fisheries have been excluded from land settlements. In partial recognition of this, the Woodward Commission provided a right of consent as a weak form of property. But to date it has clearly been inadequate to underwrite Aboriginal economic development and Indigenous well-being in Australia today is lower than that of Indigenous minorities in these other settler colonies. Under such circumstances, why is it that under the guise of being pro-development, the Howard government is actually limiting options for individual incentive and accumulation? These amendments will weaken the property rights of traditional owners, will weaken land councils and curtail the role that the ABA could play in delivering diverse forms of economic development that accord with heterogeneous Aboriginal aspirations in the NT. The amendments will allow governments in Darwin and Canberra to avoid addressing the backlogs and historical legacies evident on remote Aboriginal lands, instead cost shifting their fiscal responsibilities onto the ABA and its compensatory revenue stream raised on Aboriginal land.

The outcome from the passage of these amendments will be bad law that will be deleterious to the interests of Aboriginal people in the NT and ultimately the Australian nation. The ideologically driven and limited agenda of the government of the day aside, these amendments represent bad policy making after extensive and expensive decade-long consideration: future generations will bear the costs of repairing the damage that will be done.

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