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Submission on FaCSIA Discussion Paper ‘Access to Aboriginal Land under the Northern Territory Land Rights Act – Time for Change?’

- 1 The FaCSIA Discussion Paper focuses on two very important issues evident at many Aboriginal communities on Aboriginal-owned land in the Northern Territory, anti-social behaviour and economic under-development. It links these to a discussion about the need to either abolish or modify the permit system that has existed on Aboriginal reserves (1918–1976) and since then Aboriginal-owned land.
- 2 These are important and wide ranging issues for both Indigenous and non-Indigenous Australians and I would like to draw the attention of FaCSIA to a paper by Dr Nancy Williams that provides important insights about socio-cultural implications of land ownership and the permit system.¹ This submission, however, will focus mainly on issues associated with economic development and the permit system.
- 3 The FaCSIA Discussion Paper notes some problems with current arrangements. One suggestion is that individual Aboriginal people who wish to engage in the market economy or mainstream Australian society have been prevented by gate keepers (p.4). Elsewhere it is suggested that the permit system has operated to maintain or increase economic and social remoteness and that it has hindered effective engagement between Aboriginal people and the Australian economy. The permit system is seen as having reduced the beneficial effect of land rights (p.4).
- 4 In articulating principles with economic elements for a new system the Discussion Paper suggests that individuals should be allowed to engage with the market economy without hindrance; that Aboriginal culture (that is the values and beliefs shared by a group or community that inform everyday practice) should be respected and that options for effective land management should continue.

Problems with the FaCSIA paper

- 5 The FaCSIA Discussion Paper provides no empirical examples of the economic restrictions that the permit system creates. The permit system certainly does not hamper individuals in the remotest parts of Arnhem Land and the Western Desert selling their art in global fine art markets. There is no permit required for the flow of goods and services between Indigenous communities and the rest of the world that can be sheeted to the permit system.
- 6 The permit system operates over land that is generally owned by corporate groups of traditional owners who, as a group, have a right to be consulted and to consent to commercial development (including mining) on their land. Already though, individual

¹ Nancy Williams, ‘The nature of “permission”’ in Jon Altman, Frances Morphy and Tim Rowse (eds) *Land Rights at Risk? Evaluations of the Reeves Report* (CAEPR, ANU, Canberra, pp. 53–64).

traditional owners can grant a permit for visitation onto their land. As many traditional owners reside remotely, such permission is usually granted via an intermediary organization, a land council regional office or a community-based delegated authority. This system operates for the benefit of a permit seeker who might have difficulty identifying or locating a traditional owner; and conversely to the benefit of traditional owners who may not wish to directly interact with permit seekers or to undertake the time-intensive burden of permit administration. It is unclear why such intermediaries might be labeled by FaCSIA, in a somewhat derogatory manner, ‘gatekeepers’ unless evidence can be provided that either permits have been issued (or not issued) counter to the documented instruction of a traditional owner.

- 7 The permit system enhances the property rights of Indigenous people on their traditional lands. In theory, as with other land owners, trespass law might be an effective deterrent to unwelcome visitation, but in reality, just as pastoralists fence their properties and can padlock gates at property entrances, Indigenous people need effective means to control visitation onto their generally unfenced and un-gated lands. This is especially important in the NT because means of communications with police to report or prosecute trespassers are limited and police presence is extremely limited in both per capita and per sq km terms.
- 8 The permit system can be conceptualized as a mechanism to provide protections for existing Indigenous property rights in land and natural resources. Recent analysis of official statistical collections like the National Aboriginal and Torres Strait Islander Survey (NATSISS) 2002 shows that harvesting of wildlife remains an important source of food for many Indigenous people living in remote and very remote Australia.² The permit system ensures that Indigenous people can hunt and fish unimpeded and that competition for the resources they utilize is restricted. Indigenous livelihoods in many remote parts are natural resource dependent and the permit system facilitates the sustainable management of these important resources.
- 9 The Discussion Paper makes reference to the inability of the permit system to restrict informal dealers who reputedly conduct unethical or unconscionable trade with Indigenous artists. This is a problem of inadequate resources to police the permit system rather than a problem of the system itself. There is considerable evidence that a combination of robust community-based arts organizations and the permit system ensures economically, ecologically and culturally sustainable arts practice, a crucially important form of market engagement.³

Process issues

- 10 In 1998, the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act recommended abolition of the permit system. Subsequently, in 1999 a parliamentary inquiry *Unlocking the Future* recommended that the Reeves recommendation that the permit system be replaced by the Trespass Act be rejected outright (at recommendation 31). The reasons for this recommendation included the fact that the vast majority of Aboriginal people told the Committee that they wanted the permit system to remain. Similarly, the Committee found that many non-Aboriginal interests, including mining companies, supported the permit system. The main interest group that opposed the permit system was the Amateur Fisherman’s Association of the Northern Territory who were concerned that the permit system restricted their access to Arnhem Land. This

² See Jon Altman, Geoff Buchanan and Nicholas Biddle ‘The real “real” economy in remote Australia’ in B. Hunter (ed.) *Assessing the Evidence on Indigenous Socio-economic Outcomes: A Focus on the 2002 NATSISS* (ANU E Press, Canberra, 2006, 139–152).

³ See Jon Altman, Submission to the Senate Environment, Communications, Information Technology and the Arts Committee Inquiry into the Indigenous Visual Arts and Crafts Sector (submission no.11, 16 November 2006), and other submissions to the Arts Inquiry.

supports my view that the permit system constitutes a form of property: the recreational interests of non-Aboriginal fishers should not jeopardize the livelihoods of traditional owners.

- 11 It is noteworthy that considerable taxpayer funds (over \$1 million) were invested in the Reeves Review and the subsequent rejection of almost all its recommendations in a bipartisan report by a Committee chaired by the Hon Lou Lieberman, a Liberal member from Victoria. It appears a little disingenuous of the current FaCSIA Discussion Paper not to refer to this earlier debate and its dismissal of the need to amend the permits system. The Discussion Paper also fails to identify that the Parliamentary Committee unanimously endorsed the core principle that ‘access to Aboriginal land should always take place with proper consultation and negotiation with the Aboriginal people who rightfully own the land under inalienable freehold title’.⁴
- 12 This disingenuousness in Indigenous affairs policy making is reminiscent of the recent process for amendment of the Aboriginal Land Rights (Northern Territory) Act as reported by the Senate’s Community Affairs Legislation Committee. While all submissions (bar that of the agency, OIPC promulgating the amendments) to the Inquiry into the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 opposed amendments, the Bill was nevertheless rushed through both Houses of Parliament. One wonders similarly if the existing permit system will be amended in accord with the wishes of the government of the day irrespective of the views of Aboriginal and non-Aboriginal stakeholders?

Comments on the FaCSIA proposed options

- 13 The FaCSIA Discussion Paper provides five options for change to elicit discussion and considered submissions.
- 14 **Option 1** actually constitutes the status quo with its capacity to deem certain areas permanent ‘open’ (that is permit free) areas under s.11 of the Aboriginal Land Act (NT). Reference is also made to the fact that this option is an adjustment that would not require legislative change. Reference is made to administrative improvements that would ensure a timely and efficient system, without any indication of what these might be. One option might be to more realistically resource Aboriginal land councils and community-based organizations to process permit applications.
- 15 **Option 2** suggests that a two-tier system might apply with townships and access roads not requiring a permit and non-township areas acquiring a ‘simplified permit system’ again unspecified. This option notes that even in townships non-public spaces would maintain the current permit system which suggests that towns would be zoned into areas where a permit is required and areas where it is not. In this option there is recognition that defining public and private space might prove challenging. This is especially the case cross-culturally where for some Aboriginal groups private space might include homes, hunting and fishing grounds, ceremony places, cemeteries, sacred sites, etc. For some groups, entire clan estates might be regarded as private spaces. The arbitrary discretion, and the issue of by whom it will be exercised in this option, is likely to make it unworkable and highly contested.
- 16 **Option 3** notes that there are categories of people who currently do not require permits like public servants. This blanket provision was first canvassed by Woodward in the Aboriginal Land Rights Commission Second Report April 1974 and was incorporated in the Land Rights Act. Now it is suggested that other categories of people, like journalists, should be exempt. However, again discretion is suggested, so that such exemption would only be for legitimate business which requires assessments of what is legitimate or illegitimate. The liberalizing sentiment is confused here by a restrictive

⁴ HRSCATSIA, *Unlocking the Future: The Report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976* (House of Representatives Publishing Service, Canberra, 1999, p. 121).

suggestion that some people could specifically be excluded from entering Aboriginal land such as certain categories of serious [Aboriginal?] offenders. It should be noted that the judgment of whether a journalist is on legitimate business or not could be as administratively burdensome as the current system of granting a permit. There is no FaCSIA evidence tendered that journalists have difficulty in gaining a permit to visit Aboriginal land for legitimate business. Nor is there any evidence tendered that would substantiate the implied assertion that there is some legitimate nexus between journalistic access and a reduction in domestic violence or child abuse in Aboriginal or non-Aboriginal communities.

- 17 **Option 4** somewhat unfairly reverses the onus of proof onto land owners suggesting that they would need to demonstrate why access to certain areas need to be restricted. Unless such demonstration is provided (and accepted, by whom?) access to Aboriginal land would not require a permit. This option might be extraordinarily expensive to implement as it will be dependent on determining the validity of Aboriginal private reasons for seeking restrictions and in any case seems to treat Aboriginal land owners differently from other Australians. Counter to the Discussion Paper's prediction it seems to me that this option would have high administrative cost and would open up avenues for costly legal challenge.
- 18 **Option 5** canvasses the replacement of the permit system with the laws of trespass like the Reeves Report. However this option provides its own self-critique in noting that enforcing trespass law on much Aboriginal land (and coastal zone) would be difficult (and extremely costly) owing to the vastness of the Indigenous estate (about 500,000 sq kms in the NT) and its remoteness. Were such policing funded from the public purse and devolved to Indigenous organizations it could create a significant Indigenous employment program.

Recommendations

- 19 Without providing either empirical evidence or theoretical argument that a change in the permit system will benefit Aboriginal land owners, the FaCSIA Discussion Paper with the hypothetical sub-title 'Time for a Change?' runs the risk of being viewed as at best ideological, at worst opportunistic in seeking to implement changes to federal law while the government of the day enjoys a Senate majority.
- 20 Of the five options provided, **Option 1** which is maintaining the status quo, except in situations where a s.19A headlease agreement has been struck, is the only one that is conscionable. This is primarily because under the current system, traditional owners can already make a free, prior and informed consent decision to establish areas where no permit is required as currently occurs with the provision of recreational areas near most townships on Aboriginal land.
- 21 If the government of the day is genuinely of the view that the benefits of enhanced media scrutiny and unrestricted access to Aboriginal land outweigh the costs, then it should look to trial such an approach with a well-informed and freely consenting traditional owner group, in much the same way as it is currently seeking community uptake of the new 99-year leasing arrangements.
- 22 Uptake by any community would allow a natural experiment that can test whether the government's prediction that abolition of the permit system will generate economic and social benefit. Such a natural experiment would require comparative before and after measurement of benefit and could include comparison with a similar community that retains the permit system. Such a 'natural experiment' would need to ensure careful adherence to the *ceteris paribus* (all other things being equal) principle.
- 23 Empirical evidence of positive difference should provide government with an evidence base to persuade others to abandon the permit system.
- 24 Alternatively, if the empirical evidence suggests negative impact, this will leave the option open to reintroduce the permit system, much as currently occurs with deemed

open areas that are subsequently closed owing to negative environmental impacts. (As an aside, it is unclear if such adaptive management is possible with respect of headleases if an NT or Commonwealth leasing entity is in breach of agreement provisions.)

Conclusion

- 25 This submission recommends that only **Option 1**, effectively maintaining the status quo, should be considered.
- 26 The permit system operates to protect Aboriginal property interests in the land that they own under a particular form of freehold title. Arguably, the permit system provides Aboriginal owners of inalienable freehold the same right as that enjoyed by non-Indigenous owners of freehold: it is just that much Aboriginal freehold is more difficult to monitor for trespass owing to its scale and remoteness.
- 27 The proposal to abolish the permit system is based on a particular imagining of Aboriginal futures with greatly enhanced engagement with the free market.
- 28 However, the FaCSIA Discussion Paper provides no empirical evidence or theoretical justification that abolition of the permit system would enhance such engagement.
- 29 An alternative and more realistic focus on current Aboriginal livelihood options based on engagement with the free market, but also with the non-market customary sector (with hunting, fishing, gathering, etc in turn dependent on concessionary land owner access to natural resources) suggests that the permit system improves Aboriginal livelihood options more broadly defined.
- 30 Under such circumstances any dilution of the permit system will merely constitute a diminution of Aboriginal property and resource access rights that risk further marginalizing an already marginalized group in Australian society.
- 31 If the state's goal is to enhance Aboriginal prospects on the land that they own it might be preferable to seek the means to strengthen, rather than weaken, Aboriginal property rights.
- 32 There are many ways that this can happen, but neither abolition nor weakening of the permit system is among such possible measures.
- 33 There is also the possibility that all options other than **Option 1** are racially discriminatory in that they give Indigenous owners of inalienable freehold lesser rights than non-Indigenous owners of freehold.
- 34 Ultimately, the existing system has mechanisms embedded in it that already allow traditional owners of land to relax the permit system and allow for the creation of permit-exempt areas on the land that they own.

I am providing this submission based on my own research focus on land rights that extends back to 1977. If there are any issues in this submission that require further elaboration, please do not hesitate to get in touch.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jon Altman', with a long horizontal stroke underneath.

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30 November 2006