ECONOMIC DEVELOPMENT AND LAND COUNCIL POWER: MODERNISING THE *LAND RIGHTS ACT* OR SAME OLD SAME OLD?

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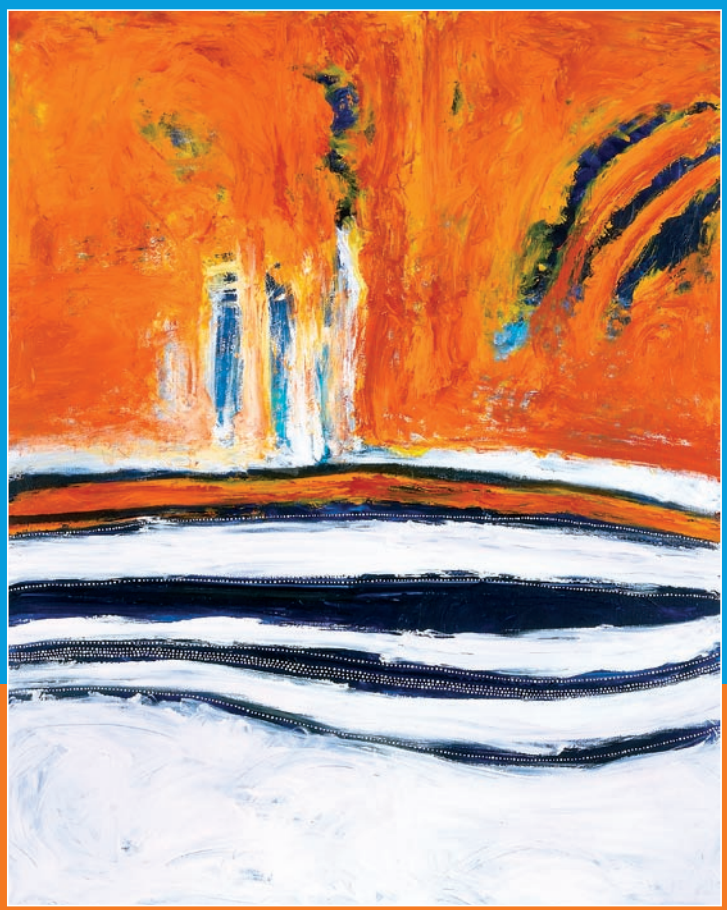

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ECONOMIC DEVELOPMENT AND LAND COUNCIL POWER: MODERNISING THE *LAND RIGHTS ACT* OR SAME OLD SAME OLD?

Sean Brennan*

> It would be difficult to see something better than the act we have now, and perhaps it would go down the drain if the changes take place. What I say and what the people who asked me to present the case here to the committee say strongly is that if there are going to be changes made to the act, Aboriginal people would like to be a part of those changes. They are saying that they would like to be making decisions and saying where we should go and how fast we should go. We want to make decisions about the pace and the timing. In the past, we were fully consulted. A lot of the people who heard about this Senate inquiry back at home knew nothing about it. The story and the changes did not get out to the people.
>
> *- Mr Wali **Wulanybuma Wunungmurra, spokesperson, Laynhapuy Association***[1]

I Background

A Introduction

In August 2006, the federal Coalition Government led by Prime Minister John Howard used its majority in both Houses of the Commonwealth Parliament to force through some very significant changes to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('*Land Rights Act*'). It did so over the opposition of all non-government parties in the Senate except Family First. Aboriginal and non-Aboriginal groups outside the Parliament also voiced concern with the amendment process and the content of the package.

Even the Government members of the brief Senate Committee inquiry into the *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* (Cth) ('2006 Amendment Act') did not disguise their discomfort. They said that the process for scrutinising the legislation was 'totally inadequate'. This was particularly so given that the Act is 'one of the most fundamentally important social justice reforms enacted in Australia and these are the most extensive and far reaching amendments that have been proposed to the Act'.[2]

This article reviews two key sets of changes contained in the 2006 Amendment Act. It does so against the backdrop of the *Land Rights Act*'s chequered political history, in which bipartisan endorsement and ideological antagonism have jostled for priority. The two aspects of the 2006 changes examined are:

- the steps that potentially erode the power of existing land councils; and
- the encouragement of 99-year township headleases in remote Aboriginal communities, intended to facilitate subleasing for businesses and individual home ownership.

The Commonwealth Government maintains these amendments are essential to update the *Land Rights Act* and ensure it can meet the challenges of the post-claim world, now that most of the major work in regaining land for traditional owners, through the Act's processes, has been completed. An alternative interpretation is, however, open. This interpretation finds consistency in these measures with some long-standing ideological objections expressed about the Act. This article explores the tension between those competing explanations for recent changes to the Act. Are the changes genuine attempts to modernise the Act, from a government genuinely committed to its fundamentals?[3] Or, are they a new way of packaging old agendas aimed at shifting the power balance away from traditional owners and existing land councils, and promoting the economic development interests of third parties?

B The *Land Rights Act*

In Australian terms, the *Land Rights Act* is remarkable legislation. There is no reference to Aboriginal people in

the *Australian Constitution*, let alone any recognition of their status as first peoples or holders of inherent specific rights. There are no reserved seats in Parliament, no constitutional guarantees of non-discrimination on the basis of race and no common law recognition of political autonomy or shared sovereignty. The national and regional representative bodies established at the start of the 1990s under the Aboriginal and Torres Strait Islander Commission ('ATSIC') legislation were recently abolished.[4] The legal recognition of Indigenous rights and governance nationally and across States and Territories is piecemeal and variable. In contemporary Australia, Indigenous policy debates frequently become entangled in partisan political arguments between the centre-right Coalition parties and the centre-left Labor Party. These partisan differences are further complicated by Australia's federated political (and party) structures.

It is perhaps remarkable, then, that the *Land Rights Act* ever made it through the national Parliament, let alone that it did so with bipartisan support. The legislation applies *only* in the Northern Territory ('NT') – a self-governing internal territory ultimately subject to Federal Government control. The law, as originally enacted, had several striking features. It provided for:

- the transfer of existing Aboriginal reserves to Aboriginal ownership in the form of inalienable freehold title;
- a land claims process conducted by an Aboriginal Land Commissioner, applying mainly to unalienated Crown land which, if successful and additionally approved by the Commonwealth Government, also leads to a grant of inalienable freehold;
- land councils with assured funding and statutory functions to represent and assist traditional owners and other Aboriginal people with relevant interests;
- the principle of informed consent, whereby actions affecting land require the approval of traditional owners and consultation with other Aboriginal people affected by the proposal;
- Aboriginal decision-making power over the grant of mineral exploration tenements (and therefore, indirectly, mining itself) – a power commonly referred to as the 'veto';
- a permit system to control access by third parties to Aboriginal land;[5] and
- protection for sacred sites, regardless of underlying tenure.[6]

In short, the Act gives Aboriginal people strong title to land, substantial decision-making control over that land (including about access by others), and solid financing arrangements that underpin strong representative organisations, enabling them to deal at the interface between the Aboriginal and non-Aboriginal worlds. Approximately half the landmass of the NT has been returned to Aboriginal hands since the Act took legal effect nearly three decades ago.[7]

The Bill that originally proposed this decisive break with Australia's past denial of Aboriginal land ownership was introduced into Parliament by the Federal Government, led by Gough Whitlam, in 1975.[8] It followed the recommendations of a Royal Commission established by Whitlam soon after he was elected in 1972 as leader of the centre-left Australian Labor Party ('ALP' or 'Labor'). Justice Edward Woodward, the Royal Commissioner, was asked to report on not whether but how to achieve legal recognition of Aboriginal land rights in the Northern Territory. He delivered an interim report in July 1973 and a final report in May 1974. The Bill to implement his recommendations was before the Parliament when the Governor-General, Sir John Kerr, sacked Whitlam as Prime Minister on 11 November 1975. It was Whitlam's opponent and successor as Prime Minister, Malcolm Fraser, from the centre-right Liberal-Country Party Coalition ('Coalition') that ensured passage of the legislation.[9]

This gave the Act an unusually bipartisan flavour that survived beyond its inception, at least at the federal level. That bipartisan support, however, has always had to compete with deep misgivings within governments in general and amongst many politicians in the centre-right parties in particular.[10]

Given the degree to which majoritarian concerns dominate Australian democratic thinking, it is hardly surprising that a law providing such strong support for Indigenous rights and autonomy would polarise debate and inspire ideological reactions. The fact that it is *Commonwealth* legislation has reinforced the hostility of some at the local level.[11] The federal Act was given overriding legal effect in the late 1970s in a Territory that achieved self-government at around the same time.[12] The Country Liberal Party ('CLP'), a centre-right Territory party (closely allied to the federal Coalition) that held government in the Northern Territory from the inception of self-government in 1978 until 2001, has always insisted on the need for change to fundamental features of the *Land Rights Act*.[13] More recently, the ALP Government in the

NT led by Clare Martin has lent support (albeit qualified) to some of the major reforms broached by the Federal Coalition Government.

C The Reeves Review 1998

The inquiry into the *Land Rights Act* conducted by John Reeves QC in 1998, its critical reception, and the prolonged period the Reeves Report spent in suspended political animation, provides important context in considering the 2006 Amendment Act.

John Reeves was briefly an ALP member for the Northern Territory in the Commonwealth Parliament during the early 1980s. By the time he was appointed by the Howard Coalition Government to review the *Land Rights Act* in 1998 he was a barrister practising in Darwin and reportedly a 'conservative',[14] 'a close friend of the Territory's Country Liberal Party Chief Minister, Shane Stone', and the NT Government's 'preferred candidate' to carry out the review.[15] He was asked to report on the operation of the Act and suggest any areas for possible change.

Reeves' verdict was that the *Land Rights Act* had been a mixed success in its first twenty years. By 1998, it had secured ownership of 42 per cent of the NT for Aboriginal people and helped 'to enrich their culture and rebuild their confidence as a people'.[16] But Reeves also asserted that, by legally privileging traditional owners, it had 'undermined Aboriginal self-determination'.[17] It had generated internal disputes by concentrating benefits in the hands of individuals. The same selective individualism, he said, had cut across the strategic use of royalty money for communal benefit.[18]

Reeves singled out land councils for particular critical attention. He said that much of the cashflow from the Act had 'dissipated' in land council administrative costs, and that the two large land councils (along with the Northern Territory Government) had participated in the development of 'a strident, oppositional political culture' over land rights in the Territory. The absence of a more 'productive partnership' had been 'to the detriment of the people of the Northern Territory, and, especially, of Aboriginal Territorians'. In terms of the Act itself, many of its procedures, especially the permit system, had imposed 'unnecessary costs'. In particular, Reeves pointed to the impact on non-Aboriginal people and the costs faced by 'the mining and other industries' in seeking access to Aboriginal land.[19]

Reeves' solution was to propose 'substantial and far reaching changes' to the Act.[20] The key structural change was to break up the existing land councils, putting decisions in relation to land in the hands of 18 regional land councils. A small number of existing land council functions would be withheld and allocated instead to another body, possibly the proposed new Territory-wide Northern Territory Aboriginal Council ('NTAC'). NTAC's primary responsibility, however, would be applying the cashflow from the Act's operation (mainly royalty equivalents) to 'the socio-economic advancement of the Aboriginal people of the Northern Territory'.[21]

The other main set of legislative changes proposed a reduction in the control traditional owners had over access to land by others. Various methods were put forward, including abolition of the permit system and awarding the Northern Territory Government the power to compulsorily acquire Aboriginal land for public purposes. Overall, Reeves located his package in the context of 'profound and deepening social and economic problems' confronting the next generation of Aboriginal Territorians, claiming it would 'offer them the opportunity to achieve better social and economic outcomes than their parents have been able to'.[22]

D Unlocking the Future 1999

The Reeves Report was referred to the federal House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs ('HORCATSIA'). Significantly, this was a lower house committee and was, therefore, chaired by a Coalition Government member, with a Government majority. The Committee's report, *Unlocking the Future*, was a striking reminder of the capacity for bipartisanship at the national level on the *Land Rights Act*. Liberal, National and Labor Party members produced a consensus document with very few partisan differences of opinion. Its advice to future parliaments was that the Act should only be amended on the basis of adequate consultation with the relevant Aboriginal people and with the informed consent of traditional owners in the NT.[23] This bipartisan advice regarding legislative best practice was not followed in 2006.

One key recommendation from HORCATSIA was that project teams should address the Committee's recommendations for amending the Act in priority order. The first priority was delegation of land council powers and the establishment of new land councils. The order of priority continued as follows:

- changes to the mining provisions in Part IV of the Act;
- review of the way in which 'areas affected money' from mining is distributed;
- modifications to the permit system, regarding access to Aboriginal land; and
- the rest of the Committee's recommendations.[24]

Project teams were intended to ensure stakeholder participation and the involvement of local Aboriginal people 'to ensure adequate consultation about [the Committee's] recommendations before any legislation to amend the *Land Rights Act* [was] introduced into Parliament'.[25] The membership of project teams was to be determined by agreement between the Commonwealth Minister and the land councils, with Northern Territory Government involvement 'when and where specifically appropriate'.[26]

This practice came close to being adopted for the 2006 Amendment Act only in respect of the second named priority – changes to the mining provisions in Part IV of the Act. Amendments to Part IV emerged from extensive negotiations between the four NT land councils and the NT Government, and consultations with the mining industry. The proposals were set out in a joint submission to the Commonwealth Government,[27] which duly incorporated them in the 2006 Amendment Act. Once put in legislative form, these changes were politically uncontentious and, by contrast with those discussed in this article (and other controversial elements of the 2006 Amendment Act), they passed through both houses of the Commonwealth Parliament without opposition.

In *Unlocking the Future*, HORCATSIA implicitly rejected the Reeves recommendation for breaking up land councils into 18 separate regional bodies and establishing NTAC. It did so by cataloguing the many criticisms made of the proposals, and, instead, recommending changes to enhance the autonomy 'of those who wish to remain within the current land council structure' and to 'facilitate a more effective means, for those who do not, to establish their own independent land council'.[28]

Several other key features of the Reeves blueprint were also rejected by HORCATSIA. The Commonwealth Government has never formally responded to the HORCATSIA report.

I now turn to the first of two key components in the 2006 package: proposals with the potential to diminish the power of existing land councils.

II Land Council Power

A The Politics of Land Council Power

There are issues of *realpolitik* that surround the position of NT land councils. Aboriginal people have very little political power in Australian democracy. They do not have the political influence that comes with corporate wealth. Their raw numbers (less than 3 per cent of the national population) and their geographic distribution make it difficult to apply meaningful electoral pressure on politicians.[29] Their organised and elected voice within Australian government – the regional ATSIC councils and the national ATSIC board of commissioners – has been abolished and the only body in its place is an advisory one, the National Indigenous Council ('NIC'), with members hand-picked by the Commonwealth Government. Since the departure of Senator Aden Ridgeway there are no Aboriginal members of the Commonwealth Parliament.

In organisational terms, it is the corporation that non-profit associations of Aboriginal people have largely adopted over the last 30 years as the vehicle to organise themselves politically and 'deliver crucial services such as health, housing, legal services and CDEP ['Community Development Employment Project'] schemes, to their constituencies or memberships'.[30] The limited statistics available suggest that although there are almost 3000 organisations incorporated under the Indigenous-specific *Aboriginal Councils and Associations Act 1976* (Cth), most of these corporations are small with very low turnover and modest assets – 'most would fall well within the thresholds set for qualifying as small proprietary companies under the [mainstream] *Corporations Act*'.[31]

In this context, the two large land councils in the NT, the Central Land Council ('CLC') and Northern Land Council ('NLC'), are atypical. They have much larger annual incomes and a more significant asset base.[32] They are significant employers in the Northern Territory and are able to recruit consultant and in-house expertise, equipping them for high-level government and corporate engagement. They have a well established representative structure drawn from across their regions, clear statutory functions that put them at the centre of dealings related to almost half of the Territory, and 30 years of experience in working at the interface between Aboriginal communities and the non-Aboriginal world.

Since they have achieved a critical mass as regional organisations in terms of staff,[33] resources and experience,

their own constituents look to the land councils to be strong advocates[34] and to address a wide suite of issues with an immediate bearing on their lives. In any given year, the land councils might be engaged alone or in concert with others on any number of the following tasks. They may work on issues about land and the environment such as land claims; national park management; sacred site protection and site clearances; land management programs; feral animal reduction; and the grant of permits to visit Aboriginal land. They may participate in discussions about land such as the negotiated acquisition of community living areas and negotiations over mining and exploration. They may focus on infrastructure issues including the formulation of telecommunications policy and better provision of facilities in remote communities. They may engage in the debate over statehood in the Northern Territory. They may adopt strategies addressing social and cultural issues such as community development projects to improve education outcomes; substance abuse strategies; the celebration and promotion of Aboriginal achievement; the role of women in maintaining Aboriginal law and culture; the repatriation of artefacts; and cultural mapping projects. They may work on economic issues such as capacity-building in the Aboriginal pastoral industry; training and employment of Aboriginal community rangers; the development of Aboriginal tourist enterprises; the provision of intellectual property advice; and the operation of an Aboriginal job placement agency. They may also provide advice and support to smaller Aboriginal organisations.[35]

The sheer heft and capacity of such organisations makes for an uneasy relationship with government. On the one hand, governments as policy-makers and agents for service delivery have no choice but to engage with Aboriginal communities. Frequently for bureaucrats, the more organised the 'other side' is to meet at the interface and consolidate information and views, the better. On the other hand, few politicians relish competitors for political power. There is no escaping the fact that after 30 years of developing organisational capacity, engaging with the Aboriginal and non-Aboriginal worlds on such diverse fronts and representing the land and related interests of such large regional populations, the land councils are centres of political power and influence, particularly in the Northern Territory but also sometimes in dealings at the Commonwealth level.[36]

Several factors have underpinned that political reality, one of which has been the unusual strength of the land rights legislation from an Aboriginal point of view. It has forced non-Aboriginal people in Australia to listen to the views of traditional owners (and, hence, land councils) because of their significant control over land management decisions. The Act has also given these Aboriginal organisations an assured source of funding. This funding largely permits them to escape the cycle of dependency and multiple grant administration that has plagued so many other Aboriginal organisations and limited their effectiveness.[37]

The political weight of the land councils should not of course be exaggerated. Their financial scale, their workforce and their statutory powers bear no real resemblance to the size of government itself or even its major agencies (at either a national or Territory level). But with the original legislation largely intact, by 2006 the land councils represented a significant political force.

When politicians move to change the Act in major ways, it is reasonable, in addition to assessing specific impacts, to scrutinise the potential effects of the amendments on this underlying power dynamic. Upon examination, significant parts of the 2006 Amendment Act address, directly or indirectly, the *size* of the existing land councils, their *funding*, and some of the existing decision-making *powers* of traditional owners as expressed through their land councils. There is also a perceptible shift in the balance of power under the Act toward government, through an enhanced role for the Commonwealth Minister. Before turning to consider those legislative details, some historical context is appropriate.

For those politicians not favourably disposed to the *Land Rights Act*, the power of the two larger existing land councils – the NLC and CLC – has been publicly acknowledged as a problem. Perhaps the most unguarded expression of this viewpoint came during the period from 1998 to 2000 from the Deputy Prime Minister in the Howard Government at the time, Mr Tim Fischer. Just prior to the 1998 election he told a Cairns audience:

> The Northern Land Council based in Darwin and the Central Land Council based in Alice Springs have become giant, bureaucratic, bloodsucking land councils which take away from smaller communities, resources and flexible infrastructure and leadership…[38]

'I am much attracted to the prospect of breaking them up',[39] he was later reported as saying, adding that many Aboriginal

communities 'are just absolutely in almost civil war with the Northern Land Council and Central Land Council because of the way they have had resources and allocations stripped away from them by the NLC and the CLC'.[40] Denying that his deputy was exploiting racial division and trying to attract One Nation voters back to the National Party during the 1998 campaign, the Prime Minister stood by Mr Fischer.[41] The Deputy Prime Minister later said that he regretted his choice of words but adhered to his criticisms of the larger land councils.[42]

Similarly, soon after the Reeves Review was completed, the CLP Chief Minister, Mr Shane Stone, told the NT Legislative Assembly that the two larger land councils had over-reached in their political role and 'done the Aboriginal people of the Territory a grave disservice'.[43] Two years later, the federal Coalition Minister who had commissioned Reeves to review the Act, Senator John Herron, was still said to favour the breaking up of the existing larger land councils.[44] Indeed, it was suggested that in early 2000 Senator Herron took a submission to Cabinet 'to reduce the power and resources of the two big land councils',[45] but that in considering plans to change the *Land Rights Act*, Cabinet had 'kept its intentions secret'.[46]

B The Genuine Debate about Larger vs Smaller Organisations

To acknowledge the heated *political* discussion of large land councils is not to deny that the size of such organisations is a genuine issue for debate. The debate has been represented in other contexts as an ongoing tension between atomism and collectivism.[47] There are two basic ideas at work. The first is an anthropological one. Aboriginal people (perhaps most people in the contemporary world) have several layers of common identity, ranging from the very local level (as an individual, family or small group member) to a much broader geographical or other level of abstraction. These different identities will be 'activated' at different times, depending on the context.[48] The second idea is a political or organisational one, involving a mixture of pragmatic and principled considerations. When dealing at the interface between two cultural worlds, with a much more numerous and/or powerful set of non-Indigenous entities, what scale of collective organisation should Aboriginal people favour? What is the right balance to achieve 'effectiveness, legitimacy, representativeness and accountability'?[49]

Various accommodations of these tensions are already found within the Act. For example, the *Land Rights Act* privileges the decision-making power of 'a local descent group' with 'primary spiritual responsibility' for the land, 'common spiritual affiliations to a site on the land' and a traditional entitlement to forage as of right over that land.[50] It is that group of 'traditional Aboriginal owners' which has a veto over development proposals on Aboriginal land (the right to give or withhold 'informed consent'). In addition, the wishes of a second, more 'regionalised' group must be taken into account as well. No action can be taken in connection with the land unless 'any Aboriginal community or group that may be affected by the proposed action has been consulted and has had adequate opportunity to express its view'.[51] In both cases, the consent or otherwise of traditional owners and the views of other affected Aboriginal people are ascertained by a third Aboriginal entity. It is the land council for the region, composed of Aboriginal members from that region (and the staff they employ), that is charged by the Act to negotiate the conflicting interests of Aboriginal people and those who seek something in relation to Aboriginal land.

So the *Land Rights Act* has these three levels at which Aboriginal people from particular regions may get involved with land-related business. The first level is a human construct and, thus, there is always the possibility of disputation. But its definition is driven by law far more than *choice* – both the customary law of Aboriginal people and the statutory law of the Act's definition of traditional owners. The second level – those people affected by a particular proposal – is a more situation-specific and arguably subjective judgment, albeit with technocratic overtones. However, it is the contrast between the first and the third level that I wish to focus on.

The 'geographical range' for the third level of organisation – basically, the size of the land council – is an issue that is up for grabs under the Act, as a matter of choice. After considering arguments for and against larger and smaller land councils in his first report in 1973, Justice Woodward recommended splitting the NT in two: one land council for the central region based in Alice Springs and one for the northern region based in Darwin. He contemplated that circumstances might change over time, possibly driving people towards either amalgamation or devolution. The establishment of the Central Land Council and the Northern Land Council 'should not be seen … as being incapable of amendment by the Aboriginal people themselves'.[52]

The Act created a mechanism (described below) so that if a 'substantial majority' of adult Aboriginal people living in the area persuaded the Commonwealth Minister that they favoured a new, smaller land council, it could happen. As a consequence, the 'geographical range' for this third level of involvement in land-related business could shrink – the membership 'pool' for the land council could become much closer in size to the cohort at the first level (traditional owners) and the second level (generally, residents of the area). But the status quo for the Act, stemming back to Woodward's first report, was the existence of two large regional land councils encompassing a population far greater than the biggest of the traditional land-owning groups.

One of the central controversies in debates over the *Land Rights Act* is where the land councils should be located on the spectrum between small and local at the one end and large and regional (in a fairly macro sense) at the other. Two island communities have persuaded the Commonwealth Minister to establish much smaller 'breakaway' organisations – the Tiwi Land Council for Bathurst and Melville Island in 1978 and the Anindilyakwa Land Council on Groote Eylandt in 1991. The setting of boundaries (and the likelihood of generating disputes in doing so) is seen as one of the major disadvantages in a move to smaller land councils. Even John Reeves, who favoured much smaller organisations, acknowledged that 'it is probably not coincidental that these two new land councils are island populations whose lands are defined by natural boundaries and who have a largely homogenous cultural base'.[53]

The chief arguments from proponents of smaller land councils is that they will be less remote, 'closer to the ground' and more responsive and accountable to their constituents. They accord with a strong desire for local autonomy that has 'origins, in part at least, within the Aboriginal polity itself'.[54] The Reeves Review was firmly in this camp.[55]

Reeves mixed in with these arguments a different and more controversial point. He took issue with the anthropological model expressed in the Act. In particular, he said it was too rigid and simplistic, in defining a particular descent group as the traditional owners and awarding them paramount decision-making authority under the Act. This overlooked the degree to which regional populations enjoyed traditional affiliations to land. The group 'that best represents the complex, dynamic and multi-faceted facts of Aboriginal traditional practices and processes in relation to the control of land' is, he said, 'the regional community'.[56] The Act thus undermined, rather than facilitated, the exercise of Aboriginal self-determination.

The solution for Reeves was a new *Land Rights Act* under which a much smaller land council (10 to 15 per cent of the size of the existing larger land councils) would be freed from the 'informed consent from traditional owners – consultation of affected people' model in dealing with proposed action relating to land. Instead, a small land council could make decisions 'in the best interests of the Aboriginal people of its region' adopting whatever decision-making process it thought 'best reflects Aboriginal traditional processes in its region'.[57]

Whatever merit there might be in challenging the particular anthropological model favoured in the 1970s in the *Land Rights Act*, or in taking the regional character of rights into account,[58] Reeves' analysis and postulated alternative were roundly rejected following publication of his report. There was a chorus of anthropological disapproval for the way in which he collapsed the distinction between traditional owners and residents of Aboriginal land.[59] The bipartisan HORCATSIA Report said that Reeves' analysis of the role of traditional owners was rejected by Aboriginal people who spoke to the Committee, anthropologists and Sir Edward Woodward:[60] '[e]ven Aboriginal groups in dispute with the larger land councils did not question the need for traditional owners to make decisions over their own land'.[61]

Putting aside Reeves' poorly received thoughts on regional populations of owners and residents, the argument about larger versus smaller land councils remains. The case for 'smaller is better' has been sketched above but in this debate, no side enjoys monopoly on arguments of anthropological aptness, or pragmatic and principled appeal in the organisational sense. The advocates of larger land councils say, for example, that a critical distance between the group whose interests are at stake and the Aboriginal organisation charged with the task of ascertaining that and other groups' views is a key to the fair and faithful rendering of those views. As David Martin puts it:

> A common argument, and one adopted uncritically in the Reeves Report, is that smaller, regionally based Aboriginal organisations are more accountable to their constituents. However, such arguments paradoxically ignore the defining feature of the Aboriginal polity – its intense emphasis on

> localism. Ultimately, with such an emphasis, any notion of 'representativeness' itself (in a western democratic sense) becomes problematic, and small regionally based organisations can be just as unrepresentative as larger ones and far more prone to capture by particular sectional interests.[62] … There would be a great risk that such small land councils would become isolated and mired in local politics, at the expense of serving the interests of their full constituencies.[63]

For advocates of the large organisation model, the safety valve in the Act for dealing with pressure for local autonomy is not so much the creation of new land councils but a policy of regionalising offices, staff and resources under the umbrella of the larger organisation. The technical path under the Act of *delegating* powers is seen as the more palatable option for achieving local responsiveness and autonomy, while preserving the critical mass necessary to carry out an imposing set of tasks in a tough political environment. Reeves, and to an extent the HORCATSIA Report, found in practical terms, however, that the Land Councils had under-delivered on their promise of regionalisation.

The idea of critical mass is important because it brings in the pragmatic dimensions of the 'large land council view'. Martin suggests that 'locally or subregionally based [I]ndigenous bodies frequently have chronic management and financial accountability problems'.[64] In regional and remote Australia, even well established, credible organisations sometimes find it extremely difficult to recruit people of sufficient qualification and experience to fill staff positions in discipline areas like anthropology. Reduction in scale may reduce the need for anthropological intermediaries. For the foreseeable future, however, the operation of a land council required to operate at the interface between Aboriginal people and those who seek access to or use of Aboriginal land will presumably require anthropological expertise. The same can be said in respect of various other areas of specialisation: accounting and business management; land use and ecology; and law.[65] The greater the atomisation, the bigger the recruitment headache can become.

The other interesting aspect to the critical mass argument is the degree to which it has found favour with the Commonwealth in perhaps analogous situations. In native title, the Government's Office of Indigenous Policy Coordination ('OIPC')[66] seems to hold a longer-term Commonwealth preference for *consolidation* of Aboriginal organisations dealing with complex legal and cultural issues at the interface with non-Aboriginal Australia. OIPC noted that a review of Native Title Representative Bodies ('NTRBs') as far back as 1995 registered the 'strong arguments based on maximising economies of scope and scale for Native Title Representative Bodies to be responsible for larger rather than smaller geographical regions and to have exclusive representative powers within those regions'.[67] While differing in some respects from the 1995 review, in 2004 OIPC confirmed that its 'views on economies of scale still apply'.[68] OIPC has said there may be a case for reducing numbers further, 'resulting in few but larger bodies. … Larger representative bodies potentially benefit from economies of scale, may be more able to attract and keep quality staff, and consequently provide a superior service to their clients'.[69]

Similar thinking can be seen in another context where the Commonwealth funds regional Aboriginal organisations to deliver professional services – the Aboriginal and Torres Strait Islander Legal Services ('ATSILS'), which provide predominantly criminal law services. In its recent tendering-out exercise for the provision of Aboriginal legal aid in the Northern Territory, for example, the Commonwealth Attorney-General's Department said: '[t]he Department has a preference to engage a single service provider in any one State and the Northern Territory'.[70] This decision to favour consolidation towards a single provider was taken at the political level by the Attorney-General.[71]

C The 2006 Changes

The 2006 Amendment Act does not of itself break up the existing large land councils. It does, however, create the potential for their power to be eroded in several ways.

1 Forced 'Delegation'

The original Act contained the kind of delegation provision one might find in any number of Commonwealth statutes.[72] It permitted land councils to delegate their functions in-house – to the Chair, other Council members, staff and a committee of members. Only a limited set of powers were delegable – the important functions remained the responsibility of the land council as a whole.[73] Delegation did not take away the continued capacity of the land council to exercise those powers.

This was consistent with conventional legal notions of delegation. It was an internal and voluntary process, designed

to promote efficiency while preserving overall organisational responsibility for statutory functions. Section 34AB(d) of the *Acts Interpretation Act 1901* (Cth) ('*Acts Interpretation Act*') reflects a parliamentary presumption that, in the ordinary case, the original repository of power will retain *concurrent* jurisdiction with its delegate.[74]

The 2006 Amendment Act departs from these basic principles in the following ways:

- significant powers and functions[75] may end up being exercised by an external organisation;
- the transfer of powers may be involuntary and indeed done over the objection of the original repository of power;[76]
- the original repository is forbidden from exercising the powers or functions while a 'delegation' is in place (and s 34AB(d) of the *Acts Interpretation Act* is expressly 'disapplied');[77] and
- control over the variation or revocation of the delegation is exercisable in many cases, not by the original repository of the power but sometimes by the Commonwealth Minister and sometimes by the delegate corporation itself.[78]

The 'delegation' provisions authorise a Commonwealth Minister to forcibly transfer powers from an existing land council to a particular kind of corporation in relation to a subset of the land council's geographical area. That corporation will have a majority of Aboriginal members from that area.[79] But now, with the enactment of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), the delegate corporation may also include non-Aboriginal people as members and even directors. There is no requirement for informed consent from traditional owners regarding the transfer of powers and, therefore, no assurance that the new body will enjoy the confidence and the support of the people whose interests it will purport to represent.

The concept of delegation has been distorted and there is potential for disagreement and confusion between the overlapping roles of the land council and the corporation where forced devolution of some powers has occurred.[80] This could have adverse consequences not just for the organisations involved and their constituencies but also for third parties seeking commercial certainty in their dealings on Aboriginal land.[81]

In short, the 2006 Amendment Act creates the potential for unilateral action by a Commonwealth Minister on the key issue of representation, based on an inadequate process and criteria. A Minister could force the transfer of important powers and functions from a land council whose membership is exclusively Aboriginal to a corporation with a significant non-Aboriginal membership. The jurisdiction of the existing land council will be ousted. This is a dramatic consequence and, within its terms, equal to the establishment of a new land council; yet, the 'delegation' paradigm sees it occur with minimal attention in the Act to process, criteria and safeguards. In the past, developers and mining companies have been known to manipulate smaller Aboriginal organisations in trying to get their hands on Aboriginal land and resources. In this environment, these changes to the law have a disturbing potential.

Through so-called delegation provisions, the Government can achieve a major reduction in the authority of existing land councils without the due process, rigour and transparency that such a significant measure warrants, and without the informed consent of traditional owners for the area. In so doing, the Act also offers scope for abuse by governments seeking particular outcomes in sensitive areas like the mining of uranium and other minerals on Aboriginal land or the creation of township leases.

As the spokesperson for the Laynhapuy Association in northeast Arnhem Land told the parliamentary inquiry into the 2006 Amendment Act:

> We are very concerned that the proposed changes will make our land councils weaker and the minister – whoever that might be – stronger, so the power will change. At the same time, if that is going to be the case, then the power of the traditional people will gradually weaken. We want our land council which operates from day to day here in the Northern Territory to be more accountable and more responsive to land-holders. We want to lead these changes and make sure that they know that we want to be a part of the changes, if there is any need for changes to the act.[82]

2 Land Council Funding

Sums equivalent to the mining royalties paid to the Territory and Commonwealth Governments for mining on Aboriginal land ('mining royalty equivalents') are paid into the Aboriginals Benefit Account ('ABA'). From its inception,

the Act guaranteed to the land councils a fixed minimum percentage (40 per cent) of mining royalty equivalents to finance the costs of their operations.[83]

Land councils have often received *more than* 40 per cent of the available ABA funds.[84] But what the original Act guaranteed was a statutory floor under land council funding. The 2006 Amendment Act, by contrast, puts decisions about the annual allocation of land council funding from the ABA directly in the hands of the Commonwealth Minister. Land councils prepare and send the Minister estimates of their administrative expenses for the year, but the final allocation to land councils shall be 'such amounts as the Minister determines'.[85] This represents another shift in the power dynamic between land councils and the Commonwealth Government in favour of the latter.

Notably, one of the few issues government and non-government members of HORCATSIA were divided over was the statutory guarantee of 40 per cent of ABA money to land councils. Government members thought it discouraged accountability while non-government members said it was important to the maintenance of well resourced, secure and professional land councils. The Committee agreed the issue should be resolved by traditional owners through a process guided by a working party.[86]

Likewise, when the issue was debated in 2006 the Opposition said that removing the 40 per cent guarantee from the Act would undermine the independence of land councils and, therefore, their capacity for advocacy on behalf of traditional owners.[87] The Government disagreed, saying that the 40 per cent figure was arbitrary and inconsistent with normal performance-based funding for statutory authorities.[88]

3 Creation of New Land Councils

It has always been possible for groups of Aboriginal people within existing land council boundaries to break away and form a new, smaller land council. Where the Minister was satisfied that a 'substantial majority' of adult Aboriginal people living in the area was in favour of establishing a new land council and that it was 'an appropriate area for the operation of a land council', then he or she could effect its establishment by notice in the Government *Gazette*.[89]

As a result of the 2006 Amendment Act, there are now more detailed provisions for the establishment of a new land council, including more specific criteria to be addressed in an application to the Minister[90] and an additional safeguard: that the Minister is satisfied that 'the proposed new Land Council will be able to satisfactorily perform the functions of a Land Council'.[91] These are improvements on the original Act. Critically, however, the requirement for a 'substantial majority' has been replaced by a threshold requirement of 55 per cent in a vote conducted by the Australian Electoral Commission.[92] The previous threshold was open to interpretation as to what 'substantial' means. If, in percentage terms, a substantial majority rests somewhere significantly above 50 per cent and below 100 per cent, the Government's choice of 55 per cent must be seen as either at the extreme bottom of the scale. The Government rejected amendments moved in the Senate to set the threshold at 60 per cent and add a requirement of informed consent from traditional owners for the area involved.[93]

4 Summary

The Territory land councils have their critics, but they have become undeniably strong organisations: large enough to recruit good technical assistance and achieve economies of scale, and powerful enough to materially alter the political position of Indigenous people within the Territory. The 2006 Amendment Act has made the creation of smaller land councils, or corporate 'delegates' which will function as de facto smaller land councils, more likely. Whether there will be an 'accountability dividend' remains to be seen. In *realpolitik* terms, however competent new organisations prove to be in discharging their statutory functions (and too little attention has been paid to ensuring that in respect of 'delegate' corporations), there is a real prospect that a reduction in size, scale, reach and constituency will involve a corresponding reduction in political impact for two of the most significant Aboriginal organisations in the country.[94]

III Economic Development, Home Ownership and Township Leases

A Economic Development and the *Land Rights Act*

The second point of focus for the 2006 amendments is the Commonwealth Government's assertion that they will 'usher the potential for a new era of opportunity for Australian Aboriginals living in the Territory'[95] – in particular, through the 99-year township leases which 'will make it easier for

Aboriginal people to own their own homes and for businesses to operate in the Northern Territory on Aboriginal land in the way that they operate in other parts of Australia'.[96]

The Government said there was widespread recognition that, with the claims era (that is, the period of getting land back) drawing to a close, 'the Act needs to be amended to deliver better economic outcomes'.[97] The Reeves Review also justified many of its recommendations for substantial legislative change on the basis that the Act urgently needed to address the socio-economic advancement of Aboriginal people in the NT. More generally, the era of 'practical reconciliation' policies and the heightened focus on Aboriginal poverty and the reasons behind it, from leading Aboriginal and non-Aboriginal commentators, mean there is greater attention being paid to the relationship between the *Land Rights Act* and better socio-economic outcomes, particularly in remote communities.

Justice Woodward himself did not make a strong claim about the economic benefits from Aboriginal land rights when stating the aims of his recommended scheme, though neither did he see them as irrelevant. Rather, he treated the recognition of land rights as a precondition to economic improvement: 'the provision of land holdings as a first essential for people who are economically depressed and who have at present no real opportunity of achieving a normal Australian standard of living'.[98]

His proposals assumed a more explicitly socio-economic character when he addressed the Aboriginal Land Commission's role 'as adviser to the government on land rights questions as they emerge in practice'.[99] He envisaged that, in addition to investigating claims based on traditional rights to land, the Aboriginal Land Commission should investigate 'cases where Aborigines need land for housing or economic purposes'[100] and make recommendations about purchases 'it thinks necessary to satisfy the land needs of Aboriginal people'.[101] Ironically, in light of subsequent criticisms from the centre-right parties, it was this more instrumentalist aspect of Whitlam's land rights package that was dropped by the Coalition when it passed the Act in 1976.

2 Pre-2006 Aboriginal Land Tenure and the Role for Leases and Mortgages

Woodward's primary focus on delivering security of tenure for Aboriginal groups was reflected in the particular form of land ownership they obtained under the Act. Following a transfer or successful claim and a positive recommendation by the Commonwealth Minister, the nominated land trust receives a grant of fee simple[102] that is communally held and inalienable except by surrender to the Crown or conveyance to another land trust.[103] There is no reference in the Act to mortgages over Aboriginal land.

Since its inception, however, the Act has contained leasing provisions that contemplate non-traditional uses for Aboriginal land. Significantly there has always been a provision in the Act permitting the grant of an estate or interest to *any* person for *any* purpose.[104] Although premised on the informed consent of traditional owners to the grant, the Act put two additional safeguards/obstacles in place. The land council had to be satisfied that the terms and conditions of the grant were reasonable[105] and, where the term of the lease exceeded 10 years, the Commonwealth Minister had to give his or her consent.[106] As Justice Brennan said in a 1982 High Court decision about the Act: '[t]he Aboriginal people connected with a tract of country were thus made competent to use their country in a non-traditional way if and when an Aboriginal consensus to do so should be established'.[107]

Subleasing has also been possible under the Act. It required the consent of both land council and, where Ministerial consent was legally required for the original grant, the Minister.[108] A prime example of the way in which commercially valuable subleasing has already occurred under the existing s 19 lease provisions is the Alice Springs to Darwin Railway, part of which was constructed over Aboriginal land:

> [T]he head-lease between the Land Trust and the AustralAsia Railway Corporation is a reasonably simple leasing arrangement. In essence, the head-lease makes provision for future leases and sub-leases by recording the Land Council's and the Minister's 'one-off' consent to those transactions, as well as the grant of the original lease. The special conditions in the lease states that, no further consent needed to be obtained from the Minister or the Land Council, and that any sub-lease granted under the head lease may be mortgaged by the Lessor without any further requirement of consent. The Railway lease in effect demonstrates the practicality of commercial leases and sub-leases on Aboriginal land, and the capacity for those instruments to be accepted as sound security for advancing money on mortgage.[109]

At a simplistic level, there is little controversy about paying more attention to the socio-economic potential of land rights. Reeves said in 1998:

> In contrast to the slight attention given to the economic and social advancement of Aboriginal Territorians as a purpose of the Act when it was passed by the Commonwealth Parliament more than 20 years ago, there was strong support in the written and oral submissions to the Review of the need to focus on the economic and the social advancement of Aboriginal people in the future. In my view, this signifies a recognition that it is timely to pursue this goal as a purpose of the *Land Rights Act*. Alternatively, it may be a reflection of the fact that the era of land claims and land grants is drawing to a close, and that Aboriginal people are in the process of examining and emphasising other objectives.[110]

3 The Idea of Tenure Reform

The principles underpinning such development attract more debate. One of the issues concerns the amount of control Aboriginal people exercise over access to their land by third parties for business and other purposes. The NT Government told the Reeves Review that the Act had been drawn up without regard to the 'future economic, social and cultural development of the Northern Territory society generally' and, therefore, that the Act required changes so that it operated 'without serving to divide Territory society, disproportionately adding to the cost of land administration and retarding economic growth'.[111]

Reeves broadly concurred with these sentiments, remarking that 'the costs of [the] *Land Rights Act* have probably exceeded their benefits for other [non-Aboriginal] Territorians'.[112] This highlights a major rhetorical difference between the Reeves Review and the Commonwealth's argument in support of its 2006 amendments – the relevance of land to *Aboriginal* economic development. Reeves disparaged the idea of 'directly developing the land granted to Aboriginal Territorians as providing their best economic way forward',[113] saying that the development of education and skills, and the formation of stronger partnerships with government, the private sector and the broader community were far more important.

As a consequence, leasing or tenure reform did not feature significantly in Reeves' recommendations. On the other hand, to reduce the costs and other impediments to accessing Aboriginal land – that is, to address more directly[114] the development interests of *non-Aboriginal people* – Reeves suggested a suite of changes, including giving the NT Government the power to compulsorily acquire Aboriginal land and removing the requirement for permits to enter Aboriginal land. He also said that dismantling the larger land councils and replacing them with much smaller bodies (as discussed above) would reduce the 'transaction costs associated with giving the Land Councils a monopoly, in the representation of traditional Aboriginal owners with miners and other business ventures with respect to Aboriginal land'.[115]

Reeves did receive submissions on tenure issues. Six years before the ALP Government of NT Chief Minister Clare Martin put forward a township leasing proposal in a confidential paper in mid-2004, its CLP predecessor also discussed a long-term lease arrangement in Aboriginal communities, with subleases for business or housing, in its 1998 submission to the Reeves Review.[116] The submission also included the idea of a long-term lease to an entity under the *Local Government Act 1994* (NT) to handle various issues 'often foreign to Aboriginal culture … including the conduct of commercial operations'.[117]

In his brief response, Reeves noted that many Aboriginal communities were established on reserves with no regard to underlying traditional ownership. One consequence was that some Aboriginal people lacked security of tenure, despite long-term residence on Aboriginal land. He recommended the compulsory negotiation of what he called a 'rent free sublease for a suitable term, of the land on which that community is situated' – although he appears to have been talking of a lease to a local government body, not a true sublease.[118] To facilitate home ownership, he recommended that the local government entity be able 'to sublease its land for housing or business purposes'.[119] Anthropologist Peter Sutton, one of Reeves' most prominent critics, endorsed the idea, at least at the communal level.[120]

In reviewing Reeves' recommendations in 1999, HORCATSIA also voiced support for township leases and subleases, emphasising their feasibility under the existing s 19 of the Act but otherwise using language similar to that adopted by the Federal Government in 2006. It was also 'sympathetic towards the insecurity of tenure that may be felt by residents who have no traditional affiliations to the land'. The Committee suggested that:

> negotiation of rent-free or so-called 'peppercorn' sub leases in municipal areas may relieve some tension in large communities. *These leases can be struck under s 19 without need to amend the Act* … Section 19 also states that individual families can negotiate with traditional owners for residential or business sub-leases. With cooperation from lending institutions, this arrangement could provide for 'mortgageable' leases on Aboriginal land, opening up the sorts of opportunities that many other Australians take for granted.[121]

Subleasing and mortgages were also discussed in the joint submission to the Commonwealth from Land Councils and the NT Government regarding amendments to the *Land Rights Act* in 2003. There, the parties (including notably the land councils) conceded that s 19(8) as it then stood was 'apparently a major impediment to lending institutions contemplating investment on Aboriginal land', despite the successful financing of the railway.[122] That section required the consent of the land council and the Minister before the grantee of an interest could transfer their interest to another person, thereby possibly restricting a lender's ability to enforce a mortgage in event of a default. The joint submission recommended amendment to s 19(8) to clarify that the terms and conditions of the initial grant could override its potential effect in this respect – that is, a commercial lease could be issued dispensing with the requirement for further consents 'for later transfer or mortgage purposes'.[123]

In July 2004, Noel Pearson and Lara Kostakidis-Lianos discussed the applicability of the ideas of Peruvian economist Hernando de Soto to Aboriginal communities with communal landholdings in Australia. De Soto argues that one important explanation for the poverty of millions in Latin America and elsewhere is the weakness of economically important legal institutions and processes – in particular, the absence of individual property rights.[124] People may occupy the land their shanty home is on or sow a modest crop on adjacent land, but they lack legal title to their house or their farm. Without a legally recognised asset to borrow against, there are no funds available to invest in building up an enterprise – this 'informal economy' lacks certain vital ingredients for capital formation.

Pearson and Kostakidis-Lianos said that de Soto's ideas encourage a focus on the structural barriers to Indigenous participation in the 'real economy' in Australia. For many Aboriginal people, they said, those barriers include their presence on communally-owned inalienable title:

> The majority of Indigenous assets exist outside the Australian economy. They are, in de Soto's words 'dead capital', because they cannot be leveraged to *create* capital.
>
> Indigenous communities living on Indigenous lands (though we own 'property') are locked out of the Australian property system that enables capital formation. All of our assets, in the form of lands, housing, infrastructure, buildings, enterprises etc are inalienable and, as a result, have no *capital* value. They cost huge amounts of money to develop, to replace and to renovate – but they have no capital value. Billions of dollars transferred from government to Indigenous communities ends up in the form of dead capital. We end up in a dead capital trap – a poverty trap.[125]

Pearson and Kostakidis-Lianos advocated moving Indigenous assets into the mainstream economy. On the other hand, they cautioned against simply breaking up communal titles into individual ones. Sites of cultural and environmental significance require protection and the risk of 'surrender of land on unjust terms' must be avoided. The objective, they said, is an 'intelligent compromise' that involves maximising the fungibility of assets while minimising the risk to communal ownership and values.[126]

Around the same time, the NT Government circulated amongst the four land councils a confidential paper outlining its ideas for township headleases and subleases. Subsequently, in early 2005, it directly approached the Commonwealth Government with its plans. In the meantime, the Coalition, led by John Howard, had won a fourth term at a federal election and, for the first time, a government majority in the Upper House of the Commonwealth Parliament, the Senate. This gave new life to the Government's desire to substantially amend the *Land Rights Act*. Its interest in legislative amendment had been quiescent for several years because of the frosty reception it had been likely to receive in the Senate.

By then, ATSIC had been abolished and the Commonwealth had established its hand-picked advisory body, the NIC. In late 2004, Mr Warren Mundine, an Aboriginal man from NSW, a member of the NIC and soon to be the federal President of the ALP, voiced his support for major tenure reform on Aboriginal lands. He said that communal ownership made Aboriginal people asset-rich but cash-poor and retarded economic development.[127]

In March 2005, the right-wing think-tank, the Centre for Independent Studies, published a paper by Hughes and Warin that argued that 'nowhere in the world has communal land ownership ever led to economic development'.[128] The authors said that Aboriginal people in the NT were trapped in a socialist experiment that was a miserable failure, and that communal ownership was the principal reason for the lack of economic development in remote areas. Their first priority was the creation of individual property rights: '[w]ith individual property rights, land could be used for collateral to borrow for business, allowing the application of capital and technology to create productive enterprises with employment capacity'.[129]

The following month the Prime Minister made a rare visit to an Aboriginal community, Wadeye, southwest of Darwin. There, he signalled changes to the *Land Rights Act* to facilitate home ownership and small business: 'I believe there is a case for reviewing the whole issue of Aboriginal land title in the sense of looking more towards private recognition. It's a view that I've held for some time'.[130] From that point on, the issue assumed an apparently unstoppable momentum, but the process took place largely behind closed doors.[131]

4 The 2006 Changes

The heart of the new township lease arrangement is found in s 19A of the amended Act. Where a land council is satisfied that traditional owners have given their informed consent, and the Minister has also agreed, a 99-year lease over a township on Aboriginal land can be granted to a NT or Commonwealth government 'entity'. Subleases can then be granted. To ensure that traditional owners have only a one-off say in the process, there is a prohibition on restrictions in the headlease that would require their consent to the grant of a sublease.[132] The Act also forbids the headlease from containing 'any provision relating to the payment of rent, or the non-payment of rent, in relation to a sublease'.[133]

At the same time the Government also changed the *Land Rights Act* to pay for the township leasing scheme. Amendments to the ABA effectively allow the Commonwealth to divert, into the hands of government, money destined to be paid to or for the benefit of Aboriginal people. The government entity gaining the benefit of a township lease can use the ABA money to pay rent to traditional owners due under the headlease. The Commonwealth can also use the money to meet the administrative costs it or the NT Government incurs in implementing its township leasing scheme.[134] The Commonwealth's justification was that the ABA is not Aboriginal people's money but an account funded from consolidated revenue. The Commonwealth Government indicated that additional money for housing would be made available to those communities that adopted the township lease arrangement.[135]

The NT Government, led by ALP Chief Minister Clare Martin, said it broadly supported the township lease proposals. This position is not surprising since the NT Government seems to have drafted the confidential 2004 paper which pre-figured the 2006 amendments. However, it thought the Commonwealth's process should have been slower, more inclusive and more like that adopted for the changes to Part IV of the Act dealing with mining.[136] The basic case it put to the Senate Committee inquiry, notably without referring to any specific examples, was:

> The fact is that there is a legacy of very limited leasing of land within Aboriginal townships. Developments within townships have been delayed as a consequence of the cumbersome nature of the current process, which requires each individual lease to be separately negotiated, with the resultant transaction costs and delays. As a result, in many cases the current provisions for leasing under the act have been effectively ignored in favour of essential small-scale developments on communities proceeding expeditiously.
>
> The result is that investors are reluctant to invest in infrastructure and communities. The Australian government is hesitant to invest in vital infrastructure for services such as Centrelink. The remote Indigenous housing sector is the only element of the national housing system which fails to draw on private sector borrowings and relies entirely on government investment. Importantly, traditional owners are missing out on the income they are entitled to from people using their land. This stagnated development is unacceptable in a situation where many Aboriginal communities are becoming towns and with our Aboriginal population set to double over the next 20 years.[137]

Pressed for more detail, the NT Government official continued:

> I think it really comes down to transaction costs. To get a lease, legal action and things like surveys, which are expensive, are involved. There is no doubt that, particularly in regard to

> surveys, for instance, there are great economies of scale if you do a whole town rather than do them block by block. But my experience suggests that it is largely about the time involved. In terms of encouraging business, there is no doubt that, if you say there will be a two-year delay while you get your lease, a lot of people just wander off. It is not conducive to and supportive of economic development. In the end, when you actually get a lease, is there any difference? Not really. I do not think there is any significant difference between a 99-year lease under the current section 19 and a lease under this proposal, but the process itself is significantly different…
>
> [Senator CROSSIN – So it is possible under the current arrangements to do that?]
>
> It is certainly possible. But I would think that – and I am looking at it from the perspective of time – if there were a significant demand for section 19 leases then we would have to put a lot more resources into the land councils.[138]

It has been suggested by the Commonwealth and others that township leases may also allow for traditional owners to be paid rent for the use of Aboriginal land for utilities and infrastructure, where that has not happened in the past.[139]

5 General Concerns about Tenure Reform

A number of points can be made about the government case for amending the *Land Rights Act* in this way.

First, the case made by government about the link between private leaseholdings, home ownership and improved economic outcomes for Aboriginal people was largely rhetorical. The argument appealed to 'common sense' and formal equality – offering the same choice and opportunities as other Australians[140] – rather than empirical evidence demonstrating an economic case.[141] This concern has additional weight given the apparent shift within the World Bank – formerly a strong proponent of individual titling as a path to development in poor countries around the world – to a more sceptical view. In a recent article, Penny Lee attributes to 'the World Bank's key policy advisor' a warning that in remote areas of low population replacing communal tenure with individual titling may not be cost-effective and that instead of ideologically-driven solutions, policy-makers 'should focus on ways to enhance security and effectiveness of property rights under existing arrangements'.[142]

There is also the question of *whose* economic development is being promoted. Rhetorically, in 2006, the Government's focus was on Aboriginal people living in remote communities, who might achieve home ownership or start up new businesses on Aboriginal land. It is worth noting, however, that Reeves disparaged this idea as a path to greater wealth for Aboriginal people. Nevertheless, he advocated liberalising access to Aboriginal land, increasing the NT Government's say over that land and breaking up what he called the large land council's 'monopoly' in the representation of traditional owners, *as a means of unlocking economic potential for non-Aboriginal people and entities*. The rhetorical contrast is strong. However, the bright-line contrast between the Reeves package and the 2006 proposals in this respect begins to dim, when one combines:

- the one-off leasing of township land to an undefined government entity (originally proposed on terms pre-set to favour government),[143] with the intention of subleasing for commercial as well as housing and governmental purposes;the recirculation of royalty equivalents from the ABA as rent for those leases (rather than the generation of new income for Aboriginal people);
- proposals that potentially erode the powers of existing land councils, through the creation of new land councils or the forced devolution of powers to smaller corporations with possibly significant non-Indigenous membership; and
- the signal, almost as soon as the 2006 Amendment Act became law, that legislative changes will be made to liberalise the permit system.

The Social Justice Commissioner, Mr Tom Calma, has made the point that Justice Woodward intended that land rights return autonomy and decision-making power to Aboriginal people. Calma has said that this commitment in the legislation to self-determination is not:

> simply about achieving better socioeconomic outcomes; it is also about the right and power of Indigenous Australians, as a distinct peoples, to decide what development they want, how they want to achieve it, and what aspects of their laws, culture and values they will retain or give up in the process.[144]

A one-size-fits-all plan promoting township leases as the way forward does not sit well with this ethic underpinning the *Land Rights Act*.

Sceptics about major tenure reform also point to several factors which they say exert a stronger influence on economic outcomes, including: poor roads and telecommunications; the costs of surveying remote township land; the distance from markets for many Aboriginal communities; the low average incomes which are unlikely to support mortgages; and the limited education and training levels that hamper participation by Aboriginal people in the mainstream economy.[145] Arguably, there are several factors more significant than tenure in explaining the lack of economic development or home ownership on Aboriginal land in remote communities.

These are rational arguments that suggest the search for a 'silver bullet' in Aboriginal development is dangerously naïve. At the same time, there is in contemporary Australia an awareness of the need to do something urgently about Aboriginal poverty in remote communities, for some kind of circuit breaker – a structural change that might help trigger or create the preconditions for a sequence of other changes. Referring to Cape York communities, Pearson and Kostakidis-Lianos said that life outside the mainstream economy is not the 'optimal situation for the protection and preservation of Indigenous culture'. This is because in a climate of dependency and poverty, that culture is 'threatened with disintegration' and 'when communities look to the future, there must be something on the horizon other than a passive welfare existence'.[146]

Reviewing these *general* arguments about tenure reform reinforces that perhaps the most difficult aspect of this debate is gauging whether and where intelligent scepticism should give way to an optimistic leap of faith.[147] But there are also points to make about the *specific* character of the township lease amendments adopted by Parliament in 2006.

6 Specific Concerns about the 2006 Changes

(a) Voluntariness

The Government insists that the 'new township leasing arrangements are entirely voluntary and no-one will be required to enter into a township lease in order to obtain essential services'.[148] There 'may be cases where a community is willing to enter into a township lease to obtain some particular or special benefits which would not otherwise be available'.[149]

During the Senate Committee inquiry into the legislation, however, there was concern expressed that the desperate need for infrastructure in remote communities would leave little choice for Aboriginal communities but to sign up to township lease arrangements.[150] During parliamentary debate on the legislation, Senator Rachel Siewert repeated an allegation aired by others that 'Elcho Island has been required to sign onto this process in order to get 50 additional houses'.[151] She said that the additional houses were, however, an essential service:

> When you have overcrowding of 15 to 16 people in a house, it is an essential service to provide housing for those people. It is not an add-on; it is essential. In order for that community to get that additional housing, they should not be coerced into signing an agreement but they are being required to sign one to get those 50 additional houses.[152]

Later, in the House of Representatives, the responsible Minister, Mr Brough, confirmed that agreement to a township lease was a precondition for Commonwealth funding of 50 new houses on Elcho Island.[153]

As the Australian States well know, when the Commonwealth holds the power of the purse-strings (in this case the funding of infrastructure and services), financial leverage can take the place of legal compulsion. It seems reasonable to assume, therefore, that traditional owners in many parts of the Northern Territory will feel very strong pressure to enter into headleases over township land, despite the ostensibly voluntary nature of the scheme.

These concerns over the bargaining power of traditional owners in the face of government pressure are magnified when one takes into account the 'delegation' provisions discussed earlier. The power to grant township leases (upon satisfaction that there is informed consent) can be forcibly stripped from land councils under the 'delegation' provisions.[154] In that situation, the job of determining whether informed consent has been given and whether a grant should be made will fall to a smaller corporation that may have significant non-Aboriginal membership and that could be dominated by residents who are not traditional owners.

(b) The Undefined Entity

The Act contemplates that a headlease will be granted by the traditional owners of township land to 'an approved entity',

established by government. The headlessee under the Act stands to become a very important player in the Northern Territory. It will hold a lease, or more likely, multiple leases over some of the potentially most valuable Aboriginal land in the Northern Territory (remembering that almost half of the NT landmass is Aboriginal land). It will enjoy the dominant property rights in an Aboriginal township for the lifespan of an Aboriginal person and, statistically, through the lifespan of their grandchild as well.

The Government speaks of the headlessee as a driver of economic development in a new era of prosperity for Indigenous people. It will certainly have complex legal and financial responsibilities because, to a significant extent, the Bill puts the economic fate of many Aboriginal people in the Northern Territory in its hands.

Parliament is accustomed to passing laws that establish public bodies with long-term objectives and weighty responsibilities. Typically, it does so on the strength of detailed legislative provisions spelling out basic features of the body, such as:

- its composition and structure;
- its powers, duties and functions;
- its method of doing business; and
- its lines of accountability.

The 2006 Amendment Act said almost nothing about headlessees. A last-minute amendment means that the headlessee might be a Commonwealth rather than a Territory entity. This suggests policy-making on the run about one of the Act's most critical features. Aboriginal people might find the headlease later transferred to another body whose identity is exclusively determined by a government minister, with no parliamentary oversight through tabling and disallowance and, it appears, no reference back to traditional owners.[155]

(c) Use of ABA Money

Under the pre-2006 Act, if traditional owners leased township land the income would be paid to, or for the benefit of, the traditional owners. That money would be additional to other money that may come their way under the Act, for example, as compensation for the adverse effects of mining on Aboriginal land through the ABA.

In this sense the Act diminished, rather than enhanced, economic returns to traditional owners. A government entity will make money from subleasing Aboriginal township land for 99 years – indeed, traditional owners are apparently prevented from sharing that income, once the upfront headlease has been negotiated.[156] Yet, because of the way the Bill was drafted, governments do not need to pay for the valuable set of additional rights they acquire over township land. Instead, the costs will be met from money already earmarked for financial compensation and other benefits to Aboriginal people in the NT. That fund will be further diminished by governments using ABA money to pay for the costs of implementing their township leasing policy.

7 The Fear of Being Sidelined and the Failure of Process

There was a basic, understandable reservation during 2006 on the part of many Aboriginal people about the unilateral insertion of the 99-year township lease model in the *Land Rights Act* and the perceived threat of government pressure to adopt it. The Commonwealth Government missed an opportunity to respond to this concern, thereby undermining what possibly might have been a consensual and better quality amendment process, from which the Commonwealth could have taken great credit.

The Commonwealth chose not to engage the land councils in formal negotiations (as had happened for example with the Alice to Darwin railway) to see whether such a scheme or its underlying objectives could be put into operation in a genuinely voluntary and co-operative fashion within the existing s 19 leasehold provisions.[157] Without that attempt at partnership – and regardless of its merits – the township leasing scheme began its life with the strong odour of another 'government-knows-best' policy, imposed from above. The idea that emerged from the joint NT Government-land council negotiations in 2003 – for a modest clarifying amendment to s 19(8) of the Act that would confirm mortgagee rights in the event of a default – appears to have been simply swamped by the political demand for an ostentatiously vigorous and unilateral tenure reform package.

Imposing a solution polarised the politics and made cool-headed discussion of the township leasing proposal far more difficult. For example, one of the major anxieties about the proposal – based on overseas experience with the fragmentation of communal title – is that so soon (less than 30 years) after regaining a strong say over land use, traditional owners might be pressured into surrendering it again for four generations at a time. There is understandable concern

amongst Aboriginal people and organisations about what kind of unwanted commercial activity might be licensed by sublease in the next 99 years, by a government entity about which people know nothing. In the absence of a negotiation process over the proposed amendments, these substantive issues were left largely unaddressed.

The Government's view on township leasing is that traditional owners have a risk management tool at their disposal – the terms negotiated for the grant of the headlease.[158] There were two problems with that argument in mid-2006. The first was that the Act prohibited some terms and conditions being inserted in the headlease.[159] Secondly, with government transfer payments so vital to local economies, what bargaining power would traditional owners have regarding sublease safeguards? Genuine negotiations between the two levels of government and the land councils (with time and opportunity for consultation with their constituencies) may have enabled solutions to be found to these practical problems.

Instead, the perception that traditional owners might be marginalised in the development of township land was heightened by the adoption of a poor process. The amendments to Part IV of the Act dealing with mining also put to Parliament in 2006, had the benefit of stakeholder negotiations and represented a consensus reached between two levels of government and four land councils. The process regarding township leasing was much more top-down. When asked about the consultation process for the legislation during the parliamentary inquiry into the 2006 amendments, the official from OIPC said that 'we had a teleconference with the Central Land Council on 2 December [2005]'. 'That was of course', he admitted, 'subsequent to the government's announcement in principle of the changes it wished to make to the land rights act'.[160] 'In relation to the township leasing', he said, 'the government is of the view that the principal stakeholder in this was the Northern Territory government'.[161]

Similarly, the NT Government's decision to break from the collaborative approach to Part IV of the Act, which appears to have gone so well, and 'do a deal' with the Commonwealth on township leasing in early 2005 was unfortunate. Such behaviour sows mistrust, as Aboriginal people perceived themselves once more shut out of the process as their future was discussed and determined behind closed doors.

By the time the legislation surfaced as a Bill in the House of Representatives at the end of May 2006, the township lease proposal had a strong unilateralist flavour. The Northern Territory ALP Government had initiated the process, and the federal Coalition Government, especially its newly appointed Indigenous Affairs Minister, had taken up the idea of tenure reform as opening 'a new era of opportunity'. The views of traditional owners about what was planned for their land seemed relatively unimportant. A polarised political debate ensued, with the non-government parties opposing those parts of the legislation that went beyond the joint submission of the land councils and the NT Government in 2003.

There is a reasonable possibility that such an outcome could have been avoided with a better process. Subleasing, as pointed out earlier, was always feasible under s 19 of the Act, that is, before the 2006 amendments. The Government's assertion, however, was that it was too slow, costly and frustrating to keep the existing safeguards on leasing in place – the most important of which was the consent of traditional owners.[162]

Although not supported by example, the government argument is not an irrational one. It is at least conceivable that in some circumstances a case-by-case traditional owner veto over subleases is impractical. Traditional owners apparently have seen the merits of such arguments in the past – the Alice Springs to Darwin Railway being one prominent example.

What seems clear is that there are some differences of opinion between, for example, land councils and government on the precise nature of economic development that takes place on Aboriginal land, but there is also substantial common ground. Like any negotiation this suggests that ready agreement could be reached on some issues, while the successful resolution of others issues may take more time. A good example is the distinction between long-term lease arrangements for housing and government infrastructure on the one hand and commercial leases on the other.

A paper prepared by the Central Land Council in March 2005 advocated the negotiation of headlease arrangements for residential purposes in Aboriginal townships and standard form leases for government infrastructure. As James Nugent, a senior policy officer at the Central Land Council, stated:

> I think if you take a look at the Central Land Council's proposition on housing leases you will see that the land

> council has no difficulty with the proposition per se. If it improves the lot of Aboriginal people, of the traditional owners, if it is genuinely a good idea, then more power to it. The land councils would work with that. The difficulty is in constraining the process and in providing some sort of coercion to force traditional owners into a position where they do not have full negotiating rights. If the idea and the philosophy that underpins the government proposal is a good one, then it could certainly have been rolled out by putting a proposition to the land councils which could have been taken to traditional owners under the existing provisions of the land rights act. There is therefore no need to change the land rights act, if indeed this is a good idea. It has just never been put.[163]

On commercial leases, however, the Land Council said that the retention of traditional owner control was important and any case for departing from the existing operation of s 19 of the Act must involve the resolution of 'real and identified problems'.[164] The reason for treating commercial leases separately was clarified by Mr Ross, the Chairman of the Central Land Council:

> You then go back and start talking about how people enter into business when you have taken their land from them and given them a few measly dollars in return for that land. Any business person in this country and around the world knows that one of your greatest assets is always your land. What do you start with when you have given that away? Let's be sensible about what is being proposed. You are going to take that land off them. It is the best asset that they could ever have in being able to negotiate any business opportunities; employment et cetera into the future, and you will remove their capacity to deal with them, all for a few measly dollars that they then have to go and borrow probably 10 times as much as to get started again. It is absolute craziness.[165]… You have removed their ability to participate.[166]

In other words, the infrequency of business approaches for commercial leases and the unpredictable nature of the proposals that might arise over 99 years mean that a one-off alienation of a township headlease to a government entity, for what is likely to be a relatively modest amount, is simply a poor strategic use of perhaps people's most valuable asset.[167]

These are not dogmatic objections by organisations, uninterested in the pursuit of economic development or committed to the maintenance of 'communist enclaves'.[168] They offer the ready possibility of stakeholder agreement on residential sublease arrangements (and probably for infrastructure as well). They provide a basis for discussion of how genuine and meritorious concerns for the long-term fate of communal land might be addressed in the commercial leasing context, either within an unamended Act or through negotiated amendments. In the words of the Labor Leader in the Senate: '[t]here are traditional landowner groups who want to find a model that will streamline leasing and encourage economic activity yet preserve their role as decision makers and financial beneficiaries of development on their lands'.[169]

Yet, such an option was not explored by the Commonwealth prior to introducing its 2006 Amendment Act.

IV Conclusion

No legislation as complex and long-lasting as the *Land Rights Act* can remain unaltered. Justice Woodward himself combined a conviction that the basic principles of his scheme should remain undisturbed with a pragmatic acceptance that any generation of policy-makers have, at best, limited foresight about what is to come. He recommended a regular cycle of seven-year reviews so that 'anomalies are brought to light and that the system does not become rigid and unresponsive to changing needs'.[170] This recognised that '[w]e cannot now envisage what the social or economic climate may be like in forty years time'.[171]

Such a review was conducted in 1983 by the then recently retired Aboriginal Land Commissioner John Toohey (later a High Court judge). The next review did not occur until Reeves' inquiry in 1998; although the Hawke ALP Government and land councils negotiated a major package of amendments mainly to the mining provisions that became law in 1987.

Earlier in this paper, attention was drawn to the balance of concerns in Reeves' rhetoric and substantive proposals. He spent very little time on tenure reform and saw the ownership of land as largely an economic cul-de-sac for Aboriginal people in the NT – no particular path out of poverty. While Reeves justified his package primarily by reference to socioeconomic advancement for Aboriginal people, in detail much of it involved removing barriers and costs for non-Aboriginal 'outsiders' seeking to get onto Aboriginal land. For many this raised the question of whose economic development interests were really being served.

The 2006 Amendment Act has been packaged quite differently. The Commonwealth has put great emphasis on the economic potential and leverage to be gained by Aboriginal people from their ownership of land. One of the difficult questions for sceptics and, more importantly, the Aboriginal landholders of the NT is whether the difference in 2006 is rhetorical or real. Are 'changes in land title arrangements … aimed at the development needs of Aboriginal people' or, alternatively, at 'giving governments and third parties more power over land use and access at the expense of Aboriginal rights'?[172]

So soon after the passage of the Act it is really impossible to answer the question. The optimistic desire to see something new that makes a decisive break with the poverty of the past, the involvement of a new Minister taking a conspicuously 'hands-on' approach, and the base level support for (or at least non-opposition to) a headlease arrangement for housing and infrastructure in townships all suggest giving the Government the benefit of the doubt. In addition, it should be noted that the Government did not seek to use its Senate majority for wholesale implementation of the heavily criticised Reeves package or something similar.

In a similar vein, in the past Reeves and some Commonwealth Ministers advocated the dismantling of the larger land councils. The 2006 Amendment Act leaves the land councils intact and arguably confines itself to the path by which Aboriginal people themselves might choose to push further down the path of devolution.

On the other hand, over the 10 years since its election, the posture of the Howard Coalition Government towards the *Land Rights Act*, the land councils, customary law and the institutions of Aboriginal Australia leave plenty of grounds for scepticism. Reasons for maintaining that scepticism, at least for the moment, can be found in both the content of the 2006 amendment package and the process by which it was put into operation.

A The Benefit of the Doubt?

In the aftermath of the legislative package passing through Parliament and in advance of its practical implementation, only an interim judgment can be made. In my view the following factors justify maintaining a very sceptical view of the Commonwealth Government's approach (and to some extent the NT Government's approach as well).

1 Policy Consistency

In organisational terms, the Commonwealth has typically favoured the consolidation of small Aboriginal organisations to achieve effectiveness and critical mass. The most apposite examples are organisations also facing large and complex responsibilities at the cultural interface between Aboriginal and non-Aboriginal Australia: Indigenous legal services and NTRBs. In this respect the consistently devolutionary approach to the large land councils risks being seen as politically selective.

Of course no organisation is without its justified critics and the 2006 Amendment Act does take a more tempered approach to balancing localism and regionalism than Reeves did. Nonetheless, some dubious policy choices have been made that raise suspicions that weakening land council power might also be about strengthening the relative position of non-Aboriginal parties seeking advantage from Aboriginal land. This is shown, for example, through the characterisation of 55 per cent approval as a 'substantial majority' and the misnamed 'delegation' provisions that allow de facto new land councils to be formed with inadequate safeguards.

On township leasing, the Commonwealth has skewed the choices available to communities financially with 'take-it-or-leave-it' offers on new housing and education money and rigidifying a 99-year headlease arrangement in the Act itself. Yet the package is justified as encouraging Aboriginal initiative and escaping the one-size-fits-all communist past. The Central Land Council has also alleged double standards on the part of the NT Government. While significant and unilateral changes have been made to the federal *Land Rights Act* in the name of enhanced economic opportunity, more restrictive legislative impediments to economic activity by Aboriginal people living on NT freehold land or community living areas under the *Pastoral Lands Act* (NT) remain.[173]

2 Stakeholder Support

On land council reform, the Commonwealth has marshalled little more than a rhetorical case in favour of smaller, more 'responsive' organisations. The NT Government's position was expressed in its joint submission with the existing land councils in 2003, which advocated accelerated but voluntary delegation. The Commonwealth's choice of the 55 per cent threshold for the establishment of new land councils enjoys visible support from no quarter that I am aware of.

Significantly, the mining industry, with whom Aboriginal people and the land councils have had an at times bumpy relationship, thought 55 per cent was far too low (it advocated a 67 per cent overall 'yes' vote and, separately, the informed consent of traditional owners for the area). Likewise, it said that ministerially-enforced delegation could be disastrous and that substantive support from both traditional owners and Aboriginal residents was an essential threshold requirement to make delegation work. The Minerals Council of Australia is a powerful stakeholder group that frequently has the ear of government. When it sides with land councils and says that the amendments could have 'extraordinary unintended consequences' including 'disjunctive processes, increased complexity and inefficiencies to the detriment of all interested parties',[174] the suspicion that political or ideological agendas might be at work within government intensifies.

On township leasing, there is a basic level of support for at least better securing the residential existence of Aboriginal people on Aboriginal township land and putting government infrastructure on a sounder tenurial footing. Leasing and subleasing for commercial purposes has already occurred consensually on Aboriginal land. Given those foundations, what is striking in 2006 is the lack of widespread stakeholder support for the insertion of 99-year headlease arrangements in the Act (the 'process' reasons for this are discussed below). The NT Government 'broadly … supports' the proposal, which after all seems to have originated in its own bureaucracy, but it has hedged that view in various ways. The Northern Land Council offered both some support and some strident criticisms of the Commonwealth's model.[175] The Central Land Council expressed a range of objections, particularly in relation to potentially valuable commercial leases, as discussed above. But the Commonwealth seems to have done little or nothing to build a groundswell of support for its flagship reform amongst the people's whose lives will be most directly affected: the traditional owners and residents of Aboriginal land in the NT. Nor did it approach the land councils and traditional owners to implement its ideas on a consensual basis, before resorting to unilateral amendment of an iconic law.

3 Humility

No one would claim that Australian governments have a great track record in Indigenous affairs. Most recently, no less an 'insider' than the Secretary of the Commonwealth Treasury Dr Ken Henry said:

> Indigenous disadvantage diminishes all of Australia, not only the dysfunctional and disintegrating communities in which it is most apparent. Its persistence has not been for want of policy action. Yet it has to be admitted that decades of policy action have failed.[176]

In an affluent first world country Aboriginal people typically rank lowest amongst groups within the community, according to statistical measures of health and material well-being. This is despite the fact that for much of the 20th Century many Aboriginal people were subjected to coercive and centralised forms of legal and administrative control, ostensibly designed to maximise their welfare. In the latter part of the 20th Century, Indigenous policy, institutions and service delivery have occupied vast amounts of bureaucratic time and energy. This very modest record of achievement might appropriately condition the approach of a government promoting change in the name of greater choice and opportunity (It was the Coalition parties, for example, that removed land claims on the basis of need from the Act in the first place – to criticise the Act's failure to yield better economic results is an interesting manoeuvre). The top-down nature of the 2006 proposals and their implementation continues rather than abandons the bad habits of the past in this respect.

4 Chutzpah

It is no doubt true that more might have been achieved earlier, on the socio-economic front, out of the *Land Rights Act*. The CLP approach to the Act when in government was very adversarial or, as the federal Liberal MP who chaired the HORCATSIA inquiry put it, 'bloody-minded'.[177] One of Reeves' criticisms was that 'almost all dealings between the two large land councils and the Northern Territory Government are acrimonious', although he said he would not attempt to apportion blame for this situation.[178] He advocated a strong and genuine partnership between Aboriginal Territorians and the Northern Territory Government.

It is difficult to overlook, however, the degree to which the CLP-led NT Government took an adversarial approach to the operation of the *Land Rights Act* for its first two decades. Who knows what greater partnership and socio-economic development might have been possible during that time if Aboriginal Territorians and their land councils had not been regularly pitted against the NT Government in litigation – court action in which Reeves acknowledged the two large land councils had been 'almost totally successful'.[179] It is not

surprising that land councils and Aboriginal groups who found themselves in a hostile political environment legally defending (usually successfully) the gains they had made, spent less time considering socio-economic futures than they might otherwise have done. Former CLP Chief Minister Ian Tuxworth (writing in 1998) had a slightly different emphasis but a similar overall conclusion: '[m]uch of the trauma that has evolved over the last twenty years could have and should have been avoided, and would have been avoided with some give and take on both sides. But in those days political attitudes were hard and righteous'.[180]

Governments seeking to persuade people to take significant risks with the largest asset they own, in a nation with a racial history as fraught as Australia's, should be mindful of a more recent political history that will not have been forgotten by the people with whom they are dealing.

5 The Suspicion of Being Short-Changed

Services in remote NT communities are notoriously underfunded and both the NT and Commonwealth Government must take their share of responsibility for that situation. Given the frequently acrimonious relationship between government and Aboriginal people in the NT over the *Land Rights Act*, the level of mistrust is quite high. Aboriginal people, like Indigenous peoples around the world, have grounds for a more than ordinary suspicion of being short-changed by the promises of politicians. Several key features of the 2006 Amendment Act do little to build that trust. For example, rather than injecting new money into Aboriginal communities, as part of the entrepreneurial culture to be unleashed by township leasing, the Commonwealth chose to recirculate rental money for traditional owners from funds already designated to benefit Aboriginal people in the NT (the ABA). The same can be said about the decision to meet the administrative costs of implementing what is after all a unilaterally imposed government policy – particularly when the Central Land Council has estimated that simply surveying township areas alone in remote areas may cost millions of dollars.

Based on recent experience in two communities, the perception had already developed by the time the Senate Committee inquired into the amendments in mid-2006 (that is, *before* the legislation was even passed), that traditional owners will be pressured into signing headleases in return for funding of essential services like education and housing. The Government has sought to distinguish 'essential services' (funding for which will continue as before) from discretionary funding (such as new housing or a new private school partly supported by public funds). But the Minister, Mr Brough, acknowledged in Parliament that the community on Elcho Island will only get money for 50 new houses if it signs a 99-year township lease.

For infrastructure-starved communities, the deck looks a little stacked in favour of what the Government wants. The arbitrariness of this approach to funding vital infrastructure is magnified when the NT Chief Minister acknowledged, after the legislation had gone through, that perhaps only a few communities in the NT may adopt township leases. If the model is not applicable across the NT, should government make such large sums of money dependent on its adoption?

6 The Willingness to Cede Power

A sign of good faith that a government is genuine about empowering Aboriginal communities and encouraging initiative is the sight of government letting go of some of the power it currently enjoys. There are some minor changes to this effect in the amendments, lifting certain thresholds before Ministerial consent is required for particular dealings with Aboriginal land. However, the 2006 Amendment Act swings power away from Aboriginal organisations towards the Commonwealth Minister in significant respects. The Minister can force the devolution of functions to smaller corporations over the objection of existing land councils and without requiring substantial Aboriginal, let alone traditional owner, support. The Minister can agree to the transfer of a township headlease to another entity, apparently without reference to the lessors (that is, the traditional owners). And the Minister can exclude the operation of NT planning laws and other regulations where a Commonwealth entity holds a headlease from traditional owners over a township. The fact that land councils no longer enjoy a statutory guarantee of funding, but instead depend on year-by-year decisions of the Commonwealth Minister reflects another important shift in the underlying power dynamic.

7 The Process of Implementing Change – Falling to Temptation

Given its importance in 2006, a separate concluding section of the paper is devoted to this issue.

Mr Reeves was certainly right that, despite its bipartisan political birth, the *Land Rights Act* 'grew up' in an adversarial political culture. Long-term political polarisation weakens the policy environment because it tends to reduce trust and crowd out the potential for debate in the 'intelligent middle'. Rationally, legislation needs attention from time to time, even when it has an elevated status as 'one of the most fundamentally important social justice reforms enacted in Australia'.[181] Someone who perceives aggression or hostility towards a hard-won gain or a long-cherished principle, however, is more likely to adopt a position of stout defence than open-minded engagement. That is particularly so when that valued possession offers shelter from the otherwise intimidating pace of externally imposed cultural change. Cultures that privilege seniority and have developed to survive harsh conditions, such as the Central and Western Desert region, certainly have techniques for adaptation. Aboriginal land ownership, however, as the product of transmission across many generations and linked as it is to a cosmology rooted in the very creation of the land and its features, is a conservative institution in political terms.

Governments have a number of tools and techniques available to them in seeking to achieve policy outcomes in this robust, complex and potentially change-resistant political setting. Some methods are more sophisticated than others. The sophisticated ones tend to take longer and involve more collaboration than headstrong politicians may be comfortable with. But there may nonetheless be reasons to adopt them.

Among the tools available are things that, used unilaterally, tend to reinforce governments' own sense of control: the power of the purse strings; the power to make legislative amendments; the power to decide time-frames in which change will take place; and the power to determine what form changes will take. Governments, however, can utilise other capacities and techniques, in advance of this heavier weaponry. They can offer support for initiatives from within the affected community or constituency. They can encourage experimentation, suggest ideas, provide resources and lead public opinion by creating a more sympathetic and understanding climate for innovation, risk-taking and the inevitable mistakes that might occur. In practical terms, they can open a discussion, provide appropriate space and time for it to occur, and allow the politics of the situation to play out and for the parties or stakeholders involved to talk among themselves and explore common ground. Government is not a bystander under this scenario. It can initiate the formal process towards change. Having at least a say in setting the agenda, it can then intervene to influence the discussion and perhaps apply moderate pressure in the interests of conflict-resolution or timeliness along the way. Everyone is aware the heavy weaponry exists and can be wheeled out if really necessary.

The non-contentious elements of the 2006 amendments reflect just this sort of process. Constructive engagement and the willingness to negotiate can produce a pragmatic, tailored solution agreeable to the key stakeholders. A set of policy outcomes can be achieved in a reasonable space of time. Along the way, the knowledge of those who work with the system every day can be harnessed to the process of change, spotting flaws and weeding out problems before an idea in Canberra becomes a law everyone has to live with. Inevitably, a process that gives parties that kind of ownership over reform is more likely to bed down successfully than a set of ideas foisted upon people by politicians and bureaucrats. As co-authors of the change, rather than its sullen or hostile recipients, intermediary organisations (in this case, the land councils) are far more likely to encourage its acceptance by their constituents.

Greater accountability and more responsiveness to constituents are perfectly acceptable government policy goals where large representative organisations are concerned. The existing land councils have always had their critics and some of them undoubtedly have legitimate complaints. But a top-down government approach to the vital issue of representation and advocacy, that ignores even the views of influential third parties to whom governments are typically responsive, risks converting a delicate and complex societal issue into an ideological one.

On economic development, the rushed and adversarial process regarding township leases encouraged a false dichotomy between those who want to promote 'economic development' in Aboriginal communities and those who do not. There are genuine debates to be had about sustainable economic strategies on what is, in many cases, arid land, long ago abandoned as uneconomic by non-Aboriginal people. There are cultural values at stake and intergenerational issues of custodianship to consider. But of course we should, in contemporary Australia, give thought to how ownership of sometimes very substantial areas of land might contribute to improving the quality of life of Aboriginal people. It is foolish or ill-informed, however, to regard land councils and

those who work in them as uninterested in seeing Aboriginal people transcend the unwanted consequences of poverty and dependence. There was a ready constituency for government to work with on these issues.

Unilateralism,[182] coupled with bold claims of hope and salvation flowing from government intervention, squanders the existing goodwill and enthusiasm for improved outcomes. During parliamentary debate, the Government urged sceptics to go beyond worst case scenario thinking and recognise the opportunities being created. Referring to the proposals for new land councils heavily criticised during the Senate Committee inquiry, the inquiry chair Senator Humphries said:

> These are among a number of provisions in the legislation which may have great benefit to Indigenous communities but which may also create controversy if they are used the wrong way … But we have to accept that in order to create opportunities some risks might have to be taken that such misuse or abuse of power might occur.[183]

Again, that level of trust is difficult to generate when government engages in unilateralist behaviour.

In a polarised political climate it is tempting for government critics to see the 2006 Amendment Act as 'Son of Reeves' or 'Reeves Mark 2', but it is no wholesale implementation of the 1998 Review. Clearly, for example, the Government has joined HORCATSIA and the chorus of critics in the period from 1998 to 2000 in rejecting the imposition of new land council boundaries and the dismemberment of the two larger land councils into 16 smaller bodies, with a new Territory-wide council at the apex of the system.

However, there are several ways to skin a cat and more than one way of implementing some of the main ideas underpinning Reeves' critique and his alternative model. Change can also be rolled out incrementally rather than as part of a single 'big-bang' approach urged by Reeves – something with the added virtue of allowing the government to 'test the waters' and the limits of tolerance for change within its own ranks and the broader political system. On this front, it is notable that having abstained from addressing Reeves' criticisms of the permit system in the 2006 Amendment Act the Federal Government, soon after its passage, issued a discussion paper on proposed changes to that fundamental aspect of traditional owner control over Aboriginal land.[184]

Despite the hail of negative criticism that greeted the Reeves Report and the rejection of many of its central recommendations by a government-chaired, bi-partisan parliamentary committee, the Federal Government always kept its options open. Newspaper reports suggested that then Aboriginal Affairs Minister, Senator Herron, took a submission to Cabinet in 2000 incorporating Reeves Report recommendations but it appears to have been set aside,[185] presumably because the numbers in the Senate (and perhaps the staging of the Sydney Olympic Games) made a confrontational approach to such iconic legislation politically questionable. During that period, however, the Prime Minister offered warm endorsement of Reeves and his work in Parliament[186] and the Government conspicuously has never delivered a formal response to the HORCATSIA's implicitly critical report (a departure from standard practice).

After the 2004 election, the only legislative barrier to legislative change became resistance within the Coalition parties themselves. The 2006 Amendment Act showed that even where a rushed, unilateral and, in the words of backbench Coalition Senators, 'totally inadequate' process was adopted, any such barrier could be overcome without any (at least publicly perceived) party dissension. In the midst of intense and negative media coverage of remote Aboriginal communities and the allegedly immoral nature of customary law, the Government introduced the 2006 amendments and secured their passage in a matter of weeks.

Reeves would have diminished the relative power exercised by traditional owners as against other Aboriginal people resident on Aboriginal land.[187] He also sought to break up land councils into smaller organisations.[188] These and other changes were linked to what he saw as an urgent new purpose for the *Land Rights Act*: 'more rapid social and economic progress'. In this sense arguably there is a line that can be drawn between Reeves and the 2006 Amendment Act.

The basic requirement that things happen on Aboriginal land only with the informed consent of traditional owners was not explicitly disturbed in the 2006 Amendment Act. On the other hand, 99-year township leases are consistent with greater autonomy over significant areas of Aboriginal land being exercised by residents, with traditional owners reduced to a one-off exercise of control over what will happen over that extremely long duration. In addition, the forced 'delegation' provisions and the low statistical threshold for creation of new land councils both create enhanced means of reducing

the size and power of existing land councils. Both processes for devolution give residents a strong say in such dramatic changes, with some traditional owners potentially excluded altogether.[189] This is despite HORCATSIA's recommendation that both (voluntary) delegation and formation of new land councils occur only with the informed consent of traditional owners, and in the latter case with overall support of at least 60 per cent of Aboriginal residents.[190] In 2003, the Northern Territory Government also joined the land councils in supporting the requirement of informed consent by traditional owners as a precondition to the establishment of new land councils.[191]

The relative reduction of traditional owner decision-making power goes potentially further in the 2006 Amendment Act. Reeves said that smaller regional land councils should adopt decision-making processes that 'suit them', rather than maintaining the Act's layered mechanisms that privilege traditional owners but also take account of other affected Aboriginal people's views. There was widespread criticism that this 'regionalised' form of decision-making would exacerbate conflict and sit unhappily with customary processes.[192] HORCATSIA said that '[e]ven Aboriginal groups in dispute with the larger land councils did not question the need for traditional owners to make decisions over their own land'.[193] By permitting the exercise of key functions such as the ascertainment of informed consent to development proposals by smaller land councils, and particularly 'delegate' corporations formed on the strength of resident-weighted breakaway processes, the 2006 Amendment Act arguably pushes in the same direction Reeves took. The possibility of capture of smaller organisations by a strong local force of non-traditional owner opinion is greater when the mediating organisation tasked to independently confirm consent is smaller and closer to the ground.[194]

Ultimately, the 2006 Amendment Act creates the impression of a government that yielded to temptation. The temptation to grandstand and trumpet decisive government action, when the opportunity existed for less spectacular but more inclusive collaboration with stakeholders. The temptation to use its numbers to crunch change through the Parliament, rather than more patiently build a bipartisan coalition of support. And the temptation if not to re-stage past battles, at least to smooth the path a little for the achievement of long-standing ideological aims.

Endnotes

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1 Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Darwin, 21 July 2006, 53 (Mr Wali Wulanybuma Wunungmurra, Spokesperson, Laynhapuy Association) <www.aph.gov.au/hansard/senate/commttee/ S9506.pdf> at 28 November 2006.

2 Senate Community Affairs Legislation Committee, Parliament of Australia, *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006* (2006) 1 <http://www.aph.gov.au/senate/committee/ clac_ctte/aborig_land_rights/report/c01.pdf> at 9 December 2006>.

3 The Commonwealth Government emphasised that the *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* ('2006 Amendment Act') preserves the inalienability and communal nature of Aboriginal freehold, and its traditional owners' right of veto over development and access : see, eg, Commonwealth, *Parliamentary Debates*, Senate, 16 August 2006, 21 (The Hon Rod Kemp, Minister for the Arts and Sport); Commonwealth, Parliamentary Debates, Senate, 9 August 2006, 11 (Judith Adams).

4 The regional body for Australia's other Indigenous population, the Torres Strait Regional Authority, is an exception. It was singled out for retention when the Aboriginal and Torres Strait Islander Commission ('ATSIC') regional councils and the national board of commissioners were abolished: *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* (Cth).

5 In combination with the *Aboriginal Land Act 1978* (NT).

6 In combination with the *Aboriginal Sacred Sites Act 1989* (NT).

7 As at January 2005, 44.6 per cent of the Northern Territory ('NT') was Aboriginal owned or controlled land, the vast majority being inalienable freehold land: Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005* (2005) 53. Some additional land is subject to claims yet to be finalised.

8 Aboriginal Land (Northern Territory) Bill 1975 (Cth).

9 The final version of the Act was not quite the same as Whitlam's Bill. The main difference was the omission of land claims based on need rather than traditional ownership.

10 Mr Lou Lieberman, federal Liberal Party MP and chair of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs ('HORCATSIA'), the parliamentary committee that inquired into the Reeves Review (discussed below Pt I(C) and (D)), was reported as saying at the time the committee's findings were published: 'I think on the part of the NT Government, as I said in the report, they've been fairly bloody-minded about their opposition to land claims': ABC Television, 'Aborigines Fear NT

Land Rights Review May Threaten Title', *The 7:30 Report*, 30 April 1999 <www.abc.net.au/7.30/stories/s23533.htm> at 29 October 2006. To that point, only the centre-right Country Liberal Party ('CLP') – affiliated with the Federal Coalition parties – had held power since the NT attained self-government in 1978.

11 Northern Territory Government, *Submission to the Inquiry into the Reeves Review of the* Aboriginal Land Rights (Northern Territory) Act 1976 (2 March 1999) <www.aph.gov.au/house/committee/atsia/reeves/sub5.pdf> at 28 November 2006: '[t]he Territory notes, however, that the Act emanates from an inquiry conducted in 1974, before the creation of the separate self governing body politic of the Northern Territory, and in which no consideration was given to the future economic, social and cultural development of Northern Territory society generally': at 4.

12 The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('Land Rights Act') commenced on 26 January 1977. The *Northern Territory (Self-Government) Act 1978* (Cth) commenced on 1 July 1978.

13 Between 1978 and 2001 CLP governments of the Northern Territory enthusiastically created and promoted notions of identity for the purpose of establishing bonds of loyalty to the Territory among its non-Aboriginal population, most of whom came from others parts of Australia and the world. Governments championed what the political scientist Alistair Heatley described as 'Territorianism', an aggressively presented sense of identity that encompassed full statehood and rapid economic development. A significant element was strong opposition to Aboriginal land rights: David Carment, 'Unfurling the Flag: Historians, Identity and Politics in Australia and the Northern Territory' (2005) 16 *Journal of Northern Territory History* 29, 32.

See also Northern Territory Government, 'Toward Statehood: Land Matters upon Statehood' (Options Paper, November 1986); Northern Territory Government, *Submission to the Reeves Review*, above n 11, 4; Jodeen Carney, 'Remote Area Employment Study Shows Why Land Rights Has Failed' (Press Release, 25 September 2006) <www.clp.org.au/news/default.asp?action=article&ID=379> at 28 November 2006.

14 Paul Toohey, 'We Don't Want Your Land Rights', *The Australian* (Sydney), 10 February 2001, 24.

15 David Nason, 'Ex-Labor MP Heads Review of Land Rights', *The Australian* (Sydney), 30 June 1997, 3.

16 John Reeves, *Building on Land Rights for the Next Generation. Report of the Review of the* Aboriginal Land Rights (Northern Territory) Act 1976 (1998) I.

17 Ibid.

18 The NT Government and, in some cases the Commonwealth Government, receives royalty payments from resource companies for mining activities in the NT. The phrase 'royalty money' used here refers in particular to the equivalent sums (often referred to as 'mining royalty equivalents') that are paid into the Aboriginals Benefit Account ('ABA') under Part VI of the *Land Rights Act*, to be allocated in set proportions to purposes that are for the benefit of Aboriginal people in the NT .

19 John Reeves, *Building on Land Rights for the Next Generation. Report of the Review of the* Aboriginal Land Rights (Northern Territory) Act 1976 (1998) II.

20 Ibid.

21 Ibid III.

22 Ibid.

23 Recommendation 1 of the Report stated:
The Aboriginal Land Rights (Northern Territory) Act 1976 ('the Act') not be amended without:

- traditional Aboriginal owners in the Northern Territory first understanding the nature and purpose of any amendments and as a group giving their consent; and
- any Aboriginal communities or groups that may be affected having been consulted and given adequate opportunity to express their views: House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Unlocking the Future: The Report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976* (1999) xvii.

24 Ibid 9.

25 Ibid 8.

26 Ibid 9.

27 Northern Territory Government and Northern, Central, Tiwi and Anindilyakwa Land Councils, *Detailed Joint Submission to the Commonwealth Workability Reforms of the* Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA) (2003) 3 <www.nt.gov.au/dcm/people/pdf/200306_ALRA_ JointSubmission.pdf> at 28 November 2006.

28 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Unlocking the Future*, above n 23, 20–1.

29 There are arguably exceptions to that general proposition. For example, in the Northern Territory polity 20 per cent of Members of the Legislative Assembly are Aboriginal, and in a handful of State and federal seats, mainly in northern Australia, there are significant Indigenous populations. There is also a non-Indigenous constituency across Australia that regards Indigenous rights and non-discrimination as important political issues and has mobilised through church organisations and non-government organisations, such as Australians for Native Title and Reconciliation ('ANTaR'). These movements can amplify these issues in electoral terms.

30 Corrs Chambers Westgarth Lawyers et al, *A Modern Statute for Indigenous Corporations: Reforming the* Aboriginal Councils and

Associations Act 1976. *Final Report of the Review of the* Aboriginal Councils and Associations Act 1976 (Cth) (2003) 74 <http://www.orac.gov.au/publications/legislation/final_report.pdf> at 11 December 2006.

31 Ibid 73.

32 For example, the Central Land Council ('CLC') had revenue relating to its core (non-native title) operating activities for the financial year ending 30 June 2005 of over $16 million and assets valued at $12.3 million: Central Land Council, *Annual Report 2004–2005* (2005) 70–1 <http://www.clc.org.au/aboutus/annualreport.asp> at 11 December 2006.

33 In 2005, the CLC employed 118 staff (including 54 Aboriginal people): ibid 50. The Northern Land Council ('NLC') employed 137 people: Northern Land Council, *Annual Report 2004–2005* (2005) 140 <http://www.nlc.org.au/html/files/04-05_NLC%20Annual%20Report_Financials.pdf> at 11 December 2006. Critically, this includes maintaining the organisational capacity to meet the very demanding accountability regimes imposed on Aboriginal organisations as well helping to support land councils in meeting an array of constituent and government demands, such as the operation of a corporate services division capable of dealing with finance; human resources; training; property; information technology; library; and archives.

34 Former CLC staff member and federal ALP Member for Lingiari, Mr Warren Snowdon, has written that central 'to understanding how the CLC operates and why it does things, is this acknowledgment that the Council is regarded by Aboriginal people as their political agent not only in relation to land and land matters but in relation to other issues as well': Alexis Wright (ed), *Take Power like This Old Man Here* (1998) 327.

35 This is a sample of activities taken from Central Land Council, *Annual Report*, above n 32, 17–24.

36 The Northern Territory Government's submission to the Reeves Review conceded that Aboriginal land rights were 'an intensely political issue in the Northern Territory and will always be so' and that there is 'a place for the land councils in the political debate, and they have a legitimate role in entering the political arena and advocating the interests of their constituency'. It suggested, however, that this was 'the problem' created by the Act: it had given the land councils functions that 'allow the creation of organisations where there is no separation of politics from statutory and managerial functions': see Northern Territory, *Parliamentary Debates*, Legislative Assembly, 13 October 1998 (Shane Stone, Chief Minister) <notes.nt.gov.au/lant/hansard/HANSARD8.NSF?OpenDatabase> at 6 November 2006.

37 Australia Institute, *Resourcing Indigenous Development and Self-Determination – A Scoping Paper* (2000) 21; William Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report 2003 (2004) 59 <http://www.hreoc.gov.au/social_justice/sjreport03/> at 11 December 2006; Commonwealth Grants Commission, *Report on Indigenous Funding* 2001 (2001) 68 <http://www.cgc.gov.au/IFI_Pages/ifi_final_report_complete.htm> at 11 December 2006.

38 Tim Fischer, 'Comments by Mr Fischer on NT Land Councils' (Press Release, 28 September 1998) 1.

39 Matthew Horan, 'Fischer Slams Land Councils', *Herald-Sun* (Melbourne), 29 September 1998, 2.

40 Janine MacDonald, 'Howard Backs Attack on Aboriginal Land Councils', *The Age* (Melbourne), 30 September 1998, 11.

41 Howard was quoted as saying: 'I haven't seen what Tim said, but he's right when he wants the resources available for Indigenous people to go to them rather than to bureaucracies': ibid. He was also quoted as saying: 'I think it really, with respect, is silly to say that sort of comment is invoking the race-card': Liz Rudall and Sherrill Nixon, 'Howard Defends Fischer over Bloodsucker Label', Australian Associated Press, 29 September 1998.

42 Katharine Murphy, 'Fresh Attack by Fischer Widens Rift', *Australian Financial Review* (Sydney), 14 January 1999, 8.

43 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 13 October 1998 <notes.nt.gov.au/lant/hansard/HANSARD8.NSF?OpenDatabase> at 29 November 2006.

44 Mr Stone's successor as CLP Chief Minister, Mr Denis Burke, was reported as saying: '[i]f you speak to him (Senator Herron), he's strongly supportive': 'Fed Govt Delaying Carve up of Land Councils – Burke', Australian Associated Press, 4 December 2000.

45 Richard McGregor and Benjamin Haslem, 'Push to Split Land Councils', *The Australian* (Sydney), 9 March 2000, 3.

46 Mark Metherell, 'Post-Games Land Rights Collision', *Sydney Morning Herald* (Sydney), 3 October 2000, 1.

47 Peter Sutton, *Native Title in Australia: An Ethnographic Perspective* (2003) ch 4. Sutton's discussion refers to the initial construction of claims for recognition of land and sea rights, but the ideas are applicable to the choice Aboriginal people make in other areas, such as the scale of their representative organisations (where their views have some relevance, as they do under the *Land Rights Act*).

48 As a rough analogy, a non-Indigenous Australian living in Cairns may stress their individual identity in their workplace; their family membership at a ceremony like a wedding or funeral; their status as a far North Queenslander in discussing State politics; their allegiance to Queensland when a State of Origin football game is being played; and their Australianness when travelling overseas.

49 David Martin, 'The Reeves Report's Assumptions on Regionalism and Socioeconomic Advancement' in Jon C Altman, Frances Morphy and Tim Rowse (eds), *Land Rights at Risk? Evaluations of the Reeves Report* (1999) 155, 160.

50 Definition of 'traditional Aboriginal owner' in *Aboriginal Land Rights*

(Northern Territory) Act 1976 (Cth) s 3.

51 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 23(3)(b).

52 Aboriginal Land Rights Commission, *First Report* (1973) 41–2.

53 Reeves, above n 16, 193.

54 Martin, above n 49, 160.

55 Reeves, above n 16, chs 6, 9, 10, 27.

56 Ibid 140.

57 Ibid 213.

58 See Peter Sutton, 'The Reeves Report and the Idea of the "Community"' in Jon C Altman, Frances Morphy and Tim Rowse (eds), *Land Rights at Risk? Evaluations of the Reeves Report* (1999) 39, 51.

59 See several contributions in Jon C Altman, Frances Morphy and Tim Rowse (eds), *Land Rights at Risk? Evaluations of the Reeves Report* (1999), including from Peter Sutton who said: Aboriginal tradition usually makes a clear and quite profound distinction between traditional affiliations to countries and residential associations with settlements or districts. While there are complex actual and potential relationships between the two, they do not, separately, grant equivalent rights and interests in land. …Attempts to merge the two or to blur the distinction by Aboriginal people are rare and, in my experience, they are typically met with fierce opposition: Sutton, above n 58, 41. In the same book, David Martin is similarly scathing about collapsing the ownership/residence distinction and Reeves' 'quite fundamental misunderstanding and misrepresentation … of the characteristics of Northern Territory Aboriginal societies': Martin, above n 49, 157.

60 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Unlocking the Future*, above n 23, 37–8.

61 Ibid 37.

62 Martin, above n 49, 161. Martin is not necessarily a 'supporter' of larger land councils. His preferred model of '[d]evolved regional land councils operating under the organisational umbrella of the existing larger land councils', where devolution is a decision for the Minister, shares some similarities with the forced 'delegation' model adopted in the 2006 Amendment Act. There is, however, one crucial difference: the requirement for informed consent to the devolution by traditional owners: at 164.

63 Ibid 163.

64 Ibid.

65 See David Pollack, 'Smaller Land Councils: Value for Money?' in Jon C Altman, Frances Morphy and Tim Rowse (eds), *Land Rights at Risk? Evaluations of the Reeves Report* (1999) 141.

66 In describing the provenance for government views on native title and land rights one immediately glimpses the instability of the Commonwealth administration in these areas. The Government's Office of Indigenous Policy Coordination ('OIPC') is now located in the Department of Families, Community Services and Indigenous Affairs and it has sole or joint responsibility for changes to both the *Land Rights Act* and the *Native Title Act 1993* (Cth). Over less than three years between 2003 and 2006, that responsibility was located in four different places within the Commonwealth bureaucracy under the control of three different Commonwealth Ministers. Before January 2006, OIPC was located in the Department of Immigration and Multicultural and Indigenous Affairs, after being created on 1 July 2004. Before then, the Native Title and Land Rights Branch was located in Aboriginal and Torres Strait Islander Services, the Government's service delivery agency hived off from ATSIC in April 2003. Prior to that, the Branch had been located in ATSIC itself.

67 Office of Indigenous Policy Coordination (Commonwealth Department of Immigration and Multicultural and Indigenous Affairs), *Submission to the Inquiry into the Capacity of Native Title Representative Bodies to Discharge Their Duties under the* Native Title Act 1993 (August 2004) 10–11 <www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/submissions/sub01a.pdf> at 29 November 2006.

68 Ibid 11.

69 However, undoubtedly conscious of the Government's rather different agenda in the Northern Territory under the *Land Rights Act*, OIPC has also recognised problems inherent in larger organisations, noting that they 'can become detached from and unresponsive to their constituency, which has been an area of concern to the government in reviewing the role of existing Land Councils under the *Aboriginal Land Rights (Northern Territory) Act*': ibid 19.

70 Indigenous Law and Justice Branch, Attorney-General's Department, Australian Government, *Request for Tender for the Provision of Legal Aid Services to Indigenous Australians in Northern Territory* (No 05/05) (2005) 20 <www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/B12D890D533F2CEC6EAF61106AB06C55)~RFT+No+05+05+for+Northern+Territory+(PDF).pdf/$file/RFT+No+05+05+for+Northern+Territory+(PDF).pdf> at 19 December 2006.

71 Evidence to Senate Legal and Constitutional Legislation Committee (Estimates), Parliament of Australia, Canberra, 24 May 2006, 122 (John Boersig, Assistant Secretary, Indigenous Law and Justice Branch; James Popple, First Assistant Secretary, Indigenous Justice and Legal Assistance Division; Jan McLucas) <www.aph.gov.au/hansard/senate/commttee/S9341.pdf> at 29 November 2006.

72 See *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 28, prior to amendment by the *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* (Cth).

73 A land council could not delegate its role in giving or withholding

consent to the grant of mining interests, exploration licences or other significant interests on Aboriginal land; nor in determining the distribution of any surplus land council funds to local Aboriginal organisations.

74 As a leading administrative law text puts it (in another context): '[t]his is consistent with the view that delegation involves a replication rather than a transfer of power': Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 310.

75 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 28(3).

76 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 28C. The process begins with an application from a body corporate to the land council. If the land council refuses the request or fails to act on it, the corporation can apply to the Commonwealth Minister. If satisfied that the body will be able to satisfactorily perform the functions and exercise the powers sought, after consulting the land council, the Minister may approve the request.

77 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 28D.

78 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 28B.

79 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 28A(1).

80 Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Darwin, 21 July 2006, 19 (Ron Levy) <www.aph.gov.au/hansard/senate/commttee/S9506.pdf> at 29 November 2006.

81 See Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Darwin, 21 July 2006, 73 (Jon Altman) <www.aph.gov.au/hansard/senate/commttee/S9506.pdf> at 29 November 2006.

82 Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Darwin, 21 July 2006, 54 (Wali Wulanybuma Wunungmurra, Spokesperson, Laynhapuy Association) <www.aph.gov.au/hansard/senate/commttee/S9506.pdf> at 29 November 2006. Perhaps not surprisingly, the two large land councils were opposed to this aspect of the amendments. The NLC saw it as a back-door implementation of the Reeves blueprint for breaking up land councils into multiple small bodies, the model rejected by HORCATSIA in 1999: Northern Land Council, *Submission to the Inquiry into the* Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 (21 July 2006) 2 <www.aph.gov.au/senate/committee/clac_ctte/aborig_land_rights/submissions/sub13.pdf> at 19 December 2006. CLC said forced 'delegation' was 'a mechanism which allows the stripping and reallocation of core functions', likely to 'promote disputes and litigation' and 'inconsistent with Commonwealth policy in native title matters': Central Land Council, *Submission to the Inquiry into the* Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 (July 2006) 9-10 <www.aph.gov.au/senate/committee/clac_ctte/aborig_land_rights/submissions/sub12.pdf> at 19 December 2006.

83 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 64.

84 Commonwealth, *Parliamentary Debates*, Senate, 16 August 2006, 11 (The Hon Rod Kemp, Minister for the Arts and Sport).

85 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 64(1).

86 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Unlocking the Future*, above n 23, 76.

87 Commonwealth, *Parliamentary Debates*, Senate, 16 August 2006, 9 (Chris Evans).

88 Commonwealth, *Parliamentary Debates*, Senate, 16 August 2006, 11 (The Hon Rod Kemp, Minister for the Arts and Sport). The NLC said that the 40% floor 'provides Land Councils with an appropriate guarantee of independence and autonomy and that removing it 'means that the circumstances to justify break up of Land Councils may readily be achieved by the exercise of Ministerial funding discretion': Northern Land Council, *Submission to the Inquiry into the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006* (21 July 2006) 2-3 <www.aph.gov.au/senate/committee/clac_ctte/aborig_land_rights/submissions/sub13.pdf> at 19 December 2006. The CLC said that 'abolition of the statutory guarantee allows for greater political interference': Central Land Council, *Submission to the Inquiry into the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006* (July 2006) 13 <www.aph.gov.au/senate/committee/clac_ctte/aborig_land_rights/submissions/sub12.pdf> at 19 December 2006.

89 See *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 21(3), prior to amendment by the *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* (Cth).

90 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 21A(2).

91 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 21B(2)(b).

92 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 21C.

93 'In the current bill there is no requirement for traditional owner consent for new land councils. Such a requirement would disadvantage residents on Aboriginal land and would be an additional requirement to the current legislation': Commonwealth, *Parliamentary Debates*, Senate, 15 August 2006, 18–19 (Sandy Macdonald). The NLC said that 'removing the "substantial majority" requirement and replacing it with a 55% plebiscite' would increase the Minister's power: Northern Land Council, *Submission to the Inquiry into the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006* (21 July 2006) 1 <www.aph.gov.au/senate/committee/clac_ctte/aborig_land_rights/submissions/sub13.pdf> at 19 December 2006. The CLC said that '[t]raditional landowners have fought Land Claims to be accorded the rights they have under the *Land Rights Act* and so only traditional landowners should be involved in deciding whether to create a new Land Council. This amendment has the potential to be particularly problematic in townships and communities where … a large proportion of

the Aboriginal population are not traditional landowners': Central Land Council, *Submission to the Inquiry into the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006* (July 2006) 12 <www.aph.gov.au/senate/committee/clac_ctte/aborig_land_rights/submissions/sub12.pdf> at 19 December 2006.

94 Political scientist Brian Galligan wrote of Reeves' proposals:
> The political consequences of having a host of smaller land councils instead of a couple of larger ones should be obvious. The classic way to weaken power and influence is to fragment and diffuse it geographically and among smaller tribes and communities. That is especially the case if those tribes and communities are scattered over large land territories: Brian Galligan, 'The Reeves Report as Public Policy' in Jon C Altman, Frances Morphy and Tim Rowse (eds), *Land Rights at Risk? Evaluations of the Reeves Report* (1999) 11, 21.

95 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 May 2006, 7 (The Hon Mal Brough, Minister for Family, Community Services and Indigenous Affairs).

96 Commonwealth, *Parliamentary Debates*, Senate, 8 August 2006, 93 (Gary Humphries).

97 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 May 2006, 7 (The Hon Mal Brough, Minister for Family, Community Services and Indigenous Affairs).

98 Commonwealth of Australia, Aboriginal Land Rights Commission, *Second Report* (1974) 137.

99 Ibid 129.

100 Ibid 132.

101 Ibid 129.

102 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 10-12.

103 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 19(4)(b) and 19(12). The NT Department of Planning and Infrastructure says that '[t]hough simply recorded in the Land Titles Register as "Freehold" land held under Aboriginal freehold title cannot be dealt with as normal freehold as the title vests in the community rather than in individuals': <www.ipe.nt.gov.au/whatwedo/landinformation/landlingo.html> at 19 December 2006.

104 It commenced life as s 19(4)(a) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and since 1987 has appeared as s 19(4A) of the Act.

105 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 19(5)(c).

106 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 19(4A), 19(7). The threshold for Ministerial consent was lifted to 40 years by item 43 in sch 1 of the *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* (Cth), amending s 19(7) of the principal Act.

107 *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 359.

108 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 19(8).

109 Central Land Council, *Communal Title and Economic Development, Central Land Council Policy Paper* (2005) 10 <www.clc.org.au/AboutUs/CLC%20tenure%20paper.pdf> at 29 November 2006.

110 Reeves, above n 16, 74.

111 Quoted by the Chief Minister, Shane Stone, in Northern Territory, *Parliamentary Debates*, Legislative Assembly, 13 October 1998 (Shane Stone, Chief Minister) <notes.nt.gov.au/lant/hansard/HANSARD8.NSF?OpenDatabase> at 29 November 2006.

112 Reeves, above n 16, VI.

113 Ibid VIII.

114 Admittedly, the question is one of relative rather than absolute emphasis, given that non-Aboriginal commercial activity on Aboriginal land may have economic benefits for Aboriginal people as well.

115 Ibid (emphasis added).

116 In Reeves, above n 16, 478–9.

117 Ibid 479.

118 Ibid 500.

119 Ibid.

120 It is difficult, due to Reeves' unhelpful use of the term sublease to describe a 'primary' lease, to discern whether Sutton's support runs to the idea of individual subleases for housing blocks:
> The *Land Rights Act* alone, as it stands, is clearly inadequate to the task of dealing with the security concerns of long-term residents whose ancestral countries lie somewhere other than where they are living. Anxieties about being 'kicked off' or 'sent back' by those who have ancient connections to the land are real…I therefore support the Reeves Review's recommendation (1998: 500) that rent-free subleases should be negotiated, where possible, so that settlement communities may have security of tenure. But what I have in mind here is some kind of municipal areas, not large tracts of country lacking in permanent dwellings: Sutton, above n 58, 45.

121 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Unlocking the Future*, above n 23, 46–7 (emphasis added).

122 Northern Territory Government et al, above n 27, 13 <www.nt.gov.au/dcm/people/pdf/ 200306_ALRA_JointSubmission.pdf> at 29 November 2006.

123 Central Land Council, above n 109, 5.

124 The main work relied on by Pearson and Kostakidis-Lianos is Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000).

125 Noel Pearson and Lara Kostakidis-Lianos, 'Building Indigenous Capital: Removing Obstacles to Participation in the Real Economy' (July 2004) *Viewpoint* [2] <www.cyi.org.au/release.aspx?article=EG088DQNZMZG1O33R3IN> at 1 November 2006.

126 Ibid [7].

127 ABC Radio, 'Indigenous Groups Debate Role of Land Ownership', PM, 6 December 2004 <www.abc.net.au/pm/content/2004/

s1259072.htm> at 29 November 2006.

128 Helen Hughes and Jenness Warin, *A New Deal for Aborigines and Torres Strait Islanders in Remote Communities*, Issue Analysis No 54, Centre for Independent Studies, (2005) 1.

129 Ibid 15.

130 Interview with John Howard, Prime Minister of Australia (Doorstop Interview, Wadeye, Northern Territory, 6 April 2005) <www.pm.gov.au/News/interviews/Interview1305.html> at 29 November 2006.

131 The National Indigenous Council forwarded Indigenous Land Tenure Principles to the Government on 16 June 2005 that contemplated 'involuntary measures…as a last resort' to achieve individual leases for 'home ownership and entrepreneurship'. Officials in OIPC refused to answer questions in the Senate's Estimates hearings in mid-2005 on the role of government employees in the preparation of the land tenure principles: Evidence to Senate Legal and Constitutional Legislation Committee (Estimates), Parliament of Australia, Canberra, 27 July 2005, 21–7 <www.aph.gov.au/hansard/senate/commttee/S8423.pdf> at 8 November 2006.

132 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 19A(14).

133 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 19A(15).

134 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 64(4A).

135 Commonwealth, Parliamentary Debates, House of Representatives, 16 August 2006,116–18 (The Hon Mal Brough, Minister for Family, Community Services and Indigenous Affairs).

136 Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Darwin, 21 July 2006, 79–80 (Dennis Bree, Deputy Chief Executive, Department of Business, Economic and Regional Development, Northern Territory) <www.aph.gov.au/hansard/senate/commttee/S9506.pdf> at 29 November 2006.

137 Ibid 78.

138 Ibid 85.

139 Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Darwin, 21 July 2006, 113 (Brian Stacey, State Manager, Northern Territory, Office of Indigenous Policy Coordinartion, Darwin), 71 (Jon Altman – who stressed that infrastructure leases should be separate to housing headleases) <www.aph.gov.au/hansard/senate/commttee/S9506.pdf> at 29 November 2006.

140 Commonwealth, *Parliamentary Debates*, Senate, 16 August 2006, 20 (The Hon Rod Kemp, Minister for the Arts and Sport).

141 See the call for 'evidence-based' approaches in Jon Altman, Craig Linkhorn and Jennifer Clarke assisted by Bill Fogarty and Kali Napier (for Oxfam Australia), *Land Rights and Development Reform in Remote Australia* (2005) 8 <www.oxfam.org.au/campaigns/indigenous/docs/landrights.pdf> at 29 November 2006. The NT Government, which appears to have instigated the idea, has admitted that no economic assessment was done to assess whether the changed tenure arrangements would improve economic development in NT Aboriginal communities: Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Darwin, 21 July 2006, 87 (Dennis Bree, Deputy Chief Executive, Department of Business, Economic and Regional Development, Northern Territory) <www.aph.gov.au/hansard/senate/commttee/S9506.pdf> at 29 November 2006.

142 Klaus Deininger and Hans Binswanger, 'The Evolution of the World Bank's Land Policy' in Alain de Janvry et al (eds), *Access to Land, Rural Poverty and Public Action* (2001) 407, 418–19 in Penny Lee, 'Individual Titling of Aboriginal Land in the Northern Territory: What Australia Can Learn from the International Community' (2006) 29(2) *University of New South Wales Law Journal* 22, 36. See also Jim Fingleton (ed), *Privatising Land in the Pacific: A Defence of Customary Tenures* (2005) <http://www.tai.org.au/documents/downloads/DP80.pdf > at 11 December 2006; Altman, Linkhorn and Clarke, above n 141, 7; Calma, above n 7, 119–20; Central Land Council, above n 109, 13–14.

143 A cap on rental income (set at a maximum of five per cent of the improved capital value of the land) in proposed s 19A(6) in the original Bill was removed by the Government after the Bill passed from the House of Representatives to the Senate. The restriction on other payments under the headlease in proposed s 19A(7) was also modified by the Government.

144 Calma, above n 7, 32.

145 Penny Lee, 'Individual Titling of Aboriginal Land in the Northern Territory: What Australia Can Learn from the International Community' (2006) 29(2) *University of New South Wales Law Journal* 22, 31–3; Altman, Linkhorn and Clarke, above n 141, 7; Central Land Council, above n 109, 6, 12; Calma, above n 7, 123–9. For socio-economically-based doubts specifically about the promotion of home ownership in remote communities, see also Will Sanders, *Housing Tenure and Indigenous Australians in Remote and Settled Australia* (2005). Cf Hughes and Warin, above n 128. They write: '[c]ommunal ownership of land, royalties and other resources is the principal cause of the lack of economic development in remote areas': at 15.

146 Pearson and Kostakidis-Lianos, above n 125, [8].

147 For example, in discussing barriers to home ownership the CLC acknowledges the potential for changed circumstances leading to changed behaviour: 'Most individuals and families are simply not in a position to enter into a mortgage given that level of income. Not surprisingly, the issue of individual home ownership is not raised as an aspiration of traditional land owners living on Aboriginal land. Perhaps if living standards and income levels were to rise it may become an aspiration for future generations': Central Land Council, above n 109, 12. See also Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Darwin, 21 July

2006, 32 (David Ross, Director, Central Land Council) <www.aph.gov.au/hansard/senate/commttee/S9506.pdf> at 29 November 2006.

148 Commonwealth, *Parliamentary Debates*, Senate, 15 August 2006, 16 (The Hon Rod Kemp, Minister for the Arts and Sport).

149 Ibid 11–12 (The Hon Rod Kemp, Minister for the Arts and Sport).

150 See, eg, Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Darwin, 21 July 2006, 7, 16 (John Daly, Chairman, Northern Land Council) <www.aph.gov.au/hansard/senate/commttee/S9506.pdf> at 29 November 2006.

151 Commonwealth, *Parliamentary Debates*, Senate, 16 August 2006, 19 (Rachel Siewert).

152 Commonwealth, *Parliamentary Debates*, Senate, 16 August 2006, 19 (Rachel Siewert).

153 Commonwealth, *Parliamentary Debates*, House of Representatives, 16 August 2006, 117 (The Hon Mal Brough, Minister for Family, Community Services and Indigenous Affairs).

154 Commonwealth, *Parliamentary Debates*, Senate, 16 August 2006, 7–8 (The Hon Rod Kemp, Minister for the Arts and Sport).

155 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 19A(8).

156 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 19A(15).

157 According to CLC, the NT Government approached the Land Councils with a confidential concept paper *Tenure and Town Planning in Remote Communities* (2004) but following the expression of initial concerns the model was forwarded (unfortunately so, in the view of the CLC) 'to the Australian Government as a credible and detailed proposal requiring amendments to the Land Rights Act outside the scope of the agreed package of amendments put forward by the four Territory Land Councils and the NT Government'. The CLC's view was that 'further analysis and discussions with the Land Councils would have resulted in a more rigorous assessment of the issues requiring resolution, and the development of a far more appropriate and effective model': Central Land Council, above n 109, 18. The Northern Territory Government said that in 'early 2005 it became obvious that the Australian government was determined to make changes to streamline existing arrangements': Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Darwin, 21 July 2006, 78 (Dennis Bree, Deputy Chief Executive, Department of Business, Economic and Regional Development, Northern Territory) <www.aph.gov.au/hansard/senate/commttee/S9506.pdf> at 29 November 2006.

158 Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Darwin, 21 July 2006, 112 (Brian Stacey, State Manager, Northern Territory, Office of Indigenous Policy Coordination, Darwin) <www.aph.gov.au/hansard/senate/commttee/S9506.pdf> at 2 November 2006. This is also a point made by the NT Government: at 86 (Dennis Bree, Deputy Chief Executive, Department of Business, Economic and Regional Development, Northern Territory).

159 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 19A(6), 19(14), 19(15).

160 Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Darwin, 21 July 2006, 102 (Greg Roche, Acting Group Manager, Land and Resources Group, Office of Indigenous Policy Coordination, Canberra) <www.aph.gov.au/hansard/senate/commttee/S9506.pdf> at 11 December 2006. For the source of the government's announcement of the changes they intended making to the land rights act, see Amanda Vanstone, 'Long Term Leases the Way Forward for NT Aboriginal Townships' (Press Release, 5 October 2005) <www.atsia.gov.au/media/former_minister/media05/v0535.aspx> at 11 December 2006.

161 Ibid 101.

162 Commonwealth, *Parliamentary Debates*, House of Representatives, 16 August 2006, 115 (The Hon Mal Brough, Minister for Family, Community Services and Indigenous Affairs).

163 Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Darwin, 21 July 2006, 32 (David Ross, Director, Central Land Council) <www.aph.gov.au/hansard/senate/commttee/S9506.pdf> at 2 November 2006.

164 Central Land Council, above n 109, 22.

165 Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Darwin, 21 July 2006, 30 (David Ross, Director, Central Land Council) <www.aph.gov.au/hansard/senate/commttee/S9506.pdf> at 2 November 2006.

166 Ibid 33. Professor Jon Altman also said: 'It is imperative that traditional owners of townships, through land councils or independently, are resourced to seek independent legal advice about whether they should be entering into 99-year leases in relation to a headlease to receive the housing and infrastructure that they need, because the implications of the headlease is that the NT or Commonwealth entity will have control over a wide range of potential developments in townships, not just housing and infrastructure': Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Darwin, 21 July 2006, 72 (Jon Altman) <www.aph.gov.au/hansard/senate/commttee/S9506.pdf> at 29 November 2006.

167 'If you want to engage Aboriginal people in economic development opportunities, and traditional owners specifically, why would you remove their rights over townships, which could help facilitate that? Outside the context of mineral exploration, the major commercial development opportunities are going to be situated in townships. That is why in the model that we put back to the Territory government we said that we were not prepared for traditional owners to forgo those rights over townships. That is essentially what we are talking about. We are talking about a 99-

year period – four generations – during which people would forgo their rights to do any negotiations under the sublease arrangement over any economic development opportunities into the future': Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Darwin, 21 July 2006, 34 (Siobhan McDonnell, Policy Officer, Central Land Council) <www.aph.gov.au/hansard/senate/commttee/S9506.pdf> at 29 November 2006.

168 The Minister for Family, Community Services and Indigenous Affairs, Mr Brough, told Parliament that Aboriginal people in the NT and elsewhere lived in 'little communist enclaves' where they were locked out of home ownership and running their own business: Commonwealth, *Parliamentary Debates*, House of Representatives, 19 June 2006, 31 (The Hon Mal Brough, Minister for Family, Community Services and Indigenous Affairs).

169 Commonwealth, *Parliamentary Debates*, Senate, 8 August 2006, 80 (Chris Evans).

170 Aboriginal Land Rights Commission, above n 98, 137.

171 Ibid 35.

172 The phrasing is borrowed from Noel Pearson, 'Reconciliation a Building Block', *The Australian* (Sydney), 19 April 2005, 13 where the author suggested '[w]e should take John Howard's word in good faith' on that issue. To keep those comments in context, they related specifically to the Prime Minister's brief and general comments in Wadeye discussed earlier, not the 2006 Amendment Act, which was still more than a year away.

173 Central Land Council, above n 109, 7–9. 'The Northern Territory has very restrictive tenure arrangements over community living areas that basically mean that you cannot have Aboriginal people being involved in economic development opportunities on community living areas. If the Commonwealth and the Territory really thought that tenure was the major impediment to economic development, why have they not moved to adjust their own tenure arrangements? Why are they looking only at Aboriginal land?': Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Darwin, 21 July 2006, 32 (Siobhan McDonnell, Policy Officer, Central Land Council) <www.aph.gov.au/hansard/senate/commttee/S9506.pdf> at 2 November 2006.

174 Minerals Council of Australia, *Submission to the Inquiry into the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006* (17 July 2006) 3 <http://www.aph.gov.au/senate/committee/clac_ctte/aborig_land_rights/submissions/sub10.pdf> at 11 December 2006.

175 See, for example, Northern Land Council, *Submission to the Inquiry into the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006* (21 July 2006) 13-24 <www.aph.gov.au/senate/committee/clac_ctte/aborig_land_rights/submissions/sub13.pdf> at 19 December 2006 and and Northern Land Council, 'NLC Has Serious Concerns Regarding Amendments' (Press Release, 1 June 2006) <www.nlc.org.au/html/files/06_06_01_NLC%20ALRA%20response.pdf> at 19 December 2006.

176 Ken Henry, 'Managing Prosperity' (Paper presented at the 2006 Economic and Social Outlook Conference, Melbourne, 2 November 2006) 5 <http://www.treasury.gov.au/documents/1183/HTML/docshell.asp?URL=Managing_Prosperity_updated.htm> at 11 December 2006.

177 ABC Television, 'Aborigines Fear NT Land Rights Review May Threaten Title', *The 7:30 Report*, 30 April 1999 <www.abc.net.au/7.30/stories/s23533.htm> at 19 December 2006 (Mr Lou Lieberman).

178 Ibid 101–2.

179 Ibid 104.

180 Wright, above n 34, 339.

181 Senate Community Affairs Legislation Committee, above n 2, 1.

182 See the view of the NT Government's senior representative: Evidence to Senate Community Affairs Legislation Committee, Parliament of Australia, Darwin, 21 July 2006, 86 (Dennis Bree, Deputy Chief Executive, Department of Business, Economic and Regional Development, Northern Territory) <www.aph.gov.au/hansard/senate/commttee/S9506.pdf> at 29 November 2006.

183 Commonwealth, *Parliamentary Debates*, Senate, 9 August 2006, 4 (Gary Humphries). In a similar vein, on the forced 'delegation' issue, Senator Kemp said, 'We do not expect that the minister would not agree to a reasonable land council decision not to delegate. The ministerial role is a safeguard or, if you like, a safety valve': Commonwealth, *Parliamentary Debates*, Senate, 15 August 2006, 8 (The Hon Rod Kemp, Minister for the Arts and Sport).

184 Department of Families, Community Services and Indigenous Affairs, Australian Government, *Access to Aboriginal Land under the Northern Territory Aboriginal Land Rights Act – Time for Change?* (Discussion Paper, October 2006) <www.oipc.gov.au/permit_system/docs/Permits_Discussion_Paper.pdf> at 29 November 2006.

185 McGregor and Haslem, above n 45, 3; Metherell, above n 46, 1.

186 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 October 2000, 20744 (John Howard, Prime Minister).

187 Reeves, above n 16, 119, 203–4.

188 The Reeves Review argues that the present system privileges small 'traditional owner' groups and gives insufficient acknowledgment to the wider regional populations within which such groups are reproduced culturally and socially. While the *Land Rights Act* does give a place to people who are not traditional owners but are entitled by tradition to use or occupy Aboriginal land, ultimate control of what happens on that land is said to lie in the consultative relationship between the traditional owners and the land councils. The fundamental criticism that is advanced deals with both parts of this relationship. The criticism essentially is that:

- the power of traditional owners within the scheme of

the Act is excessive, and the powers of members of the resident Aboriginal community are insufficient;

- the large land councils, while politically successful at a Territory and national level, are defective in a number of practical and regionally local ways, unlike the two smaller land councils.

The fundamental solutions to each main criticism offered by the Reeves Review are, respectively, to:

- collapse the owner/resident categories into one for the purpose of decision-making; and
- get rid of the larger land councils and break up the Northern Territory into 18 regional land councils overseen by a single Northern Territory Aboriginal Council (NTAC): Sutton, above n 58, 40.

189 That is, those who are not resident on the land concerned at the time.

190 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Unlocking the Future*, above n 23, 42, 43. This was because 'to achieve consistency with other provisions of the *Land Rights Act*, traditional owners should have a role in deciding whether or not a new land council should be established to represent their interests and assist in the management of their land': at 43. According to HORCATSIA, the process towards any new land council should also include formation of a working party of stakeholders to define boundaries, a public discussion paper setting out the implications, arguments for and against and capability of the proposed body, an information campaign and a plebiscite.

191 Northern Territory Government et al, above n 27, 3.

192 Tim Rowse, 'Introduction' in Jon C Altman, Frances Morphy and Tim Rowse (eds), *Land Rights at Risk? Evaluations of the Reeves Report* (1999) 1, 5.

193 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Unlocking the Future*, above n 23, 37.

194 A common argument, and one adopted uncritically in the Reeves Report, is that smaller, regionally based Aboriginal organisations are more accountable to their constituents. However, such arguments paradoxically ignore the defining feature of the Aboriginal polity – its intense emphasis on localism. Ultimately, with such an emphasis, any notion of 'representativeness' itself (in a western democratic sense) becomes problematic, and small regionally based organisations can be just as unrepresentative as larger ones and far more prone to capture by particular sectional interests: Martin, above n 49,161. See also Nicolas Peterson, 'Reeves in the Context of the History of Land Rights Legislation: Anthropological Aspects' in Jon C Altman, Frances Morphy and Tim Rowse (eds), *Land Rights at Risk? Evaluations of the Reeves Report* (1999) 30.