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SELF-DETERMINATION'S LAND RIGHTS

Destined to disappoint?

Jon Altman¹

Introduction

The Commonwealth's *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) is a statutory instrument designed to deliver a form of social justice – that is, to arrest and even reverse the illegal land dispossession that occurred in Australia since British colonisation. The ALRA was developed and passed during the same period (1972–77) in which the Australian Government established a policy of Indigenous self-determination; as Justice Woodward stated when presenting the framework of the ALRA, 'Aborigines should be free to choose their own manner of living'.² Both conservative and Labor governments expected that land title would be a means for remote living Aboriginal people in the Northern Territory to eventually attain economic and social equality with other Australians.

The ALRA remains the most progressive and comprehensive land rights law in Australia. It has delivered a form of inalienable collective title over an estimated 48–50 per cent of the Northern Territory (635,000–650,000 sq kms) – with exact acreage remaining difficult to calculate because some claims are still being legally resolved. Ownership of land has afforded many

1 I would like to thank Sana Nakata, Melinda Hinkson, Shino Konishi, Michael Dillon, Karrina Nolan and the editors of this book for critical engagement with an earlier version of this chapter.

2 Woodward, *Commission*, 10.

Aboriginal people in the Northern Territory the choice to live differently in accord with diverse elements of their traditions and customs. I use the term differently here in two senses: differently to mainstream Western ways, and differently to how they had lived on government settlements and missions. However, the expectations that the ALRA raised are fundamentally contradictory. On the one hand, traditional owners may wish to live differently on Aboriginal-owned land. Such ‘difference’, from an Indigenous standpoint, might emphasise the protection of sacred sites in a sentient ancestral landscape and the use of the land’s natural resources for sustenance and wellbeing. On the other hand, individuals might aspire to attain socio-economic equality; to strive for equality as sameness – assessed from a political or bureaucratic standpoint using conventional social indicators and statistics – that might make it impossible to live on one’s ancestral land. Assessment of whether the ALRA has met its objectives is thus relative to one’s choice of a wide spectrum of standpoints – ranging from that of a recognised traditional owner of land who might be focused on maintaining difference to that of a member of Australia’s political, corporate or bureaucratic elites who often emphasise sameness.

By all statistical accounts, the ALRA has failed to deliver socio-economic equality between the Northern Territory’s Aboriginal and non-Aboriginal people, measured as two distinct populations. Could land title ever have simultaneously satisfied the Aboriginal aspiration to live differently and any aspiration to be equal, in socio-economic terms, to non-Aboriginal people? This is a complex question that I look to address in my conclusion. This question matters to me personally because, since the late 1970s, I have worked at various times with and/or on behalf of traditional owners, Aboriginal groups, governments, statutory authorities and non-government organisations to strengthen the ALRA and to resist the dilution of its provisions.

The ALRA’s immediate antecedents: 1972

Ruling on a case brought by residents of Yirrkala mission in the Northern Territory Supreme Court, in April 1971 Justice Blackburn found that Australian law did not recognise Aboriginal title to land; this meant that the Commonwealth Government was under no legal obligation to consult with Aboriginal residents about a massive bauxite mine on Crown land reserved for their exclusive use. The Australian Government had to respond to the public perception that while the ruling was correct in

law it was unfair in its effect on the plaintiffs' community. On Australia Day 1972, Prime Minister McMahon announced that the Australian Government would create a new form of tenure – a lease, lasting 50 years, available to individuals, groups or communities who could demonstrate to a Land Board their intention and ability to make economic and social use of the land.³ As in other leases, mineral and forest rights would be reserved for the Crown. It was assumed by the McMahon Government (and more widely) that the interest of Aboriginal people themselves would be served by mineral exploration and development on Aboriginal reserves.

The prime minister's Australia Day statement angered Aboriginal activists; they immediately set up the 'Aboriginal Tent Embassy' on the lawns of Parliament House. By early February activists associated with the Embassy had drawn up a five-point plan for land rights: Aboriginal control of the Northern Territory as a state within the Commonwealth, legal title and mining rights to all reserves throughout Australia, the preservation of all sacred sites throughout Australia, legal title and mining rights to areas in and around all Australian capital cities, and compensation (6 billion dollars, worth about \$200 billion in 2019) for lands not returnable and an annual percentage of gross national income.⁴ According to John Newfong, 'the figure of six billion was chosen in order to establish in the minds of the white men and their governments not only this right of prior ownership but also our right to compensation'.⁵ Like the McMahon statement, the demands of the Aboriginal Tent Embassy encompassed competing logics: a call for social justice and compensation for past wrongs, and for land as the economic base for self-sufficiency as well as for its spiritual and sacred importance.

On 8 February 1972 a delegation of activists met Opposition leader Gough Whitlam who gave partial endorsement of the five-point plan and made a commitment to Aboriginal land rights that was widely reported in the media.⁶ In his election speech of November 1972 Whitlam stated:

We will legislate to give aborigines land rights – not just because their case is beyond argument, but because all of us as Australians are diminished while the aborigines are denied their rightful place in this nation.⁷

3 McMahon, *Australian Aborigines Commonwealth Policy*.

4 Newfong, 'Aboriginal Embassy', 139.

5 Newfong, 'Aboriginal Embassy', 142.

6 Robinson, 'Aboriginal Embassy', 8; Foley, 'Reflection', 36.

7 Whitlam, 'It's Time'.

At the same time Whitlam, like McMahon, promoted northern development: 'Labor's objective is to develop the vast and valuable resources of Northern Australia for the benefit of the Australian nation and future Australians'.

From Woodward's royal commission to land rights: 1972–77

Exactly 12 months after Whitlam met with Aboriginal activists on the lawns of Parliament House, his government (elected 2 December 1972) commissioned Mr Justice Woodward, who had represented the Yolngu plaintiffs in the Gove case, to advise how to recognise in legislation the traditional land rights of the Aboriginal people of the Northern Territory. Woodward's inquiry was limited to the Northern Territory in part because his commission was a direct political response to the Blackburn decision, but also because the Territory was administered from Canberra and the Australian Constitution empowered the Commonwealth to make laws there.⁸

Woodward produced a template for land rights law. The 20 per cent of the Northern Territory that had been reserved for Aboriginal use was to be transferred to land trusts to be managed by statutory land councils as instructed by the owners of that land. All unalienated Crown lands were to be open to claim by people who could demonstrate before an Aboriginal land commissioner that they were a local descent group with primary spiritual responsibility for land and associated sacred sites and were entitled 'as a right to forage over the land claimed'.⁹

Woodward was determined to complete his inquiry quickly and so chose an approach that he assessed as measured, 'taking into account financial and political realities'.¹⁰ Woodward did not engage with, or receive submissions from, the Black activists from the Aboriginal Tent Embassy; he may have assessed their more radical demands as unrealistic.

8 Neate, *Land Rights Law*, 3.

9 Section 3 of *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth).

10 Woodward, *One Brief Interval*, 141.

Woodward's 'measured' approach had shortcomings. Although the Letters Patent of his commission directed him to include 'rights in minerals and timber', he did not recommend that landowners be vested with property rights in subsurface minerals.¹¹ The question of mineral rights probably caused Woodward the most difficulty and concern.¹² But in the end, he was persuaded by mining industry submissions that Aboriginal traditional owners should be treated no differently from other Australians. This decision undoubtedly reduced the economic potency of land rights. Instead, he recommended a right of veto, so that Aboriginal landowners would have the legal authority to determine what happens on their land: 'I believe that to deny Aborigines the right to prevent mining on their land is to deny the reality of their land rights'.¹³ Woodward thought it 'likely, particularly in the long term, that consent will generally be given'.¹⁴ On the 'difficult question'¹⁵ of how to distribute money paid by miners, he recommended that:

All statutory payments for permits and leases be paid over by the Government to the regional Land Council for distribution among traditional owners; all royalty payments be paid over by the government to the regional Land Council for distribution as follows: two tenths to be retained by the Land Council, two tenths to be paid to the other regional Land Council, three tenths to be paid to the local community, and three tenths to be paid to the A.B.T.F [Aborigines Benefits Trust Fund].¹⁶

Passed by the Australian Parliament in 1976, the ALRA established Aboriginal land councils as statutory authorities to represent traditional owners with a degree of independence from governments. In other respects, Woodward's recommendations had been diluted. For example, the ALRA excluded the possibility that land could be claimed based on need or in towns. Some responsibilities that Woodward had imagined for the Commonwealth were delegated to the new Northern Territory Government, effective 1 July 1978, so that Aboriginal people have found themselves in a politically fraught tripartite arrangement. Mining royalties that were to be paid to land councils were now to be paid to the Northern Territory Government. The Commonwealth was to pay

11 Woodward, *Commission*, 1.

12 Woodward, *Commission*, 103–04.

13 Woodward, *Commission*, 104.

14 Woodward, *Commission*, 104.

15 Woodward, *Commission*, 108.

16 Woodward, *Commission*, 109.

an equivalent amount to the newly established Aboriginals Benefit Trust Account that superseded the existing Aboriginal Benefits Trust Fund. This changed the way that the use of royalties was to be accountable. Because these Commonwealth payments were now from consolidated revenue, royalty-equivalents were not the 'private' income that Aboriginal people might derive from consenting to the commercial use of their property but 'public moneys' subject to ministerial directions and scrutiny.¹⁷

Woodward's hope was that 'Aboriginal communities should have as much autonomy as possible in running their own affairs'.¹⁸ As a law enabling self-determination, the ALRA's version of land rights goes beyond any land or native title laws passed since. However, while Aboriginal people own considerable tracts of land, most of what happens on that land where Aboriginal people are invariably in the clear majority is legally subject to external governance, not local Aboriginal regulation. Political jurisdiction over Aboriginal lands, mineral exploration aside, remains almost exclusively with mainstream forms of government. Both Woodward's proposals and the ensuing the ALRA combine the visions of becoming equal and remaining different, though Woodward seemed to privilege difference over sameness. While 'Aborigines should be free to choose their own manner of living', their land rights would be 'a first essential step for people who are economically depressed and who have at present no real opportunity for achieving a normal Australian standard of living'.¹⁹ He warned that 'the granting of land rights can only be a first step on a long road towards self-sufficiency and eventual social and economic equality for Aborigines' and that 'there is little point in recognising Aboriginal claims to land unless the Aboriginal people concerned are also provided with the necessary funds to make use of that land in any sensible way which they wish'.²⁰

17 Altman, *Mining Royalties*, 42–47.

18 Woodward, *Commission*, 10.

19 Woodward, *Commission*, 10, 2.

20 Woodward, *Commission*, 133, 9.

Equality and difference as a practical research problem

Almost on the day the ALRA was proclaimed, my Aboriginal economic policy research commenced at the University of Melbourne collaborating with John Nieuwenhuysen. Our project, funded by the Commonwealth Department of Aboriginal Affairs, was to document the economic situation of Indigenous people across Australia.²¹ We were aware of the postcolonial optimism of those with newly acquired property rights in land, especially among those people who had moved to outstations or homelands from the government settlements and missions where they had been centralised, voluntarily and involuntarily, under colonial regimes. We were no less aware of an emerging tension between the rights of groups to enjoy their land rights, a form of difference, and a government goal shared by many Aboriginal people for socio-economic sameness. Like Woodward, we were careful to argue that it would be difficult, and in some situations perhaps impossible, to achieve socio-economic equality. We sought to reduce expectations that land rights would enable economic independence from government, especially for remote outstation communities.²²

Shifting from the academic discipline of economics to anthropology, in 1979 I was granted permission by the late Anchor Kulunba and his family to live with them at an outstation called Mumeka located on their Kurulk clan estate in western Arnhem Land. I wanted to understand how Kuninjku people made their living and what they thought about development.

Kuninjku-speaking people had moved to the government settlement of Maningrida, established in 1957 under the policy of assimilation. In the early 1970s, when rights to land were emerging as a national issue, they returned to live on their ancestral lands at outstations, including Mumeka, as 'an experiment in self-determination' assisted administratively and logistically by unusual and sympathetic officials like the enigmatic John Hunter in their particular situation (see Haynes chapter).²³ Kuninjku people who had maintained only vestiges of their pre-colonial hunter-gatherer way of living in Maningrida went back to live on their land as 'modern hunter-gatherers'.²⁴

21 Altman and Nieuwenhuysen, *Economic Status*.

22 Altman and Nieuwenhuysen, *Economic Status*, 195–96.

23 Peterson and Myers, *Self-determination*.

24 Altman, *Hunter-Gatherers*.

My research showed that people were sustained from three sources. First, they worked consistently to self-provision, exploiting the resources on their country; much of their dietary intake was from bush foods. When I quantified the value of this food, I found that most of their 'income' (cash and non-cash) came from hunting and fishing. At the same time, Kuninjku engaged with market capitalism. Assisted by a community-controlled arts centre based at Maningrida, they produced art for sale. Over time they became increasingly adept at refiguring their artistic traditions using local materials and references to sacred places and mythology. Their third source of support was the social security benefits to which they had recently become entitled as Australian citizens. Inequitably, as poor Australians, they received very little else from the state in terms of health or education or community services. The plural (or hybrid) economy they fashioned for themselves fundamentally challenged evolutionary thinking, dominant in policy circles, about the superiority of capitalism in remote regions such as Arnhem Land.

This was land rights and self-determination at work. Kuninjku people were taking primary spiritual responsibility for their clan lands, protecting sacred sites while exercising their economic right to make a living off their land and resources. In 1985, when a mining company sought permission to explore their land for minerals, the Northern Land Council mediated, as required by law, to identify and consult traditional owners. Key landowners had observed the nearby Nabarlek and Ranger uranium mines and had talked to these mines' beneficiaries, so they were aware of the potential monetary benefits of consenting to exploration and mining.²⁵ However, their experience of the ALRA was that it secured their access to their lands and resources, and Kuninjku people were now relatively economically and politically autonomous. Vetoing exploration, they implicitly accepted a social compact that enabled them to lead a materially modest, but spiritually rich and socially cohesive, lifeway.

Over a two-year period from 1985 to 1987 I used my Mumeka research in submissions to two national inquiries. In each case I advocated for policies to support people who chose to live at outstations on their ancestral lands. The Miller Committee on Aboriginal Employment and Training Programs saw economic value in people living off the land and recommended the rapid expansion of the Community Development Employment

25 Altman, *Mining Royalties*.

Projects (CDEP) scheme as a form of unconditional income support for outstation residents.²⁶ While the ensuing Aboriginal Employment Development Policy (AEDP) partly implemented this recommendation, the AEDP also aimed to deliver economic equality between Indigenous and other Australians by 2000, which I had advised was impossible to achieve in very remote Australia.²⁷ The second inquiry – a national review of outstations – was conducted by the House of Representatives Standing Committee on Aboriginal Affairs. The committee's report *Return to Country* not only lauded the relative autonomy of outstation residents but also recommended the flexible delivery of citizenship entitlements such as education and health and municipal services to these small and remote communities.²⁸ The committee also endorsed the Miller recommendations for investment in appropriate forms of income support and economic development. In my view, it is an enduring indictment of Australian fiscal federalism and of the lack of intergovernmental cooperation and accountability that the Commonwealth and Northern Territory governments never properly implemented the recommendations from these national inquiries. Policy innovation and its implementation might well have ameliorated the emerging tensions and conflicted logics of simultaneously supporting forms of difference and sameness that continue to undermine the aspirations of many traditional owners today.

Defending land rights and self-determination from equality as sameness

Twenty years after the ALRA's passage, and with the election of a conservative government in March 1996, self-determination's land rights were subject to increasing criticism as an obstacle to socio-economic equality. Policy thinking swung to focus more on the socio-economic status of individuals and households and less on collective rights and Indigenous-specific approaches to governance and development. In the period since 1996, governments have revisited assimilationist goals – adopting Western norms

26 Miller, *Aboriginal Employment*.

27 Australian Government, *Aboriginal Employment*. The Miller Committee also endorsed capital programs to build an economic base and new industries in Aboriginal-owned remote Australia. This recommendation resonated with the Aboriginal Tent Embassy's claim for compensation in 1972 but, as Dillon's chapter in this book argues, implementation of this idea has been disappointing.

28 House of Representatives Standing Committee on Aboriginal Affairs, *Return to Country*.

and values in judging wellbeing and in comparing Indigenous people living remotely on their land with all other Australians.²⁹ In 1993, many of the conservative parliamentarians who now made up the Howard Government (1996–2007) had opposed the *Native Title Act 1993*. Pandering to populism, the incoming Prime Minister John Howard represented native title as endangering national economic development.³⁰ Because the ALRA's free prior and informed consent provisions conferred stronger negotiating rights on traditional owners than the Native Title Act, the ALRA was in the new government's sights for reform.³¹

To describe my own engagements in these policy debates I will focus on two episodes of attempted reform before revisiting Mumeka to outline what this has meant on the ground.

In 1997, the Howard Government commissioned John Reeves QC to review the ALRA. His report *Building on Land Rights for the Next Generation* sought to make the ALRA an instrument to secure economic and social advancement for all Aboriginal people in the Northern Territory, not only for Aboriginal landowners.³² In this respect, Reeves's vision resonated with McMahon's in 1972. Reeves proposed diluting the rights of traditional owners and the political power of their representative land councils. The Territory government, having consistently opposed land claims made under the ALRA since 1978, welcomed Reeves's reforms as strengthening its territorial and political jurisdictions. The land councils fought back, armed with activist expertise and – reminiscent of the Aboriginal Tent Embassy in 1972 – support from a substantial section of national public opinion. Aboriginal people in several Central Australian communities burned copies of the Reeves Report. John Herron, Minister for Aboriginal Affairs, referred the review and its recommendations to the public scrutiny of a parliamentary inquiry. Sir Edward Woodward, now in his late 70s, was so disappointed with the Reeves Report that he made submission to the inquiry highlighting the shortcomings of its recommendations.³³

29 Sullivan, *Belonging Together*; Strakosch, *Neoliberal Indigenous*.

30 John Howard, television interview with Kerry O'Brien, 7.30 Report, ABC, 4 September 1997, transcript, PM Transcripts, Department of the Prime Minister and Cabinet, accessed 26 February 2019, pmtranscripts.pmc.gov.au/release/transcript-10469.

31 McKenna 'Assessing the Relative'. In 1984, the Hawke Government had similarly proposed to weaken the ALRA's right of veto as an element of its unsuccessful plan for a 'preferred national land rights model'. Libby, *Hawke's Law*.

32 Reeves, *Next Generation*.

33 Woodward, *One Brief Interval*, 150.

I was among a group of academics at The Australian National University that collaborated with the Northern Territory land councils to convene a conference whose proceedings were quickly published.³⁴ Among the conference contributors were Nicolas Peterson, who had been Woodward's expert anthropological adviser, Ian Viner, the government minister who had chaperoned the ALRA through parliament in 1976, and John Reeves. My own contribution took aim at Reeves's proposal that the land councils and royalty associations be replaced by a Northern Territory Aboriginal Council (NTAC). NTAC's function would be to receive and redistribute money earned from the agreed commercial use of Aboriginal land. I argued that this mechanism would blur an important distinction: between money coming to Aboriginal people as owners who had consented to others' extraction of mineral resources from their land and money coming to Aboriginal people, at the discretion of the minister, via the Aboriginals Benefit Trust Account. One likely effect of implementing NTAC, I argued, was that it would greatly reduce any incentive for traditional owners to negotiate royalty-generating agreements counter to Reeves's purported intention.³⁵

In *Unlocking the Future: The Report of the Inquiry into the Reeves Review* the parliamentary standing committee unanimously rejected Reeves's recommendations.³⁶ The unanimity of this rejection, given that the Reeves inquiry was government-initiated, was surprising, as was the committee's lead recommendation that the ALRA should not be amended without the free, prior and informed consent of traditional Aboriginal owners in the Northern Territory.³⁷ Unlike Woodward in 1974, Reeves in 1998 clearly underestimated the support for what the ALRA had achieved: political representation and property rights in land.

The conservatives' desire to reform the ALRA re-emerged in 2005, during the fourth Howard Government. This government was emboldened by its control of both houses of parliament; by the bipartisan abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC), leaving the

34 Altman, Morphy and Rowse, *Land Rights*. By 1999 there were four land councils, the original Northern and Central Land Councils augmented by the Tiwi Land Council (established in 1978) and the Anindilyakwa Land Council (established in 1991).

35 Altman, 'The Proposed'.

36 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Unlocking the Future*.

37 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Unlocking the Future*, xvii.

ALRA politically exposed with only land councils as its defenders; and by intensifying assault on the institutions of Indigenous Australia.³⁸ To replace ATSIC, the Howard Government appointed a National Indigenous Council (NIC). The NIC called for Indigenous Australians to have more opportunity for private home ownership and for business development. Warren Mundine, a New South Wales Aboriginal member of the NIC, was mistaken in describing tenure over Aboriginal land as ‘communal’ but his label was endorsed by powerful officials and the government. Mundine and others argued that the ‘communal’ title conferred by the ALRA inhibited both private home ownership and business development on Aboriginal land. Some commentators also managed to link the need for better security for women and children – widely acknowledged – with the need to reform ‘communal’ land tenure. In June 2007, the Howard Government exploited the *Little Children Are Sacred* report of the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, and seeming inaction by the Northern Territory Government, to launch the Northern Territory Intervention and harness public outrage to attack the ALRA by suggesting the permit system provided a protective umbrella for child sexual abusers.³⁹ The government judged that it had public support to intervene in the Territory’s remote communities, including by changing the ALRA, for the good of Aboriginal people.

Under the Howard Government’s Northern Territory Intervention, entire townships located on Aboriginal land were leased compulsorily by the Australian Government for a five-year period. In response, the traditional owners of Maningrida brought an action in the High Court of Australia. The court ruled in 2009 that such unilateral acquisition of property was constitutionally legal only if the government paid just terms compensation.⁴⁰ After protracted legal negotiations the Gillard Government paid. This incident was a clear reminder about power relations in Australia – the settler state retains radical land title. Self-determination’s land rights are qualified, a gift that can be withdrawn. The ALRA is vulnerable to deleterious amendment, even abolition, by the same parliament that conferred the rights, as long as it meets its constitutional obligation to compensate.

38 Sullivan, *Belonging Together*.

39 Hinkson, ‘Introduction’.

40 Brennan, ‘*Wirridjal v Commonwealth*’.

The 'national emergency' amendments to the ALRA abolished the need for a permit to enter public areas of Aboriginal-owned townships and promoted new arrangements for 99-year leasing of land within townships (under a new Section 19A of the ALRA) to implement earlier NIC and government proposals. The leases were to be managed by a Canberra-based executive director of township leasing appointed by the minister and funded from royalties raised on Aboriginal land. This last reform was an ironic reversal of McMahon's (1972) proposal that Aboriginal people hold leases over Crown land; now Aboriginal landowners could issue a lease over their land to a government agency that in turn would issue subleases. Few land trusts have embraced the Section 19A leasing option. To transfer ultimate control of their land to the executive director of township leasing has had very limited appeal.

To understand what these struggles over land tenure have meant to those pursuing their lifeways on Aboriginal land, let us return to the Kuninjku. They have remained committed to their country for decades in the face of deepening ambivalences and underfunding by Commonwealth and Territory governments. Until the Northern Territory Intervention, Kuninjku had maintained what I have described as a plural economy in which minimal, unconditional state support facilitated self-provisioning and engagement with the extremely limited market opportunities available in remote Australia.⁴¹ In this adaptive economy, they enacted Woodward's freedom 'to choose their own manner of living' and 'freedom to change traditional ways as well as a freedom to retain them'.⁴²

Wary that fundamental reform of the ALRA would be politically difficult and could incur high compensation costs, Australian governments since 2007 have instead amplified a project of improvement to reform the people. A suite of paternalistic measures has been introduced seeking to convert the norms and values of remote living Aboriginal people to match those of some imagined responsible neoliberal subject. These measures are not about land rights per se, but about the owners' commitment to live on the land. Kuninjku, like homelands people everywhere, have been under enormous administrative pressure to recentralise to larger townships. Some wish to do so, but to the extent that traditional owners cease to live on their land, their territorial rights have little meaning.

41 Curchin, 'Economic Hybridity'.

42 Woodward, *Commission*, 10.

Kuninjku are aware of the strategies designed to recentralise them, to eliminate their mobile way of living, and to inculcate them with Western norms and values ostensibly to close statistical gaps via enhanced engagement with market capitalism. They understand that they are losing the right to sustain themselves with a ‘hybrid’ economy dependent on continuing connection to their traditional lands and resources. They are deeply frustrated and angered that if they resist this second wave of colonisation they will be punished with impoverishing loss of the welfare payments on which their adapted economy has been dependent since the 1970s. The government is also coopting their regional support organisation, the Bawinanga Aboriginal Corporation, to assist delivery of programs, like compulsory work for the dole and income management, that close rather than open on-country possibilities.⁴³

The recent actions of government have not extinguished all possibility of on-country living. For example, traditional owners in western Arnhem Land residing within the Warddeken Indigenous Protected Area have garnered support for living on country by voluntarily committing their biodiverse lands to the Australian conservation estate. These same lands have also been committed to a carbon farming commons, the Arnhem Land Fire Abatement project that extends over most of Arnhem Land’s 100,000 sq kms. Managing wild fires contributes to the abatement of greenhouse gas emissions, and such abatement is sold. By attracting payments from diverse public, private and philanthropic sources to conserve biodiversity and reduce carbon emissions, some groups have managed to maintain enough independence from the state to successfully exercise their ongoing desire to live at outstations and make a living. This replicable example might prove a harbinger of how proactive members of remote communities might refigure their relations with the state and capitalism to be more politically and economically autonomous.

Conclusion

Was self-determination’s land rights destined to disappoint? Did the ALRA deliver simple justice to people unfairly dispossessed and betterment to people who are economically depressed? At the start of this chapter, I identified twin logics embedded in the ALRA: to deliver simple justice

43 Altman, ‘Raphael Lemkin’.

by returning ancestral lands and to encourage the utilisation of this land to improve socio-economic marginality. I have argued that the tension between these logics has been exacerbated in the last two decades by policy settings that measure the wellbeing of Aboriginal people (and thus the success or failure of policy) by assessing only the degree to which they live in the same way as non-Aboriginal people. In such assessment, no value is accorded to people's self-determining choice to live in accord with elements of their customs and traditions.

The ALRA has contributed to simple justice by assuring legal title to vast tracts of ancestral land. However, by excluding the mineral rights that the land councils had argued were of fundamental importance to achieving full land rights, both Woodward's recommendations and the ALRA failed Aboriginal expectations. The ALRA's concession to the enduring influence of the mining industry in capitalist Australia marked the limits of settler state recognition.⁴⁴

And why only in the Northern Territory? A request was made to Woodward to expand his inquiry to cover all Australia.⁴⁵ He declined because he believed this would take six years and he considered it preferable to treat the Northern Territory as a pilot study. In its limited spatial coverage and lack of political empowerment and compensation, the ALRA did not meet the demands made by Black activists in Canberra in 1972. The ALRA applies only to the Northern Territory, less than one-fifth of the Australian continent; the Territory's Indigenous population, the ALRA's potential beneficiaries, constitute less than 10 per cent of the total Indigenous population estimated from the 2016 Census (compared to 20 per cent in 1971). From the perspective of those at the Aboriginal Tent Embassy, the early commitment to national land rights made by Whitlam soon turned to bitter disappointment. As Gary Foley, one of the Black activists now a professor of history notes, the young Black radicals got their first major lesson about 'political deceit and duplicity' owing to the failure of Whitlam to deliver on his promises.⁴⁶

Perhaps there has been unrealistic expectation that land rights would deliver too much too quickly? Woodward cautioned that 'the granting of land rights can only be a first step on a long road towards self-sufficiency

44 Altman, *Mining Royalties*, 39.

45 Woodward, *One Brief Interval*, 138; Woodward, *Commission*, 130.

46 Foley, 'A Reflection', 41.

and eventual social and economic equality for Aborigines'. He went on: 'it is an essential step even though its outcome may not be apparent for many years'.⁴⁷ While some tentative steps forward were taken in the early years of the ALRA, in the last two decades the steps have been backward. Those living on Aboriginal land in the Northern Territory are not only the most impoverished people in Australia, but also they are becoming relatively poorer.⁴⁸ This trend is the result of policy to discourage and even financially penalise those who live on their country. The most recent estimates from a Centre for Appropriate Technology (2016) survey indicated that there are over 600 homelands in the Northern Territory.⁴⁹ People may have land rights, but because the Commonwealth and Northern Territory governments fail to support living at outstations, people are leaving their ancestral lands. To pressure Aboriginal people for whom connection to country, sacred sites and ancestors in the landscape are paramount values to live in the same way as non-Aboriginal people is a form of cultural genocide.⁵⁰

According to Woodward, one of the aims of land rights was to remove, as far as possible, the legitimate grievance of an important minority group within the community.⁵¹ After nearly half a century, we can see that this aim has failed. The Aboriginal Tent Embassy still stands in Canberra as a potent symbolic reminder of outstanding Aboriginal claims against the settler state. Gary Foley predicts that 'the Embassy can only be removed when Aboriginal people achieve their goals of land rights, self-determination and economic independence'.⁵²

This chapter makes two broad arguments. First, that the ALRA was initially designed as an innovative and progressive institution. However, as Commonwealth law, the ALRA is always vulnerable to change, especially if a government controls both houses of parliament. The ALRA has been increasingly poorly applied, adversely amended and associated with other increasingly misconceived policies of betterment. Second, the twin logics of the land rights agenda – to enable both difference and equality – are in so much tension that the ALRA, as a settler colonial project, must always fail to some degree irrespective of how it is attempted. The underlying

47 Woodward, *Commission*, 133.

48 Markham and Biddle, 'Income'.

49 Centre for Appropriate Technology, *Northern Territory Homelands*.

50 Altman, 'Raphael Lemkin'; see also Short, *Redefining Genocide*.

51 Woodward, *Commission*, 2.

52 Foley, 'A Reflection', 41.

principle of land rights policy should be to align with and support the aspirations of traditional owners and to assure them the resources they need. Government policy must acknowledge that Aboriginal people in some regions have very limited possibilities of becoming the same in statistical terms as the other Australians with whom they are so often compared. Informed by such realism, steps along Woodward's long road can yet again be forwards, not backwards.

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