

## The “Areas Affected Moneys”—Considering Regulation And Disclosure

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I make the observations in this paper looking back and seeking to better understand the legislative, administrative and political environment that absorbed me and threw me daily challenges for over two decades as an officer of the Australian Public Service. From 1982 to 2006, the core function of my duties was managing the fund known today as the Aboriginals Benefit Account, known otherwise over this period as the Aboriginals Benefit Trust Account, and the Aboriginals Benefit Reserve. Whereas the Government of the day has controls over expenditure from the fund, the revenues into the fund representing royalties are beyond its control, for they are subject to market forces. Therein lay many challenges.

The Statutory Royalty Equivalent regime established by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Land Rights Act) *per se*, is centred on the Aboriginals Benefit Account (ABA) and is unique to the Northern Territory. There are many dimensions to it. I will speak on one area of keen interest to me over the period above i.e. the “areas – affected” distributions from the ABA through the land councils to incorporated associations representing Aboriginal people affected by mining on their land. The views are my own and I do not set out to provide an authoritative critique of the legislation. Experience would tell us that that any legislative and administrative framework will have its critics – it is always easy to find fault, yet much harder to meaningfully and effectively improve a regime to fulfil outcomes sought by Government and other stakeholders. This would describe the endeavours to date to amend the Land Rights Act. I believe that any reviewer of Part III would have considered closely the issues of **regulation and disclosure** of the “areas-affected” moneys, two areas that would, I feel, naturally bother a tremulous public servant seeking to deliver the best results for a disparate group of stakeholders. In particular, do **regulation and disclosure** go far enough?

Significant moneys have flowed from the Australian Government’s Special Appropriations into the ABA and its antecedents, 30% of which (less Mining Withholding Tax) has been paid to the land councils, thence remitted by the land councils to incorporated entities on the basis that they represent traditional owners and others affected by the mine, which had paid royalties the equivalent of which were appropriated to initiate the process through the ABA. Since 1978, following the commencement of the Land Rights Act which establishes this Statutory Royalty Equivalent distribution process, and particularly from the 1980s, we came to refer to these incorporated entities as “royalty associations”, and to the 30% distribution from the ABA (less Mining Withholding Tax) through the land councils to the royalty associations, as the “areas-affected moneys”. The existing royalty associations are incorporated under either the Northern Territory *Associations Act 2003* (formerly under the *Associations Incorporation Act 1978*), or the Australian Government’s *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (formerly under the *Aboriginal Councils and Associations Act 1976*).

These distributions have grown and are growing, reflective of the commodities boom driving sales and profits of the miners on Aboriginal land in the NT higher. A table of the 30% areas-

affected moneys paid from the ABA to the land councils over the last five reporting years is below.

These amounts are net of Mining Withholding Tax (4%), levied on “mining payments” from the ABA, and in total approximate \$84 million over the 5 year period<sup>1</sup>.

<b>2006-2007 (rounded to \$'000)</b>	<b>2005-2006</b>	<b>2004-2005</b>	<b>2003-2004</b>	<b>2002-2003</b>
\$25,152,000	\$18,042,687	\$14,351,428	\$12,851,709	\$13,475,790

But what was intended by this process? What was then foreseen to be the fate of these areas-affected moneys? Were they intended by Government to flow on to per-capita or clan distributions, or were they meant to be accumulated, invested and create some financial independence for the Aboriginal people of the areas-affected? The Second-reading Speech in the Parliament by the Minister for Aboriginal Affairs of June 1976 in the passage of the Aboriginal Land Rights (Northern Territory) Bill does not give us any clear picture<sup>2</sup>. From the significant body of research into this payments regime, however, we can find references to the intention that the areas-affected moneys be compensatory and applied to community purposes<sup>3</sup>.

Were these intentions realised? Can we find out readily? First we need to identify the royalty associations in respect of which the land councils made determinations under the Land Rights Act to distribute the areas-affected moneys, then the quantum of those distributions. From a review of the annual reports of the two major land councils (Northern and Central) of the early 1980s, they give the reader some very useful information on these distributions and the recipient associations (i.e. their names and the amounts paid and payable to them), but this detailed level of information apparently ceased for some time, with the subsequent disclosure of aggregated figures only (i.e. total payments). The Anindilyakwa Land Council similarly provided these same useful disclosures on recipient associations from its initial report (1991-1992), yet only to 2006<sup>4</sup> (the Tiwi Land Council reported no areas-affected distributions over these periods).

These detailed reports were apparently voluntary disclosures – over some years we found line-item information disclosed by each, but for whatever reason it was subsequently discontinued. Arguably, users of General Purpose Financial Reports, from the Federal and Northern Territory Governments to members of the public, could have an interest in the destination of the areas-affected distributions as determined under the Land Rights Act by the land councils. As program moneys administered by Departments of the Australian Government in the Northern Territory for disadvantaged Indigenous communities grow demonstrably, and as we hear the phrase “income management” as a new addition to the vocabulary of those working in Indigenous Affairs, should we not seek to maximise our information on the outcomes from the areas-affected moneys? They are, from the table above, quite material in any scheme of funding.

Moreover, what is the character of the areas-affected moneys - are they taxpayer’s moneys in which the reader of the annual reports above can reasonably seek further information as to their destination, application and outcomes, or are they private moneys thus not the subject of further disclosure? We can find opposing views between John Reeves QC in his work

“*Building on Land Rights for the Next Generation – Report on the Review of the Aboriginal Land Rights (Northern Territory) Act 1976*” (considered to be public moneys), and the land councils in response to Reeves (considered to be private moneys)<sup>5</sup>, Whatever the view, should the reporting of payments by the land councils of the areas-affected moneys, in total and not as previously disaggregated, be the end of the trail? The keen reader could of course seek out the identity of the royalty associations from anecdotal information, the media (usually flagging a financial loss) or other local knowledge, and examine the audited financial statements lodged by the royalty association(s) with the Australian Government or Northern Territory Government Regulator<sup>6</sup>, in seeking to make some assessment of the outcomes Part III of the Land Rights Act has delivered.

Yet the detailed (or disaggregated) disclosures concerning payments to royalty associations appear again in 2006-2007 (if only in the 2006-2007 Annual Report of the Central Land Council)<sup>7</sup>, for the keen reader has been delivered a brace of amendments to Part III of the Land Rights Act of October 2006<sup>8</sup>, which appears to have solved the disclosure deficit discussed above. There is an irony here in that the (apparently voluntary) disclosures above by the three land councils in the 1980s and 1990s (Northern, Central and Anindilyakwa) have been seen by the Government of the day as fit to enshrine in legislation.

So what are some of the changes, the more salient changes, we can note from the amendments? Without quoting turgid passages of legislation a land council, in making a determination to distribute areas-affected moneys to a royalty association, must have regard to evaluations or audits of the royalty association and reports of those to the Federal Minister. No powers of intervention are set down for the Federal Minister however, for these powers are left to the relative Regulator of the royalty association. In addition to details of determinations it has made in favour of a royalty association, a land council must now disclose the name of the royalty association and the amount paid to it. Of further use to the keen reader, the *Northern Territory Associations Act 2003* requires preparation and lodgement of far more comprehensive financial statements by associations than those required by its predecessor, the *Northern Territory Associations Incorporation Act 1978*.<sup>9</sup>

Obligations are quite reasonably placed on the royalty association which receives the areas-affected moneys by the Land Rights Act amendments for, on spending these moneys, it must inform the recipient of the moneys of the purpose of the payment (i.e. it is tied to a purpose) and, in addition to providing the relative land council with a copy of the financial statements required by its regulator, the royalty association must provide a written report including details of the purpose of its expenditure, and the identity of the recipient and amount and date of the payment(s). For the benefit of the keen reader, surely this now provides unprecedented disclosure, if not a very useful audit trail of the areas-affected moneys. Taxpayers’ money or not, we seem to have overcome the disclosure deficits in legislation that existed prior to 2006-2007.

But now having this new breadth of information from 2006-2007, do the relative Regulators have the necessary powers to act on irregularities that it may throw up? Let us look at the past and present powers of the Regulators. The powers for the Northern Territory Regulator were provided under the *Associations Incorporations Act 1978* (as amended) up to 2004, for the royalty associations incorporated in the NT (as with all incorporated associations). Under this legislation the NT Regulator had powers to intervene in the affairs of an association. With the repeal of this legislation and the commencement of the *Association Act 2003* (from May

2004), the powers of intervention remained, which would appear to be quite comprehensive for the Regulator to apply in the event that an investigation into the affairs of a (royalty) association was considered to be appropriate.

Turning to the Federal sphere, royalty associations had incorporated under the *Aboriginal Councils and Associations Act 1976* (as amended) which, up to 2007, provided limited powers to the Regulator in respect of the affairs of a (royalty) association if it came to grief. Being of the same vintage as the Land Rights Act, it proved in need of reform, yet rather than pursue an amendment process only (it was reviewed in 2001), the Australian Government of the day repealed the *Aboriginal Councils and Associations Act 1976* (as amended) and introduced the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the *CAATSI Act*), effective from 1 July 2007. The *CAATSI Act* incorporates many provisions of and aligns with the *Corporations Act*, particularly as to duties of directors and officers, disclosure of related party transactions, maintaining a register of disqualified directors, and penalties. Under the *CAATSI Act*, the Regulator's powers include calling and running general meetings and Annual General Meetings, appointment of examiners and special administrators, obtaining information, and disqualifying persons from managing corporations. It provides for more penalties and offences than the *Aboriginal Councils and Associations Act 1976* (as amended)<sup>10</sup>.

It is therefore appropriate at this point to return to my question in the opening paragraph; do regulation and disclosure go far enough? I would posit that they do, for between the Land Rights Act amendments and the Northern Territory's *Associations Act 2003* (matters of disclosure) and the Australian Government's *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (matters of regulation), we have arguably a comprehensive regime, certainly relative to that which existed before in the Federal sphere, and had confounded and frustrated many of us in the Land Rights Act administration for several decades.

There will, however, be anomalies which come to light in respect of disclosure and regulation. The keen reader would recall the most public and spectacular report of losses and grief in respect of a royalty association representing the area affected by the Ranger Uranium Mine (and its related entities) found in "The Australian" newspaper during November 1999, with headlines which included "Mining payments bring no benefit"<sup>11</sup>, "Questions begin on Gagudju millions"<sup>12</sup> and "\$46m slips through 300 sets of fingers"<sup>13</sup>. Media reports over November 1999 referred to "an Aboriginal Association" and to "Gagudju Association" in this context. Why did the Regulator in the Northern Territory not rush to the rescue? The regulatory legislation then prevailing for Gagudju Association Inc. was the (Northern Territory) *Associations Incorporation Act 1978* (as amended) and, as found above, gave the NT Regulator powers of intervention. It would appear, however, from the audited financial statements of Gagudju Association Inc. for 1998-1999 and 1999-2000<sup>14</sup>, that the major grief and the losses were actually suffered by a related entity (a small proprietary company) over which the Northern Territory Regulator held no jurisdiction. The related entity would have been required to lodge annual returns by the Australian Investments and Securities Commission (ASIC), which may or may not have included audited financial statements (i.e. by virtue of threshold limits, it may not have been required to lodge this information)<sup>15</sup>. It would appear from the relative audited financial statements that for 1998-1999 and 1999-2000, Gagudju Association Inc. was actually solvent, notwithstanding the perceptions above.

Yet the questions must arise – what happened to the areas-affected moneys? Were they utilised effectively? From the headlines above re Gagudju, and from the short life of the Kunwinjku Association, which had received areas-affected moneys in respect of the Narbalek Uranium Mine from 1982 to 1988 (Kunwinjku was wound up in 1988)<sup>16</sup>, we have a public perception of a less than optimal outcome. We can, however, find positive news more recently e.g. the Rirratjingu Association Aboriginal Corporation of North East Arnhemland leveraging areas-affected moneys to secure grant funds and commercial finance for the Malpi Development, which provides rental accommodation in Nhulunbuy. I can recall years of complaints over areas-affected distributions on Groote Eylandt from traditional owners and the dissipation of those moneys, yet today, through the aggregating of the areas-affected moneys on Groote Eylandt to leverage additional funding, the Dugong Beach Resort stands as an example of the achievable.

Clearly, these observations do not give us the answers to the questions above – they only tell us that the overall result is likely to be mixed, and some rigorous research is needed on the application of the areas-affected moneys before we run to any conclusions as to their effectiveness.

Another question – should the areas-affected moneys be marshalled to close the gap on Indigenous disadvantage in the Northern Territory? When we consider the quantum and the trend of the areas-affected moneys in the table at page 2, it is apparent that the commodities boom now provides us with a special opportunity to do so.

To conclude, the effectiveness of the application of the areas-affected moneys cannot solely be a consequence of an ever expanding disclosure and regulatory regime. The real powers to maximise these moneys rest in the royalty associations themselves i.e. in the officer bearers, the officers and the members - an area that is arguably better addressed for the long term through education than regulation.

## Endnotes

<sup>1</sup> Published Annual Reports of the Aboriginals Benefit Account for 2002-2003, 2003-2004, 2004-2005, 2005-2006

Published Annual Report of the Department of Family and Community Services and Indigenous Affairs for 2006-2007

<sup>2</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 4 June 1976, 3081-3084 (Ian Viner, Minister for Aboriginal Affairs).

<sup>3</sup> For example, the Centre for Aboriginal Economic Policy Research, Monograph No. 14, *Land Rights at Risk? Evaluations of the Reeves Report*, edited by J C Altman, F Morphy and T Rowse, chapter 10, pp123-124

<sup>4</sup> Published Annual Reports of the Northern Land Council from 1982-1983 to 2005-2006

Published Annual Reports of the Central Land Council from 1982-1983 to 2005-2006

Published Annual Reports of the Anindilyakwa Land Council from 1991-1992 to 2005-2006

Published Annual Reports of the Tiwi Land Council from 1982-1983 to 2005-2006

<sup>5</sup> Unlocking the Future: The Report of the Inquiry into the Reeves Review of the *Aboriginal Land Rights (Northern Territory) Act 1976*, August 1999

<sup>6</sup> The term “Regulator” is used in reference to the Registrar of the Office of the Registrar of Aboriginal Corporations, and to the Northern Territory Commissioner for Consumer Affairs

<sup>7</sup> 2006-2007 Published Annual Reports of the Northern, Central, Tiwi and Anindilyakwa Land Councils. The Tiwi Land Council reported nil areas-affected distributions over this period.

<sup>8</sup> *The Aboriginal Land Rights (Northern Territory) Act 1976*, Act No. 191 of 1976 as amended, compilation prepared on 17 February 2008 taking into account amendments up to Act No. 128 of 2007

<sup>9</sup> The *Associations Incorporation Act 1978* required preparation and lodgement of a balance sheet only (i.e. the association’s financial position only as at the end of the year), whereas the *Associations Act 2003* requires preparation and lodgement of financial statements disclosing transactions of the association for the year and the net result, in addition to its financial position as at the end of the year.

<sup>10</sup> Fact sheets prepared by the Australian Government Registrar of Aboriginal Corporations in 2006-2007

<sup>11</sup> “The Australian” of 15 November 1999

<sup>12</sup> “The Australian” of 10 November 1999

<sup>13</sup> “The Australian” of 9 November 1999

<sup>14</sup> Audited financial statements of Gagudju Association Incorporated for years ended 1999 and 2000, as lodged with the Northern Territory Regulator

<sup>15</sup> A search of ASIC records revealed nil lodgement of audited financial statements for 1998-1999 by Gagudju Enterprises P/L.

<sup>16</sup> Parliament of Australia: Senate: Committee: Report on Uranium Mining and Milling in the Northern Territory – April 1997