ATSIC SUBMISSION (INCLUDING OPENING STATEMENT)

THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS INQUIRY INTO THE RECOMMENDATIONS OF THE REEVES REPORT

CANBERRA 10 MARCH 1999

Reeves Review: Submission to HORSCATSIA

Canberra 10 March 1999

Opening Statement

Mr Chairman

In making these opening comments to the Committee today, I would like first of all to introduce the ATSIC representatives who are here today to meet with the Committee.

I convey the apologies of the ATSIC Chairman, Mr Gatjil Djerrkura, but it was not possible to find a time which suited both the Committee and Mr Djerrkura.

We met with the Committee one week ago in Darwin. The primary purpose of today's meeting is to provide to the Committee a formal submission on the Reeves Report. However I must stress that we do not see this as our final word on the Reeves Report.

As I indicated in Darwin, we wish to reserve our right to make further submissions to the Committee in the light of ongoing analysis and further consideration by the ATSIC elected arm and the Aboriginal community of the Northern Territory.

In these comments I wish to emphasise a number of points which ATSIC considers to be of importance. We want the Committee to take careful note of these matters.

Firstly, there is the ongoing importance of traditional law and custom in respect of Aboriginal decision making about land. There are two issues here.

One is that in the Northern Territory, Aboriginal law and custom by and large remains central to how decisions are made, and that to flout such law and traditions is not acceptable.

The other is that this fundamental fact of Aboriginal life should be reflected in the land rights legislation. If it is not, we should not call this land rights legislation at all. At present the Land Rights Act gives traditional owners primacy in decision making.

Under the Reeves proposals this would no longer be the case.

The committee will find that this is a consistent theme when it meets with Aboriginal communities and people, and also in submissions from leading experts.

Evidence taken by this Committee at Bathurst Island last week made very clear that ultimately decisions about the use of Aboriginal land can only be made by the traditional owners of that particular land - by the clan responsible under Aboriginal law for its control and management.

There is no getting around this fact of Aboriginal law in the Northern Territory - sure there are all sorts of responsibilities held by all sorts of people, depending on the nature of decisions to be made - but in the last resort only certain people can speak for what we call "country" - and this is the basis of Aboriginal law and custom.

What we are saying is that the necessary connection in the legislation between decisions about land and traditional ownership must not be broken. Unfortunately this is exactly what Mr Reeves proposes.

ATSIC calls on the Committee to explicitly and unanimously reject the Reeves Report in this regard. Otherwise we will have a regime which is directly hostile to Aboriginal culture.

In these circumstances we will be back to the discredited policy of assimilation, which caused so much pain and suffering.

Australia will stand condemned for disregarding the fundamental human rights of its indigenous people to live and act in accordance with their law and culture.

I turn now to the circumstance surrounding the development of the Reeves Report. We discussed some of these matters in Darwin, but ATSIC is concerned that the Committee should squarely confront these matters.

It is not just that there may have been some problems with the way the Report was developed, but that we should now get on with looking at the recommendations. In the case of Reeves the problems are so significant that they have to be addressed.

These problems start with the unsuitability of the reviewer. A single Northern Territory barrister, who had limited experience in the area of land rights, and with a strong political involvement in the life of the Northern Territory, was clearly an inappropriate choice.

There is a perception, rightly or wrongly, of bias and of an agenda set by the Northern Territory Government.

The significance of this is that the report lacks credibility, as will any amendments to the Act based on it.

As well there are the huge problems in the consultation process followed, and where there was no consultation in relation to major recommendations in the report.

The fact that the report was developed with virtually no input from the Steering Committee which had been set up to guide it needs to be noted and considered, and, ATSIC suggests, questions should be asked.

The huge costs of the exercise, now in excess of $1.3 million, should also be noted, given the enormous problems facing us in terms of Aboriginal health and housing.

What we are asking the Committee to do is to confront and consider these basic flaws in the Reeves Report. They are too important to be skipped over.

ATSIC is also concerned that the deliberations of this Committee will similarly be based on inadequate consultation processes.

Already there are worrying signs. It is simply not sufficient to visit some communities for a few short hours and consider that any accurate view of Aboriginal responses to the Reeves Report can be obtained.

There needs to be adequate time and resources. There needs to be a recognition that the hearings process is foreign to many Aboriginal people and it is very difficult for them. In this case these difficulties are compounded by the absurdly complex Reeves Report.

It must be remembered that very few Aboriginal people in the Northern Territory have formal schooling beyond a basic primary or junior high school level, and that for many people English is a second language which is both poorly understood and a difficult medium of communication, especially at the level of legislation and policy.

These cross-cultural and language difficulties are to some degree inevitable. But the Committee should be aware of them, do everything in its power to minimise them, and realise it should be cautious in its approach.

One obvious way to respond to this situation is to be prepared to spend more time with more communities. For example what sort of consultation process in the Northern Territory can leave out the whole Gulf Region?

The question here is whose timetable is important? Why is there a rush? Would it not be better for a more inclusive process even if it took a little longer? Remember, Aboriginal people will be living with the consequences of these changes for a long time.

There are some specific issues which ATSIC wants to draw to the attention of the Committee. One is that our legal view is that there are significant legal problems in respect of a number of proposals in the Reeves Report.

These legal issues are summarised in the submission we are presenting today. These concerns are serious enough to put a major question mark over a number of the central proposals in the Reeves Report.

The Committee should take careful note of these legal concerns, which cover Constitutional problems, problems with the Racial Discrimination Act, and problems of natural justice and of established legal policy.

We would be prepared to expand on these problems at a later date. For the moment we have identified where the major problems lie.

I turn now to the proposed abolition of land trusts, and the transfer of Aboriginal land from the trusts to the regional land councils. In Darwin, Chairperson Mr Jack spelt out for the Committee how wrong Mr Reeves has been in saying that these trusts do little. ATSIC wishes the Committee to take particular note of the issue of land trusts.

To ATSIC, the proposed abolition of the land trusts represents an unjustified and inexcusable expropriation of property. It would generate compensation claims.

More importantly, it is hard to imagine the hurt and bitterness which would result. All those claimants who over the years since 1976 have been successful in getting their land granted, having trusts established and being provided with the deeds to their land would see this all taken back. Their title would be handed over to regional land councils, who might or might not include or represent the traditional owners

This would be a cruel blow and a betrayal of trust beyond imagination. It would make a mockery of all the processes which have taken place for land claims under the Act.

If anything, the role and functions of land trusts should in fact be strengthened in the Land Rights Act

ATSIC and others have made clear their opposition to the proposal to set up 18 regional land councils. ATSIC acknowledges that in some areas there are concerns about the large land councils and a desire either for a greater degree of devolution or the formation of new land councils.

It seems evident that the existing provisions of the Act allow for these circumstances, and as has been pointed out, 2 land councils have been set up under these provisions - the Tiwi and Anindilyakwa Land Councils.

Nevertheless, to the extent problems are perceived with the current provisions of the Act providing for new land councils or for devolution of functions, let us examine them and see whether some modifications or improvements are required. ATSIC could do this, in consultation with the 4 existing land councils and the Minister.

There are two further issues which ATSIC believes should be dealt with and disposed of now, so as not to waste the time and resources of the Committee and other interested parties any further.

One is the proposed Northern Territory Aboriginal Council. We have gone to some length in our submission to show that Mr Reeves has gone outside his terms of reference and exceeded his mandate in the Report.

This is no where clearer than with the proposal for NTAC. It should be clear by now, following the hearings in Darwin and Bathurst Island last week, that this proposal is completely unacceptable.

Mr Reeves has proposed a structure for land rights which would in effect be a new set of institutional, administrative and financial arrangements in respect of programs for Aboriginal social and economic development in the Northern Territory.

Under the Reeves proposals the Land Rights Act becomes the vehicle for Aboriginal affairs in the Northern Territory.

The proposed Northern Territory Aboriginal Council is to become the primary co-ordinating agency for Aboriginal programs and funding, subsuming the Aboriginal Benefits Reserve, Northern Territory Government and Commonwealth and ATSIC programs.

In respect of ATSIC, it should be noted that NTAC is clearly designed as the way to replace ATSIC in the Northern Territory, by taking over its programs.

We will see the elected ATSIC regional councils sidelined under the new NTAC and regional land councils model proposed by Reeves. This development clearly has implications wider than the Northern Territory.

Regional land councils, funded by NTAC from ATSIC appropriations, will deliver CDEP, housing and other programs. Such organisation will be land councils in name only.

What we are seeing is the first stage in the dismantling of ATSIC nationally, and its replacement by regional bodies under the control of Government appointed or influenced bodies such as NTAC.

Such a development will mean a significant retreat from Aboriginal self determination in this country. In the Northern Territory it will signal a return to the paternalism of Welfare Branch days.

NTAC is an idea which should never have surfaced in this Report. It would be an organisation which would be opposed by virtually all Aboriginal people.

To dispose of this proposal at an early stage would certainly assist in focussing on the operational provisions of the Land Rights Act.

Another is the proposed abolition of the permit system.

The rejection of this Reeves proposal is strong - take the evidence given by Aboriginal people so far, including the strong support for retaining the permit system in evidence given at Bathurst Island last Wednesday.

The proposal to abolish the permit system is unrealistic and unworkable. It smacks of cheap populism. If there are problems with the permit system, and this remains to be seen, they can be attended to without scrapping this essential element of land rights.

In respect of permits at Gove, ATSIC was asked by the Committee Chair to make a response to concerns raised in Nabalco's submission to the Committee. Although there has not been the time to investigate the matter fully, the following comments are provided for the Committee’s information.

As far as the issue of access and the permit system on p.9 of the Nabalco submission, there is more to this matter than the Nabalco submission would suggest.

Pressure to use the land to meet the recreation needs of residents of Nhulunbuy began after the gazettal of the Mining (Gove Peninsula Nabalco Agreement) Ordinance of

1968. In 1975 clan leaders and community members agreed to designate 15 areas for recreation and established a permit system for access.

These permits were originally issued by Government departments and subsequently by the Northern Land Council.

Degradation of areas used for recreation became noticeable as early as 1980. It was clear that the concerns of the Aboriginal people about the cultural and environmental health of the land was not always echoed by similar concern from those seeking to use it for recreation.

There were difficulties with the existing permit arrangements because they were not supported by a sustainable management regime. Consequently the clan leaders established Dhimurru Land Management as their natural and cultural resource agency in 1992.

Dhimurru took over the issuing of permits to some 20 designated recreation areas, and supported by permit fees undertook a series of environmental rehabilitation and monitoring programs with Yolngu rangers.

Nabalco suggests that designated areas have been withdrawn or temporarily closed from time to time. However, it should be noted that where this has occurred it has usually been in response to direct and repeated infringements of permit conditions. Also this is accepted land management practice where there is land degradation.

But the point to be made here is that the landowners are entirely within their rights, both under Aboriginal and European law, to offer or deny access to any parts of their land. That is a right enjoyed by all other landholders in Australia.

Simply put, Nabalco is still living in the time of Judge Blackburn and the Gove decision. Nothing has happened since then – not the Woodward report, not the Land Rights Act, not Mabo and not Wik – has got through to Nabalco.

In concluding these opening remarks, I wish to point out that ATSIC is opposed to the thrust of the Reeves proposals.

We see this as a fundamentally flawed report, and invite the Committee to confront this fact.

As others have said, this has been a lost opportunity for review and reform of the Land Rights Act.

ATSIC believes that Mr Reeves proposals to fundamentally rewrite the Land Rights Act must be rejected outright. The nexus between traditional owners and decision-making must be retained. There is no excuse to diminish either the statutory or common law rights of Aboriginal people in the Northern Territory.

ATSIC is happy to co-operate in reviewing the workability of the Land Rights Act.

ATSIC is opposed to its wholesale destruction as proposed by the Reeves Review.

We believe this Committee has a heavy responsibility to restore balance and common sense to the review of the Land Rights Act in its consideration of the Reeves Report and its report to the Government.

Thank you Mr Chairman. I will now ask my fellow ATSIC representatives if they wish to add anything at this stage, before turning to any questions members of the Committee may have.

Review of the Aboriginal Land Rights (Northern Territory) Act 1976

Submission to the House of Representatives Standing Committee

Introduction

In introducing his Report 'Building on Land Rights for the Next Generation" Mr Reeves notes the many changes which have taken place in the Northern Territory in the quarter century since Justice Woodward proposed a Land Rights Act. Accordingly, Mr Reeves emphasises the need for this generation to look afresh at the provisions of the Land Rights Act.

Mr Reeves says that, in general terms, this is what the review is about – reconsidering the Land Rights Act and taking into account arrangements as they have evolved over time, the current cultural social and economic circumstances of Aboriginal people, and the broader social, political and economic conditions prevailing in the Northern Territory and in Australia generally.

Mr Reeves set himself a huge task. Such a comprehensive exercise encompassing historical, cultural, social and economic analysis goes well beyond the confines of an operational review of the legislation. The risks in a single reviewer undertaking such an ambitious project over a relatively short time period are high. These risks include faulty or wrong analysis, based on incomplete facts or misreading of the facts, and flawed findings and inappropriate recommendations.

Mr Reeves justifies this broad approach by reference to the Terms of Reference set for the Review. He notes that the Terms of Reference require the Review to consider broad socio-economic issues as well as a number of specific issues arising out of the provisions of the Act. Mr Reeves asserts that the Terms of Reference operate at two levels. They are sufficiently wide to allow recommendations which propose broad changes relating to the purposes of the Act in the light of his interpretation of current circumstances. At the same time they require attention to a number of specific issues.

ATSIC does not agree that the Terms of Reference should be read the way that Mr Reeves has done. Only one of the Terms of Reference, number (ii), refers to the broader issue of social cultural and economic costs and benefits. The other eight Terms of Reference are all concerned with specific matters pertaining to the implementation of the Land Rights Act. This shows what the Review should have been about - that is a focus on improving the efficiency and effectiveness of the operation of the Land Rights Act. Further, the particular Term of Reference which Mr Reeves relies on as the justification for taking a wide approach calls for an assessment of the impact of the legislation in terms of social, economic, cultural and economic costs and benefits. It does not call for or mandate recommendations proposing a radical transformation of the purposes of the Act.

Whilst there is little justification for the wide view Mr Reeves has taken of his task, there clearly was a need for a review of the operation of the Act. There had been no review since that undertaken by Justice Toohey in 1983. It had always been the

intention to review the operation of the Act on a regular basis and ATSIC supported a review being undertaken at this time. However, it was never envisaged that such a review should result in a proposed fundamental rewrite of the Act, as we now have before us.

ATSIC suggested that the reviewer should be provided with a set of principles to guide his work, in the same way that the then Minister, the Hon Clyde Holding, had provided such principles to guide the review undertaken by Justice Toohey in 1983 (see p XVIII of the ATSIC submission to the Review of January 1998).

Unfortunately the proposal that some guiding principles should be provided for the review was not accepted. Similarly, as discussed in the Report at pp 9-10, the Northern Land Council (NLC) proposed that the Review be conducted within a set of core or guiding principles (see also "Our land, Our law". Northern Land Council Submission to the Review, December 1997 p 17). Mr Reeves rejected the NLC proposal, stating that : 'Notwithstanding the NLC's proposed principles, I have conducted the Review on the basis that every matter that is relevant to the Terms of Reference is open for examination". (p 10)

We must all live with the consequences now. What we have to deal with is an extraordinarily complex long, and difficult document which goes well outside any mandate for an operational review of the legislation. It should be noted that the cost to the ATSIC Budget as a result of this approach is now over $1 million, with not all costs yet brought in.

The thrust of the Recommendations would see a dismantling of the current land rights provisions as they have developed to date, and a wholesale restructuring of the associated political and institutional arrangements.

Not only has the reviewer gone well beyond his mandate and left us with an unwieldy report. Not surprisingly, the Report's findings are fundamentally flawed, and its recommendations are in the main unworkable. Consequently, we are in danger of bitter contention, conflict and division about a set of unworkable and unacceptable recommendations. This is a recipe for confusion, and rather than fostering partnership and social cohesion, will only exacerbate existing divisions and create increased uncertainty for all.

The report's findings are not acceptable to Aboriginal people. However, there is likely to be widespread concern about these proposals in the wider Australian community as well as amongst Aboriginal people. Any perceived dismantling of land rights in the Northern Territory will also almost certainly come under international scrutiny and possibly attract international criticism.

The purposes of the legislation

Chapter four of the Report is "Effectiveness of the Act in Achieving its Purposes". This apparently innocent title addresses the first Term of Reference, which reads "(i) the effectiveness of the legislation in achieving its purpose". It should be noted that this Term of Reference clearly refers to a singular purpose in respect of the Act. Mr Reeves contrives to find additional purposes, and to propose new ones.

There is no doubt that Mr Reeves is correct in identifying the main purpose of the Land Rights Act as being to grant traditional Aboriginal land in the Northern Territory to, and for the benefit of, Aboriginals. However his attempt to identify two further purposes of the Act is not convincing. These additional purposes, according to Mr Reeves, relying on a range of sources extraneous to the Act, are:

- To recognise traditional Aboriginal interests in, and relationships to, land; and
- To provide Aboriginal people with effective control over activities on the land so granted.

(for proposed new purposes see below)

ATSIC does not find this interpretation of the Act and other sources particularly convincing. These purported purposes should be seen as part and parcel of the main purpose of returning Aboriginal land to its owners. Along with this return of title ATSIC believes that Aboriginals by and large have regained the ability to control the use of their land, including access to it. Whilst Mr Reeves acknowledges that the Act has been very successful in meeting its primary objective of returning land, and its secondary objective of recognising traditional Aboriginal interests in and relationships to land, he argues that it has not been as effective in meeting the third of his identified purposes, that is providing Aboriginal people with effective control over activities on their land.

This contention by Mr Reeves is central to some of the major findings and recommendations of the Report. However, ATSIC believes it is fundamentally flawed. In fact, Mr Reeves goes so far as to claim:

> "In my view, the decision-making structure provided under the Act is almost the exact opposite of the community or regional decision making process that are usually followed by Aboriginal people".

This interpretation is at odds with the reality of the operation of the Land Rights Act. There will always be difficulties and frustrations when two quite different legal systems intersect, as happens when the Land Rights Act recognises traditional ownership and the right of traditional owners to exercise their authority in respect of decisions about activities on their land. Necessarily the arrangements which provide an interface between the two societies are going to be difficult for both.

It is important to get the best fit possible, and if some Aboriginal people complain of problems with the system in place those difficulties should be examined and changes made where possible. But this is a long way from saying that Aboriginal people are disempowered by the Land Rights legislation. In fact it is clear that regaining country, and being able to consent to or reject activities proposed for the country, has resulted in Aboriginal people, in particular the traditional owners, having a very great deal of control over the activities that occur on their land, in just the way intended by the purpose of the Act.

This is not to deny that there may be legitimate concerns – but it is to reject outright Mr Reeves' central assertion that the Land Rights Act has not worked in terms of Aboriginal self-determination for Aboriginal lands.

However, it is when Mr Reeves goes on to propose entirely new purposes for the Act that his propositions become quite unacceptable. The first of the new purposes to be imposed on Aboriginal people via the vehicle of the Land Rights Act is "forming a partnership" between Aboriginal Territorians, the Northern Territory Government and other Territorians.

Firstly it should be noted that ATSIC did not propose or support this purpose being added to the Act, despite the appearance that this might be so from the discussion on p.71 of the review report. In fact, ATSIC explicitly opposed such a purpose being identified for the Act in its submission to the Reeves Inquiry of January 1998 (p XIX).

Secondly, Aboriginal people are being asked to give up their rights in order to make this partnership. Mr Reeves contends that a partnership involves some give and take on both sides. When we look at the list of give and takes on p.73 of the Report, it is clear which party is being asked to give up things of substance. It is clearly the Aboriginal side.

It is intended for example that the programs provided by this agency, ATSIC, will come under the control of the new Northern Territory Aboriginal Council (NTAC). See also p.613 to see the extent of the grab for ATSIC funds involved here. That a body which will not be elected but will be appointed jointly by the Chief Minister and the Commonwealth Minister will have this control as part of the partnership arrangement is clearly a significant step away from self-determination.

The proposal that CDEP should be transferred to NTAC and that consideration be given to transferring other ATSIC programs, is of major concern. ATSIC would be sidelined in the Northern Territory. Quite clearly this would be the first step to dismantling ATSIC nation-wide.

Such a major development would mean that this country will have moved away from providing for self-determination for its indigenous peoples. The importance of the Reeves Report in abolishing through displacement the ATSIC elected regional councils in the Northern Territory cannot be underestimated. This will represent a return to the paternalism and Government control which characterised the role of the Welfare Branch in the Northern Territory under the policy of assimilation.

In a similar vein the new purpose of Aboriginal social and economic development is inappropriate. Of course the return of traditional lands can be very important in achieving these objectives. But many Aboriginal people do not live on Aboriginal land, and it is a serious distortion of the purpose of the Land Rights Act to impose this overriding Territory-wide objective on the Act. The result will be that in achieving the desired outcomes of partnership and economic and social development the whole purpose and idea of recognition of traditional rights and culture and traditional land ownership rights will be subsumed and lost.

Major issues

The report is fundamentally flawed in 3 areas:

- The reporting process
- The anthropology; and
- The law

Inadequate consultation processes in the conduct of the review.

Given the scope of the Report, the consultation process undertaken was clearly inadequate. A short visit to a community to hear the views of Aboriginal people on the Land Rights Act against the Terms of Reference, with little in the way of advance information to the communities of what the review was about, is hardly an adequate consultation process.

One or two days at a meeting where people attending may come from a large number of communities and language groups is simply not good enough. For example, reference to the transcript for the Tennant Creek meeting of 11 February 1998 shows that there were a number of expressions of concern that not enough time was being provided and that people had difficulty understanding what was going on. Eventually Mr Reeves agreed to an extra day, which was the 3rd of March. But given the amount of Aboriginal land in the vicinity of Tennant Creek, the large number of Aboriginal communities, and the range of circumstances confronting Aboriginal people in the area, this is a clearly inadequate consultation process.

Mr Reeves acknowledges that there was criticism of the timetable for the Review. However he concludes that:

"Nonetheless, I am confident that the Aboriginal people of the Northern Territory were widely consulted during this Review and given the opportunity to express their views"" ATSIC knows, on the basis of its representative role and its considerable experience, that the degree of consultation undertaken by Mr Reeves falls short of even minimal requirements.

A further complaint about the consultation process is that the Report seems to be a poor reflection of the meetings which took place, and that in particular key findings and recommendations, such as the proposal to establish NTAC, appear to be unrelated to such discussions had with Aboriginal people. There is not a single submission from Aboriginal interests that proposes any of the major recommendations made by Mr Reeves.

It is important for this Committee to be aware of the difficulties of consultation with remote Aboriginal communities, the need to provide adequate time and resources for such consultations to be meaningful, and the dangers of developing recommendations on the basis of an inadequate and inappropriate consultative process. This is another reason why the sheer scale of the Reeves Report adds to the difficulty of a manageable and fair consideration of it.

Flawed understanding of Aboriginal society in the Northern Territory

The extensive discussion in the report of the basis of traditional land ownership and decision-making processes in respect of such land which we find in this Report is all directed to one result – that is to break the nexus in the current Act between traditional

land owners and decisions about land. By refuting the local descent group with affiliation to sacred sites, the Reeves Report is able to substitute an amorphous vaguely defined concept of regional populations as the basis by which Aboriginal society is reproduced socially and culturally. This revisionist anthropology has come under strong attack from leading authoritative anthropologists, and no doubt the Committee will receive submissions from anthropologists rebutting the views on these matters of the Reeves Report.

ATSIC can report that the proposal to remove the traditional owners from the scheme of the Land Rights Act is seen from another perspective by Aboriginal people. It is seen as an affront to the very recognition and acknowledgment of Aboriginal custom and culture which the Land Rights Act was intended to provide, and which its provisions embody. To Aboriginal people, this is a return to the discredited assimilation policies of the past. If you are an Aboriginal you do not need the chapters Mr Reeves devotes to the subject to know that only certain people can speak for country – and this is the long and the short of it. You also know that regional populations as such can never speak for country. Land ownership and land management is all to do with descent groups and affiliation to sites. Western anthropology attempts to capture this law-based system with terms such as "clans", or "local descent groups". In fact, the Land Rights Act, whilst it may not be perfect, has got it pretty right. If Regional Land Councils can consist of people who have no affiliation with country, and if those people can have an equal say in respect of decisions about country, the power of the legislature is being used to socially engineer Aboriginal society. This denigration of traditional law and custom, more than any other aspect of the many obnoxious proposals in this Report, will lead to despair and disillusionment, conflict and strife within Aboriginal communities, and social disruption and breakdown.

It is only through keeping our culture strong that our society can face the challenges of the 21st century in a strong and positive way. The Land Rights Act has been our hope. To turn it into an amorphous social and economic program delivery mechanism which at best pays lip service to Aboriginal traditions and law, is assimilationist and regressive.

Failure to deal adequately with the legal context

Parts of the Report are based on errors of law. Some of the recommendations in the report cannot be implemented because they are unconstitutional or would probably require the payment of vast amounts of compensation. Some of the recommendations in the report contradict established legal policy. The implementation of some of the recommendations in the report would involve racial discrimination and infringement of human rights.

In brief, the areas of concern are:

Payments to Royalty Associations

- Reeves says the mining royalty equivalents paid to royalty associations are public moneys. Therefore the royalty associations should be accountable for them.

- The analysis is legally flawed. Reeves gives insufficient weight to the legal and policy consequences of the interposition of the Land Councils between the Aboriginal Benefits Reserve and the Royalty Associations.
- In consequence of that interposition the moneys cease to be public moneys for the purposes of the *Financial Management and Accountability Act 1997*.
- An entirely different legal and accounting regime, the *Commonwealth Authorities and Companies Act 1997*, applies.
- In determining appropriate accountability arrangements regard should be had to:
    - the historical background, in particular the historical explanation of the payments as compensation
    - the reasons for and the consequences of interposition of the Land Councils between the public money account (the Aboriginal Benefits Reserve) and payments to Royalty Associations.

Acquisition Issues

- It is strongly arguable that any amendment of the *Aboriginal Land Rights (Northern Territory) Act 1976* that gave rise to an acquisition would require the payment of just terms compensation.
- In any event, if the principles of the *Racial Discrimination Act 1975* are applied, compensation must be provided for any acquisition.
- Implementation of the following recommendations may give rise to an acquisition:

    - That RLC's hold all Aboriginal land
    - Modification of rights relating to Aboriginal land
    - That a grant under the Land Rights Act should extinguish native
    - That a grant under the Pastoral Land Act (NT) should extinguish native title
    - Taking over the assets of Royalty Associations
    - Reservation of ownership of living fish and native fauna
    - Remedy of the 'error' in relation to the Elliott Stockyards

Cultural Protection and Racial Discrimination Issues

(i)International Covenant on Civil and Political Rights

- Implementation of the following recommendations, either individually or cumulatively, could give rise to breach of Australia's obligations under the International Covenant on Civil and Political Rights:

1.

- Repeal of s.70 of the Land Rights Act together with repeal of Part II of the Aboriginal Land Act (NT) (the prohibition of entry on Aboriginal Land and the permit system)
- Repeal of s.74 and amendment of s.71 of the Land Rights Act to remove the current protection against application to Aboriginal land of inconsistent Northern Territory laws and instead to enable application of Northern Territory laws to Aboriginal land notwithstanding negative effects on the use and occupation of that land
- Repeal of ss 67 and 68 of the Land Rights Act and insertion of new provisions with the result that Aboriginal land may be compulsorily acquired by the

Northern Territory and roads may be constructed over Aboriginal land without Aboriginal consent

- Reservation to the Crown of ownership of all living fish and native fauna on Aboriginal land together with a joint management regime in which conservation and other interests would override Aboriginal interests
- Amendment of the Land Rights Act and the *Mining Act* (NT) to make provision for licences to enter Aboriginal land for reconnaissance exploration without Aboriginal consent
  Transfer of all Aboriginal land into 18 separate regions with 18 new Regional Land Councils becoming the trustees and carrying out the trustee duties presently carried out by the Land Trusts together with provision for the Northern Territory Aboriginal Council to be able to intervene in the affairs of the Regional Land Councils.

(ii)Racial Discrimination

- Implementation of a number of recommendations, either alone or in combination, would give rise to inconsistency with the principles of the *Racial Discrimination Act 1975 (RDA).*
- The later legislation would prevail over the RDA.
- Implementation of those recommendations would, however, give rise to racial discrimination contrary to the *International Convention for the Elimination of All Forms of Racial Discrimination*
- In consequence, the constitutional validity of the *Racial Discrimination Act 1975* would be at risk.
- Such recommendations include
  - That RLC's hold all Aboriginal land (implementation would require expropriation from current title holders, the Land Trusts)
  - Taking over the assets of Royalty Associations.

Judicial Power Issues

- Implementation of the following recommendations is likely to give rise to invalidity by reason of infringement of the requirements of Chapter 111 of the Constitution
  - The recommendation that the Aboriginal Land Commissioner have regard to detriment (pp.255-256, 269)
  - The recommendation that dispute resolution functions be conferred on Regional Land Councils (pp.212, 213, 595)

Specific Proposals

1.The replacement of the existing system of four Land Councils by a new system comprising an umbrella body to be known as the Northern Territory Aboriginal Council and eighteen Regional Land Councils

The Northern Territory Aboriginal Council will have extensive powers, especially in supervising the Regional Land Councils and controlling funds. Its Board is to be appointed jointly by the Chief Minister of the Northern Territory and the

Commonwealth Minister for Aboriginal and Torres Strait Islander Affairs. The proposal is unacceptable because:

(a) it is fundamentally undemocratic;
(b) NTAC will not be answerable to Aboriginal peoples;
(c) it significantly increases the role of the NT Government in the administration of the Act; and may eventually lead to a confusion of the role of the Council with that of the Northern Territory Government in delivery of programs to Aboriginal communities;
(d) It may, according to the Report, divest ATSIC of its responsibilities and award ATSIC's programs to the new body. This proposal is contrary to self-determination and is totally unacceptable to ATSIC.

The eighteen Regional Land Councils will be required to undertake all of the functions of the present Land Councils in their regions with the exceptions of completing the land claims process, sacred sites assistance, and assistance with commercial ventures, which functions will be undertaken by NTAC or the Northern Territory Government.

However, they would not replicate the existing land councils, whose decisions must be taken in accordance with the informed consent of the traditional owners. No such requirement is proposed in the Report, and each new Regional Land Council would be free to make its own decision-making process. To quote from the Report:

> "Each RLC should be required to make its decisions in the best interests of the Aboriginal people of its region and should be entitled to adopt the decision making process that it considers best reflects Aboriginal traditional processes in its region" (p213)

This formulation, coupled with the lack of effective legal redress under Mr Reeves recommendations, is an invitation to instability and strife. There are clear dangers within small land councils operating on such nebulous guidelines of nepotism, unfair procedures, and denial of traditional rights and entitlements.

In addition, residents who do not have traditional affiliations to land within a Regional Council area will still be able to be members and take part in decision-making, a proposition totally unacceptable to ATSIC. This is quite contrary to Aboriginal customary law – if it becomes possible it will only be because the imposed Australian legal system deliberately overrides Aboriginal law and custom.

ATSIC is not opposed to the creation of new Land Councils. There are, however, already provisions in the Land Rights Act which enable new Land Councils to be established if a substantial majority of those Aboriginal people affected are in favour. These provisions should be relied upon where appropriate, as they allow Aboriginal people to make the decision. Two Land Councils, the Tiwi and Anindilyakwa, have in fact been established using the provisions of the current Act, and there is no reason why more such land councils should not be established in the future. ATSIC also supports the functions and powers of Land Councils being able to be devolved to Regional Committees.

2. Extinguishment of native title on Aboriginal Land and Community Living Areas.

Such widespread extinguishment of native title rights as proposed by Mr Reeves is unprecedented. It would result in the extinguishment of native title over virtually 50% of the land mass of the Northern Territory and goes even further than the Government's Wik Ten Point Plan legislation. Extinguishment of rights, without the agreement of the native title holders, will infringe legal and constitutional protections of those persons.

3. Abolition of the permit system and replacement by the clearly inadequate and inappropriate NT Trespass laws.

No evidence is presented in the Reeves report to suggest that anyone is being unreasonably denied access to Aboriginal land or that there are other problems with the current system. If there are problems, they can be remedied without abolishing effective controls over entry onto Aboriginal land. It is this sort of issue which should be addressed by the Review at a practical and pragmatic level, to see if there is a problem, if so to what extent, and what might be appropriate remedies to any defects in the operation of the system. The idea that revamped NT Trespass laws could operate to provide the privacy and control that make ownership of land meaningful is clearly inappropriate and unworkable. The intent behind these proposals seems to be to open up Aboriginal land to much freer access. This proposal is rejected by ATSIC as contrary to the intent of providing land rights in the form of inalienable freehold title to Aboriginal people.

4. The proposed removal of sacred sites protection from the Act, leaving such protection only to NT laws.

This will leave sacred sites protection at the mercy of the Northern Territory Government, which can pass legislation to amend its laws in the single house Parliament in a day, without even consulting indigenous people. This is unacceptable to Aboriginal people.

5. The proposal for massive changes to the Aboriginal Benefit Reserve and the Royalty Associations

All of these proposals ultimately have the same consequence – to make the ABR an instrument of government rather than of Aboriginal Territorians.

Mr Reeves recommends that the Act should be amended to include a clear statement of purposes for the distribution of funds in the ABR. That purpose, according to Mr Reeves, should be to promote the social and economic development of Aboriginal people in the Northern Territory.

That purpose is at odds with the fact that these monies , since 1952, have always been regarded as compensation for the effects of mining on Aboriginal land. If there is to be a purpose, it should be consistent with this. However, the bigger concern is that as a consequence of inserting this purpose, the mining royalty equivalents will be used to fund services which are properly the responsibility of government and are citizenship entitlements. Mr Reeves indicates consistently throughout his report that income received under the Act should be used for education, training, health and housing and that this is the way to have the greatest impact on the long term social and economic development of Aboriginal people in the Northern Territory.

Those services should not be funded from the ABR and to allow it to do so will allow Governments to reduce their obligations to Aboriginals as citizens when there remains a massive backlog of need.

6. The proposed changes to the mining provisions.

In particular, ATSIC is opposed to miners being able to be given the so-called "reconnaissance licences" for low impact exploration without having to obtain the prior consent of traditional owners. The proposal represents a fundamental shift in the nature and extent of the rights of traditional owners.

Combined with the proposed changes to the permit system, it is likely to become very difficult to control or regulate entry onto Aboriginal land and to protect the privacy of Aboriginal communities and outstations, and to prevent entry onto or desecration of sacred sites.

7. Proposals such as the application of NT laws to Aboriginal land, and compulsory acquisition by the NT Government.

These proposals appear to be designed solely to benefit the Northern Territory Government, without having due regard to the ownership rights and interests of the traditional owners nor showing why they are necessary. ATSIC is not aware of any significant problems under the present arrangements and believes that the normal consultation and negotiation processes are adequate. There is no need to significantly diminish the ownership and property rights of Aboriginal people in this fashion.

Conclusion

This submission has not provided a detailed and comprehensive analysis of all the findings and recommendations of the Report. However, ATSIC reserves its right to come back to the Committee with detailed analysis of certain parts of the legislation. Certainly we wish to pursue with the Committee in detail ATSIC's legal concerns.

It has been the intention of this submission to show that the Report is unacceptable to Aboriginal people, and that it attacks rights in land which were thought to be recognised and accepted by the Australian community. It strips traditional owners of their land and hands them over to Regional Land Councils and it takes away from traditional owners their ability to make decisions about their land.

The report as well is unnecessarily wide in its scope and expensive. Mr Reeves did not have the mandate nor a legitimate reason to propose the virtual abolition of the land rights regime established by the Fraser Government in 1976. ATSIC's view is that the report is impossible to deal with, comprehend and implement.

The fundamental flaws in the report obscure any value it might have. So it is time move on – to start to examine real operational issues about the performance of the Land Rights Act and to find improvements which are fair and acceptable to all. But, regardless, Aboriginal people are not prepared to accept this attempted dismantling of the major piece of land rights legislation in this country.

ATSIC believes that the thrust of the Review is unacceptable. Any changes to the land rights legislation can only be dealt with effectively if they are consistent with the aspirations of the Aboriginal people of the Northern Territory.