INDIGENOUS LAND CORPORATION

ILC Submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs

Inquiry into the Reeves Report on

the Aboriginal Land Rights (Northern Territory) Act

May 1999

Introduction

The Standing Committee on Aboriginal and Torres Strait Islander Affairs has nominated certain specific issues for comment in its Terms of Reference.

Section 1 of this submission addresses the matters raised in the Terms of Reference which are of particular concern to the Indigenous Land Corporation (ILC), with emphasis on the recommendations of the Reeves Report which may impact upon the operations of the ILC.

Section 2 comments on 'partnership' between indigenous Territorians and the Northern Territory Government proposed by the Reviewer.

Section 3 addresses matters related to the Reviewer's understanding of traditional ownership and analysis of anthropological evidence.

This submission endeavours to canvass issues that may not have been addressed in other submissions to the Committee.

General Comments

The ILC is concerned by and draws attention to the poor quality of this report. It is seriously flawed in several important respects:

- The report makes erroneous assumptions about the role and functions of land councils under the *Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA)* and these assumptions underpin important recommendations of the Report.

- Its analysis of the information collected during the review is patchy and arguably biased. The report seriously misrepresents the work of leading anthropologists in an unprofessional manner, draws conclusions which the evidence does not support and fails to cite anthropological /ethnographical opinion upon which it relies.

- The conclusions are inconsistent, illogical and fail to provide important detail. They are based on incorrect assumptions, misrepresentation of evidence and unsubstantiated assertions, rather than on clear analysis and argument.

It is a disappointing result in view of the considerable public expense of the conduct of the Review.

Section 1 Terms of Reference

The Committee seeks views on:

a) The proposed system of Regional Land Councils, including

i) The extent to which they would provide a greater level of self-management for Aboriginal people

The Reeves report proposes a system of Regional Land Councils (RLCs) and a new Northern Territory Aboriginal Council (NTAC) as complementary bodies. The question of whether smaller Regional Land Councils would provide a greater level of self-management therefore must be considered in the context of the proposal to appoint an overarching council.

On the face of it, regionalisation would appear to support greater empowerment but, in practice, the proposal is unlikely to achieve this result. Several factors need to be considered:

1. The establishment of 18 regional bodies will not, of itself, necessarily achieve devolution of either power or resources. Indeed, given that most of the primary functions of the existing land councils will not be undertaken by the RLCs, but by NTAC, initially an appointed, ***non-elected***, and more centralised body, it is difficult to see how the establishment of a number of smaller bodies with limited powers and functions will provide a greater level of self-management to Aboriginal people;

2. The proposed RLCs will have no independent financial resources, and will be financially dependent on the discretion of NTAC. Further, Regional Councils will be required to deposit income earned independently into an NTAC account which can only be spent for purposes approved by NTAC. The control of NTAC over RLC financial resources would appear to undermine rather than enhance greater levels of self-management at regional level;

3. The proposal does not acknowledge the need to recognise traditional owners as the people competent and entitled to make decisions about their land;

4. Greater regionalisation will mean more boundaries, which is likely to increase the difficulty of integrating indigenous structures with administrative requirements. Further, residency in a particular region

is accorded far too great a significance in terms of the rights of individuals, under Aboriginal tradition, to be consulted about what happens on their land.

Under the present system the two major land councils administer the provisions of the ALRA over large areas where there are numbers of discrete groups. Artificial regional boundaries could disrupt consultation and other necessary processes. The custodial responsibilities of traditional landowners extend beyond their communities of residence and are likely often to cross over the proposed regional boundaries.

For example, consultation meetings concerning a proposed Exploration Licence Application (ELA) may require people who are resident in different communities to meet together some hundreds of kilometres distant from where they live. It would be a highly complex task for several different regional councils to attempt to conduct the various consultations with all the persons required to be consulted and unlikely that a cohesive result would be achieved.

The practical difficulties and costs of administering such procedures across regional boundaries are likely to be greatly increased if this proposal were implemented.

The ability and success of the major land councils in administering the provisions the ALRA across their regions under the present system, and their cost-effectiveness, appears to have been greatly underestimated.

5. The regional areas proposed are not culturally discrete areas, as are Tiwi and Anindilyakwa. There is no reason to suppose that they will work more effectively than the present system.

   Although the Tiwi and Anindilyakwa Land Councils are proposed as models for the new regional councils, neither has demonstrated the capacity nor been required to perform some of the key functions proposed for RLCs, such as negotiation of a conjunctive exploration and mining agreement.

6. The proposal assumes a kind of 'corporate decision-making' process, based on overseas models, which simply does not exist in Australian indigenous systems.

7. A greater number of administrative units will create greater demand on, and competition for, scarce resources. Indeed, given the proposals not only for a 'super council', NTAC, but for an additional

"Congress of Regional Land Councils" there would appear to be many more proposed administrative, bureaucratic 'layers'.[1]

[1] It is proposed that NTAC would be funded by ***all*** funds received by the Aboriginal Benefits Reserve, as well as CDEP funding ('work for the dole') and other Commonwealth and Northern Territory funding sources (see Reeves Report, p. 605). Except for the diversion of additional ABR funds, these funding sources will presumably be drawn from existing programs in order that NTAC may provide those services or programs. The addition of Regional Land Councils and a Congress of Regional Councils is likely to reduce any 'economies of scale' which might be achieved by NTAC, by adding two additional service levels.

Implications of establishment of RLCs for the operations of the ILC

The ILC does not oppose the concept of regionalisation and has no difficulty with a proposal to work with regional bodies in the Northern Territory, as it does throughout Australia. The ILC has a number of concerns, however, including the following:

- the composition of RLCs may undermine the rights of traditional Aboriginal landowners to determine what should be done on their land and create difficulty in execution of ILC policy.

- the central role and statutory functions of the major Northern Territory land councils in dealing with land matters provide cost and efficiency benefits which are very unlikely to be achieved, at least for a period of transition, should a new regime be introduced.

- the capacity and expertise of newly-established bodies to assist the ILC in performing its functions cannot readily be predicted.

- The ILC has concerns about the proposed statutory functions of RLCs and how these would relate to the ILC's performance of its statutory functions in land acquisition and land management.

- In relation to land acquisition, the ILC must grant title to land to an Aboriginal Corporation. It is proposed that RLCs will hold title to land in their regions and it is unclear whether the ILC would be able, under its legislation, to grant title to land it acquired on behalf of Aboriginal people to an RLC. If the ILC can divest to an RLC, it remains to be seen whether such bodies would be appropriate.

- In relation to land management, the ILC may only undertake land management activities with the consent of the landowners. ILC policies further provide for the consent of traditional landowners, wherever practicable, in relation to land management activities. Practical difficulties may arise should an RLC, as the titleholding body, seek ILC assistance to provide land management assistance for activities which are not sought or approved by traditional landowners.

- The Northern Land Council and Central Land Council are currently providing land management services under service agreements with the ILC. These services include assessment of properties, and financial and pastoral management services to Aboriginal-owned pastoral properties in their respective regions. Both councils have pastoral support and environmental management units which provide relevant technical expertise. The councils have 'economies

of scale' which enable them to staff these units (and provide them with administrative, legal and financial support). It is very unlikely that smaller, regional councils would be able to employ expert staff to provide the range of expertise presently provided by the major land councils. As the ILC has a statutory obligation to provide land management assistance, the increased cost to the ILC – and to the public – to provide this support would be substantial.

- The transcripts of hearings held by the Standing Committee among indigenous people in the Northern Territory demonstrate a strong negative response to the Reeves Report proposals. This gives rise to concern that the proposed system of RLCs would be unworkable for the ILC.

a) The proposed system of Regional Land Councils, including

ii) The role of traditional owners in decision making in relation to Aboriginal land under that system;

The role of the traditional owners in decision making in relation to Aboriginal land must remain paramount. Any diminution of their present status and function under the ALRA strikes at the very intent of the legislation.

The arguments in favour of the RLC proposal are confusing. The Reviewer claims that the present system "is not a traditional Aboriginal decision-making system", yet appears to have misconstrued, or misunderstood, the decision-making role of the land councils and purpose of council meetings. The Reviewer describes the Council's decision-making process as follows:

"It requires Aboriginal people to attend a large Land Council meeting where people are present from all over the Top End or Centre of the Northern Territory, to make decisions about the traditional land of a particular group of Aboriginal people."

The Reviewer has misrepresented the role of the Councils and the decision-making process. In fact the decision-making role of the Council occurs at the end of a process of consultation with traditional landowners. The Council's role is, in effect, to satisfy itself that the agreement about a proposed development has been reached in accordance with traditional decision-making processes and according to the wishes of the particular traditional landowners concerned. If it is so satisfied, the Council ratifies the decision of the traditional

landowners and thus gives statutory effect to their decision.

The Act clearly states that in giving (or withholding) its consent in relation to any matter in connexion with Aboriginal Freehold land granted under the ALRA, the Council must be satisfied that the traditional landowners understand the nature and purpose of the proposed action and, as a group consent to it. The Council must also ensure that any Aboriginal community or group which may be affected has been consulted and had adequate opportunity to express its views. (ALRA, s.23(3)(a) and (b), and s.48A(4)(a) and (b).) The fact that Council meetings are the forum for official decision-making in accordance with the ALRA should not be taken as evidence that consultation and decision-making with regard to land does not take place at a more local level or include all of the persons entitled by traditional law to participate in the process.

What is proposed instead is a far more discretionary role for RLCs, which would merely " have regard to the best interests of the Aboriginal people of its region" and shall consult with " and if necessary, obtain the consent of those Aboriginal people whom it believes ... it is required to, in accordance with Aboriginal tradition". Essentially, it is proposed that the present clear statutory obligations to represent traditional landowners and act on their decisions will be replaced with a self-regulatory discretion to consult.

The Reviewer has not presented any evidence that such a structure (which does not prescribe proper representation of traditional landowners) would be any more consistent with traditional decision-making processes than is currently the case under the ALRA. Instead, he merely asserts this to be the case, based on his prior misrepresentation of the role of the councils and conduct of council meetings.

As membership of RLCs will not be confined to traditional landowners, and RLCs will determine who they should consult with, it is a matter of concern that RLCs could authorise certain activities on land over which they have no traditional rights to do so, without the approval or authority of traditional owners.

The ILC strongly opposes any measure that would have the effect of undermining the rights of traditional landowners to control their land, contrary to the spirit and intentions of the ALRA.

The fundamental purpose of the ALRA is to redress the previous dispossession of Aboriginal people in the Northern Territory by restoring land to its traditional owners under a form of title and a legislative

system aimed at assisting them to maintain cultural integrity. The ALRA supports traditional Aboriginal structures by providing an interface for interaction with the non-indigenous system through the land councils.

The proposed RLCs and NTAC do not appear to provide these safeguards, and, contrary to the intentions of the ALRA, could effectively become agents of dispossession, empowered to act contrary to the wishes and interests of traditional landowners.

If the intention of these proposals is to provide for the needs of Aboriginal people who do not own or reside on their traditional land, it would be more effective and more consistent with the intent of the ALRA to meet those needs by other mechanisms, such as legislation expressly enacted for this purpose by the Northern Territory.

b) The proposed structure and functions of the Northern Territory Aboriginal Council

General Comments

The arguments in support of the proposal to establish the Northern Territory Aboriginal Council (NTAC) appear superficial and misleading.

The role of the proposed NTAC – "responsibility for developing Aboriginal skills, assets, culture, employment and self-reliance" – has been closely linked to responsibility for economic and social advancement of Aboriginal people in order to address the poor living conditions and cycle of dependency which are evident in remote Aboriginal communities.

The Reviewer comments "One only has to visit an Aboriginal community in the Northern Territory to see that the public funds which have been distributed over the past two decades have not had the beneficial impact that was obviously hoped".[2]

Although the Reviewer explicitly acknowledges the limited purposes of the ALRA and that economic development was not initially a primary goal of the ALRA[3] the Report nevertheless appears to ascribe to Land Councils functions, powers and responsibilities they do not have. The Report encourages readers to conclude that land councils have failed to deliver the improvements in living conditions, community

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[2] John Reeves, *Building on Land Rights for the Next Generation – the Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, 2nd Edition Report, p. ii [hereinafter, "the Reeves Report"] p.604
[3] Reeves Report, p.74

infrastructure, economic, educational and social advancement of Aboriginal people in remote Northern Territory communities which might have been expected over the past 20 years.

In the opening Synopsis, the Report claims that a "negative result" of the Land Rights Act is that moneys received under the Act have not been strategically applied to the social and economic advancement of the Aboriginal people of the Northern Territory as a whole" and that these moneys have '*largely been dissipated in Land Council administrative costs*' [emphasis added].[4] In fact, the ALRA specifically provides for the land councils to receive 40% of the ABR funds to meet the costs of discharging their statutory functions. Of the remaining 60%, 30% is paid to 'Aborigines affected' by development and the other 30% is retained by the ABR to apply to the benefit of NT Aboriginal people generally. The Reviewer again encourages readers to assume that the ABR funds provided to the land councils should have been applied in some other more 'beneficial' way contrary to the relevant provisions of the ALRA.

In the body of the report it is stated that, in addition to ABR funds, Land Councils receive income from sources such as ATSIC, and the Commonwealth Department of Primary Industry and Energy and the Department of Employment Education Training and Youth Affairs. The Reviewer has not provided the quantum of this additional funding nor any information on the purposes for and the conditions under which it was provided. The effect of this omission is an implication that Land Councils have not only "dissipated" ABR funds, but have been a major recipient of funds for the provision of services additional to their statutory responsibilities.

This is a serious misrepresentation of the facts.

The 1994/95 Annual Report of the Central Land Council, for example, provides a list of additional funds received by the CLC from bodies such as AITSIS, DEET, ATSIC and the National Landcare Program.[5] The report clearly identifies the funds as being additional "*to the funding provided for the administrative costs of its statutory functions"* and details the specific projects for which the funds were provided.

The review is also seriously flawed in drawing such a link between the role and statutory functions of land councils under the ALRA and the social and economic disadvantage of indigenous people in the Northern Territory.

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[4] Reeves Report, Synopsis, p.II
[5] CLC Annual Report 1994-95, p.64

The ALRA was put in place "to provide for the granting of Traditional Aboriginal Land for the benefit of Aboriginals (sic), and for other purposes", as its long title states. Its purpose is to enable Aboriginal people to claim and acquire, through process of law, the land of which they had been dispossessed by the process of colonisation. The Reviewer has identified other purposes for which the ALRA was established, namely to recognise Aborigines' interests in and relationships to land and to provide Aboriginal people with effective control over activities on their land. Essentially however, the purposes are still related to land and its enjoyment and control by Aboriginal people. The Reviewer does not suggest that the purposes of the ALRA include broader objectives for social and economic advancement of Aboriginal people of the Northern Territory.

The report acknowledges that land councils have been effective in fulfilling their primary statutory function and that large areas of land have been returned to Aboriginal ownership with consequent important benefits to the well-being of indigenous landowners.

The Reviewer is on false ground, however, in suggesting that either the land councils, or the process of returning land under the ALRA, should have brought about the improvements in social and economic circumstances which it is implied they were expected to achieve.

Whilst stating that the ALRA "has returned much of their traditional land to them", the report fails to note that a high proportion of the land available for schedule or claim under the ALRA has never been economically productive. It was formerly reserved or Vacant Crown Land that had never been economically productive and was not considered capable of commercial exploitation. Very little 'quality' pastoral land has ever been available for claim.

Ownership of non-viable or economically marginal land could not, of itself, provide an economic base to address the material disadvantage of Aboriginal people resident in remote communities on that land.

While land ownership may bring about a range of material and other benefits, the social, cultural and economic marginalisation of indigenous people, stemming from decades of dispossession and mistreatment, cannot be 'fixed' solely by the provision of land.

In effect, the Reviewer is ascribing to land councils statutory responsibilities which they do not have and is 'blaming' the councils for failing to deliver outcomes which they have neither responsibility, authority, nor the resources to address.

Proposed functions:

As noted above, the grounds for proposing the establishment of this body appear to be the continuing cycle of dependency and poor living conditions evident in remote Northern Territory communities.

The proposed NTAC is to be "charged with responsibility for developing Aboriginal skills, assets, culture, employment and self-reliance". The Reviewer has made a recommendation which is akin to a 'motherhood statement'. How could anyone disagree with a proposal to establish a body to bring peace to the Balkans?

It is not clear how the responsibilities outlined for NTAC would address the underlying causes of the problems generally outlined as the reason for establishing the Council, in particular, the extreme poverty, poor health and inadequate community infrastructure which exist in remote Northern Territory communities.

The responsibility for providing services, meeting infrastructure needs and addressing Aboriginal economic advancement rightly belongs to State or Territory Governments. In common with States, these responsibilities have not adequately been met in the Northern Territory, despite a 'fiscal equalisation' policy which provides the Northern Territory with disproportionately high public funding for the purpose of addressing the infrastructure needs and disadvantage of its indigenous peoples.[6]

Better coordination of services to indigenous people in the Northern Territory is clearly needed. This was a major objective of the *National Commitment to Improved Outcomes in the Delivery of Services for Aboriginal Peoples and Torres Strait Islanders of the Ministerial Council for Aboriginal and Torres Strait Islander Affairs*.

The proposal to establish NTAC raises the question of whether such a body, established under the ALRA, is an appropriate vehicle for addressing these issues and even if it were, whether the Commonwealth and Northern Territory governments would agree to the level and division of funding required to ensure effectiveness.

Funding sources

The ILC has further concerns in relation to NTAC's proposed funding sources.

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[6] Indeed, the Northern Territory land councils have attempted to draw attention to the failure of Governments to deliver services for which they are funded to the Commonwealth Grants Commission – see *Central Land Council Annual Report 1992-93*, p.64

NTAC will be supported " by funds received from activity on Aboriginal land passed through the Aboriginals Benefit Reserve (ABR)", significantly augmented by funds from other sources. The Report recommends that NTAC be funded by 100% of the ABR (compared to the current 40% for the land councils)[7]. The additional sources of funding would include Commonwealth and Northern Territory funding, CDEP (work for the dole) funds, and other funds 'earmarked for expenditure on Aboriginal economic, social and cultural advancement in the Northern Territory'.

This recommendation must be based on a recognition that the ABR monies are inadequate to fund the proposed structure and an assumption that NTAC would assume functions and powers currently performed by ATSIC and the Northern Territory and Commonwealth governments. It must be questioned why so much funding is required and what will be the effect on other agencies. Committee members should seriously question the need for a new, large and complex bureaucratic structure, particularly when no real evidence had been presented regarding the financial impact of the structure being proposed.

- *Use of ABR funds*

  The proposal to fund a body such as the proposed NTAC from the Aboriginal Benefits Reserve (ABR) is not appropriate. ABR funds are essentially private funds derived from profit-making activities on Aboriginal land. Indigenous people are already paying for the administration of the ALRA and for welfare and other activities that are properly the function of Governments from these funds.

  The proposed NTAC effectively suggests that, for indigenous people, the private benefits of land ownership should be used to provide funds to address the myriad of problems affecting indigenous communities, allowing Governments to reduce their financial commitment and responsibility for addressing these issues.

  Traditional owners, on whose lands this income is generated, are thus subsidising the Northern Territory and indeed other Australian taxpayers. Private landholders are rarely required to use property-derived income in such a fashion. The present situation is already inequitable but is one that the Reviewer would see extended.

  Such a proposal would make the Northern Territory's indigenous

[7] Reeves Report, pp 604-605

population the only group of marginalised people who are required to pay for their own servicing.

- *Use of ATSIC funding sources – impact on ATSIC Regional Councils*

  This proposal appears to completely disregard the role, function and purpose of ATSIC and gives rise to serious concerns that the role of ATSIC regional councils will be significantly diminished by the introduction of NTAC.

  ATSIC Councils do not simply provide funds for services: they are the elected representatives of indigenous people. The councils create regional policy and represent regional needs at national level. They also have coordinating responsibilities in the delivery of services by Federal, Territory and Local government.

  The effective replacement of these elected decision-making bodies by a body appointed directly by the Commonwealth and Territory Ministers cannot, on any reasonable analysis, be considered as enhancing self-determination or self-management. The result would be quite to the contrary of the intention – dependence and marginalisation would be furthered.

  In addition the proposal creates an additional layer of bureaucracy that will effectively enable further abdication of responsibility by mainstream Territory and Federal agencies.

Coordination of services by NTAC

The ILC is not convinced that service coordination difficulties in the Territory would be solved by NTAC. The Reviewer does not present any evidence as to why this solution should have any higher degree of success than that of the previous efforts by various government agencies or initiatives. These include the former Department of Aboriginal Affairs and ATSIC or agreements such as the *National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders* of the Council of Australian Governments.

The present lack of coordination in service provision does not derive from the failure of the ALRA or the Land Councils, but from the unwillingness of the Northern Territory Government to provide services to Aboriginal people at a level commensurate with that enjoyed by other sectors of the community. Other State Governments largely share this intransigence.

One of the most persistent problems in indigenous affairs is the inability of service providers to appropriately allocate responsibility between the States and the Federal government. In many circumstances, indigenous needs are seen simply as the purview of the Federal government and, regardless of its resource limitations, ATSIC is expected to foot the bill. In others, the States argue that indigenous people have access to "mainstream programs" without considering the significant disadvantages that indigenous people experience in trying to access these programs. Indeed, the fact that many indigenous communities are rural or remote means that this disadvantage is exacerbated by the general neglect by governments of rural and remote areas which is very strongly felt by many non-indigenous people.

Economies of scale also do not appear to have been properly calculated. The TLC and the ALC are used as models for the regional bodies but the small size of the TLC and ALC reflects the low scale and limited scope of their activities. NTAC would be a large bureaucracy, channelling large amounts of money and resources across a regional network for any service or program for indigenous peoples. It is unclear how such a body would provide economies of scale, particularly when the functions it is expected to discharge are much broader than the bodies that it is intended to replace. Nowhere in the Report are there detailed costings or financial analyses to support the recommendation.

Implications for ILC Operations

The Report does not clearly delineate the structure and functions of either the RLCs or of NTAC. The "Congress" recommendation appears little more than an ill-fitting afterthought and its legal and political status is unknown. Because of this inadequacy, the ILC has not included it in its analysis of implications for the ILC.

Whilst NTAC would retain control over the income and expenditure of the RLCs, the RLCs are described as having 'real power'. RLCs are recommended to be landholding bodies, and to negotiate exploration and mining agreements, yet NTAC retains power to make 'commercial deals'. The question must be asked, what is a mining agreement if it is not a 'commercial deal'? Given this confusion and inconsistency, the ILC has some very real concerns about forming meaningful working relationships with any of the proposed bodies.

Section 2 The new 'Partnership' proposed in the Reeves Report

The Report advocates that the formation of a partnership between indigenous Territorians, the Northern Territory Government and other Territorians should be a new purpose of the ALRA.

The 'partnership approach' advocated in the Report[8] seeks to establish what is in reality a very one sided arrangement – in which indigenous Territorians are required to sacrifice some of the key strengths of the ALRA in return for receiving their legitimate entitlements as citizens of the Northern Territory. Indigenous people should not have to make sacrifices in order to be able to enjoy their rights as citizens.

[8] Reeves Report, pp 71-74

1. Benefits of a Partnership Arrangement for Indigenous people.

The benefits that the report lists as accruing to indigenous people through such a partnership are, in fact, basic human and civil rights.

- *Control over their own destinies at all levels*

The need for indigenous people to have control over their destinies was very clearly stated in the Royal Commission into Aboriginal Deaths in Custody which made 339 Recommendations, many of which were specifically directed to this end. The Northern Territory is not alone among the Australian governments in having received public funds to implement these recommendations but whose response and effort have fallen short. The Report advances no evidence to support the claims that its recommendations will achieve this greater control.

- *Genuine financial and moral support from the Northern Territory Government to address their health, housing and education needs*

It is an indictment of both the Commonwealth and Northern Territory Governments that indigenous people do not enjoy this support already. That indigenous people should have to sacrifice benefits provided under beneficial Commonwealth legislation to achieve a level of support offered to every other Territorian regardless of ethnic origin is unreasonable and unjust.

- *A dedicated effort to provide young Aboriginal people with the skills and training necessary to allow them to become self-reliant members of the Territory community*

Once again, this is the responsibility of the Territory government and should not have to be won by concessions.

- *Freedom from fear that their hard won land rights may somehow be snatched away from them*

Implementation of the recommendations of this Review is likely to exacerbate such fears. Aboriginal people in the NT are already rightly aggrieved by the imposition of the "sunset clause" (section 50(2A)). The recommendations threaten to weaken the rights of traditional owners to the land they already own or claim. The way to free indigenous people from this fear is to strengthen the legislation, remove the sunset clause and for the Commonwealth to make it plain to the Territory that "patriation" of the ALRA is not a possibility. In view of the fact that indigenous people have witnessed the progressive weakening of the ALRA and of other Commonwealth initiatives to

address their dispossession, fear that hard won land rights will be undermined or wound back is a reasonable response.

2. Claimed Benefits of implementation of the Report's Recommendations for all Territorians

The benefits that the implementation of the recommendations will presumably provide for Territorians already exist. This section of the report perpetuates a number of baseless myths.

- *Reduced tension in the Territory between Aboriginal Territorians and other Territorians with, for example, fewer taxpayer's dollars being spent on adversarial court cases where one party or another has come off as the loser.*

This purported benefit seems to blame indigenous people and the ALRA for the hostile response of the Northern Territory Government to land rights. The Northern Territory government has been overwhelmingly unsuccessful in its attempts, over twenty years, to oppose land claims in the Federal and High Courts. Tax dollars in the millions have indeed been squandered in pointless legal battles, but to blame indigenous people or the land councils is not only a gross injustice but contrary to the historical record. Indeed, the land councils have expended substantial funds defending legitimate claims through the Courts. The tax dollars spent on adversarial court cases are derived from the people of Australia generally and not purely by Territorians. The way to prevent this wastage is not to wring concessions from an embattled, poverty-stricken indigenous minority but to deal effectively with the confrontational attitude of the Northern Territory government.

- *Guaranteed public access to all rivers and beaches of the Northern Territory for recreation.*

Guaranteed public access already exists by means of the permit system, which applies to all persons who are not traditional owners, not just non-indigenous people. The system is property-based not racially determined. In fact, in cases where land has been successfully claimed which included existing public recreation areas, public access has been guaranteed by negotiation with the land holders. In many instances, access to such places does not require a permit.

Secondly, in those instances where access might be restricted it will primarily be for reasons of ritual or other significance. It is unreasonable to suggest that the religious responsibilities of indigenous people who own the land should be subordinated to the recreational desires of others. Indigenous people, like all other Australians, have the right to

freely practice their religion and this right must be seen as a higher priority than the purely recreational pursuits of urban dwelling Territorians or tourists. The right to recreation is often impeded by the need to provide for public or private well-being as in the case of areas protected to preserve their fragile environmental characteristics.

It should be noted that Aboriginal land is privately owned freehold land and Committee members should be wary of any proposal to dilute to rights of any freeholder, whether on the basis of race or on the basis of the purely recreational desires of the general public. Non-indigenous freeholders (and leaseholders for that matter) would be rightly affronted if they were required to give up their right either to exclude people or to determine conditions of entry.

- *Confidence that major developments, which are in everyone's interest ... will not be stopped or delayed as part of the ongoing retaliatory 'war'*

The claims that indigenous people are anti-development or that land councils unreasonably stop or delay development are a myth[9]. Indigenous people in the Territory, as elsewhere, have shown themselves to be actively interested in or amenable to the needs of development where these can be accommodated. The 'war' to which the Reviewer refers is neither "retaliatory" nor is it a war. What the Reviewer is describing is the persistent hostility of Northern Territory Government towards the ALRA and towards the rights of indigenous people under the ALRA. Land councils are not engaged in a retaliatory exchange, they are in fact fulfilling their statutory obligations to ensure that traditional land owners enjoy and exercise their rights under the ALRA.

The recent agreement reached between the Northern Territory and the Northern and Central Land Councils in respect of the Alice-Darwin railway corridor is a prime example of how those rights can be exercised using the existing processes of the ALRA to the benefit of a proposed development. The Northern Territory Transport Minister, Mr Barry Coulter, recently praised the land councils for "a magnificent job" in arranging for the 198-year lease for the 1500 kilometre corridor, which passes over the land of seventeen language groups[10].

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[9] It was recently reported that traditional owners had approved exploration licences over 38% of the NLC region in addition to 140 licences covering 80,000 square kilometres in the CLC region. Land Rights News, Vol 2, No 48, March 1999 page 4.

[10] Land Rights News, Vol 2, No 48, March 1999 page 7.

- *The prospect that Aboriginal land will be used, not only to generate wealth for Aboriginal Territorians, but that all Territorians will share in the land's potential to lift living standards in the Northern Territory*

All land in the Northern Territory was once indigenous-owned and was alienated without compensation. The wealth generated by this alienated land is disproportionately enjoyed by non-indigenous Territorians who have living standards so far above those of their fellow indigenous citizens that the levels can barely sustain comparison in the same terms. Non-indigenous Territorians are also already enjoying the fruits of wealth generation from indigenous land, as all developments, such as mining and tourism, have substantial multiplier effects.

In addition, Committee members should question whether private landholders ought to be expected or compelled to share the income from their land with others.

3. Requirements for the Partnership

Similar criticisms may be levelled at the means by which the Reporter proposes the partnership be established. Every requirement proposed for the Northern Territory is one that it should currently be exercising. This is particularly the case in relation to acceptance and support of land rights. Both the ALRA and the Native Title Act are laws of the Commonwealth Parliament. Acceptance and support is a reasonable expectation of the Northern Territory, but one that it has persistently and obdurately failed to discharge. Similarly, the involvement of indigenous people in decisions about expenditure on priority areas, and adequate funding and advice are reasonable expectations that any citizen would have of government. Once again, indigenous people are expected to concede rights to receive support to which they are already legitimately and legally entitled.

Section 3 Comments on Traditional Ownership and other Indigenous Issues

The Review devotes considerable space to matters of anthropology and traditional land tenure mechanisms and structures, many of which have been dealt with by other commentators. The following summarises points that are, in the ILC's view, contentious or erroneous.

Anthropological views of traditional land ownership

The claim that the ALRA is flawed because it relies on a mistaken or antiquated anthropological concept of traditional ownership is completely incorrect. The word "patrilineal" or words meaning this does not appear in the ALRA or in subsequent amendments. Land Commissioners were never compelled to locate traditional ownership within a patriclan, nor have they. The Reviewer is in error in repeating this view and relying upon it to support his arguments, particularly in relation to the formation of the proposed RLCs.

This view has long been expressed,[11] however, the definition of traditional ownership in the ALRA is not intended to be comprehensive. Rather, it identifies four markers of traditional ownership that have been capable of broad interpretation by successive Land Commissioners. Indeed, varying forms of descent-based groups were accepted as having traditional ownership status very early in the history of land claims.

While the first land claim was granted on the basis of ownership vested in patrilineal clans, later claims in the Gulf region were made on a similar basis, despite the fact that other options had proved to be available by then. This reflects the nature of land tenure in the area rather than an inclination on the part of Land Commissioners or their advisers to run the patrilineal line to the exclusion of all others. Traditional ownership groups based on other than patrilineal bases were very soon and widely recognised, and it is arguable that there was never any proclivity for the patrilineal base but that the early claims were, by circumstance or design, made on the basis of patrilines. Moreover, the Land Commissioners are required to state that there are owners according to tradition, not provide exhaustive lists of persons with these rights. The fact that Land Commissioners have done this is a pragmatic response to the needs of Land Councils.

Sites

The single most important flaw in the Review is that the Reviewer demonstrates a profound lack of understanding of indigenous land tenure. This is most evident throughout the discussion on sites, permits and anthropology. In effect, the Reviewer is proposing an intervention into indigenous social process that unwittingly enforces assimilation rather than respecting and protecting the integrity of indigenous cultures. For example, the Reviewer argues that compensation should not be payable for works carried out on sacred sites as this has no grounding in tradition and does not apply to violations perpetrated by

[11] Perhaps most prominently by Gumbert (1984).

non-indigenous person[12]. A violation is a violation regardless of who perpetrates it.[13]

The statement "Aboriginal custom did not appear to include a commonly acknowledged right to exclude others from lands, except sacred sites" is not supported by ethnography. The Reviewer cites (p 305) unspecified anthropological advice to justify such a conclusion. This statement is incorrect and fails to understand the complexity of traditional tenure structures and mechanisms. Anthropological advice provided by Dr Peterson in his submission to the Review quite clearly stated the opposite view [14]. Dr Peterson is recognised as eminent in the field of indigenous land tenure. Since the Reviewer has chosen to ignore this advice, the contrary advice which he found convincing needs to cited.

The Review further acknowledges "elaborate greeting rites" but fails to appreciate their significance. This is the basis of the Reviewer's error.

The significance and widespread nature of these rites has been analysed by Peterson[15] who concludes that;

> ...it can be inferred, throughout the continent, failure of a visiting person or party to announce its presence to the local residents is taken as a prelude to an act of hostility and provokes the likelihood of aggression from the territory occupiers.....Greeting ceremonies are thus functionally analogous to boundary defence ..."

In other words, the existence of these rites is proof of the existence of proprietorship rather than a denial of it.

Elsewhere[16], Peterson explains that the nature and scale of Australian indigenous groups and the size of their territories meant that the defence of geographical boundaries was impossible; rather the boundaries of social groups were rigidly enforced and defended. Morphy[17] describes the landscape as a sociocentric grid, in that moiety

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[12] Reeves Report page 286

[13] Myers notes that the subtleties of indigenous etiquette are indeed applied to non-Aboriginal people (1987:105). Elsewhere Myers records an incident in which he travelled in the Gibson desert in the company of an Aboriginal person who took some yellow ochre from a hill. This person was later threatened by spearing by the place's custodian (340-341). The verso of retribution is compensation. Moreover, if the Reviewer had considered compensation within the broader context of reciprocity the results of his analysis may have been more balanced.

[14] "As far as I am aware all systems of native title in the Territory also include exclusive possession. By this I mean a core group of people traditionally had the right to exclude and control all people and all activities on their land" (Peterson, 1997:6)

[15] Peterson 1975 page 62.

[16] Peterson 1975 page 60

[17] Morphy 1995 page 201

and clan are mapped onto it. Kinship can be expressed in terms of landscape, or, as he states, "Kinship gives permission to be in certain places".

There is evidence that access mechanisms and procedures were widely recognised, even by early settlers[18] and that official sources noted the indigenous view of trespass:

> After careful enquiry I am of the opinion that this is the attitude of the Aborigines towards Europeans. Entrance to their country is an act of invasion. It is a declaration of war, and they will halt at no opportunity of attacking the white invaders[19].

Ethnographic examples also indicate that people feared using the resources of land other than their own because they did not know the appropriate mythic circumstances[20].

This discussion arises from the Reviewer's statement of disagreement with the NLC contention that the relationship of groups to sites is analogous to a proprietary interest[21]. The ILC would state the case more strongly than the NLC – interest in sites is a proprietary interest. The ILC is persuaded by the arguments of the Professor of Law at the University of Western Australia.

> In accord with general principles the Australian High Court has recognised the proprietary nature of native title. Native title is regarded as 'property' for the purposes of protection and enforcement:
>
> - against Crown extinguishment and expropriation;
> - under s 51(xxxi) of the Constitution;
> - under the Racial Discrimination Act 1975;
> - as a burden on the Crown radical title; and
> - as against interference by third parties.
>
> Native title is afforded the high degree of protection and enforceability 'against the whole world' due to a proprietary interest[22].

The ILC acknowledges that traditional ownership as determined by the ALRA and native title are not always synonymous. It also acknowledges the decision of the Federal Court in *Pareroultja vs Tickner* [23] which confirmed that the rights of traditional owners under the ALRA embraced and enhanced common law native title. Therefore if native title encompasses proprietary interests there is a very

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[18] See Massola 1969:7 for details on an axe quarry at Mount William in Victoria.
[19] Government resident, J L Parsons, to superiors in Adelaide 1884
[20] Bolger, 1984-5 page 368.
[21] Reeves Report page 286
[22] Bartlett 1998 page 92
[23] (1993) 117 ALR 206

strong argument to support the view that the rights and interests of traditional owners under the ALRA are also proprietary in nature.

Spiritual affiliation with land

On pages 203-204, the Report makes the following statement:

> *… traditional Aboriginal owners are groups of Aboriginal people who have common spiritual affiliations to sites on the land. These groups are not political, residential or domestic units, or any units of daily life. They reflect a religious organisation that cuts across residential demographics of Aboriginal regional populations. For this reason, groups of traditional Aboriginal owners are not organised to take any action relevant to the secular interests of Aboriginal people. They are groups based on common rights rather communities of need.*

The statement represents a fundamental misconception of the nature of traditional ownership and presents a false dichotomy between the religious/sacred and the secular/profane. It is often considered to be much more difficult to distinguish between the sacred and the profane in Australian indigenous cultures than it is in others although, in fact, it is often very difficult to isolate the purely sacred from the profane in *any* culture. This is easily demonstrated by reference to mainstream Australian values. Football, is normally considered to be a profane activity devoid of the sacred yet there are demonstrably attitudes (adulation) and behaviours (ritual observance) associated with football that can be defined as cultic (ie. pertaining to worship). Conversely, Christmas might be considered as a sacred (the Mass of Christ) occasion but for the largely profane activities (feasting, reciprocal exchange of consumer goods and insobriety) associated with it.

In respect of Australian indigenous cultures, the sacred nature of land is very well documented, as is the fact that this land is owned in some shape or form. The fact that the land generates, preserves and contains the sacred does not mean that the owners are devoid of other interests in it. Groups are not necessarily constructed on one basis only and the fact that there is a sacred component does not preclude the existence of other crucial elements. The claim that traditional landowners are not organised to take action on secular matters is completely unsubstantiated. No doubt there are some groups who are not organised and others that are. This is to do with social organisation and cohesion, and is not a function of a lack of competence under customary law and tradition. Moreover, defining traditional landowning groups as being based on common rights and not communities of need is a significant error. If a group is based on some commonality, and it must be to qualify as a group, then it has

status as a community. If the commonality is based on shared rights, it does not follow that there are not also shared needs.

Conclusion

The ILC has serious concerns about the quality of the Reeves Report. The Report either misrepresents or makes incorrect assumptions about the role and functions of land councils by ascribing (overtly or by implication) to land councils responsibilities that they do not have and then blaming them for not discharging them. The Report has also seriously misrepresented the work and ideas of many of Australia's leading academics. Based on this flawed analysis, the Report makes recommendations for new purposes for the ALRA and new structures by which to implement those purposes. The result is an incomplete and illogical structure, with poorly-defined functions and a financial base that is largely insecure. The ILC is concerned that such an uncertain future for the property rights and interests of indigenous landholders and for the delivery of services to indigenous Territorians generally could create real difficulties for the ILC's operations in the Northern Territory.

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