ACTION FOR ABORIGINAL RIGHTS

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SUBMISSION TO THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON ABORIGNAL AND TORRES STRAIT ISLANDR AFFAIRS ON THE REEVES REPORT ON THE ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) ACT.

CONTENTS

1. Introduction

Action for Aboriginal Rights is a non – Indigenous organisation whose main aim is to work in support of the Aborigines Australians for the achievement of the recognition of their Indigenous rights.

In relation to the Aboriginal Land Rights (NT) Act, our group work included the writing of submissions to Mr. Justice Woodward's Commission and subsequently to the Parliamentary Committee.

Our present submission comprises comments on the contents of the Reeves Report on the Aboriginal Land rights (NT) Act. The submission also contains some of our recommendations.

The contents of the submission are arranged under John Reeves Q.C. headings and follows the Report's contents order.

Unfortunately we were not aware of the Committee's inquiry until the middle of February, so we did not have sufficient time to comment on the full contents of the Report. This accounts for the gups in our submission.

We are grateful to the Committee Secretary for sending us a copy of the Report.

Finally we wish to emphasise that in our view no changes to the Act should be made without Aboriginal consent.

2. Comments on the Reeves Report

Chapter 3. Aboriginal Land Rights Compared (P. 33)

Aboriginal population and land (p. 33)

John Reeves Q.C. recognises correctly that "of course although large in area, much of this land

(ie land owned or controlled by Aboriginal people in Australia) is not of great commercial value - so comparison of its size with the size of states or territories is misleading if it is meant to imply anything about the commercial value of Aboriginal owned or controlled land."

Likewise much of this land is incapable to sustain high density of population, so it is also misleading to compare its size with state and territories on the basis of population ratios.

The only meaningful use of land size ratio is when one compares the area a particular Aboriginal nation, ie Pitjantjatjara, Yolngu, Kuli, Yorta Yorta etc. owned or controlled before European invasion with the area it now owns or controls, provided a qualification stating the relative quality of these lands and waters, accompanies the size ratio.

Ownership of minerals (p. 41)

In this section, John Reeves Q.C. should have included a brief history of mineral ownership in Australia, including the fact that in Queensland some private land holders still also own minerals in their land except for gold and coal (Frank Brennan, John Egan and John Honner, " Finding Common Ground ", p. 30).

It is evident from the history of mineral ownership by non-indigenous land holders that were it not for " Terra Nullius ' legal fiction, Aboriginal land ownership titles would have also included, like the old non-indigenous land titles, the ownership of minerals in their land and the right to compensation for their acquisition by the Crown.

Exploration and mining (p. 45)

Again John Reeves Q.C. should have included here the rights of non-indigenous land holders to control exploration and mining on their land, for example the veto right of pastoralists in WA etc.

United States – American Indians, Inuit and Aleut (p. 50)

Land / resource rights (p. 50)

We think that it would be helpful if John Reeves Q.C. included here a more comprehensive summery of the Indigenous peoples land / resource rights in the USA than what this section presents (see Appendix 1).

Chapter 4 – Effectiveness of the Act in Achieving its Purpose (p. 56)

The original purpose of the Act (p. 60)

The Federal Government's Letters Patent to Justice Woodward instructed the Woodward Commission to inquire into -

> " The appropriate means to recognise and establish the traditional **rights** and interests of the Aborigines in and in relation to land…"

In his second report, Justice Woodward recommended that the aims of the legislation could best be achieved by –

> " preserving and strengthening all Aboriginal interests in and **rights over land** which exist today…."

So how come John Reeves Q.C. managed to asses the **" rights "** aspect of the purpose as **" relationships " ?**

Very effective in recognising traditional Aboriginal interests in and relationship to land (p. 61)

In view of our above comment on John Reeves Q.C. assessment of the other purposes of the Act, it is evident that the phrase " relationship to " should be replaced by " right over " in the title of this section.

Given this correction, it is evident that, although the Aboriginal Land Rights (NT) Act may be judged as being very effective in recognising traditional Aboriginal interests in and rights over land, the other N.T. legislative provisions referred to by John Reeves Q.C. are only effective in recognising traditional Aboriginal interests in and relationship with land. The listed N.T. legislation only give Aboriginal peoples' access rights to the land. They do not give them any say in the management of these lands. Therefore they cannot be said to be very effective in achieving " the other purposes of the Act ".

Not as effective in providing Aboriginal people with effective control over activities on their land (p. 63)

We do agree with Human Rights and Equal Opportunity Commission's submission that the ALRA has failed to establish a structure for governance of land in accordance with Aboriginal tradition. We also agree with John Reeves Q.C. that the drawback of the setting of priorities by the Land Councils is the by product of the centralised system provided under the Act. But the centralised system is part and parcel of Australian Government and if Aboriginal people are to deal effectively with the broader community they cannot avoid having a centralised system representing them.

Distrust, resentment, hostility and lack of support (p. 66)

We do agree with Mr. I. Viner Q.C. assessment of the N.T. Government's attitude to Aboriginal Land Rights (NT) Act (John Reeves Q.C. quote on p. 67). In fact from our members' experience, the tone of the reporting in the N.T.'s newspapers and the appeals against land claims, it is evident that this attitude is shared by a wide section of the Territory's non-Indigenous population and has roots in Pre – Land Rights racism.

To the non – Indigenous Territorians, accustomed to Aboriginal people having no rights, any cost associated with the Land Rights Act will be excessive. As evident from the photograph of the keep out sign on the Gimbet Station, the Territorians are used to and accept private land owners' right to bar trespassers from their land. The fact that they do not accept that Aborigines should have this right shows that they still do not want to accept that Aboriginal land held under the Land Rights Act is private land.

In view of such attitude, the economist approach used by John Reeves Q.C. is inapplicable to the analysis of the effects of the Act on the attitude of the non – indigenous Territorians to Aborigines.

On p. 70, John Reeves Q.C. blames " the perceived imposition of unreasonable cost on the Territorians by the large Land Councils " on the lack of acceptance of Aboriginal land rights. We point out that the Territorians found the Act unacceptable even before it was enacted.

What could be achieved by partnership approach (p. 71)

We consider that all except the first of John Reeves' Q.C. proposed expected benefits for all Territorians require both unfair and unjust concessions from Aborigines. This is because the nature of these benefits imply that lands, rivers and beaches restored to Aboriginal ownership under the Act are treated as public or Crown land for the public to be guaranteed access to all river and beaches, and for major developments and generation of wealth for all to be assured. If it is accepted that non – Indigenous holders of private properties, such as Gimbat Station, can erect " keep out " sign on their gates, why shouldn't it be accepted that Aborigines have the same right ?

How to achieve a partnership (p. 72)

Under the heading " A new purpose – farming a partnership " (p. 71), John Reeves Q.C. refers to ATSIC's reference to the statement made by President Regan in 1989 and President Clinton in 1994, about the need for a unique and close government partnership between the United States government

and the American Indian governments. Because the American Indian tribes have the status of home sovereign nations, the partnership between governments and the American Indian governments are partnerships between equal partners with equal right. Because in Australia Aboriginal sovereignty as yet has not been officially recognised, it is vital from the equal partners point of view, that the Aboriginal Land Rights (NT) Act remains subject to Federal Law, and no part of it should be subject to the N.T. Government powers. The importance of this prerequisite for the achievement of partnership is evident from John Reeves Q.C. quote of the Northern Territories Government's response to the question relating to its policy position in relation to land rights, ie that –

> " Aboriginal Territorians should participate in the NT as a new State on the same basis as other Territorians and subject to the same legal rights and obligations although the antecedents of the Aboriginal people are recognised. In terms of special legislation, Aboriginal Territorians should only be subject to national legislation applying throughout Australia ".

In other words, apart from the recognition of antecedence, the Land Rights Act and substantive equality are not acceptable to the N.T. Government. It only accepts the Native Title Act and formal equality without any regard for the consequent injustice that flows from it (see Aboriginal and Torres Strait Islander Justice Commissioner's Native Title Report, July 1995 – June 1996, pp.20 to 23).

Chapter 6: Land Councils – Structure and Performance (p. 93)

Women on the Councils (p. 99)

The poor representation of women on the Land Councils stems from the history of anthropologists & non – Indigenous authorities relations with Aborigines. The anthropologists, church and government officials were predominantly men and they sought out Aboriginal men to communicate with and pass some responsibility to (see Diana Bell, " Daughters of the Dreaming ", or Diana Bell and Pam Ditton, " Law: the Old and the New "). Consequently in Aboriginal communities men began to be seen by the women as the go between. In the process men acquired the required skills for positions on Councils. It would take conscious effort to restore the gender balance and Aboriginal peole should be consulted on how this could be assisted.

Conclusions (p. 117)

The negative perception of the Land Councils is very similar to the non – Indigenous peoples perception of the governments and public service. How to change this negative perception and improve the Councils relationship with the communities should be left to the Aborigines to decide.

Chapter 7: Traditional Aboriginal Owners and Anthropology (p. 119)

New anthropological thinking (p. 139)

It is regrettable that in his overview of the new anthropological thinking, John Reeves Q.C. omitted to include Diana Bell's, Marcia Langton's and Nancy Williams works. Of particular importance to the understanding the Gove Land Rights case is Nancy M. Williams book, " The Yolngu and their land; a system of land tenure and fight for its recognition ", AIAS1986.

We wish to point out here that Aborigines worked out the most appropriate land ownership system to their needs and to ensure social harmony. This system did not take into account our presence and the need for dealing with us and our land tenure system. Our presence and past interference shows that Aborigines no longer can utilise their land for optimum social and economical purposes. It is unfortunate, as is the case with the Native Title Act, that we form our own models of Aboriginal social structures and their land ownership system and then exploit these artificial models for gaining benefits for the non – Indigenous people at the expense of the Indigenous People's rights.

We agree with John Reeves Q.C. conclusion that the current Land Rights Act scheme does not reflect adequately the reality of Aboriginal social structure with respect to land tenure. We recommend that

the Aboriginal people should be allowed to resolve and define this structure themselves and that their decision be accepted as the basis of the desired amendments to the Act.

Chapter 11: Outstanding Land Claims (p. 214)

Disposition of land claims – past and future (p. 218)

Categorisation of outstanding land claims (p. 219)

Intertidal zone (p. 223)

We fully agree with and endorse the NLC supplementary submission as quoted by John Reeves Q.C. on pp. 227 and 228.

We also share Barbara Wauchope (p. 227) concern about the effect of fishing boats on the ecology of the sea.

We therefore recommend that the NLC proposed amendments to the Land Rights Act (p.228) be accepted.

Sea and sea bed (p. 235)

We do disagree with John Reeves Q.C. recommended amendment to the Land Rights Act on this issue (p. 239). We recommend that the NLC's view is accepted and no ammendments on this issue are made to the Act.

Conservation Land Corporation and NT Land Corporation (p. 239)

We do agree with both CLC and NLC and disagree with John Reeves Q.C. view.

We recommend that these areas are claimable under the Land Rights Act under the same principle as was the case for Uluru and Kakadu National Parks.

Stock routs and stock reserves and the 'sunset clause' (p. 243)

We do agree with ATSICS's argument in favour of the repeal of ss. 50(2A) (p. 244).

We therefore recommend that ss. 50(2A) be repealed.

Chapter 13: Sacred Sites and Sacred Objects (p. 275)

Crisis as of the Northern Territory Aboriginal Sacred Sites Act (p. 278)

We do agree with comments from the submissions by the NLC, ATSIC and CLC on the Northern Territory Aboriginal Sacred Sites Act as summarised by John Reeves Q.C. We refer the Committee to our submission on proposed review of the Aboriginal and Torres Strait Islander Heritage Protection Act, 1984 (see Appendix 2) for our view on the desired relative status of the Federal and State/Territories legislation, and the need for official recognition of Aboriginal religion and Sacred Sites as consecrated lands.

Chapter 20: Native title and Community Living Areas (p. 435)

Native Title and the Land Rights Act (p. 436)

We do agree with John Reeves Q.C. that the conflict which arrises from the different provisions of the Aboriginal Land Rights (NT) Act and the Native Title Act needs to be resolved. This conflict of course stems from the statutory legislations and not from the native title as defined by Aboriginal Law.

We also share John Reeves Q.C. view that this conflict should be resolved in favour of the Land Rights Act for the three reasons he gives (p. 456).

But we do not agree with his primary recommendation that the a past or future grant of land under the land rights Act should extinguish all native title rights and interests in that land.

For firstly, as is evident from Letters Patent dated 8 February, 1973, Mr. JusticeWoodward received a Commission to inquire into and report upon " the appropriate means to recognise and establish the traditional rights and interests of Aborigines in and in relation to land…".
In other words, because at that time the Australian Law did not recognise Aboriginal land proprietary rights, the then Whitlam Government decided to appropriately change the Law.

Therefore the main purpose of the Land Rights Act was to recognise within Australian Law the traditional rights of Aborigines in their land, ie native title rights.

So how can a land grant under the Land Rights Act, extinguish the traditional rights and interests it is supposed to be restoring to the Aboriginal Owners of the land?

Clearly John Reeves primary recommendation is thus a contradiction in terms.

Secondly, although Aboriginal traditional rights in relation to land are defined by Aboriginal Law and so are fully determined and controlled by Aborigines themselves, both the Land Rights Act, which gives them statutory recognition, and the Native Title Act, which was only supposed to give them statutory protection but in fact also statutorily amended them, are outside Aboriginal control.

Consequently the Aborigines have no guarantee that in the future the relative protection of their rights provided by the two Acts will not be reversed by the Australian Parliament.

We therefore recommend that:-

1. John Reeves' Q.C. first recommended amendment to the Native Title Act (p461) be rejected by the Committee and replaced by the following amendment -

a. A past or future grant of land under the Land Rights Act automatically recognises the traditional owners as native title holders of the land.
b. On land covered by the Land Rights Act, the Land Rights Act always prevails over the Native Title Act until such time when the Aboriginal communities, who are subject to the Land Rights Act, and their representative Land Councils decide otherwise.

2. The Committee accepts John Reeves' Q.C. remaining three recommendations unchanged.

Community Living Areas and Native Title (p. 462)

We do disagree with John Reeve's Q.C. recommended amendments to the Native Title Act with respect to the status of community living areas (p. 470). Instead we recommend that the following variation of the Northern Land Council's approach be adopted (p. 469) –

a. A qualified grant of freehold title be made pursuant to s. 92 (1) of the Crown Lands Act (NT) which would involve –

- imposing a reservation which states that native title rights and interests are not extinguished or effected by the grant of freehold;
- imposing a covenant which restricts the grantee association from alienating the land other than to the Crown or its native title holders;
- imposing a covenant which requires the grantee association to enter into an agreement with the native title holders for a specific duration as to the terms and condition under which the association can utilise the land with the provision that the terms and conditions will be renegotiated at the end of the specified period of time, or alternatively, requires the body corporate to adopt a constitution which contains provisions that the land is held in trust on

behalf of all persons who hold native title rights or interests in respect of the land, and that the body corporate performs its function on the basis of the consent of the native title holders;

b. The Native Title Act be amended to provide that a grant of freehold title of an area of land as a Community Living Area does not extinguish any native title rights and interests in the land, but imposes the following conditions on the native title holders:-

- the native title holders have to enter into a negotiated agreement with the grantee association if the association chooses this alternative to be written into the imposed covenant on the granted land;
- the native title holders can not enter into agreement with any one else without the consent of the grantee association.

After all native title is the oldest land proprietary title in Australia. It should therefore be treated as the underlying title to all other titles and be able to revive once other titles expire. Pastoral leases were imposed on the native title holders without asking their consent. The problem which the community Living Areas legislation now aims to redress stems from the fact that the underlying status of native title was officially disregarded. Consequently, in spite of the statutory access rights, pastoralists treated the native title holders as just labour force and not as both labour force and landlords of the leased land. As a matter of justice, a repetition of these past wrongs should not be repeated again against the native title holders.

Chapter 21. Inalienable Freehold Title and Land Trusts (p. 473)

We fully agree with John Reeves' Q.C. that the inalienable freehold title is most appropriate form of title for Aboriginal land (p. 477). We also agree that the Act should be amended to allow the Aborigines more flexibility over the use of their land. But it is evident from both ATSIC's and NLC's submissions that John Reeves' Q.C. proposed structural changes to Land Councils and Land Trust is against Aboriginal wishes. We therefore stress and recommend that only changes to the Act are adopted which are acceptable to Aborigines.

Chapter 24. Exploration and Mining (p. 513)

Before discussing the issue of exploration and mining on Aboriginal lands, we wish to point out that the law relating to mineral ownership and control of exploration and mining on private and religious denomination lands was not, and still is not uniform over Australia.

For example:-

- In Victoria, until the 1980's, land owners holding land titles issued before 1892 owned the surface and everything under neath it apart from gold and some coal. More than 20% of land in Victoria was in this category, and is referred in the Mines Act as prior land (" State reviews mineral law ", the Age, 26-11-1981);
- In N.S.W., until the 1980's, seven – eighth's of coal royalties on coal extracted from private land was returned by the Crown to the owners of the land (" Coal royalty row takes a back seat social reform ", Financial Review, 26-11-1981);
- In Queensland, in 1971, the Queensland Parliament amended the Mines Act to ensure that landholders who held land under 1860, 1868 and 1872 land legislation and so also held ownership of minerals in their land other than gold and coal, were compensated for the value minerals as well as land in the event of Government's acquisition (Frank Brennan, " right Reasons for Aboriginal Land Rights ", in " Finding Common Ground " by Frank Brennan, John Egan and John Honner, p. 30);
- in Wester Australia, in 1970 the then Liberal State Government extended the right of private owners of land to control mining on their land if the mining involved any interference with the surface. Though this unqualified veto right extends only to cultivated land, the definition is broad enough to include uncleared land which is used from time to time for agistment of stock. Because of this most farming properties in Western Australia are protected from mining without the owner's consent (Senator Fred Chaney, " Land Rights Dispute ", West Australian, 5-8-78);

- in Victoria the Mines Act gives to religious denominations and private owners of land unqualified right to veto mining on specific parts of their lands including a buffer area around them, ie consecrated land, land in which churches or register places of worship are situated, land in cities or borough which is no more than 0.2 hectares in area, land used as orchards, vineyard etc.

Therefore any argument against Aboriginal rights with respect to the ownership of minerals, royalties and control rights of exploration and mining on their land, which are based on appeal for uniformity of law, are unsustainable.

Further, were it not for the " Terra Nullius " legal fiction, Aboriginal land ownership would have been enshrined in the early land laws of each State, and so, as is the case with prior land in Victoria, their title would most likely include ownership of minerals within their lands. Payment of royalties to Aborigines for minerals mined on their land should therefore be seen more as a right than as an act of benevolence on our part.

We also wish to point out that in the USA Indian tribes have much greater rights in respect of their control of exploration and mining on their land than Aborigines have under the Aboriginal Land Rights (NT) Act. Yet in spite of this, the mining companies, in many instances the same ones that operate in Australia, have no difficulties in operating there (see Appendix 1).

Further, the examples given on p. 24 of Appendix 1 of agreements signed between mining companies and Indian tribes in the USA, and on p. 46 of the two intra – company dealings, show that mining companies are capable to pay bigger dividends to Aboriginal owners than they are required to do at present.

It is evident from the above that the difficulties with present legislative process controlling exploration and mining on Aboriginal land in NT as illustrated by John Reeves' Q.C. quote on p. 515 from ATYSIC's submission, does not stem from Aboriginal rights to control mining on their land, but from curtailing of these rights, the powers of the Northern Territory Minister for Mines and Energy and the "deeming" effect inherent in the part the federal Minister for Aboriginal and Torres Strait Affairs plays in the process.

It is our paranoia about Aboriginal rights and self-determination which led to the changes in the legislation which confined Aboriginal veto right to the exploration stage only and ignored to address the main cause of the problems, namely the absence of competitive bidding at both exploration and mining lisence application stages (see Appendix 1, pp. 17, 19 for corresponding legislative process in the USA).

John Reeves Q.C. expresses his sympathy for the mining companies (p. 518). We sympathise with the Aborigines who are so restricted by the powers of the two Ministers and by having to make decisions at the exploration stage without knowing the full consequences the mining will have on their land and community. We also feel that the two large Land Councils are unfairly blamed for the supposedly low number of exploration licenses they approved. In the absence of competitive bidding, it is reasonable to expect that mining companies will exploit the system to delay their operations until world market prices are more favourable, while retaining their advantage over other companies with respect to obtaining Aboriginal consent to explore and mine their lands.

The question of the veto is central (p. 523)

John Reeves Q.C. points out that " it is clear that Justice Woodward's concerns (about the effects mining without consent could have on Aboriginal communities) had nothing to do with money, which the right to exercise the veto has come to be associated with (in the form of ' negotiated royalties ')". But Justice Woodward also made the comment that Aboriginal tradition should not be expected to be static, that they should be free to follow their own traditional method of decision – making, and should be free to choose their own manner of living. Accordingly Aboriginal communities should be free to improve their economical assets, so using the veto right for that purpose does not conflict with John Reeves' Q.C. quotation of Justice Woodward's concerns. Further, as the right to control access to and

activities on traditional estates is consistent feature of Australian Indigenous law (see Aboriginal and Torres Strait Islander Social Justice Commissioner's Native Title Report, July 1995 – June 1996, pp. 18, 22), the veto right is irrespectively of its statutory intention, a basic Indigenous inheritance right and so should be accepted as such. Any statutory replacement of this right by the right to negotiate only, as is the case in Native Title Act, would be not only unjust but also it would contribute to further delays in negotiation processes. This is because such delays could be used by mining companies to achieve the deal they want without the risk of loosing their right to mine.

It is therefore essential that the veto right is retained in the legislation. In our view, it should be extended so that it could be exercised both at the exploration and mining stage. This would make agreements easier as both parties would have better knowledge at both stages on which to base their decisions.

Reconnaissance licences make sense (p. 526)

John Reeves Q.C. claims that low – level exploration activity " has little, if any, impact on the land or those occupying it ". We do disagree. Low – reconnaissance activity with hand - held devices, or such other means as may be prescribed involve disturbance of the soil and hence disturbance of fauna and destruction of flora. It therefore can pose a threat to the species in the area, especially to rear and endangered species of both flora and fauna. This applies both to Crown and private land. The note that " under the N.T. Mining Act, a person holding miner's right is entitled to enter Crown land and explore provided that he does not use explosives, a mechanical device other than a hand – held device or such other means as may be prescribed " is irrelevant to whether such activity should or should not be permitted on the Aboriginal land without Aboriginal consent as Aboriginal land is not Crown land. In Victoria prospectors holding a Miner's right but not holding any registered mining title are limited to Crown land and the use of hand – operating implements. Prospecting on private lands may only occur after a claim has been registered, which necessitates the land owners written consent. Aboriginal lands are private lands and so should be treated as such. On p. 527, John Reeves Q.C. also quotes the Industry Commission statement that where the land is leased to various categories land holders, the land holders usually have to be consulted about access. It is therefore regrettable that John Reeves Q.C. then expresses his view that the Land Rights Act and the Mining Act (NT) should contain provisions which allow a person to obtain a licence for this purpose from the relevant Northern Territory authority without acquiring Aboriginal consent.

In our view the Act could be changed, provided the change is approved by Aborigines, to make the issue of such permits easier than for exploration and mining, but they still should require written Land Councils' consent.

Provisions should be made for renewal of mining leases (p. 529)

We do agree with the NLC submission that to provide for renewal without the requirement for further Aboriginal consent would seriously diminish Aboriginal land rights. In the USA there is no requirement that the holder of exploration title on Indian land be automatically entitled to a mining lease (see Appendix 1, p. 18) and this provision does not discourage mining companies from seeking such licences.

We therefore disagree with John Reeves' Q.C. assessment that to allow Aboriginal people to apply a veto at the stage of renewal of a licence would be akin to exposing mining companies to a form of 'sovereign risk'. The mining companies would be aware at the stage they enter into contract of the veto right, so they could bargain for the contract to contain some form of agreement to consent to the possible renewal of their lease. There is nothing unexpected about this, so how can this be a form of sovereign risk? John Reeves' Q.C. suggested process of negotiations, conciliation and arbitration could be used to apply to companies currently holding mining licences on Aboriginal lands as an interim measure to avoid exposing them to rules they did not expect at the time they entered into the mining agreements.

Conjunctive versus disjunctive agreements (p. 530)

We recommend that the right to veto both at the exploration and mining stage should be restored to the Aborigines. As is evident from Appendix 1, this right together with the introduction of competitive bidding as replacement of the present dependence on the Northern Territory Minister for Mines and Energy consent to an applicant's commencement of negotiation with the Land Council for the consent to the grant of the joint exploration and mining licence, will both reduce current delays and solve the problems raised by John Reeves Q.C. on p. 530.

The exploration and mining provisions should be recast and simplified (p. 531)

The veto should remain (p. 531)

We disagree with John Reeves' Q.C. assessment that the right to negotiate under the Native Title Act is aimed at protecting and enhancing common law native title rights that have not been extinguished, and therefore continue to exist in relation to the land. The common law native title rights are the rights as defined by Indigenous law. Therefore as pointed out in the submission under the heading " The Question of the veto is central ", the common law native title rights include the right to veto. The provision, in the Act of the 'right to negotiate' instead of the right to veto is a statutory amendment of the native title. Because of this amendment any argument based on the desire for uniformity clearly favour in justice the replacement of the 'right to negotiate' in the Native Title Act with the right to veto.

Recommendations (p. 540)

Although we agree with some points made by John Reeves Q.C. on pages 532 to 541, we disagree with most of them. We recommend that subject to the approval of the Land Councils, the Aboriginal under the Aboriginal Land Rights (NT) Act and ATSIC

- The Land Rights Act and the Mining Act (NT) should be amended to provide provisions to make it easier for the Land Councils to approve the application by a person to enter Aboriginal land for the purpose of reconnaissance exploration subject to conditions specified by the Land Councils;
- The structure and function of the present Land Councils should remain unchanged;
- The Land Rights Act should be amended to extend the right of veto to the exploration, mining and renewal of mining leases stages;
- The Land Rights Act should be amended to allow the Land Councils to use the competitive bidding process used in the USA (see Appendix 1, pp. 16, 17) for both exploration and mining, with the function of the Secretary of the Interior being replaced by the Federal Minister For Aboriginal Affairs;
- the Land Rights Act should be amended to allow the traditional owners, subject to the approval of the Land Councils and the Federal Minister for Aboriginal Affairs and any limitations or provisions prescribed by the Aboriginal community affected, to enter into any joint venture, operating, production sharing, service, management, lease or other agreement, or any amendment, supplement or other modification of such agreement providing for the exploration for, or extraction, processing, or other development of energy or non-energy mineral resources' or providing for sale or other disposition or production of such mineral resources (see Appendix1, p. 19);
- the Northern Territory Government should accept whatever enforceable agreements are made between a mining company and the Land Councils (unless it considers that the agreement should fail on other grounds, ie environmental) and issue the required exploration licence or mining licence;
- mining companies operating on Aboriginal land should be bound by law to pay normal royalties to the N.T. Government (as is the case now) and all so-called negotiated royalties to the Land Councils for the use by Aboriginal communities according to rules decided by the communities;
- the Commonwealth Government should continue to pay mining royalty equivalent into the Aboriginal Benefit Reserve for the benefit of all Aborigines living in the N.T.

- the Land Rights Act should be amended to remove the 'national interest' qualification of the veto right. Australian Parliament is empowered by the Constitution to enact special law when required by national interest, so the qualification is in principle redundant (see Pitjantjantjara Land Rights Commission Report).

3. Conclusion

The John Reeves Q.C. report is very detailed report, and as we have pointed out in the introduction, because of the lack of time, we were unable to comment in detail on every aspect of it.

On reading through the Report we came to the conclusion that although the report contains some positive recommendations, on balance its recommendations diminish Aboriginal rights as Indigenous Peoples.

In our opinion –

1. the structure of the Land Councils is an internal matter for Aboriginal people to decide. Therefore John Reeves Q.C. proposal to replace the present Land councils and the Northern Territory Aboriginal Council should be presented to the Aboriginal people to be free to accept or reject it;

2. John Reeves Q.C. recommendation with respect to mining provisions of the Act should be rejected. Instead we recommend that:-

    - The Land Rights Act and the Mining Act (NT) should be amended to provide provisions to make it easier for the Land Councils to approve the application by a person to enter Aboriginal land for the purpose of reconnaissance exploration subject to conditions specified by the Land Councils;
    - The structure and function of the present Land Councils should remain unchanged;
    - The Land Rights Act should be amended to extend the right of veto to the exploration, mining and renewal of mining leases stages;
    - The Land Rights Act should be amended to allow the Land Councils to use the competitive bidding process used in the USA (see Appendix 1, pp. 16, 17) for both exploration and mining, with the function of the Secretary of the Interior being replaced by the Federal Minister For Aboriginal Affairs;
    - the Land Rights Act should be amended to allow the traditional owners, subject to the approval of the Land Councils and the Federal Minister for Aboriginal Affairs and any limitations or provisions prescribed by the Aboriginal community affected, to enter into any joint venture, operating, production sharing, service, management, lease or other agreement, or any amendment, supplement or other modification of such agreement providing for the exploration for, or extraction, processing, or other development of energy or non-energy mineral resources' or providing for sale or other disposition or production of such mineral resources
      (see Appendix1, p. 19);

- the Northern Territory Government should accept whatever enforceable agreements are made between a mining company and the Land Councils (unless it considers that the agreement should fail on other grounds, ie environmental) and issue the required exploration licence or mining licence;
- mining companies operating on Aboriginal land should be bound by law to pay normal royalties to the N.T. Government (as is the case now) and all so-called negotiated royalties to the Land Councils for the use by Aboriginal communities according to rules decided by the communities;
- the Commonwealth Government should continue to pay mining royalty equivalent into the Aboriginal Benefit Reserve for the benefit of all Aborigines living in the N.T.
- the Land Rights Act should be amended to remove the 'national interest' qualification of the veto right. Australian Parliament is empowered by the Constitution to enact special law when required by national interest, so the qualification is in principle redundant (see Pitjantjantjara Land Rights Commission Report).

3. John Reeves Q.C. proposals concerning access to Aboriginal land should be rejected and the present system retained except for reconnaissance exploration which we addressed in part 2 above;
4. Apart of environmental protection laws, Northern Territory Laws should not apply to the Aboriginal land.
5. Aboriginal people should be given a part in the management of the lands and waters to which they are given access under the N.T. Fisheries Act, Territory Parks and Wildlife Conservation Act and the Pastoral Land Act;
6. for the purpose of establishing partnerships with the Northern Territory Government, it is important that the Land Rights Act remains subject to Federal Law only;
7. the Land Rights Act must be amended to include recognition of traditional rights to the seas and waters;
8. because the Federal Court is in the process of considering the case of whether land under seas adjacent to the N.T. mainland are claimable under the Land Rights Act, amendments of the Act with respect of this issue are not warranted;
9. land held by the Conservation Land Corporation and the N.T. Land Corporation should be claimable under the Land Rights Act under the same principle as was the case of Uluru and Kakadu National Parks;
10. subsection 50(2A) of the Land rights Act should be repealed;
11. Aboriginal religion should be officially recognised as religion and Sacred Sites as consecrated lands. The Northern Territory Aboriginal Sacred Sites Act should be amended to give full control and responsibility for the Sacred Sites to Aboriginal people;
12. John Reeves' Q.C. first recommended amendment to the Native Title Act (p461) be rejected by the Committee and replaced by the following amendment -

- A past or future grant of land under the Land Rights Act automatically recognises the traditional owners as native title holders of the land.
- On land covered by the Land Rights Act, the Land Rights Act always prevails over the Native Title Act until such time when the Aboriginal communities, who are subject to the Land Rights Act, and their representative Land Councils decide otherwise.

The Committee should accept John Reeves' Q.C. remaining three recommendations unchanged;

13. with respect to the Native Title Act and Community Living Areas, the following variation of the Northern Land Council's approach be adopted (p. 469) -
    a. a qualified grant of freehold title be made for Community Living Areas pursuant to s. 92 (1) of the Crown Lands Act (NT) which would involve –

        - imposing a reservation which states that native title rights and interests are not extinguished or effected by the grant of freehold;
        - imposing a covenant which restricts the grantee association from alienating the land other than to the Crown or its native title holders;
        - imposing a covenant which requires the grantee association to enter into an agreement with the native title holders for a specific duration as to the terms and condition under which the association can utilise the land with the provision that the terms and conditions will be renegotiated at the end of the specified period of time, or alternatively, requires the body corporate to adopt a constitution which contains provisions that the land is held in trust on behalf of all persons who hold native title rights or interests in respect of the land, and that the body corporate performs its function on the basis of the consent of the native title holders;

    b. the Native Title Act be amended to provide that a grant of freehold title of an area of land as a Community Living Area does not extinguish any native title rights and interests in the land, but imposes the following conditions on the native title holders:-

- the native title holders have to enter into a negotiated agreement with the grantee association if the association chooses this alternative to be written into the imposed covenant on the granted land;
- the native title holders can not enter into agreement with any one else without the consent of the grantee association;

14. the inalienable freehold title is most appropriate form of title for Aboriginal land (p. 477). We also agree with John Reeves Q.C. that the Act should be amended to allow the Aborigines more flexibility over the use of their land. But it is evident from both ATSIC's and NLC's submissions that John Reeves' Q.C. proposed structural changes to Land Councils and Land Trust is against Aboriginal wishes. We therefore stress and recommend that only changes to the Act are adopted which are acceptable to Aborigines.

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5th February, 1999.