CLC response to the Forrest Review

24 September 2014

This brief submission addresses only those aspects of the Forrest review found in chapter eight concerning land tenure, land access payments, home ownership and the Northern Territory Land Councils. The CLC is also a member of the Aboriginal Peak Organisations NT (APO NT). The APO NT submission provides comment on a much broader range of issues and should be read in conjunction with this submission. Attached also is a detailed paper ‘Land Reform in the Northern Territory: evidence not ideology’ (CLC 2013) produced by the CLC which provides a comprehensive analysis of these issues in the CLC region.¹

Summary

The Forrest review (the report) lacks substance in its analysis of land tenure policy issues and adopts an ideological, rather than an evidence-based, approach to this issue. It is very disappointing that the section devoted to the Northern Territory Land Councils (p.212-214) needlessly criticises the land councils with no critical analysis, no reference to our materials, nor any attempt to discuss these matters directly with the land councils. The report clearly endorses the current government’s preferred tenure option, that of s.19A ‘township’ leases, without consideration of the alternative regime which is significantly advanced throughout the NT, that of s.19 voluntary leases covering most existing infrastructure on Aboriginal land. It also fails to adequately comprehend the significance of the non-tenure barriers to home ownership and economic development, including but not limited to: remoteness, lack of infrastructure, poor roads, low incomes, low literacy and numeracy, poor health and distance from markets.

Specific points

Land reform in the NT

1.1 The report asserts that ‘administration and land reform to individual leasing or ownership have stalled’ (p.212). This statement completely ignores the major reform which has occurred in the NT over the past five years, whereby almost all remote infrastructure and community housing is now held under s.19 leases. This is detailed in the CLC paper referred to above. Cadastral surveys are being undertaken by the NT Government utilising federal funding, with 16 communities in the CLC region substantially progressed. This considerable and significant land tenure and land administration reform process is now being overlooked because it represents an alternative regime to the Australian Government’s preferred ‘township’ leasing model. The report also states that ‘Indigenous land councils....have either refused or found it difficult to obtain a mandate from traditional owners to convert Aboriginal titles to freehold leases for the purposes of home construction, home ownership and home allotment and leasing’ (p.212). Almost all remote community houses in the CLC region are now held under lease by the Executive Director of Township Leasing (EDTL) and these leases have been consented to by traditional owners. Traditional owners of the three communities that were offered new houses in this region (Yuendumu, Lajamanu and Hermannsburg) consented to appropriate leasing arrangements to enable construction of their new houses, as required by the Australian Government. Reasonable applications for leases are considered by traditional owners and are consented to more often than not. Traditional owners have so far rejected proposals that involve wholesale leasing of a community to the government. Surely this is clear evidence that land councils are progressing any reasonable applications for leases required for housing management and development purposes? There has only been one approach to the CLC for a lease to enable private home ownership, and this was from a non-Aboriginal person.

1.2 The report takes a rather uncritical position regarding township leasing. The Central Land Council (CLC) has criticised the provisions relating to s.19A township leasing because they:

- Introduce government control over private decision making on Aboriginal land (through the Executive Director of Township Leasing (EDTL))

- Are unnecessary. The outcomes sought can be achieved through leases under section 19 of the ALRA.

- Restrict the freedom of traditional owners to bargain commercially, through legislative
restrictions on what may be provided for in the head lease

The EDTL has, as part of existing township leases, established a ‘Consultative Forum’ which is charged with fostering close cooperation with traditional owners and community members and providing an opportunity for involvement in decisions relating to the development of their community. While the EDTL has said that the views of the Consultative Forum have always been followed, there is no guarantee this will happen in the future. In practice this is an advisory body with no decision making power.

1.3 While a large number of sub-leases have been issued under township leases, voluntary leasing under the section 19 of the ALRA, whereby the traditional owners retain control over the grant of leases, is also now significantly advanced throughout the CLC region, with over 400 section 19 leases now executed in remote communities. The vast majority of all available lots in larger townships are now covered by formal leases with fair rent payable for all but housing leases (as is the case under the township leasing model). The report ignores this reality and fails to explain what a whole of township lease would now achieve. It is also far from evident that a township lease is a model that, without additional investments and support, better delivers economic development or home ownership outcomes than section 19 leasing.

1.4 Academic and lawyer, Leon Terrill recently examined the two whole township leases agreed to in the NT and his assessment is that ‘township leases give the impression of doing far more than they actually do.’

Like on Aboriginal communities in the CLC region, the substantial majority of subleases are being granted to government agencies, and to a lesser extent to non-government organisations. Only a small number of subleases have been granted to private enterprises, traditional owners or community residents. Terrill notes that it has also been argued that township leases ‘facilitate the development of a real estate market’, however:

rights acquired under a sublease are contained, subject to ongoing rental obligations and subject also to some level of restriction on transfer (with the exception of homeownership subleases). This will not lead to a market in subleases...Even if subleases were in a more commodifiable form they would still overwhelmingly be held by either government agencies

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or government-funded organisations. Communities would still be remote and average incomes would still be low...Reasons for the absence of land markets in remote Aboriginal communities go well beyond tenure, and altering tenure does not reset the socioeconomic and cultural matrix.\textsuperscript{5}

**Home ownership and Housing**

1.5 The Forrest report states that ‘statutory bodies that represent traditional owners should heed their instructions to enable home ownership on their land. If the current system is not doing it, governments should use every lever to drive the necessary change’ (p.213). This inflammatory statement does little to progress considered debate on this complex issue. The CLC has a statutory responsibility to act on the instructions of traditional owners but none have requested it pursue home ownership on their behalf.

1.6 The CLC asserts that tenure is not the main impediment to home ownership. If tenure were the primary issue why are there not more examples of Aboriginal people owning their own homes in comparable remote communities that are not on Aboriginal land, such as Kalkaringi, Elliott, Ti-Tree and Finke? The report asserts that ‘The 40-year leases are not over individual lots but over area, or suburbs, and cannot be sublet, so they are not conducive to home ownership’ (p.213). This is untrue. Should an individual want to seek a lease for private home ownership the process is quite straightforward. Where a forty year housing lease exists the lot would be removed, by consent of the parties, from the housing lease. An individual lease over the lot would be granted subject to the consent of the traditional owners for an appropriate term, likely to be 80-99 years. The tenure solution is ready but the accompanying policy parameters require much more work. The report goes on to say that ‘This ingrained inefficiency simply requires council members to heed the will of their people for home ownership’ (p.213). This is simply fanciful and out of touch with the realities of remote living. At this time in central Australia there is no grassroots push for home ownership. Over time, should there be a viable framework for home ownership, it may become something that traditional owners aspire to. The CLC is very happy to assist those who want to own a home in a remote community.

1.7 In order to progress remote home ownership the following issues need to be addressed.

- What sort of terms and restrictions should be included in a home ownership lease or sublease? Are the terms and conditions in existing township subleases appropriate?

\textsuperscript{5} Ibid, 176.
- Open, closed or regulated markets:
  - Who decides which is chosen? What is the process for making this decision?
  - What is the legal mechanism for implementing it?
  - What is the process for ensuring that the consequences of this are made known to homeowners?
- Policies for the pricing of houses for sale:
  - new houses: what subsidies are available?
  - old houses: what valuation methodology is used?
- Is there a need for a buy-back scheme? How would it be funded? Who would manage it? How would prices be set? Is this communicated to homeowners upon purchase?
- Is there a need for additional regulation or processes to monitor construction quality:
  - for self-build construction (i.e. where the homeowner engages a builder)?
  - for construction for sale by private enterprise?
- If so, whose responsibility is this? How is it implemented? Does it connect to the availability of subsidised finance?
- Does the Indigenous Home Ownership Program provide an adequate and appropriate mortgage product?
- Is there need for advance work on default processes: do existing default processes need to be modified in the remote community context?
- What ongoing support is required for home owners, including the need to access affordable and quality repairs and maintenance services?
- Process for ensuring that all homeowners have a will in place
- Dealing appropriately and sensitively with the making of wills

The CLC has made it clear to both levels of government that it is willing to participate in any relevant processes to consider and resolve such issues.

1.7 The report recommends that funding to the land councils should be based on results not process (p.213-4). The CLC is closely monitored and the annual report is tabled each year in Parliament. Funding is already based on results, but the *Aboriginal Land Rights (Northern Territory) Act 1976* makes it very clear that the CLC’s statutory function is to undertake consultative processes to ensure that traditional owners are empowered to make informed decisions. This is not the same as delivering the results desired by governments. The CLC’s ‘results’ are the informed decisions of traditional owners, whether they conform with government policy or not.
1.8 The CLC agrees that ‘state governments continue to run massive, unsustainable social and public housing systems that are riddled with debt and variable standards of performance and management’ (p.216). This move to monopoly public housing only occurred in 2007 in remote communities in the NT, contrary to national and international trends, and was enabled by the compulsory acquisition of the five year leases over remote communities. It is obvious that the remote housing system is failing many residents and the CLC has consistently advocated for a more diversified remote social housing sector. Private home ownership may occupy a small niche in any new remote housing arrangements but it is unrealistic to presume it will replace the need for a remote social housing sector.

1.9 Specific response to recommendation 26 – ‘That governments create the ability for traditional owners to convert their land to freehold or hold the underlying title with a 99-year lease owned by the home or business owner, so that it can be mortgaged or traded through the open market and so that traditional owners can build their houses on allotments on their own land’ (p.220).

It is already possible to obtain a 99 year lease under s.19 of the Aboriginal Land Rights (Northern Territory) Act 1976, and these leases can be transferrable and subject to a mortgage. No legislative reform is required in the NT, rather, other complex barriers to home ownership and commercial development need to be addressed.

Land access payments

2.1 More can be done to support and encourage traditional owners to use their own sources of income for long-term benefit. The CLC has adopted this approach with its innovative Community Development program. This program works directly with traditional owners to prioritise, plan and implement community benefit projects, including infrastructure, education support programs, early childhood and youth initiatives and cultural maintenance programs. It is a pity that the review team chose not to highlight its positive outcomes, especially given the criticisms levelled at NT land councils in the previous section.

2.2 Specific response to recommendation 27 – ‘So that land access payments can be applied to the economic and social progress of traditional owner and native title groups and ensure intergenerational benefits, that the Commonwealth Government consider the recommendations in the report of the Taxation of Native Title and Traditional Owner Benefits and Governance Working group’ (p.221).
The CLC agrees that the recommendations of the *Taxation of Native Title and Traditional Owner Benefits and Governance Working group* should be given serious consideration, and innovative programs such as the CLCs community development program should be supported and expanded.