LEGISLATIVE NOTES

REVIEW OF THE *ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) ACT* 1976

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INTRODUCTION

On 8 October 1997, the Federal Minister for Aboriginal and Torres Strait Islander Affairs, Senator John Herron, announced the appointment of John Reeves QC to conduct a review of the *Aboriginal Land Rights (Northern Territory) Act 1976 (Commonwealth)* (the "Act"). After advertising and receiving written submissions on the review, Mr Reeves is currently taking oral submissions in all major regional centres in the Northern Territory. He plans to prepare a final report for submission to the Minister by 31 May 1998.

The Act was passed by the Federal Parliament in 1976 and came into effect on 26 January 1977. The current review of the Act is the first general review since 1983.[1] Up until the end of 1986, the Act was the subject of 31 sets of amendments. Some of these amendments were substantial and some were merely formal. The 1987 amendments were probably the widest reaching of all the amendments made to the Act; among other things, the 1987 amendments introduced the time limit on the making of land claims.

The Act has had a dramatic effect on land holdings in the Northern Territory. Presently, approximately 41.9% of the total area of the Territory is made up of "Aboriginal Land"[2]. According to the office of the Aboriginal Land Commissioner, in the first 20 years of the Act's operation, 162 land claim applications were made. In the week before the expiry of the time limit for the lodging of claims under the Act on 5 June 1997, 86 new land claim applications were made. With the new claims, there are now 113 outstanding land claims for which no inquiry has commenced. The outstanding claims cover an area representing 10.51% of the total area of the Northern Territory.

TERMS OF REFERENCE

The Terms of Reference with respect to the review of the Act state that the review will examine and report on the operation of the Act and suggest any areas for possible change including recommending amendments where appropriate. In particular, the review is to consider:

(i) the effectiveness of the legislation in achieving its purpose;

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1 Mr Justice Toohey (then a Federal Court Judge and now a High Court Judge) conducted a general review of the Act in 1983 and produced a report entitled "Seven Years On". Mr JC Altman (now Professor Altman) conducted a review of some financial aspects of the Act in 1984.

2 Final Submission of the Northern Territory Government to the Review of the Aboriginal Land Rights (Northern Territory) Act 1976, January 1998, page vii.

(ii) the impact of the legislation in terms of social, cultural and economic costs and benefits;

(iii) the operation of the exploration and mining provisions;

(iv) the operations of the Aboriginal Benefits Trust Account including the distribution of payments out of the Trust Account;

(v) the operation of the Royalty Associations and their reporting requirements;

(vi) the question of compulsory acquisition powers over Aboriginal Land;

(vii) the application of Northern Territory laws to Aboriginal Land;

(viii) the role, structure and resource needs of the Land Councils following the coming into effect of the sunset clause relating to land claims; and

(ix) any other matters relevant to the operation of the Act.

While many of the matters contained in the Terms of Reference will be of interest to the mining industry, it is the operation of the exploration and mining provisions which are of most immediate impact and which are the focus of this paper.

THE EXPLORATION AND MINING PROVISIONS

Exploration and mining rights for minerals and petroleum on Aboriginal Land are, like such interests in other land in the Northern Territory, generally granted by the Northern Territory Minister for Mines and Energy pursuant to the *Mining Act 1980* (NT) (the "Mining Act") or the *Petroleum Act 1984* (NT) (the "Petroleum Act") respectively.

The principal conditions which must be met before an exploration licence can be granted to any person in respect of Aboriginal Land are as follows:

(a) the relevant Land Council must, after consulting with and obtaining the consent of the relevant Aboriginal landowners, consent to the grant;

(b) the Commonwealth Minister for Aboriginal and Torres Strait Islander Affairs (the "Commonwealth Minister") must consent to the grant; and

(c) the applicant for the exploration licence and, with the approval of the Aboriginal landowners, the Land Council must enter into an agreement under Part IV as to the terms and conditions to which the grant of the licence will be subject.[3]

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3 Section 40

The principal conditions which must be met before a mining interest, usually in the form of a mineral lease under the Mining Act or a production licence under the Petroleum Act, can be granted to a person in respect of Aboriginal Land are as follows:

(a) the applicant for the mining interest must be an "intending miner" which is defined to include a person who applies for a mining interest over an area of Aboriginal Land over which, at the time he applies for the mining interest, he holds an exploration licence or over which he held an exploration licence and, at the time he applies for the mining interest, holds an exploration retention licence or has made an application for such a licence;[4]

(b) the application and the relevant Land Council must enter into an agreement under section 46 as to the terms and conditions to which the grant of the mining interest will be subject; and

(c) the Commonwealth Minister must consent to the grant.

The steps to obtaining an exploration and mining rights on Aboriginal Land are complex[5] but it is the so-called "Aboriginal Veto" contained within the Act which is the critical issue to the mining industry. Where a Land Council refuses consent to the grant of an exploration licence, then a further application for the Land Council's consent to the grant of any exploration licence over the relevant land can only be made as provided under section 48 of the Act five years after notice of refusal has been given by the Land Council. The Commonwealth Minister can agree to a reapplication two years from the original refusal only on the application of a Land Council and only where the Commonwealth Minister is satisfied on reasonable grounds that the original refusal was for reasons other than a desire to maximise the amount of financial compensation to be received, (whether at the exploration or the mining stage), the circumstances or concern that resulted in the refusal are no longer applicable and the public interest requires that a further application be made.

With respect to the grant of mining interests, if the intending miner and the Land Council cannot agree upon the terms and conditions of the mining agreement within a twelve month period, then either or both of them may request that the Commonwealth Minister refer the matters in dispute to a Mining Commissioner for resolution by conciliation or failing that by arbitration. If the dispute is resolved by arbitration, the Land Council must enter the mining agreement determined by the Mining Commissioner if the intending miner is willing to enter such agreement.

The current regime governing exploration and mining on Aboriginal Land came into effect with the commencement of the 1987 amendments to the Act. The purpose and effect of amendments to Part IV of the Act in 1987 was to remove a "double veto", that is, the requirement to obtain the consent of the traditional owners to exploration, and further consent to mining . In the *Stockdale* decision[6], the Supreme Court of the Northern Territory confirmed the "once only" veto and held that a contractual requirement to obtain further consent to mining (after consent to exploration had been obtained) was unenforceable and void as being contrary to Part IV.

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4 Section 3

5 See B. Midena, Aboriginal Land Rights - Developments in Northern Territory [1992] *AMPLA Year Book 529, 559-565.*

6 *Northern Territory of Australia v Northern Land Council and Others* (1992) 81 NTR 1.

Northern Territory Government Submission

In its written submission to Mr Reeves,[7] the Northern Territory Government has argued that the right to refuse consent to mineral exploration is a right given to no other land owners in the Northern Territory. The rights of other landholders are limited to the right to object, the right to have disputes resolved by the Mining Warden and the right to receive compensation for disturbance to the land. The Government is of the view that the "veto" right has had an inhibiting effect on mineral exploration reducing the chances of locating viable deposits. It has argued that the "veto" provisions of the Act should be repealed with the result that exploration and mining on Aboriginal land would be subject to the same regime as applies in the rest of the country under the provisions of the *Native Title Act* 1993 (C'th).

In the alternative, the Government has argued that Part IV should be amended to provide incentives and sanctions to speed up the negotiating process including but not limited to a requirement that traditional Aboriginal owners who are opposed to mineral exploration on cultural grounds, exercise the right of refusing consent within six months, that the capacity of the applicant and the Land Council to extend the negotiating period is limited to a once only period of 12 months and that the Commonwealth Minister be required to take into account the views of the Northern Territory Minister when considering an application to extend the negotiating period which extension would also be limited to a once-only 12 month period.

Central Land Council Submission

In its written submission,[8] the Central Land Council ("CLC") states that the 1987 amendments to Part IV were a serious erosion of Aboriginal rights and that any ill-conceived tampering of rights under the Act or further substantial alteration to the administrative structure governing exploration and mining on Aboriginal land can only upset that balance and result in the complete collapse of the mining regime. The CLC argues that under the current Act, a delicate balance exists between traditional Aboriginal owners' rights to enjoy their land and control access as against the needs of the mining industry for security and certainty of access of land for the discovery and development of resources. According to the CLC, on Aboriginal land the mining industry gets the certainty it desires to enable it to secure the level of investment it requires and Aboriginal people get recognition, control and benefits from mining on their land where they choose to participate. Therefore, the CLC argues that "the veto" (or the right to refuse consent as the CLC puts it) should be maintained.

While it has argued strongly that the veto be retained, the CLC has submitted that some improvements in efficiency of operation of Part IV could be achieved through minor legislative adjustments of the mining provisions. In this regard, it has submitted that there should be an amendment to section 44A to enable the parties to an exploration agreement to include terms and conditions which will have effect at the mining stage. The principles from the Stockdale decision mean that most terms and conditions related to mining in exploration agreements are not enforceable which leaves the agreed position open to challenge by either party. Therefore, while it is the practice of the Land Council and companies negotiating an exploration

7 Final Submission of the Northern Territory Government to the Review of the Aboriginal Land Rights (Northern Territory) Act 1976, January 1998

8 Submission by the Central Land Council to the Review of the Aboriginal Land Rights (NT) Act 1976.

agreement to agree on parameters that would apply to mining, at best these parameters are a statement of intent not binding on the parties.

The CLC has also submitted that improved administrative efficiency could be achieved through an amendment to allow the parties to agree to extend the negotiating period for an exploration agreement as they see fit. At present, the Act provides for an initial negotiating period of 12 months during which time the parties can agree to extend the negotiation period. Any further extensions to the negotiating period have to be determined by the Commonwealth Minister following a request from the Land Council.

Northern Land Council Submission

The Northern Land Council ("NLC") takes a similar view to the Central Land Council relating to the "veto".[9] The NLC submits that the right to refuse consent is fundamental to Aboriginal land rights and to the purposes of the Act and that the exercise of this right has not detrimentally affected the mining industry or the Northern Territory economy. Like the CLC, the NLC believes that a number of minor amendments are required to Part IV which it believes will significantly improve the operation of the exploration and mining provisions without creating uncertainty and delay. The amendments of primary importance in this regard are to section 44A and to section 45. Section 44A presently specifically provides that compensation payments be limited to damage and disturbance to Aboriginal land or traditional Aboriginal owners. The NLC submits that there must be no restriction on the matters which can be included under exploration agreements and that traditional Aboriginal owners must have the ability to again consider the mining proposal once an ore body has been located and, at that time, also have the opportunity to negotiate terms and conditions which should apply to the mining operations. It also proposes that section 45 be amended to provide certainty for all parties regarding mining subsequent to an exploration agreement to the effect that a mining interest would not be granted to an intending miner in respect of Aboriginal land unless the mining agreement is in accordance with such of the terms and conditions of the exploration agreement as may apply to the grant of the mining interest.

Northern Territory Minerals Council Submission

In its written submission,[10] the Northern Territory Minerals Council acknowledges that there may be an expectation that the mining industry would call for the abolition of the "veto". However, it has taken the position that the existence or otherwise of the veto is a matter of principle for governments to resolve. It recognises that traditional Aboriginal land owners regard the "veto" as fundamental to their right to control activities on their land and the reality is that the industry is obliged to work within a framework which includes the right of traditional Aboriginal landowners to refuse to consent to exploration and mining on their land. However, the Minerals Council believes that if the "veto" is to be retained by government, that right should be subject to a number of refinements.

In this regard, the Minerals Council notes that as a result of the Stockdale decision, and notwithstanding that they are not necessarily binding, the practice of the Land Councils is to insist on prospective explorers

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9 "Our Land Our Law" Northern Land Council Submission to the review of the Aboriginal Land Rights (Northern Territory) Act 1976, December 1997.

10 Submission of the Northern Territory Minerals Council to the Review of the Aboriginal Land Rights (Northern Territory) Act 1976 by John Reeves QC, 21 January 1998.

and traditional owners entering into agreements as to terms which will be applicable to the mining stage as a precondition to the granting of consent to exploration. This is so even though the nature of the resource (if any) is completely unknown prior to exploration. The Minerals Council states that the veto has been exercisable at any time up to the execution of the agreement by the Land Council and that this fact is used as a bargaining tool to ensure that terms are agreed as required by the Land Council in that the veto can be exercised at any time if agreement is not reached. The Minerals Council's view is that the veto is intended only to be a device to be used by traditional owners who do not want any exploration and mining on their land. Therefore, it has proposed that the Act be amended to provide that a meeting of traditional owners be convened within a certain time after the receipt of an exploration licence application and consent or refusal of consent be required within a specified time thereafter (such as 60 days). The consent or refusal for consent would need to be given before any negotiations take place as to the contents of an exploration agreement. If consent is given but the parties are unable to agree on the terms of an agreement, there should be provision for arbitration or conciliation, at the option of either party. The Minerals Council believes that its proposal ensures that consent to exploration and mining is based on cultural or social concerns and is not dictated by the terms of the agreement.

CONCLUSION

This review of the position taken by the major participants in the debate on the review of the Act relating to the right of traditional owners to refuse consent to exploration on Aboriginal land reveals, perhaps not surprisingly, a marked difference of opinion. While the Northern Territory Government has argued that the veto be removed completely or at least that the flexibilities given to the Land Councils and traditional owners be curtailed significantly, the Land Councils argue that the veto should not only be retained but that greater flexibilities should be introduced. On the other hand, the Northern Territory Minerals Council has taken a pragmatic position which reflects the reality that intending explorers and miners in the Northern Territory must work together with the aboriginal communities in the areas in which they wish to operate. It is also the view of the mining industry that even though the mechanisms in the Act are cumbersome and time-consuming, the process provides a fair degree of certainty and predictability. This is so especially when the position under the Act is contrasted with the uncertainty that exists in relation to the operation of the *Native Title Act 1993* (Commonwealth).

According to press reports[11] the position taken by the Northern Territory Government is likely to be rejected by Mr Reeves who is reported to have stated that it would be difficult to remove the veto if the mining industry proposes that it continues. However, at the very least, it can be expected that Mr Reeves will recommend that the process for dealing with applications for exploration licences on Aboriginal land is streamlined and made more efficient. It remains to be seen whether his recommendations with regard to the Aboriginal "veto" are more far-reaching.

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11 The Australian 10 January 1998 page 8.