Central Land Council and Northern Land Council

SUBMISSION TO THE INQUIRY INTO RESOURCES EXPLORATION IMPEDIMENTS

House of Representatives Committee on Industry and Resources

1 August 2002

The broad scope of the inquiry is to report on any impediments to increasing investment in mineral and petroleum exploration in Australia. This submission is particularly addressed to the following matters which the Committee has been requested to inquire into –

- Access to land including Native Title and Cultural Heritage issues;
- Relationships with indigenous communities.

Other aspects relevant to the inquiry are also touched upon.

The Central and Northern Land Councils are statutory bodies established pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976.* In addition, the land councils are the Representative Bodies for their areas under the *Native Title Act.*

The current inquiry into impediments to increasing investment in resources exploration is one of several current government initiatives examining the operation of various aspects of the *Aboriginal Land Rights Act (NT) 1976.* It follows on from a series of reviews that have looked extensively at the mining provisions of the Land Rights Act.

Current inquiries

At the beginning of this year the Minister for Immigration and Multicultural and Indigenous Affairs, the Honourable Philip Ruddock, asked the Auditor-General to review the efficiency and effectiveness of the land councils. In March 2002, the Australian National Audit Office (ANAO) commenced a performance audit of the Northern Territory land councils and the Aboriginal Benefits Account (ABA). The ANAO is currently preparing its report following extensive examination and inspection, facilitated by the land councils, of their operations. Also under assessment by the ANAO is the financial management framework of the ABA, which is managed by the Aboriginal and Torres Strait Islander Commission (ATSIC).

On 12 April 2002 the Minister released an options paper on possible reforms to the Land Rights Act. The Minister has described this document as a mechanism for attempting to reach consensus rather than presenting a definitive Commonwealth position. It is a synthesis of recommendations arising from various reviews and does not identify the government's position on the range of possible changes that are canvassed in the paper. The land councils are presently engaged in discussions with the Northern Territory

Government to identify areas of agreement on possible changes to the Act. The land councils have already identified significant efficiencies that could result from the Northern Territory Government administering its responsibilities with respect to mineral exploration on Aboriginal land in a more effective way.

Previous inquiries

The current Commonwealth government initiatives flow from a series of relatively recent reports examining aspects of the Land Rights Act and, in particular, the operation of the mining provisions. The Reeves Report on the Review of the Land Rights Act was released in August 1998. For a number of valid reasons, the Report and its recommendations stand largely discredited because it is deeply flawed. It represents a lost opportunity for a comprehensive, balanced and objective review of the Act. Such a review has simply not been carried out.

The subsequent House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HORSCATSIA) inquiry into the recommendations of the Reeves Report went some way to salvaging something from the mess of that report. The committee conducted extensive community consultations across the Northern Territory over a four-month period in 1999 and released its report in August 1999. The community consultations revealed the level of discontent with Reeves' recommendations and significantly, the committee went on to reject a number of Reeves' key recommendations. In terms of exploration and mining, the committee made several recommendations. However, it noted that at the time of its deliberations, the National Institute of Economic and Industry Research (NIEIR) was reviewing the mining provisions of the Land Rights Act with respect to the National Competition Policy.

Dr Ian Manning, an economist at NIEIR, conducted the review of the mining provisions against the National Competition Policy principles. This review is distinguished by the extensive analysis of exploration licence data that Manning undertook. NIEIR constructed a database from exploration licence data from CLC, NLC and Northern Territory Government sources, together with a detailed survey of 100 ELAs randomly selected from each of the land councils' records. His report released in July 1999 remains the most authoritative and objective analysis of the operation of the mining provisions of the Land Rights Act.

Other inquiries, for example the Industry Commission's Inquiry into Mining and Minerals Processing (1991) and its Inquiry into Australian Direct Investment Abroad (1997), though not directly related to land rights or native title have closely scrutinised the two regimes.

Current Situation

As the focus of this inquiry is on impediments to increasing investment in mineral and petroleum exploration the CLC & NLC engaged Dr Manning to provide comments on matters relevant to the Committee's inquiry, in relation to the Land Rights Act and the Native Title Act in the Northern Territory. Dr Manning's paper is attached. It is adopted by the CLC and NLC and forms part of this submission.

The investigations over the last decade into the Land Rights Act and the land councils have tended to give special attention to the interaction of Aboriginal land rights and the resources industry, particularly the issue of access to land for exploration. The land

councils have become accustomed to the codified language in which 'land access' usually refers to unfettered access by the mining industry to Aboriginal land. We also attach as part of this submission, a copy of "Mines and Myths – The Truth about Mining on Aboriginal Land", CLC 1998. This booklet was published in the context of the Reeves Review to provide balance to some of the submissions made to that review.

Despite some significant recent progress on the part of many exploration and mining companies, the Central and Northern Land Councils (CLC/NLC) are aware that there are sections of the industry that remain preoccupied with limiting or removing the rights of Aboriginal people to control access to Aboriginal land. This has been expressed at every available opportunity and will no doubt form the substance of a number of submissions to this Inquiry. In order to further that objective those interests usually also advocate the break-up of the large Northern Territory land councils. The intended effect of the latter is to reduce substantially the resources available to particular Aboriginal groups both for negotiations and for representation.

This entrenched position in some parts of the minerals industry is detrimental to relations between Aboriginal people and the industry as a whole.

It is against this background that the land councils address the current inquiry. In any event the land councils welcome any fair and objective appraisal of the operation of the relevant provisions of the Land Rights Act and Native Title Act, and their administration by the land councils.

Relationships with indigenous communities

It is axiomatic that a good relationship with Aboriginal landowners and communities is integral to land access.

The land councils acknowledge the efforts by the mining industry to engender good relationships with Aboriginal people. In many ways there has been a change of culture across the industry, leading to a broad acceptance of the rights and interests Aboriginal people have in their land and in cultural preservation. Some mining companies in particular have worked earnestly to turn around the negative attitudes that historically were a feature of the industry industry.

On Aboriginal land, the best relationships are evident where the companies demonstrate respect for the traditional owners and their statutory rights, and give substance to the spirit of agreements and where their conduct is in accordance with agreed terms and conditions.

Further information

The Central and Northern Land Councils will be pleased to consider requests for further information should the Inquiry require any further details on matters raised in this submission. Relevant officers of the land councils may also be available to attend any Public Hearings of the Inquiry.

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National Institute of Economic and Industry Research

Review into resource exploration impediments

Prepared by Dr Ian Manning

1 August 2002

Executive summary

Mineral exploration expenditure in Australia and in the Northern Territory peaked in 1997. By 1999 it was down to 60 per cent of the peak, where it has stabilised. This is consistent with trends for exploration expenditure worldwide.

The main factor driving the reduction in expenditure was a reduction in industry profitability due to falling commodity prices. The impediments to investment suggested in the Committee's Terms of Reference are minor compared to this.

Impediment suggested in the Terms of Reference: Australia's resource endowment and the rates at which it is being drawn down.

Though many factors may be relevant, an important aim governing the draw down of Australia's resources is that resource exploitation should be accompanied by benefit to Australians, including those directly affected by the mine. Just because a mine adds to GDP does not mean that the benefits are sufficient to justify the resource draw down. An important aspect of Land Council duties is to ensure that the benefits of mineral exploration and mining on Aboriginal land are sufficient to compensate Traditional Owners and other Aboriginal people for the rundown of resources on their lands.

Impediment suggested in the Terms of Reference: The structure of the industry and the role of small companies in resource exploration in Australia

With respect to exploration on Aboriginal land, it is particularly important that the companies are competent technically and open and honest in their dealings with Traditional Owners. Provided these conditions are met, Aboriginal people benefit from a competitive industry.

Impediment suggested in the Terms of Reference: Impediments to accessing capital, particularly by small companies.

Competition in the industry, and the demand for exploration licences, depends on small but technically competent operators being able to raise capital. There is no loss if incompetent or dishonest operators cannot raise capital, but at present there are instances where competent and honest smaller exploration companies appear to have difficulty raising capital.

Impediment suggested in the terms of reference: Access to land including Native Title and Cultural Heritage issues.

The claim still sometimes heard that there have been 'no new mines' on Aboriginal land in the NT is factually incorrect.

Similarly the claim that the exploration rate for Aboriginal land has fallen behind non-Aboriginal land is of very doubtful merit. Unfortunately the ABS does not classify exploration expenditure by whether it occurred on or off Aboriginal land, and in the absence of ABS data there is no reliable and disinterested data source from which to assess this claim.

What the ABS does provide is authoritative estimates of investment in mineral expenditure in the NT and the other States, by mineral sought. The history of land rights in the NT is different from the rest of Australia, and

trends in these estimates can be analysed to see whether these differences of land rights history had any effect on the proportion of the total Australian mineral exploration budget spent in the NT. There is a possible argument that the reduction in the NT proportion in the years 1982-88 was related to a low rate of issue of new exploration licences on Aboriginal land, but there is an alternative explanation. Uranium had fallen from favour, and gold was only just beginning to gain the prominence it enjoyed in exploration programs through the 1990s. In the meantime, the NT proportion fell as explorers sought nickel in WA.

A stronger case can be made that the NT proportion of exploration expenditure was below trend for the period 1996 to 2001 for a reason related to native title. The reason was the NT government's response to the Wik decision, which resulted in suspension of issue of new Exploration Licences on pastoral leases. Other states found ways to continue issuing licences. A fall in the NT proportion was associated with this policy; though, as before, there may have been other reasons.

Turning to the process of issue of Exploration Licences on land held as Aboriginal freehold under the ALRA, the Land Councils have developed a process for implementing the requirement of the Act that informed consent should be obtained from Traditional Owners. As both Traditional Owners and applicants have become familiar with the process, the time taken for consent has fallen, though Territory circumstances still require a typical duration of two years. Exploration companies have built this into their planning process, and the costs are accordingly minimal. In return, mining companies gain certainty of title, and legitimacy in the eyes of indigenous people.

The ALRA provides that Traditional Owners may defer proposals for five years at a time. The areas so deferred are diminishing as Traditional Owners have gained confidence that the mining industry will observe the terms of exploration and mining agreements, but there will be an irreducible area of sacred sites and environmentally sensitive areas on which they will wish to defer exploration indefinitely. The relative smallness of these areas minimises costs to the mining industry. The costs are outbalanced by the considerable benefits to Traditional Owners in terms of cultural maintenance.

There is no case for reduced standards of agreement for low-impact exploration. Particularly from an Aboriginal point of view, it is not possible to distinguish low-impact from other exploration.

Impediment suggested in the terms of reference: environmental and other approval processes, including across jurisdictions.

The need for rigorous environmental performance is well accepted by the industry, and is necessary if the benefits of mining are to exceed the costs. Environmental approvals are not an impediment to exploration investment.

Impediment suggested in the terms of reference: public provision of geoscientific data

The provision of geoscientific data stimulates exploration. The Northern Territory Government has been proactive this regard.

Impediment suggested in the terms of reference: Relationships with indigenous communities

Maintaining good relationships with all communities, including indigenous communities is a worthwhile objective. This should not be viewed as an impediment to the industry.

Impediment suggested in the terms of reference: contributions to regional development.

From the point of view of local people, mining is not worthwhile unless it contributes to regional development. This applies to all local residents, but particularly to Traditional Owners, given their obligations of stewardship of their land. It is appropriate, therefore, that the industry should contribute to regional development. At current levels of contribution, the industry is not excessively burdened by requirements to contribute to Aboriginal development, nor to regional development more generally.

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Review into resource exploration impediments
NIEIR

Investment in mineral and petroleum exploration in Australia

The Committee's terms of reference are couched in terms of suggested impediments to investment in mineral exploration. Before considering the possible impediments, there is a prior question: why are impediments to exploration investment important?

The Mining Industry in the Northern Territory

The first reason why impediments may be important is that mining is an important industry. This claim is particularly often made in the NT.

The importance of the mining industry in the NT economy can be measured in various ways. The industry prefers to be measured in terms of its contribution to Gross Territory Product (or Gross Value Added); in these terms it currently contributes around 17 per cent of value added. However, since the industry relies heavily on overseas capital, only part of this value added generates Australian incomes. In turn, most of the incomes accrue elsewhere in Australia. The mining industry generates approximately 4 per cent of employment in the NT, and a similar proportion of household incomes. In other words, from a strictly NT perspective, the industry is relatively minor, falling behind defence and well behind tourism as a job-generator. It is, however, an important source of income and employment in parts of the Territory where there are few other potential sources.

At the national level, the industry can point to its importance as a generator of exports. It is fashionable among some economists to decry the importance of exports—in a globalised, free-trading world an overseas sale is considered no more significant than a domestic sale. NIEIR does not hold this view, believing instead that the Australian economy is constrained by its balance of payments position. The export contribution of the industry is thus important—though again, NIEIR believes that it is only with extreme difficulty that Australia will maintain its present standard of living by relying on commodity exports. From this point of view, the development of the mining industry as an exporter of services to mining is significant. An important aspect of services exports is cultural sensitivity, and it may be suggested that experience in handling relationships with indigenous people within Australia is an important asset when it comes to similar relationships elsewhere.

The mining industry is thus important to Australia and the NT, but not overwhelmingly so. NIEIR believes that impediments to its operations should be of concern, but only to the extent that their cost exceeds their benefit. The benefits of mining, particularly in terms of job generation, are very easily over estimated.

The fall in exploration investment

A second reason for the current concern for investment in mineral exploration is the recent decline in expenditure. Mineral exploration expenditure peaked in 1997 and by the end of the 1999 exploration season the rate of expenditure had fallen to around 60 per cent of peak levels, where it has stabilised. In real terms, current levels are a little below the previous trough in the early 1990s. It is argued in certain quarters that, without additional investment, the industry will be unable to maintain its level of output and hence its contribution to GDP.

It is important to realise that the main reason for the subdued level of investment is the poor profitability of mining at present, and the expectation that current unremunerative price levels will continue. In reviewing the past decade in mineral exploration expenditure, the Australian Bureau of Statistics (ABS) has pointed out that both Australia and the NT have followed world trends. For the duration of the decline from the 1997 peak, non-ferrous mineral exploration expenditure in Australia has been maintained at 17.7 per cent of the world total. (ABS 8412.0 March 2002). The ABS notes a correlation between the US dollar price of gold and gold exploration investment in Australia, both in the upswing to 1997 and in the downswing thereafter. However, the ABS also lists the availability and placement of venture capital (including competition from information technology companies for the speculative dollar) and other effects, including the possible impediments mentioned in the committee's terms of reference. It is emphasised that these are second-order

impediments. Nothing would revive the investment level more rapidly than an improved commodity price outlook.

Though the current relatively low level of mineral exploration investment is a perfectly rational business reaction to a poor commodity price outlook, it is still possible that investment is being subdued by the impediments mentioned in the Committee's Terms of Reference. Two questions arise for each impediment:

- Whether investment is in fact being suppressed and
- Whether the benefits so gained exceed the costs incurred by the mining industry and its beneficiaries.

NIEIR will accordingly consider each suggested impediment. Much of this paper draws on the National Competition Policy Review of the mining provisions (section 4) of the *Aboriginal Land Rights (NT) Act 1976* (ALRA), which NIEIR prepared in 1999. Where possible, material has been updated, particularly from ABS sources.

Impediment suggested in the terms of reference: draw-down of Australia's resource endowment

An important branch of economics deals with resource draw down. Major questions arising in this area include rates of technological development and appropriate discount rates to apply to non-replaceable resources. It is not proposed to deal with these debates here, since Aboriginal people are interested, not in resource draw down over the whole country, but in resource exploitation on their particular country. The question from their perspective is how the costs of exploitation can be minimised, and how lasting benefits can be derived. In some cases the prospective costs in terms of social disruption and environmental damage are such that they cannot be outweighed by benefit packages, but in most it is possible to achieve a positive benefit/cost balance.

Translating this approach to the national level means that a fundamental rule should be that investment for resource exploitation should not take place when its benefits to Australians are inadequate.

A case in point concerns the application to exploit gasfields in the Timor Gap by means of a floating platform which will process the gas from wellhead and load it onto tankers for export. It is quite possible that acceding to this proposal, rather than requiring the gas to be brought onshore for processing in Darwin, will maximise short-run petroleum exploration investment, since it will encourage explorers who wish to use fully offshore technology. However, the returns to Australians of such investment are negligible: all construction and all operations are overseas-sourced and financed, so that the only return to Australia is the royalty payment. By contrast, bringing the gas onshore will result in substantial opportunities for Australian business to secure construction work. It will encourage the establishment of gas-based industries near Darwin, and, even if most of the gas is exported, provides potential new supply into Australian gas markets. In this instance, the choice is stark: granting permission for fully-offshore development may maximise exploration investment, but is not in Australia's interest: though it increases GDP, there is no increase in national income apart from royalties.

In this context NIEIR notes that the proportion of value added in mining which accrues to Australians as incomes is falling, due to

- Increased import content in mining inputs (the Australian equipment industry has failed to keep up with the level of sophistication required) and
- Increased overseas ownership, due to the failure of Australian capital markets to finance the industry.

From this point of view, the ALRA at least ensures that mining on Aboriginal land is beneficial to Aboriginal people. These benefits arise in three ways.

- Exploration Licences (ELs) negotiated by the Land Councils include provisions for the minimisation of harm to Aboriginal people. Though the NT Mining Act includes general environmental provisions, the Traditional Owners generally find these inadequate and also wish to insert conditions governing social behaviour. A typical example is the insertion of a prohibition on hunting by mine personnel.
- Consented ELs include provision of financial benefits to Traditional Owners, and increasingly include provision for employment and contracting opportunities for Aboriginal people and businesses. In practical experience, the latter are an important means of providing benefits for Aboriginal people other than Traditional Owners.
- Finally, the ALRA provides that a sum equal to the royalties received by governments from mining on Aboriginal land shall be paid from Commonwealth consolidated revenue into the Aboriginals Benefits Account (ABA). This is a statutory provision, and is not subject to negotiation. Thirty per cent of the

funds received by the ABA are distributed among the Aboriginal residents of 'areas affected' by the mines which paid the original royalties. The affected residents may be, but frequently are not, coterminous with the Traditional Owners and their families. The remainder of the ABA funds provide core funding for the Land Councils and a proportion which has been used in various ways for the benefit of Northern Territory Aboriginal people as a whole.

The cash benefits which the ALRA provides for Aboriginal Territorians in turn benefit Territorians in general, since they are spent in the Territory, or, if saved, may be invested in Territorian enterprise. This contrasts with many of the other cash flows associated with mining. Frequently capital returns are due overseas, and many of the industry's rather few employees are city-based.

By ensuring that mineral exploration is beneficial to Traditional Owners and other Aboriginal people, the ALRA contributes to ensuring that it is beneficial to Australians as a whole. Should the national interest conflict with the decisions of the Traditional Owners, the ALRA provides that the Minister for Aboriginal and Torres Strait Islander Affairs may over-ride them. This discretion has not so far been exercised.

In summary, NIEIR considers that measures which ensure that mineral exploration and mining contribute to Australian incomes should not be regarded as impediments to exploration investment. Where investment in exploration is expected to be solely or largely to overseas benefit, it is preferable to leave the resource for future exploration.

Impediment suggested in the terms of reference: the structure of the industry and the role of small companies in resource exploration

With respect to operators on Aboriginal lands, one of the highest priority requirements is that mineral explorers should be ethical and culturally sensitive in their behaviour. Other important requirements include technical competence and a willingness to contribute to the well-being of the Traditional Owners, their families and other Aboriginal people. Provided these requirements are satisfied, it is in the interests of Traditional Owners that mineral exploration should be a competitive industry. This will contribute to the efficient exploitation of resources on Aboriginal land and, other things being equal, generate the highest benefits for Aboriginal interests. However, as will be discussed below, Traditional Owners' interest in a competitive industry is muted due to their inability to negotiate with any prospective EL applicant other than the applicant approved by the NT mining administration using its first-come first-served rule.

There appears to be a number of broad classes of applicants who tend to draw negative responses from Traditional Owners. They include the following.

- During booms, the Australian mining industry is notorious for the incidence of 'Blue Sky' mining companies, whose purpose is to mine investors' pockets rather than minerals. One strategy of such companies is to peg prospective land and on-sell it to genuine explorers, extracting a payment which is a pure speculative gain and meanwhile holding the EL out from exploration. A characteristic of such companies is their lack of geological equipment and expertise, particularly in relation to the levels required to mount an exploration program in a remote region. Traditional Owners with experience in mining learn to recognise such concerns, and in general refuse to deal with them.
- Applicants who do not take the ALRA process seriously tend to get short shrift from Traditional Owners. Evidence of lack of seriousness includes failure to employ negotiators who are familiar with the ALRA and failure to send to meetings personnel with a genuine authority to negotiate. The remedy for this type of shortcoming is in the applicant's own hands.
- Any failure by an exploration or mining company to observe the spirit of an agreement with indigenous interests travels quickly by word of mouth among Aboriginal people, and can tarnish that company's (and the industry's) reputation throughout the country and for years, indeed decades, afterwards. This can include companies being held responsible for contractors who they have not adequately supervised. On the other hand, companies can also develop good reputations, and by making a genuine effort can overcome past bad reputations.

Apart from the requirement of minimum scale to mount an exploration program in the remote areas where most Aboriginal lands lie, the capacity of exploration companies to be honest, culturally sensitive, technically competent and flexible in negotiation is independent of their size. Most multi-national mining companies are institutionalising their approach to negotiations with indigenous peoples, based not only on their experience under the ALRA but their experience under its equivalents overseas, particularly in the USA, Canada and Papua New Guinea. An expression of this trend is the recent MMSD report, which will be

considered further below. However, this does not mean that all multi-nationals meet Traditional Owner requirements, or that smaller Australian-based explorers fail to do so. Indeed, if competition is to be maintained, small explorers have a crucial role in the industry.

Impediment suggested in the terms of reference: impediments to accessing capital, particularly by small companies.

The impediments to accessing capital vary with the mining cycle. During booms it is fatally easy for 'Blue Sky NL' mining companies to access capital, and this tarnishes the subsequent reputation of the industry. Currently, however, there is evidence of a lack of venture capital entering the industry. NIEIR is aware of several smaller exploration/mining companies which are technically competent and appear to be having difficulty in raising capital.

A number of Aboriginal groups have also attempted to enter the mineral exploration industry, generally via joint venture. Some of these groups have had access to public funds earmarked for Aboriginal business development, but others have not found it easy to raise capital. However, there have been several successful entries by Aboriginal businesses into services to the mining industry. In several cases, contracts negotiated as part of exploration agreements under the ALRA served as a basis for joint venture formation and the raising of finance.

Impediment suggested in the Terms of Reference: access to land including Native Title and Cultural Heritage issues.

The *Aboriginal Land Rights Act (NT) 1976* requires that the Land Councils shall deal with native title matters by implementing the wishes of Traditional Owners. Concerning these wishes, there is no distinction between cultural heritage and other concerns associated with native title. (For the purposes of this paper the ALRA will be taken to confer a form of native title, and hence is relevant to the suggested impediment.)

Elements in the mining industry have in the past argued that denial of access to land due to the operation of the ALRA, and more recently Native Title, have reduced mine output in the NT. We will first review the history of mining in the NT over the past four decades, looking for evidence of reduced output.

New mines on Aboriginal Land

The simplest and most inaccurate claim commonly put by opponents of land rights within the mining industry is that there have been no new mines on Aboriginal land since the ALRA. Apart from the presumption that the ALRA is somehow to blame if exploration on Aboriginal land is unsuccessful, this claim is incorrect in fact. The Granites and Tanami gold mines both resulted from exploration carried out under exploration licences granted under the ALRA, though these mines bore the names of pre-ALRA operations. A total of five additional mines have been granted mining licences on Aboriginal land in the Tanami, and one at Tennant Creek.

The 'no new mines' claim has a certain superficial plausibility due to the fact that a number of these new mines use processing facilities which existed at the time of discovery. However, without the ore from mines discovered on exploration licences granted under the ALRA these facilities would have been junked 15 years ago, when the original finds ran out.

Summary: the claim that there have been 'no new mines' on Aboriginal land in the NT is wrong.

Since it cannot be claimed that Aboriginal lands have failed to yield their due quota of new mines, the argument moves on to claims about exploration levels.

Exploration on and off Aboriginal land

At various times in the past, mining industry interests, the NT government and the Commonwealth Department responsible for Resources have claimed that the rate of mineral exploration expenditure on Aboriginal land in the NT, per hectare, has been less than the rate per hectare on non-Aboriginal land. They have argued that the two rates should be similar, on grounds of equal prospectivity, and have proceeded to argue that the mining provisions of the ALRA should be weakened.

This argument rests on a very insecure statistical foundation. The ABS, which conducts the authoritative survey of investment in mineral exploration in Australia, has never distinguished between exploration conducted on and off Aboriginal land. This means that there are no authoritative estimates of exploration expenditure on and off Aboriginal land. Accordingly, the argument depends on estimates made by interested parties—the NT Department of Business, Industry and Resource Development (DBIRD) and its predecessor or the mining industry. These parties do not have access to the confidential expenditure returns provided to the ABS, and have never released their estimation methodology for public scrutiny. The Land Councils, based on similar sources, have estimated that, from the 1990s on, the rate of mineral exploration expenditure on Aboriginal land, per hectare, was equal to or greater than that on non-Aboriginal land. Indeed, since 1996, with the NT failure to issue new exploration licences on pastoral leases, the Land Councils believe that the exploration rate on Aboriginal (ALRA) land has been considerably higher.

The proponents of this debate are on firmer ground when they refer to areas under exploration, that is, areas within a granted exploration licence (EL), since DBIRD and the Land Councils jointly maintain a data base which includes this information. However, even here it is necessary to be careful. Numbers of ELprovide no indication, since the average EL on Aboriginal land is larger than the average on non-Aboriginal land. This is mainly because Aboriginal land tends to be remote, whereas non-Aboriginal land includes many potential small tenements in the established mining fields, particularly around Pine Creek. The comparison is also time-sensitive, with the proportion of Aboriginal (ALRA) land increasing steadily over the 1990s.

Summary. We conclude, therefore, that there is no statistical evidence that the native title, whether in its ALRA or its Native Title Act form, is impeding mineral exploration in the NT.

More sophisticated arguments about the effect of land rights on exploration have appealed to the historic record. To assess this argument it is necessary to provide some background material on the recent history of mineral exploration in the NT.

The history of mineral exploration in the NT

The NT comprises 17.5 per cent of Australia's land area, but in 1999-2000 produced only 3.8 per cent of total mining plus oil and gas extraction. The reasons for the low mineral output in relation to land area include the following.

- The NT's offshore oilfields are yet to reach full production.
- The NT lacks one major export mineral, coal.
- Whatever the level of undiscovered resources, most of the NT is of little interest for bulk mineral production, due to high transport costs. This may change with the construction of the railway to Darwin, but the effect of reduced transport costs on mine development has yet to take place. In the meantime, it is noticeable that the three mines producing bulk outputs (Gove for bauxite, Groote Eylandt for manganese ore and McArthur River for base metals) are all located close to the coast.

Due to transport costs, the NT mining industry is interested chiefly in minerals which are readily transportable, namely

- gold
- uranium
- diamonds and
- petroleum.

One of the first resource exploitation agreements under the ALRA covered petroleum and natural gas production from the Amadeus Basin. This basin is agreed to be small, and the NT government reserved all production for NT consumption. Interest in further onshore petroleum exploration has accordingly been limited, and will not be further considered in this paper.

In 1980 half NT non-petroleum mineral exploration expenditure was for uranium, and only 4 per cent was for gold; in 2002 the proportions had changed to 15 per cent (approximately) for uranium and 52 per cent for gold.

Uranium was the boom metal of the 1950s, and again during the late 1970s. However, between 1979 and 1982 its US dollar price halved, and by the early 1990s it had fallen to a quarter of its 1979 peak. During the mid-1990s the US dollar price rose again, reaching a peak of USD 16.50 a pound in 1996. This minor peak coincided with the removal of the Australian three mine policy for uranium. Taken together, these two

factors caused a flurry of interest in uranium production. The price has since fallen back to between USD 7 and USD 9 a pound, and interest in the industry is once again waning.

As is well known, the price of gold was pegged at USD 35 an ounce from the Second World War until 1968. With the removal of the peg the price rose slowly at first, then rapidly to a peak of USD 612 an ounce in 1980. It fell away quickly, but firmed in the USD300-400 range for more than a decade. In 1997 it fell below USD 300 an ounce, and has only very recently regained this level. Australian gold production rose from 1980 to a peak in 1997, but has since stabilised. Production in the NT followed a similar pattern, with a rise to a 1997 peak followed by stabilisation. From 1984 onwards the NT has produced a steady 7-8 per cent of Australia's gold output.

In broad outline, since 1980 there have been three phases in the search for gold in the NT.

- From 1980 (the first year for which estimates are available) to 1988 the NT proportion of total gold exploration investment was below its proportion of gold mine output. During this period, the proportion of exploration effort devoted to gold was lower in the NT than nationally, reflecting the importance of uranium exploration.
- From 1989 to 1994 the NT proportion of gold exploration expenditure exceeded its proportion of production (10-12 per cent as compared with 7-8 per cent). During this period the proportion of gold exploration in total minerals exploration in the NT reached national levels.
- Since 1995 the NT proportion of gold exploration expenditure has mirrored its proportion of production, at around 7-8 per cent. The proportion of gold exploration in total NT exploration has been maintained at the national average

The eclipse of uranium and rise of gold as minerals sought in the NT are explicable by relative price movements. The same applies to the fall-off in minerals exploration investment since 1997—the decline reflects poor prices, reduced expectations of industry profitability and poor levels of realised profitability.

Land access and investment in mineral exploration in the NT

Though the main trends in investment in mineral exploration in the NT, as in the whole of Australia, can be explained by trends in mineral prices, elements in the minerals industry persist in alleging that lack of land availability due to native title has been an important constraint. We therefore examine the history of exploration investment in the NT to see whether levels of exploration investment can be related to the major events in the history of land rights.

- In 1972, in reaction to the Gove Land Rights decision, the Commonwealth suspended the issue of mineral exploration permits on the then Aboriginal Reserves of the NT. This applied only in the NT, and if it had a significant effect should have reduced the proportion of Australian mineral exploration effort in the NT. However, if there was an effect it was marginal: the proportion of Australian mineral exploration expenditure in the NT increased from 7 per cent in 1965-72 to 8 per cent in 1972-76.
- In 1976 the ALRA was passed. As far as the Commonwealth was concerned, this provided a mechanism for the issue of ELs on Aboriginal land; however, Aboriginal land was still effectively closed to exploration since the NT Minister did not begin issuing consents to negotiate till 1982. During this period substantial areas were added to Aboriginal lands, in addition to the former reserves. Once again, there was no corresponding development elsewhere in Australia, and if the ALRA was a significant hindrance the NT's proportion of exploration expenditure should have declined. In fact, the proportion remained at over 8 per cent.
- From 1982 the NT government permitted miners to apply for ELs on Aboriginal land. However, the Land Councils found that the ALRA required them to develop procedures to identify Traditional Owners and obtain their consent. Few ELs were issued on Aboriginal land during this period. The NT share of Australian mineral exploration investment fell to average 6 per cent of the Australian total from 1982 to 1988. Though it is possible that some part of the fall was due to lack of access to Aboriginal lands, other factors were also at work. Uranium exploration was falling off Australia-wide due to the fall in the price of uranium, and gold exploration had not yet fully reacted to the increase in prices which occurred during the late 1980s. In the meantime base metals and nickel were favoured targets. The NT is not considered prospective for these minerals (partly due to lack of interest in areas with high transport costs) and the dip in NT exploration from 1982 to 1988 can thus be explained by a change in the mixture of minerals sought.
- From 1988 onwards the Land Councils approved a steady annual stream of ELAs, many of them for gold, which was now a favoured metal. (Gold has attracted more than half of Australian mineral

exploration expenditure in every year since 1987.) The NT share of Australian mineral exploration expenditure rose to average nearly 10 per cent from 1989 to 1996.

- To the extent that the 1992 Mabo decision and the subsequent 1993 Native Title Act had any dampening effect on exploration, that should have been felt largely in the rest of Australia—the NT was already covered by the ALRA. However, there was no diversion of resources into the NT, which maintained but did not increase its share.
- The Wik decision late in 1996 was followed by a decision by the NT government to suspend the issue of ELs on pastoral leases. The claimed reason was that the Wik decision made the Native Title Act unworkable. However, other states accommodated themselves to the reality of native title, and continued to issue ELs. This would be expected to result in a fall in the NT's share. The share in fact fell to a little under 8 per cent from 1997 to 2002. Given that new ELs were no longer available on pastoral leases, this implies that the emphasis in exploration shifted to Aboriginal lands. The Land Councils assisted by increasing their rate of grant of ELs, reflecting systematisation of the process and increased familiarity with it both by applicants and Traditional Owners.
- In 2001 the NT government resumed the issue of ELs on pastoral leases. In the one year, a large number of pent-up ELAs were approved, more than the industry has reasonable capacity to explore in the short term. Even so, it would not be surprising if the releases allow the Territory to increase its share of total exploration.

From 1982 to 1988 a fall in the NT share of Australian mineral exploration coincided with a low rate of issue of ELs on Aboriginal land, but the fall was at least in part due to a change in the mix of minerals sought. Again, from 1996 to 2001, by choice of the NT government, no ELs were issued on pastoral leases, and this was associated with a fall in the NT share of total exploration. During the period when both Aboriginal land and pastoral leases were available to explorers willing to follow due process (1989 to 1996) mineral exploration investment in the NT exceeded the Territory's share of Australian mineral production. It will be interesting to see whether this resumes over the next few years.

There is no evidence from this history that the ALRA has dampened the level of exploration activity, at least for the past 15 years—indeed, the availability of ELs on ALRA land allowed exploration to continue when the NT government ceased issuing ELs on pastoral leases. Subsequent events have shown that the NT government's action in suspending the issue of ELs on pastoral leases was in nobody's best interests.

Summary: Elements in the mining industry have claimed that the ALRA and native title have dampened mineral exploration activity in the NT. However, the only period where the effect appears to have been serious enough to depress the NT share of total Australian mineral exploration was the period 1996-2001. This was not due to native title as such, but to the NT government's refusal to adapt its legislation to the reality of native title.

The second strand to the mining industry's arguments about access to land concerns process rather than outcomes. To understand these arguments, it is necessary to describe the main features of the ALRA, particularly as they affect mining.

The Aboriginal Land Rights Act

The principle underlying the administration of Aboriginal lands is that the Traditional Owners of each parcel of land have the sole right to make decisions as to land use. Other Aboriginal people affected by the decision should also be consulted, but the final decision lies with the Traditional Owners. These provisions reflect Aboriginal customary law, and in turn reflect the strong relationship between Traditional Owners and the land.

Aboriginal customary law makes no distinction between mining and other activities on and under land. In Aboriginal customary law, Traditional Owners have as much right to make decisions about mining as about any other type of land use. In the common law tradition, this is akin to the position in the USA, where land ownership includes mineral rights, and is also akin to the position when settlers first brought British law to Australia. By long British tradition, freehold land ownership included mineral rights except for the Crown Minerals, that is, the precious metals. This still applies for 'old title' freehold in NSW and Tasmania. However, in the nineteenth century statutes were passed in the various Australian colonies which extended Crown ownership to all minerals, and withdrew freeholders' rights over mining apart from a right to receive compensation for disruption.

Though the separation of mining rights from freehold ownership may be satisfactory for settler Australians, it is deeply contrary to Aboriginal customary law. Under this law, the Traditional Owners are responsible for all aspects of land use and for the welfare of the land, with which they have a deep spiritual connection. This results in concerns for the protection of sacred sites and for the maintenance of the environment, and in connected concerns for the maintenance of Aboriginal culture and society. In the past, where Traditional Owners have lacked control over mining, there have been occasions where Aboriginal communities have borne heavy costs. These have included disruption of community life, desecration of sacred sites and environmental costs.

Under the ALRA, the conflict between Aboriginal customary law and Australian statute law concerning mining was resolved by adopting two main principles:

- All minerals remained in Crown ownership. This means that all Mining Acts and regulations apply on Aboriginal freehold land, and the Crown levies royalties on all mineral production.
- As with all other activities on Aboriginal freehold land, mineral exploration requires Traditional Owner consent, which is taken to include consent to subsequent mining should the exploration prove fruitful.

Part IV of the ALRA gives effect to these principles, essentially by inserting a procedure for obtaining Traditional Owner consent into the process of application for an Exploration Licence (EL). A detailed National Competition Policy Review of Part IV was conducted by the National Institute of Economic and Industry Research in 1999, and the Committee is referred to this review for a detailed description of the application process. Briefly, the process ensures that the Traditional Owners of the land covered by each Exploration Licence Application (ELA) are identified and properly informed as to the exploration proposal (including an opportunity for the applicant to present the proposals directly). There may be a period of negotiation, though where Traditional Owners are familiar with mining and the applicant is familiar with the ALRA there is an increasing tendency to adopt precedent agreements. It is the duty of the Land Council to ensure that the Traditional Owners make a fully informed decision. If the Traditional Owners decide not to accept the exploration proposal, the ELA is put on hold for five years, after which the applicant may re-apply. If the Traditional Owners accept the proposal, either as originally put or as modified by negotiation, an agreement is executed between the mining company and an incorporated body representing the Traditional Owners, and an EL is issued through the normal NT government channels. The Land Councils have a further role in that many of these agreements employ them to administer the agreement. The agreements have the authority of the Land Council, which guarantees that they have been reached by due process under the ALRA.

The typical duration of the ALRA process (ie that for which the Land Councils are responsible, excluding time taken by the NT mining administration) is two years, with second 'agreement' meeting in the 'field season' following the first. (The NT is too hot and/or wet during the southern summer months for it to be practicable to arrange meetings with Traditional Owners who live scattered through the bush. In any case, in this season many Traditional Owners carry a heavy ceremonial workload and are not available for meetings.) We discuss negotiation duration further below.

In this process the Land Councils have a quadruple role:

- Identifying Traditional Owners,
- Acting as adviser to the Traditional Owners, and acting on behalf of the Traditional Owners as an intermediary in negotiation,
- Ascertaining Traditional Owner decisions and
- Administering the resulting contracts.

Two of these roles require a detailed knowledge of Aboriginal law and society, and the ALRA structures the Land Councils to carry out these roles by making them Commonwealth statutory bodies under control of Full Councils which represent all the Aboriginal groups of their area. To carry out the roles of negotiating and administering mineral exploration and mining contracts, the Councils have equipped themselves with professional geological and legal staff.

Summary: The Aboriginal Land Rights Act provides a basis and a process by which Traditional Owners can be fully informed as to mineral exploration and mining proposed for their land; can negotiate about the proposals and can consent to them or withhold consent. If they withhold consent, the proposal is put on hold for five years; if they consent a contract is executed to cover the terms of their consent.

The argument about the rights of Traditional Owners

At its enactment in 1976, the ALRA was seen as pro-mining, since it allowed the Commonwealth to lift the ban on the issue of ELs which it had imposed on Aboriginal land in 1972. Agreements negotiated soon after the Act came into force allowed the Ranger and Nabarlek uranium mines to proceed. However, the Act did not restore the privileged position which the mining industry had enjoyed prior to the Commonwealth's ban. Instead of receiving ELs directly from the NT administration, applicants were now obliged to obtain permission from Traditional Owners. Elements in the industry began to mount a political campaign against land rights, a campaign which reached its nadir following the Wik decision and during the passage of the 1998 amendments to the Native Title Act. In the words of the report of the Mining Minerals and Sustainable Development Australia project (MMSD: *Facing the Future*, p 58)

'In 1996 the High Court determined—in the Wik case—that native title rights were not necessarily extinguished by the grant of pastoral leases. This had implications for the mining industry because numerous mining tenements are located on pastoral leases. Elements of the mining industry—and some State governments—conducted a fierce campaign against native title rights, which damaged the reputation and long-term interests of the industry itself.'

The MMSD project was an independent inquiry, conducted between December 2000 and March 2002, and sponsored by a group of global mining companies. It further noted: 'MMSD Australia research and workshops noted a "sea change" in mining industry attitudes since 1998. They attributed the change to:

- Recognition that native title is here to stay.
- Change in corporate culture of mining companies and industry bodies.
- Increased interest in the principles of sustainable development.
- Increased preparedness and ability to participate in negotiations by indigenous organisations.
- Changes in attitude on the part of some State governments, from seeking to limit native title to an emphasis on negotiation.
- An increased familiarity by native title parties with agreements and their negotiation, in particular with the introduction of Indigenous Land Use Agreements under the amended Native Title Act.'

The significance of MMSD is the public expression by an industry-associated body of the sentiments which have long been expressed in private by most of the mining companies which have applied for ELs on Aboriginal land under the ALRA. They also agree that 'Indigenous communities cannot be seen simply as another stakeholder, with the same rights to participate in decisions as any other stakeholder group. The International Convention on the Elimination of all Forms of Racial Discrimination—under which Australia has voluntarily accepted obligations—requires that states balance the rights of different racial groups. It does not require balance between the interests of different stakeholder groups—but rather that they balance the rights of indigenous and non-indigenous title holders.'

'Mining companies have begun to search for common ground with indigenous communities on a range of issues, including the recognition of claims to land. Experience is building up on both sides of negotiated agreements which may allow companies and the communities to co-exist with mutual respect and mutual benefit.' NIEIR notes that much of this rapprochement has been built on practice developed in the administration of the ALRA.

The MMSD report recommended as follows.

- 'Industry should respect the need for indigenous communities to give **prior, informed consent** to minerals development on their lands. Indigenous communities should be given comprehensive and accurate information on proposals and projects, and should be given access to independent advice and expertise. Given the uncertainties in minerals projects, and the incremental nature of project decision-making, companies should be prepared to renegotiate agreements at regular intervals.
- Industry should recognise that indigenous communities' decision-making may operate on different timeframes of that of business or mainstream communities. **Prior, informed consent** requires that communities have the time they need to properly digest, discuss and formulate responses to proposals.
- The legal status of Native Title Representative Bodies should be respected, and representative bodies engaged in negotiation of agreements.
- Whenever possible, the outcomes of agreements—particularly when they relate to employment, business opportunities and community programs—should be monitored and reported. Industry and indigenous communities need to work together to develop appropriate tools for monitoring and evaluation, and to demonstrate as much concern for the outcomes of agreements as for their establishment.

- Mining companies, governments and representative bodies should work together to promote social capital development in indigenous communities.
- Industry should work constructively with government and representative bodies to ensure the effective operation of Australia's various native title regimes.'(p 72, emphasis in the original)

The Land Councils have already gained considerable experience in negotiation and in the monitoring of agreements, and are increasingly engaged in programs for the development of social capital in indigenous communities. However, as MMSD itself recognises, not every element in the mining industry subscribes to these recommendations.

In its National Competition Policy review of the mining provisions of the ALRA, NIEIR provides a detailed account of the various criticisms of the operation of the Act. The three most prominent are refusals and delays. The question of non-negotiated access for 'low impact' exploration is also important.

Refusals

Under the ALRA, Traditional Owners have the right to defer consideration of ELAs for periods of five years at a time. They are not obliged to state the reasons for deferral, but these are known to include the following:

- Distrust of mining in general—particularly in the early years of the ALRA many Traditional Owners had had bad experiences with mining companies, or had relatives who had had such experiences,
- Disapproval, not of mining as such but of the applicant—some applicants fail to gain the confidence and respect of Traditional Owners, or make unsatisfactory proposals, and
- Reasons specific to the land—it may include a sacred site, or otherwise be considered by the Traditional Owners as unsuitable for mining.

The first of these reasons is becoming less common, since the behaviour of industry personnel operating under negotiated agreements has been far superior to insensitivity to Aboriginal culture which was formerly normal in the industry. However, there are still important groups of Traditional Owners who do not trust the industry. The second is also becoming less common, since the 'state of the art' is becoming known, and companies which do not meet this standard have dropped out of applying. (Interestingly, companies which meet the standard have also entered the NT, sometimes on the basis of experience gained with native title in other jurisdictions such as Canada.) This leaves the final reason. Estimates vary as to the proportion of Aboriginal land on which exploration will be deferred indefinitely, most often because of its sacred status. In the early days of the ALRA, whole ELAs were sometimes refused for this reason, but it is now more common to split the EL, refusing only those parts which are of sacred significance. In 1999 the current estimate was that between 20 and 35 per cent of Aboriginal land in the NT will be withheld from exploration, with a considerable overlap with areas which would be withheld in any case for environmental reasons. The Land Councils say that this area of exclusion, which is of the same order of magnitude as areas excluded as national parks (and less if allowance is made for overlap) is desirable as a mark of respect for Aboriginal culture. It is desirable that the choice should be made by the Traditional Owners themselves, and not be imposed by government.

As compared to a legal regime in which minerals explorers have unfettered access to the lands refused by Traditional Owners, the ALRA imposes a cost on the industry. The industry must forgo the profits which might have been generated had payable mineral deposits been found on the concerned land, and the NT must forgo the employment which would have been generated. These costs should be reduced to the extent that the land would have been inaccessible for other reasons. At average rates of prospectivity and mine profitability in the NT, these costs could be significant, but are of the order of tens of millions of dollars, not hundreds of millions. As against this, there are major benefits to the integrity of Aboriginal culture, and indeed there are indirect benefits to the mining industry, in that its legitimacy is improved in the eyes of Aboriginal people and other indigenous peoples elsewhere in the world. This legitimacy is not without dollar value in world capital markets.

Delays

As noted above, the typical ELA takes two years to go through the process of consultation and negotiation. However, the time taken can be longer, sometimes for reasons within the control of the applicant, and sometimes for reasons beyond the control of either the applicant or the Land Council. Reasons can include the following.

- In some areas, such as those where there has not previously been much mineral exploration, the pattern of Traditional Ownership has to be researched before the ALRA process can begin. Failure to do this can result in agreements which do not have the consent of the appropriate Owners. As exploration extends, Traditional Ownership is being researched and this is becoming a less common reason for delay.
- Negotiation is sometimes disrupted by the death of a Traditional Owner. Aboriginal custom then requires the suspension of negotiation till a period of mourning appropriate to the owner has been observed. There is sometimes further delay while the inheriting Traditional Owners are determined.

Mining industry representatives, including the Commonwealth resources administration, have argued for shorter timelines for negotiation, on the grounds that this would be more convenient for applicants. However, as quoted above, the MMSD report does not favour this approach, on the ground of cultural sensitivity. The following may be added.

- In NT remote areas it is not reasonable to allow less than two field seasons for the negotiation of an agreement.
- It is also not reasonable to deny flexibility to extend negotiation time where circumstances warrant extension.
- The benefit of shorter timelines for applicants is doubtful. It takes time to prepare and mount exploration in remote areas, and applicants can build negotiation time into their forward plans.

Given that the application process offers no impediment to maintaining access to a supply of land for exploration purposes, the cost of the delays to mining companies is no more than the cost of forethought—which is in any case necessary if exploration is to be successful, particularly in remote regions. Against this cost, the Traditional Owners gain considerable benefits, mainly in terms of cultural maintenance. Once again, the mining industry gains legitimacy benefits, and also gains the benefit of a certain and guaranteed application process. Though elements in the industry may prefer a return to the law of the 1950s, this is not possible with present levels of awareness in the international indigenous communities, and the present negotiation procedures are preferable to the *ad hoc*, uncertain arrangements which might be their practical substitute.

Low-impact exploration

The industry sometimes argues that 'low impact' exploration should not require permission from Traditional Owners. This suggestion has the following disadvantages.

- There are problems of definition. Aboriginal views of 'low impact' are not always the same as non-Aboriginal. Behaviour such as unknowingly entering a 'no go' sacred area can constitute an affront to Traditional Owners. To guard against such affronts it is desirable that all entry, for whatever purpose, should be under permit. The ALRA so provides; mining is not special in this respect.
- It also accords with Aboriginal custom that entry to lands should be subject to Traditional Owner permission. Providing 'as of right' access for low-impact exploration would offend against this principle.
- It is desirable to reach an understanding as to the terms under which any minerals found will be exploited before any discoveries are made. This reduces the scope for ambit bargaining at a later stage, and increases commercial certainty.

These problems, coupled with the systematisation of the application process for ELs on Aboriginal land, mean that there is no argument for special treatment for low-impact exploration.

Summary: There is counterpart legislation to the ALRA in North America, New Zealand and many other countries where there are indigenous peoples. Multi-national mining companies expect to find such legislation in place, and indeed believe that it is to the advantage of the industry, since it provides a framework to govern relations between miners and Traditional Owners and Aboriginal people generally. Not all of the industry has adopted this view, but significant industry voices have moderated their opposition to land rights since 1998.

On more practical matters.

- The ALRA will indeed result in some areas being withdrawn from exploration. However, these are areas which are vital to the continuity of Aboriginal culture, and should be respected as such.
- The application process under the ALRA is not a significant deterrent to companies seriously wishing to search for minerals.

- There is no case for waiving the process of application for 'low-impact' exploration.

Experience under the Native Title Act

The Native Title Act provides Traditional Owners with less say on the future of their land than Traditional Owners under the ALRA. In part, this reflects the legal status of Aboriginal owners under the Native Title Act as claimants or holders of native title rather than owners of land; and in part, the nature of native title coexisting with other interests in land. One result is that the Native Title Act provides a lesser level of protection for Aboriginal culture, and does not provide the same guarantees of respect for Aboriginal title and law as the Land Rights Act. There are strong arguments that, Native Title Holders (as distinct from claimants and holders of residual rights in country under pastoral lease) should have the same rights as Traditional Owners under the ALRA.

One area of opportunity within the Native Title Act, is the provision for Indigenous Land Use Agreements. This gives the capacity of the land councils, as Representative Bodies, the statutory mechanism to negotiate with exploration and mining companies on behalf of native title holders. The onus is on the land councils to consult with the native title holders and certify that they understand the nature and terms of agreements and consent to the land council entering into them. Once executed all native title holders are bound by the agreement as far as it deals with the issues within the agreement. In this way the land council could build on their existing processes of consultation and negotiation and experience with dealing with the mining industry through the Land Rights Act. Many good relationships exist between the land councils and mining companies and through this understanding there is scope to achieve mutually beneficial outcomes. The need for a litigious claims process is avoided through ILUAs.

The major impact of native title in the Northern Territory on exploration so far has been more with the administration by the Northern Territory Government. As mentioned, the NT government ceased issuing exploration licences immediately following the *Wik* decision in December 1996. For over three years the government would not use the right to negotiate provisions in the Commonwealth act. Rather it sought to introduce its own legislation, the power to do so being provided under 43A of the Native Title Act. Only following the demise of the Territory scheme in the Senate did the Northern Territory begin to issue exploration licences. The effect, as discussed, was to reduce exploration activity and expenditure.

Impediment suggested in the terms of reference: environmental and other approval processes, including across jurisdictions

The need for rigorous environmental performance is well accepted by the industry, and is necessary if the benefits of mining are to exceed the costs. NIEIR has not identified environmental approvals as an impediment to exploration investment. In many ways the attention to good environmental management and rehabilitation has lead to an easier acceptance by communities of mining proposal and assisted in smoother approval processing.

Impediment suggested in the terms of reference: public provision of geoscientific data

The Northern Territory Government through its Geological Survey carries out the provision of geoscientific data. NIEIR understands the Geological Survey is very active in obtaining geoscientific data and making it available to the mining industry. The NT Resources Department spent something like $16 million flying large tracts of the Northern Territory to acquire geophysical data. The effect of the release of this data has been the taking up of vast areas of land by explorers. Junior explorers have featured in this, particularly companies interested in finding diamonds. Analysis of the data by explorers has allowed them to postulate on the existence of ore bodies and given them targets to pursue.

As for geological mapping, NIEIR is aware that the land councils have gone to considerable lengths to facilitate the mapping efforts of the Geological Survey on Aboriginal land.

Impediment suggested in the terms of reference: relationships with indigenous communities

It is strange that relationships with indigenous communities should be suggested as an impediment to investment in mineral exploration. It is true that mineral explorers, and the mining industry as a whole, incur accounting costs in maintaining good relationships with indigenous communities. These include negotiation costs, payments resulting from negotiation (both cash payments and such benefits as employment

preference), and the cost to the explorer and miner of improved environmental and other operating practices required by Traditional Owners.

However, there are two arguments that these accounting costs do not constitute a disincentive to investment;

- Some of the concerned costs are economic rents, which according to economic theory do not affect the decision to invest, and
- The costs are easily over-estimated by assuming that, in the absence of existing arrangements, the industry would not have to make these expenditures. For example, there have been occasions when the industry has claimed the entire wages paid to indigenous labour as a cost, when in fact the indigenous workers were equally efficient to any others, and no net cost was therefore incurred.

In areas of high indigenous population and land ownership, under a regime of bad relations with indigenous communities, the industry would be likely to incur alternative costs; for example, increased security costs. Rather than being considered as an impediment, the opportunity to contribute to indigenous communities is one of the ways in which mining contributes to Australia as a whole. Without such contributions, there is little point in allowing the industry access to Crown mineral resources.

The Mining Minerals and Sustainable Development Australia project in its report *Facing the Future* acknowledges that 'indigenous communities cannot be seen simply as another stakeholder group' (p58). The report includes a sensible discussion of employment and business development, royalties and equity and training as benefits which the industry can and should offer.

Impediment suggested in the terms of reference: contributions to regional development

The mining industry sometimes argues that its costs are raised by requirements to contribute to regional development, for example by road construction, which raises costs and discourages investment. Two arguments are relevant here.

- In its report on Mining, the Industry Commission considered the balance between the contribution of the mining industry to regional development and the government subsidies it receives. The Commission returned a verdict of 'not proven' on this balance.
- Contributions to regional development are an important means by which industry value added is converted into Australian incomes. As argued above, if the level of contribution to Australian incomes is low, the argument for encouraging investment is correspondingly low.

NIEIR does not believe that contributions to regional development, at current rates, should be considered an impediment to worthwhile mineral exploration.

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Non-petroleum mineral exploration expenditure

Per cent Australian mineral production in Northern Territory	Financial year	Exploration expenditure in the Northern Territory as a percentage of all expenditure in Australia				Northern Territory: expenditure by mineral sought as a percentage of total expenditure in Northern Territory				Australia: expenditure by mineral sought as a percentage of all Australian expenditure		
		All minerals	Uranium	Gold	Diamonds	Gold	Base metals	Uranium	Diamonds	Gold	Uranium	Diamonds
2.0	1965	9										
2.1	1966	9										
2.7	1967	9										
2.9	1968	7										
2.7	1969	7										
2.2	1970	4										
2.3	1971	5										
2.6	1972	7										
3.2	1973	10										
3.9	1974	9	46					56			11	
2.9	1975	6	38					52			8	
3.3	1976	7	39					52			9	
2.9	1977	9	39					55			12	
2.5	1978	9	28					47			15	
2.3	1979	10	30					56			18	
3.1	1980	8	28	3	5	4	32	50	7	10	13	11
3.1	1981	7	30	1	7	3	26	50	12	16	11	11
3.8	1982	6	28	4	6	12	22	50	13	16	10	11
3.8	1983	6	23	4	6	14	15	50	11	22	8	12
4.0	1984	6	27	5	17	33	17	23	19	35	5	6
2.8	1985	6	29	5	30	34	11	14	30	40	3	7
4.1	1986	6	9	4	29	38	7	18	28	49	11	5
5.1	1987	5	24	4	15	49	10	19	9	64	4	3
5.2	1988	6	34	6	10	67	7	16	5	73	3	3
5.6	1989	10	51	12	16	66	6	20	8	66	4	5

Non-petroleum mineral exploration expenditure (continued)

Per cent Australian mineral production in Northern Territory	Financial year	Exploration expenditure in the Northern Territory as a percentage of all expenditure in Australia					Northern Territory: expenditure by mineral sought as a percentage of total expenditure in Northern Territory				Australia: expenditure by mineral sought as a percentage of all Australian expenditure		
		Base metals	All minerals	Uranium	Gold	Diamonds	Gold	Base metals	Uranium	Diamonds	Gold	Uranium	Diamonds
6.4	1990		10	47	11	9	59	12	14	9	56	3	6
6.3	1991		9	33	10	16	55	23	9	13	50	2	7
	1992		10	33	11	19	57	23	7	12	51	2	6
	1993		10	30	12	20	61	20	4	12	51	1	6
	1994		10	40	11	14	63	17	5	12	54	1	8
	1995	9	8	37	8	18	57	25	4	12	62	1	5
	1996	10	10	64	9	29	52	26	5	16	57	1	6
	1997	7	8	45	7	28	58	16	6	18	63	1	5
(7.7)	1998	6	7	33	7	17	59	19	10	10	61	2	4
(7.3)	1999	4	8	55	8	19	60	10	13	12	58	2	5
7.4	2000	3	9	53	11	14	70	8	15	7	55	2	4
	2001	4	7	(80)	7	(16)	56	17	(15)	(11)	53	1	4
	2002	(6)	8	(90)	8	(11)	52	(17)	(15)	(8)	52	1	6

Note: Bracketed estimates are based on part-year returns. 2001-02 first 3 quarters only.
Source: ABS 8407.0 and ABS 8412.0.

Mines and Myths

The truth about mining on Aboriginal land

Rodger Barnes
Manager Mining
Central Land Council

25 March 1998

Review of the Land Rights Act

On 16 July 1997 Senator John Herron, Minister for Aboriginal and Torres Strait Islander Affairs, announced a review of the *Aboriginal Land Rights (NT) Act 1976.* The review is "to examine and report on the operations of the Act and suggest any areas for possible change". One of the specific areas under examination is the "operation of the exploration and mining provisions". Mr John Reeves QC was subsequently appointed to conduct the review. He has received submissions from interested parties over December 1997 and January 1998.

Several submissions to the Review of the Land Rights Act address issues surrounding mining on Aboriginal land in a substantial way. In particular, submissions from the Northern Territory Government (NTG); the Commonwealth Department of Primary Industries & Energy (DPIE) and the Northern Territory Minerals Council Inc (NTMC) encompass the argument against traditional Aboriginal landowners' meaningful control over access to their land and their involvement in any exploration and mining activities. Together these documents make a case for the reduction of Aboriginal rights by means of amendments to the Act. Such amendments would substantially diminish the principles of protection of Aboriginal interests in their own land which are fundamental to the current process.

The case is often rehearsed and argued by very powerful sectors of society. The need to challenge the obvious distortions of the truth on which much of the argument lies directs this response. The aim here is to refute the more damaging misconceptions or mistakes over the facts about exploration and mining on Aboriginal land, particularly as they relate to the CLC region.

Misinformation

The arguments presented in those three submissions identified are based largely on selective use of statistics and factual errors or misconceptions which seriously misrepresent the extent of current exploration and mining activity on Aboriginal land. As a result the conclusions drawn are ill-conceived. For example DPIE says "there are still problems with the workability of the mining provisions" and that the Act "impedes exploration and mining on Aboriginal land in the Northern Territory, to the detriment of the mining sector and its contribution to the economy of the Northern Territory and Australia" (DPIE 1997, p1&p2).

Predictably the recommendations which flow from such a tainted analysis are equally invalid. The changes sought by these bodies need to be seen for what they really are - a means to limit the

capacity of traditional owners to negotiate fair and reasonable agreements. Obligations on mining companies would thereby be reduced at the expense of traditional owners' interests.

Despite being cast otherwise, the detractors of the Land Rights Act are not concerned so much with the prosperity of the mining industry or increasing economic benefits. Moreover, they are ideologically opposed to traditional Aboriginal landowners having rights which many other landowners in Australia, both Aboriginal and non-Aboriginal, may wish to achieve.

The following matters arising from the relevant submissions are considered misrepresentations, misconceptions or falsehoods:

- 'No new mines' on Aboriginal land
- Retarded increases in the value of mineral production in the NT
- Potential for mineral discovery should be higher on Aboriginal land
- Retarded increases in exploration expenditure in the NT
- Lesser exploration expenditure on Aboriginal land
- Lesser area of exploration licences on Aboriginal land
- Fewer exploration licences on Aboriginal land
- Detrimental effects of the right to refuse or consent to an exploration licence
- Difficulties with landowner representation

Myth: 'No new mines'

DPIE and the NTG claim that "no new mines have been established under the ALRA" (DPIE 1997, pp1&11). Interestingly the NTMC's submission does not make this claim. The facts are that there have been significant mining developments pursuant to the mining provisions of the Land Rights Act.

For instance both DPIE and the NTG categorise NFM's The Granites Gold Mine and Zapopan's Tanami Mine as *"Mines or Mining Agreements Finalised After Introduction of ALRA Where No Aboriginal Consent Required."* This is not correct.

> **The Granites Gold Mine - the facts:**
> North Flinders Mines Ltd acquired interests in the old Granites gold field, which comprised eleven small Gold Mining Leases (GMLs) before the land became Aboriginal land in 1980. These GMLs covered the known mineralised areas. However the overall mine development required a larger mineral lease. According to Territory laws, an applicant for a mineral lease has to be a holder of an exploration interest concerning that area.
>
> On the 3 August 1983, NFM entered into an agreement with the CLC for consent to the grant of an exploration licence which enabled NFM to apply for a mineral lease for the purpose of infrastructure development. The Granites Agreement also contained the terms and conditions of the grant of the new mineral lease and continues to operate at the present time.

Tanami Mine – the facts:
In the early 1980's Zapopan acquired pre-existing gold mining leases and built a mill over the historic Tanami gold mining area. A modern mill uses enormous volumes of water to process the ore and a potential borefield was identified on Aboriginal land. The CLC entered into an agreement for the grant of a water borefield licence without which it is highly unlikely that the mine could have developed. This agreement required the consent of traditional owners and the CLC.

Under another category "*Mines Discovered Since Introduction of the ALRA*", Zapopan's Tanami Mine Extension and NFM's Dead Bullock Soak deposits are claimed to be "an extension of the parent mine that did not require consent." This is also incorrect:

Tanami Extension - the facts:
Exploration rights over the area around the original Tanami mine were held by another company, Otter NL. In 1988 Otter negotiated an exploration agreement under the amended mining provisions that allowed for the grant of exploration licences around the mine. The CLC's and traditional owner's consent was required in accordance with the Land Rights Act.

With the known ore deposits on the original mining lease becoming exhausted, Zapopan approached Otter and purchased the mineralised areas contiguous with their existing mineral lease. The transfer of the interest from Otter to Zapopan required the consent of the CLC.

Zapopan then applied for an exploration retention licence (ERL) and in accordance with the Land Rights Act an agreement was entered into with the CLC. On the grant of the ERL, Zapopan applied for a new mineral lease and entered a mining agreement with the CLC. This of course did not require the consent of the CLC as consent to mining leases is not provided for in the amended mining provisions. The consent derived from the earlier CLC exploration agreement with Otter.

Dead Bullock Soak -the facts:
NFM discovered the ore deposits under an exploration agreement signed in 1988 which required the consent of the CLC and traditional owners. A mining agreement was finalised in 1991. No consent for the grant of a mineral lease was required however as this is not required under the Act. The consent deriving from the exploration agreement with the CLC.

Omitted by DPIE and the NTG is the new Tanami Mine.

Otter/Acacia's New Tanami Mine – the facts:
This gold mine is owned by the 'Tanami Mine Joint Venture' - Otter 60 percent and Acacia Resources 40 percent. Mike Reed, Minister for Mines and Energy at the time officially opened it in May 1996 (see CLC 1997, p79).

Myth: 'Retarded increases in value of mineral production'

Both DPIE (1997, p12) and NTG (1998, p62) rely on a dubious comparison between Northern Territory mineral production with the rest of Australia's as further evidence of the alleged detrimental effect of the Land Rights Act.

The NTG compares the landmass of the NT (17.5 percent of Australia) with its share of Australian mineral production (5.7 percent). The NTG acknowledges Manning's (1995) alternative analysis of the Northern Territory mining industry conflicting as it does with the NTG's position. However it jealously clings to the assertion that "reduced exploration effort could be a factor" (NTG 1998, p62).

It is self evident that the value of mineral production is inextricably linked to commodity prices rather than whether Aborigines have land rights or not. The minerals comprising a State's production and fluctuations of prices on the world commodity market explain comparative interstate trends. The effects of downturns in a particular mineral impact less on States which have the greater range of minerals.

As Manning discusses, the reality is that the Northern Territory lacks two of Australia's largest mineral export earners, black coal and iron ore. Uranium, bauxite, manganese and more recently gold make up the greater proportion of production in the NT. This is a fact of nature and neither Aborigines nor land councils are to blame. The largest contributor to the NT's value of mineral production during the early 1980's was from uranium mining. When the uranium price took a dramatic downturn in the late 1980's, this affected the NT's national share of mineral production.

It is the increased gold production in the 1990's which has maintained the NT's standing, nearly all of which comes from Aboriginal land under agreements with the CLC.

Myth: 'Potential for mineral discovery should be higher'

Despite accepting the fact that over 80 percent of mineral production in the NT derives from mines on Aboriginal land, the NTG suggests that "the potential for mineral discovery on Aboriginal land is higher than suggested by the number of existing mines" and that "access restrictions and remoteness inhibit exploration" (NTG 1998, p2). Similarly DPIE claims "if access for exploration is improved, other large mineral deposits are expected to be discovered" (DPIE 1997, p5).

Such suggestions are puzzling when the reality of mine production is understood and the recent developments on Aboriginal land are recognised.

Consider only Zapopan's Tanami extension, NFM's Dead Bullock Soak Mine and Otter/Acacia's new Tanami Mine. All these operations developed from mining ore sourced from previously unknown gold resources. These were all discovered and developed as a result of exploration programs conducted under agreements and on exploration licences consented to by traditional owners and the CLC. Using the industry's commonly touted figure for exploration success, 1 in a 1000 exploration programs leading to a mine (cf. DPIE 1997, p5), it is obvious that the success rate on Aboriginal land far exceeds the commonly accepted average by several orders of magnitude.

Clearly the exploration success on Aboriginal land has been extraordinary and is well recognised by Australia's mineral exploration industry. In the regular column on in one of the mining industry's premier journals, *Australia's Mining Monthly* called "HOTSPOTS", it is said:

> "The Tanami Desert in the Northern Territory has been one of the most promising areas for gold exploration over the past decade. Its prospectivity has survived the test of time with new discoveries being made at regular intervals." (AMM Nov 1995, p12)

And the companies leading the exploration efforts such as Acacia and Otter are dubbed 'RISING STARS' by industry commentators - see *"Rising Stars of the Australian Resource Scene"*, published, by the *Australian Mining Monthly* editions September 1996, Vol 1, p21 for Otter and December 1996, Vol 3, p3 for Acacia.

Myth: 'Retarded increases in exploration expenditure'

DPIE (1997) claims that "exploration expenditure has not been increasing in the Northern Territory at the same rate as it has been increasing in other highly prospective states, such as Western Australia and Queensland".

This argument essentially mirrors that made by the Centre for International Economics (CIE) 1993 Report, *Economic effects of land rights in the Northern Territory* - conclusions from which are referred to by DPIE. Manning reviewed the CIE report and concluded that:

> "the CIE report systematically adopts assumptions unfavourable to the ALRA. These assumptions lead to the CIE's conclusion that the Territory mining industry has suffered damage as a result of the ALRA, and lead to a wild overestimate of the damage." (Manning 1995, p38).

With reference to the patterns of exploration expenditure between states Manning says:

> "Since this peak in 1988-89, exploration expenditure in the Territory has maintained at 10 percent of the national total, in contrast to the figure of 6 percent maintained through most of the 1980s. Contrary to the CIE's conclusion the Northern Territory has maintained its share of non-petroleum mineral exploration expenditure with remarkable consistency." (Manning 1995, p13)

Comparing the figures from 1995 to 1997 it is apparent that this trend has continued to be maintained at around 9 percent to 10 percent until 1997 when the proportion of NT against the rest of Australia dropped to 7.7 percent. This drop cannot be attributed to the Land Rights Act. In fact nearly all grants of exploration licences during the 1997 calendar year were on Aboriginal land - accounting for 98 percent of the total area granted.

Importantly, the NT Government adopted a policy of not granting exploration and mining interests on pastoral leases following the *Wik* decision in December 1996. Reductions in 1997 expenditure are probably a direct consequence of the Northern Territory Governments refusal to accept or comply with the *Native Title Act 1993*. It has nothing to do with the Land Rights Act. In fact it is activity on Aboriginal land which has maintained Northern Territory's level of expenditure. Clearly the Act has served as a buffer from the full effect of such a policy stance and allowed exploration to continue over vast tracts of the Northern Territory unaffected by Native Title considerations.

Myth: 'Lesser exploration expenditure on Aboriginal land'

DPIE claims "exploration expenditure on Aboriginal land is well below that on non-Aboriginal land" (DPIE 1997, p8). The NTG makes the same assertion, relying on an unfavourably scaled graph but does not discuss it.

It is difficult to verify their figures, as the method of their compilation is unclear. However, what is clear is that they are at best, grossly inaccurate. For instance the figures show that in 1997 $12.5M was spent on Aboriginal land and $28.9M was spent on non-Aboriginal land - a total of $41.4M. This is less than half the NT expenditure quoted by the ABS ($88.9M).

DPIE explains the discrepancy by indicating that exploration on 'production leases' is not included in its estimate of exploration expenditure. The NTG however does not offer to clarify this point. The reason exploration on production leases is not included is not given. The ABS does distinguish between expenditure on production leases and 'other areas' but only for Australia as a whole. Taking the last three years as a guide the proportion of expenditure on production leases as against other areas - an average of 27 percent of exploration is on production leases. Applying this to the NT would suggest that total exploration on other areas should be around $64.7M still far in excess of the $41.4M accounted for by DPIE and the NTG.

Furthermore, NFM's Annual Reports show regional exploration (off its mineral leases) expenditure over the last three years:

- 1994-5 $ 7.362M (p24).
- 1995-6 $ 9.982M (p23).
- 1996-7 $10.136M (p23).

By far the greater proportion of NFM's exploration interests are on Aboriginal land. On the basis of this fact alone the figures submitted by DPIE are doubtful.

The CLC understands from discussions that the Central Desert Joint Venture which is exploring entirely on Aboriginal land in the region surrounding the Tanami Mine that exploration expenditure is in the order of $6M per year for the past three years. Taking this expenditure into account it can be seen that exploration expenditure by these two companies alone is well in excess of $12.5M. There are also further significant exploration programs conducted by other companies on Aboriginal land in the CLC region. The CLC estimates their annual expenditure is around $4M. The overall estimate of expenditure in 1997 on Aboriginal land in the CLC region alone is around $20M.

This analysis has not even considered exploration expenditure in the NLC region on Aboriginal land. Clearly the expenditure claimed by DPIE is highly questionable and more likely, just plain wrong. The reality is more likely to show that there are at present similar levels of exploration expenditure on and off Aboriginal land.

Myth: 'Lesser area of exploration licences on Aboriginal land'

DOPIE's claims are based on "figures from the Northern Territory Department of Mines and Energy in personal communication on 12 July 1996" (conveniently unpublished and non-verifiable information). The operative date is to 30 June 1996. However, nearly all the grants of exploration licences in the calendar year 1997 in the Northern Territory were on Aboriginal land, accounting for 98 percent of the total area granted.

It is not clear why out-of-date figures are used because ELA statistics to 31 October 1997 are quoted in another section of the submission - presumably from the same source of data. Up-to-

date figures of granted ELAs do not support the contention that there is a "lack of exploration activity on Aboriginal land in the Northern Territory" (DPIE 1997, p9).

The CLC provided details of areas under granted exploration licences as of December 1997 to the Review. These were derived from the NT Department of Mines and Energy titles data base and plotted geographically for the purpose of spatial analysis using the CLC's Geographic Information System system.

The area under active exploration licences is:

- CLC region

  36,122 sq km on Aboriginal land or 9.7%
  47,026 sq km on non-Aboriginal or 11.6%

- NLC region

  15,759 sq km on Aboriginal land or 9.5%
  36,098 sq km on non-Aboriginal land or 9.1%

A further 4,996 square kilometres of exploration licence applications on Aboriginal land has consent to the grant from the CLC and are before the NT Minister awaiting grant. On the 18 February the NT Minister granted five of these with a total area of 241 square kilometres. If all of the ELAs with consent were granted, the total area of exploration licences in the CLC region on Aboriginal land would be 41,118 square kilometres or 11 percent of Aboriginal land.

The NLC has consented to 10,900 square kilometres which when granted will bring the proportion of Aboriginal land to over 18 percent in the NLC region (NLC personal communication) That is almost twice the proportion of Aboriginal land under exploration than non-Aboriginal land.

When considered in total over the last 10 years, the area of Aboriginal land in the CLC region alone turned over to mineral and petroleum exploration under the amended mining provisions is 67,876 square kilometres, an area the size of Tasmania.

The enormous achievements in processing of exploration licences under the mining provisions by the CLC and NLC, on an objective analysis, is undeniable. The significance is even more greatly appreciated when it is remembered that in 1987 when the amended mining provisions were introduced there were nil (0) exploration licences granted on Aboriginal land. It cannot be honestly said that the Land Rights Act "impedes exploration and mining activities on Aboriginal land" (DPIE 1997, p2).

Myth: 'Fewer exploration licences on Aboriginal land'

The CLC submission (CLC 1997, p73) addressed the fact that the actual number of exploration licences at any one time on Aboriginal land is significantly less than off Aboriginal land. It is, however, misleading to compare absolute numbers of licences. Any conclusion that this indicates lesser exploration activity is erroneous.

The area of individual EL(A)s vary between a minimum of one (1) block to a maximum of 500 blocks, or approximately 3 square kilometres and 1610 square kilometres respectively. The reality

is that many EL(A)s on non-Aboriginal land tend toward the minimum area. This is because most are granted in the vicinity of historic mineral fields such as Pine Creek region and Tennant Creek region where the only land available for application are snippets 'dropped' by explorers who have continued on with the search for more mines since the 1870's.

On Aboriginal land the far greater proportion of EL(A)s are the maximum area allowable. Interest is maximised by applying for larger ELAs and much of the prospective areas are very remote in regions previously difficult to access. Many areas, for example Arnhem Land, were Aboriginal Reserves and subject to restricted entry. Other areas, for example, the Tanami Region, were simply remote and inhospitable. Modern technology and the Land Rights Act itself have made available vast areas previously unavailable for exploration.

Myth: Detrimental effect of the right to refuse consent to an exploration licence

The CLC discussed the nature of the right to consent and refuse consent to exploration (CLC 1997, p64). This right is at present already severely qualified. The right is in respect of a grant of an exploration licence application only and does not apply to the mining stage. It is in fact only a moratorium (5 years) on the application and only the same applicant may re-apply within the statutory re-application period. The right must also be exercised within prescribed time limits after which consent is deemed. Furthermore the national interest is overriding.

Since the inception of the Land Rights Act, its detractors have emotively labelled this right - 'the veto'. They have rallied to remove, contain or limit it ever since but not for any good reason except that it is a right which they assert is not available to anyone else:

> "Generally the consent or 'veto' provisions of the Act should be repealed such that exploration and mining on Aboriginal land are subject to the same regime as applies to the rest of the country" (NTG 1998, p68).

> "There are several powerful arguments against retention of the veto, including it is inconsistent with the rights of other freehold landowners in the Northern Territory and throughout most of Australia; it is inconsistent with Crown ownership of minerals, and results in the Crown ceding effective control of its minerals to traditional owners; it is inconsistent with the scheme for the rest of Australia in the Native Title Act" (NTMC 1998, p4).

These claims ignore the fact that certain other Australian title holders do possess such a right. Manning (1997, p7) lists some examples where a 'veto' exists: including agricultural freehold land in Western Australian which encompasses vast areas of the wheat fields in south-west WA, some areas in NSW where the mineral rights are privately owned including important coalfields, parts of Tasmania where older forms of titles still persist, as well as in urban areas, national parks and other conservation areas across Australia.

DOPIE also says:

> "The right of veto over exploration and mining on Aboriginal land is a key contributing factor in the ALRA's impact on those activities. From industry's viewpoint, the veto provisions puts companies in the position of trying to negotiate 'conjunctive' agreements over both exploration and mining stage where they have inadequate information on which to base commercial decisions" (1997, p15).

The CLC disagrees. In fact it is the right to say 'no' that avoids conflict. Furthermore where traditional owners wish to proceed, it allows the parties to pursue agreements with the comfort

and certainty delivered by properly ascertained consent. It really is the foundation of the success of the Land Rights Act. It delivers meaningful control over access to traditional owners who have in-turn responded positively to mineral exploration and mining because of understanding and agreement on the conditions under which it will take place. The historically difficult interactions between Aborigines and miners are being transformed into productive and mutually beneficial relationships on the basis of this right.

As for the "industry's viewpoint", the CLC can confirm that in each and every negotiation entered into - the mining company has wanted to secure at least the basic parameters for possible future mining in the exploration agreement. This is a commercially sensible approach and has nothing to do with the 'veto'. The CLC as of December 1997 has concluded 37 exploration agreements - all of which are 'conjunctive' in that they include conditions, principles or parameters which will apply if a mine is developed.

Normandy Mining Group, one of Australia largest mining corporations approaching the largest Australian producer of gold, says on the consent provisions:

> "This provision has become known by the regrettably-negative term "the veto". **Normandy does not consider that this provision should be deleted or modified"** (1997, p2).

If in this review, as with every other substantial review of Land Rights, there is support for retention of the consent provision, DPIE, NTMC and NTG have contingent proposals to further qualify or limit the exercise the right to refuse or consent. Each has a similar proposal intended to break the nexus between consent and the terms and conditions of agreements. In this scheme commencement of any negotiations means consent (whether its in 6 or 12 months) and that is impossible to countenance. The traditional landowners agreement to the activities proposed will arise simply from talking about it with the proposer. No other persons or group are forced to enter contracts on this basis. So much for the principal of full and informed consent which is so fundamental to the success of the Land Rights Act.

Myth: 'Difficulties with landowner representation'

Attacks on the two large land councils, the CLC and the NLC, are common in spite of the significant contribution of these organisations to the developments of exploration and mining on Aboriginal land, consistent with the Land Rights Act. This contribution is well recognised by the industry.

"In practice the major land councils provide a valuable "one stop shop" for explorers and they have very considerable skills and experience" (Stockdale 1997, p2). PNC "enjoys a good working relationship with the Northern Land Council and affected Aboriginal communities" (PNC 1997, p1). About their statutory role NTMC say "(t)here is no doubt that the collective knowledge, experience and expertise of the Land Councils have been invaluable..." (NTMC 1997, p14) and "certainty of validity of agreements entered into as a result of dealings with the Land Council is an important element of the Land Rights Act which the Native Title Act lacks" (NTMC 1997, p14).

There is however a willingness in some quarters to trade the certainty the shareholders get with the land council's seal on an agreement, for uncertain outcomes. These parties do not say how the appropriate traditional owners will be identified, or who will verify that they understand the terms and conditions and consent to an agreement, in the absence of an adequately resourced statutory

land council. An obvious outcome could be a myriad of vying organisations coming forward, and as a result there could be little confidence that exploration success would lead readily to mining.

Representation of traditional owners in accordance with the Land Rights Act by the land councils is a sound and proven model. To operate successfully, the mainland land councils have to be of sufficient size to assume responsibility to identify and properly consult the traditional owners.

Recommendations of NTMC, NTG & DPIE

These submissions are remarkably uniform:

- The submissions are founded on an exclusively economic development stance and promote commercial considerations at the expense of the interests of Aboriginal rights and the principles of the Land Rights Act;
- The propositions submitted rely heavily on the notion of a 'fair balance' between Aboriginal interests and the wider Australian community';
- There is close similarity amongst the issues addressed, and conclusions and recommendations made.

Accordingly, it is appropriate to respond to these collectively.

Recurring themes

The NTMC, NTG and DPIE collectively contain recommendations for change which are categorised below. The CLC strongly opposes all the suggestions or any proposals that are based on or variations of these suggestions.

Each and all of the suggestions are detrimental to the interests of Aboriginal people and reduce the rights traditional owners currently enjoy under the mining provisions. Their aim is to reduce the capacity for traditional owners to negotiate, through their land councils, agreements that are fair and reasonable. Each is about further restricting Aboriginal people ability to negotiate in a sensible commercial environment. Adopting any of the recommendations would severely disrupt the current smooth operation of the mining provisions.

Theme: Right to refuse consent

All three submissions call for the removal the right to refuse consent. The NTG suggests alignment with the Native Title Act. The DPIE and NTMC, although accepting its importance and the likelihood of the retention of the right to refuse consent, suggest a 'cultural' veto where consent or refusal must be given within 6 months (NTG) or 12 months (DPIE).

The CLC opposes these suggestions.

Theme: Constricting negotiations

NTMC suggests limiting extensions to the negotiating period only where there is consent of all parties, without indicating whom it thinks the "parties" are. If it includes the NTG as a party then in effect it is proposing no extensions at all as the NTG say the NT Mining Minister routinely

objects to extensions to the negotiated period. The NTG suggests limiting extensions to 12 months beyond the original 12-month negotiating period. The NTMC suggests restricting negotiations further by forcing model agreements on the parties as well as excluding terms and conditions which include payments based on the value of minerals. There are also the repeated calls for more use of arbitration provisions.

The CLC believes that further limitation of the time available for negotiations and restricting terms and conditions are inconsistent with the notion of freedom of contract and would be highly discriminatory. Artificial time restrictions could lead to more refusals rather than more agreements.

Theme: 'Direct communication'

NTMC, NTG and DPIE favours 'direct communication' with traditional owners. Suggestions include that traditional owners should be free to choose their own representatives in negotiations. Further suggestions are that local associations assume land council roles in relation to the negotiation of agreements. The NTG and DPIE suggest more and smaller land councils.

These suggestions ignore the Aboriginal reality of landownership and social organisation. The current legislative regime allows representatives of the applicant to present their proposals at meetings of traditional owners. The statutory land councils are currently ideally placed to represent traditional owners in negotiations with third parties. Directly negotiating with traditional owners could lead to accusations of unfair or undue influence and imbalance in bargaining power.

Theme: ABTA (now ABR) and traditional owners

DPIE & NTMC suggest changes to the effect that a greater proportion of Aboriginal Benefits Trust Account monies to go to Aboriginal communities.

The CLC believes the current structure of ABTA allocations is fair and equitable.

Theme: Government overview

As an alternate to the Minister for Aboriginal Affairs, other departments and Ministers are suggested to take over his responsibilities. Changes mooted include various involvement of the NT Minister for Aboriginal Development, NT Mining Minister. Furthermore DPIE wants to administer the Commonwealth's responsibilities.

The CLC considers the responsibility for the Land Rights Act clearly rests with the Minister for Aboriginal Affairs.

No justification

There are no sustainable reasons put forward to justify the changes proposed by the NTG, DPIE and NTMC. The mining provisions are working well. There is enormous value in the stability and certainty achieved by maintaining the existing regime. The analysis in this paper shows that much of the basis of the suggestions is inaccurate, wrong and/or misleading.

In any analysis it must be remembered that the purpose of the Land Rights Act is to benefit Aboriginal people and their interest must be held paramount. The DPIE, NTG and NTMC submissions fail on this criterion alone.

Nothing New

Most of the arguments and themes presented by these groups are those expressed publicly for years - despite repeated refutations by the CLC and NLC independent economists such as Dr Ian Manning.

A comparison of the themes summarised above with what the NT Government submitted to the *1991 Industry Commission Inquiry into Mining and Minerals Processing* reveals an almost identical stance. The NTG 1990 submission, encapsulates the same arguments and views presented in it's 1998 submission. The Industry Commission rejected most of what was put to and those same suggestions are even more untenable today given the significant exploration and mining developments on Aboriginal land over the last seven years. At present there are equivalent levels of exploration on Aboriginal land as against non-Aboriginal land.

In 1990 the NTG made pessimistic predictions about the fate of the mining industry if the Land Rights Act remained unchanged. The fact is that there were no changes to the provisions and there is no evidence now to support such pessimism. The lack of progress or refinement of thought behind the arguments reflects the ideological nature of their opposition to the Land Rights Act rather than a genuine concern for the health of the mining industry.

It is recognised that the Minerals Councils do have responsibility to secure advantages for their members. To that extent their recommendations are aimed at enhancing the position of the mining companies in the negotiation process for their own simple commercial advantage. This is probably to be expected but that position needs to be understood by all those are who interested and affected.

However, the Land Rights Act has substantially different objectives and these must not be further compromised for the narrow commercial advantages of the members of the Minerals Council.

'Fair balance' and Aboriginal interests vs wider community

Tim Rowse's submission deals with the issue of balance of Aboriginal interests with "the wider Northern Territory and Australian community". He ponders whether this phrase embraces Aboriginal people and raises the dilemma Aboriginal people must find themselves in if there is to be a balance between the interests of Aboriginal people and the wider community.

The CLC believes this is no doubt Aboriginal people are part of the 'wider community' and they do contribute to the wider economy. Economists such as Crough, Howitt & Pritchard 1989 *Aboriginal Economic Development in Central Australia* have shown that the input into the Northern Territory economy by the Aboriginal population is enormous. They conclude "that about one-third of the Central Australian economy derives from the Aboriginal sector." (Crough et al 1989, p3).

The NTG submission claims that "mining is the Northern Territory's major economic activity". Whether the commercial activity of mining companies correlates so closely with the economic

development of the Northern Territory is arguable. Clearly the argument that the mining industry deserves further enhancement of its position under the legislative processes for access to Aboriginal land through amendments to Part IV is not. Manning concludes:

> "This does not mean that Governments should sacrifice all other economic and social goals to encourage further investment in mining. Indeed, there are several reasons to think again before encouraging such investment. The total factor productivity performance of the industry has lacked lustre, price trends have generally been unfavourable and the direct job generation rate per dollar invested is low. Fifteen years ago, during the resources boon, investment in mining was predicted to guarantee the prosperity of Australia. Increases in mine output and exports have indeed taken place, but overall economic growth has been disappointing. There is no reason to believe that prosperity will automatically follow further mining investment." (1995, p9)

Governments too miss out. Figures from the Australian Bureau of Statistics (*1998 Pocket YearBook*) show the total of royalties from mining destined to the NT Government amounts to a total of only $28.673M in 1993-94, $25.848M in 1994-95 and $22.909M in 1995-96.

About royalties, Manning says:

> "On the important issue of returns to the owner of the minerals, the [Industry] Commission found that during the 1980s, the share of royalties in mineral industry turnover was 6.2 percent in Victoria, 4.7 percent in Tasmania, 0.9 percent in the Northern Territory and in the three percent range elsewhere. The low rate of royalties imposed in the Territory results from deals struck with individual producers for industry assistance reasons, and from a profit based royalty system which, whatever its theoretical merits, is vulnerable to the accounting methods used to calculate profits." (Manning 1994)

It follows therefore that the NT Government could improve community benefits from mining through more efficient and reasonable resource rents rather through attacks on Aboriginal land rights.

Collusion?

When looked at collectively a pattern emerges as to the thrust of these submissions. The NTG submission concentrates on the removal of the right to consent to the grant of exploration licences and the importance of the mining industry to the NT. Whereas DPIE attempts to provide statistics of exploration and mining in the NT - on and off Aboriginal land and as against the rest of Australia - which purport to support a call for substantial amendments to the Act.

When looked at closely, however, the DPIE submission relies heavily on information sourced (mainly unattributed personal communication) from the Northern Territory Government's own Department of Mines and Energy (DME). For instance six out of the eight figures contained in the DPIE submission are sourced from the DME.

This raises the question why the NTG did not use its own data information in its own submission and brings in to doubt the extent that the DPIE submission represents an independently formulated view.

The NTMC asserts a "problem" on the basis of ELA statistics alone and outlines solutions which closely resemble those of the NTG and DPIE. There is however no analysis from the industry's point of view of the situation with respect to its members interests affected by the Land Rights Act. The CLC suspects this is because there maybe a lack of consensus within the Mineral

Council given that many of its members have substantial interests on Aboriginal land and doing quite nicely.

The CLC described a "powerful collusion of government and industry" (CLC 1997, p61) which was able to effect changes to the mining provisions through amendments passed in 1987. The high degree of conformity between the submissions discussed confirms the point and provokes the same concerns with the present process.

Other Submissions

There are other submissions which provide a more refreshing view on the operation of the Land Rights Act as it affects mining on Aboriginal land. The Northern Land Council and ATSIC demonstrate a sound insight into the issues surrounding mining on Aboriginal land.

Normandy Mining too has made a valuable contribution. The CLC acknowledges the careful consideration of issues shown in the submission and to a large degree concurs with the points made in its submission.

The salutary significance of the submission lies in the acceptance of the fundamental principles of the Land Rights Act and respect for the land council's role in the process. The views put forward demonstrate the maturity developing in some quarters of the mining industry. It marks a historic shift in attitude which if allowed to continue can only lead to further positive long-term outcomes for both Aboriginal people and miners alike.

Importantly the Normandy submission diverges from the more customary mining industry 'line'. In any representative association there will be divergence of opinions. However, the views offered by Normandy are not unusual within the mining industry. Many of the mining companies the CLC has dealings with do convey similar views in private, but are not necessarily as courageous as Normandy when it comes to expressing these publicly. This is particularly so when these are fundamentally at odds with the views of their representative organisations such as the Minerals Councils.

Conclusion

The mining provisions in Part IV of the Land Rights Act provide a clear and transparent procedure for accessing Aboriginal land for exploration and mining. The parties have an ordered and certain course to follow with the roles and responsibilities of each clearly defined. Adherence to the processes ensures conflict is avoided and where traditional owners wish exploration to proceed, it allows for mutually productive arrangements to be concluded between miners and Aborigines.

Over the ten years since the 1987 amendments, which substantially altered the mining regime, there have been significant developments in exploration and mining on Aboriginal land to the benefit of Aboriginal people and mining companies.

As of December 1997 the CLC has entered into 37 exploration agreements in respect of 94 exploration licences as well as 6 mining/production agreements in respect of 3 Production Licences (oil & gas) and 4 Mineral Leases.

In addition to the positive commercial outcomes, the parties to agreements have achieved enormous advances in the fundamental perceptions which characterise the broader relationship between Aboriginal people and the mining fraternity across Australia.

Ten years experience operating under the amended mining provisions has seen the settling of many issues and the bedding down of the statutory process. A delicate balance of rights exists between Aboriginal landowners and mining companies seeking access. On Aboriginal land, the mining industry gets the certainty it desires while Aboriginal people get recognition, control and benefit from mining where they choose to participate. Any ill-conceived tampering of rights under the Act or substantial alteration to the administrative structure governing mining on Aboriginal land can only upset that balance to the detriment of all concerned.

[Update: Since lodging its submission in December 1997 the CLC has consented to 38 more ELAs.]

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ATSIC
Central Land Council
Department of Primary Industries and Energy
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Normandy Mining Group
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