6

The Mining Provisions of the Act

Introduction

6.1 As described in the previous chapter, the amount of money available in the Aboriginals Benefit Reserve directly correlates to the success of mining activity in the Northern Territory and the state of world markets. This chapter outlines those provisions of the Land Rights Act that govern exploration and mining on Aboriginal land.

6.2 This chapter begins with an overview of the importance of mining to the Northern Territory and the central debates over the mining provisions of the Act. It describes the current provisions in more detail, before outlining the Reeves Report's proposals and the Committee's recommendations in the light of views obtained.

The Importance of Mining to the Northern Territory

6.3 Some of the world's largest mines and mineral deposits can be found in the Northern Territory, although the industry continues to be highly prospective. The major mineral resources currently mined include manganese on Groote Eylandt; bauxite at Gove; uranium at Ranger; and gold at various locations.[1]

6.4 Mining contributed to nearly 20% of the Territory's Gross State Product in 1997-98, with mining royalties alone contributing $23 million to the local economy in the same year.[2] Furthermore, over 4 000 people are directly

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1 See Department of Industry, Science and Resources (Commonwealth) (DISR), Submissions, pp. S370-74.

2 See Aboriginals Benefit Reserve (ABR), *Annual Report* 1997-1998, p. 2; Northern Territory

employed in the Northern Territory mining industry which has a significant multiplier effect through the employment force.[3]

6.5 Other than its direct contribution to the Northern Territory and national economy, the mining industry has been responsible for substantial infrastructure development in the Northern Territory. Towns like Nhulunbuy, Alyangula, Tennant Creek, Batchelor and Jabiru all owe their existence to mining activity. In turn, infrastructure such as roads, airfields, and power and water supplies have been developed in remote areas with contributions of the mining industry.[4]

The Central Debate over the Land Rights Act

6.6 Given the proportion of the Northern Territory that is Aboriginal land, it is important that there be efficient processes to allow exploration and mining on that land. At the same time, the interests and rights of non Aboriginal and Aboriginal land owners must also be respected. Procedures to strike this balance are contained in Part IV of the Land Rights Act. An important debate for both the Reeves Review and the Committee's inquiry has been whether the Act has struck the right balance. What is in contention is whether the level of mining activity in the Northern Territory under the Land Rights Act is below what might have been expected had the Act not been in existence.[5] The greater the impact of the Act, the stronger the argument is to streamline or weaken its provisions.

National Competition Policy Review of Mining Provisions

6.7 Another inquiry that has also recently addressed this issue is the National Competition Policy Review of Part IV of the Land Rights Act. The purpose of the review, undertaken by the National Institute of Economic and Industry Research, was to review the mining provisions of the Act in accordance with National Competition Policy guidelines.

6.8 The National Competition Policy Review had not been completed at the time this report was tabled in Parliament. However, the Committee took

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Minerals Council (Minerals Council), Submissions, p. S1727.

3 Minerals Council, Submissions, p. S1733. See also Department of Employment, Workplace Relations and Small Business, 1998, *Northern Territory March 1998 Labour Market Profile*, para 3.8.3, Canberra.

4 See Minerals Council, Submissions, pp. S1737-39.

5 Of course in that case, mining companies would probably have to negotiate access under the *Native Title Act 1993*.

public evidence from Dr Ian Manning who conducted the review. He was able to report on his broad findings at the Committee's final public hearing in June 1999. Dr Manning was also able to comment on reactions that he had received to the recommendations of the Reeves Report. [6]

6.9 Before drawing its own conclusions about the balance between ease of mining access and ensuring the protection of Aboriginal interests, the chapter will briefly outline the main features of Part IV of the Act.

6.10 As already mentioned, Part IV of the Land Rights Act outlines processes by which the mining industry may seek access to Aboriginal land, while enabling Aboriginal people to still have control over activities undertaken on their land. Part IV of the Act works in concert with the Mining Act 1980 (NT) and they both influence exploration and mining access to Aboriginal land.

Current Provisions of the Land Rights Act

Exploration Licences

6.11 The first stage in obtaining an Exploration Licence is governed by the Mining Act 1980 (NT).[7] Under that legislation, mining companies need to gain the Northern Territory Department of Mines and Energy's (the 'Department') approval before they can commence negotiations with a land council. The Department ensures that applications are properly surveyed, do not overlap with other applications and that applicants have the capacity to actually undertake the exploration. Only then does the Department issue a 'Consent to Negotiate' with the appropriate land council.

6.12 The application process is then governed by the Land Rights Act. The mining provisions in the Land Rights Act start at s. 40 and require, as a statement of principle, that there shall be no grant of an Exploration Licence on Aboriginal land without the consent in writing of the relevant land council and the Minister.[8] Under s. 41 of the Act, companies that have been granted a Consent to Negotiate forward a detailed written application to the appropriate land council. The application, including

6 Ian Manning, National Institute of Economic and Industry Research (NIEIR), Transcripts, Canberra, pp. 830-845.

7 See appendix E

8 Or if the Governor-General has, by proclamation, declaring that the national interest requires that the licence be granted.

exploration proposal, must be submitted to the land council within three months of it being granted by the Department, otherwise the application is deemed to have been withdrawn[9]. The exploration proposal must describe all aspects of the exploration activity including possible social and environmental impacts[10]. The land council then checks that the proposal provides adequate information for traditional Aboriginal owners to make a decision.

6.13 Section 42 of the Land Rights Act sets out the next stage, which is the negotiation process between the traditional Aboriginal owners, the land council and the applicant.[11] The land council must identify the appropriate traditional owners for the area under application. It then organises a meeting of the appropriate traditional owners at which the applicant presents the exploration proposal (with the consent of the traditional owners, applicants may also attend subsequent meetings). A representative of the Minister for Aboriginal and Torres Strait Islander Affairs may also attend the meeting. A process of negotiation then begins, involving the licence applicant, land council and traditional owners. Section 42 has various negotiation deadlines built in, although extensions of time can be granted at various stages.

6.14 If ultimately unhappy with the application, traditional owners have the right to withhold their consent for the exploration to go ahead. Alternatively, traditional Aboriginal owners may instruct the land council to negotiate the terms of an agreement with the company, which is again done in consultation with the traditional owners. An agreement reached between an applicant, land council needs the approval of the Minister for Aboriginal and Torres Strait Islander Affairs. Finally under the Mining Act 1980 (NT), the Northern Territory Mines Minister must approve the agreement. If approval is given, then the applicant is granted a tenement.[12]

Other Provisions Relating to Exploration Licences

6.15 Section 43 of the Land Rights Act allows the Governor-General to declare that a mineral exploration project should go ahead in the national interest. In such a case, an agreement with the appropriate land council is still required, but not the consent of the traditional owners. This provision has not been used to date. Section 44 allows for conciliation or arbitration in

9 NLC, *Annual Report 1997-1998,* p. 35.

10 NLC, *Annual Report 1997-1998,* p. 35.

11 The Minister for Aboriginal and Torres Strait Islander Affairs provides the final approval.

12 This summary has been drawn from the Land Rights Act; *Reeves Report,* pp. 514-58; NLC, 1998, *Annual Report 1997-1998,* p. 35; Central Land Council (CLC), *Annual Report 1997-1998,* pp. 48-49.

cases of national interest or in the rare cases where consent has been given for an application, but not for specific terms of the agreement.

Consent to Mine

6.16 Section 45 mirrors s. 40, containing the same conditions for granting mining interests, with the exception that consent from a land council is not required. Section 46 mirrors s. 42, outlining the processes for negotiating a mining interest as distinct from an Exploration Licence.

Conjunctive and Disjunctive Agreements

6.17 Under the original provisions of the Act, Aboriginal consent was required at both the exploration and mining stages. Consent was given in one of two ways – through a 'disjunctive' agreement or a 'conjunctive' agreement. A disjunctive agreement required separate negotiation at both the exploration and mining stage. At both stages, traditional owners had the right to withhold consent. A conjunctive agreement involved negotiating provisions relating to both exploration and mining at the exploration stage. If a conjunctive agreement covering the terms and conditions for both exploration and mining was negotiated, further consent at the mining stage would only be required if the intended mining operation did not substantially accord with the terms and conditions originally negotiated.

6.18 The original mining provisions of the Act were amended in 1987 to the form that remains today. The amendments meant that traditional Aboriginal owners can only withhold consent at the exploration stage.[13]

The Stockdale Decision

6.19 In 1992, the Supreme Court of the Northern Territory handed down a decision ('the Stockdale decision') in a case brought by the Northern Territory Government which asked the Court to rule on the legality of an exploration agreement between Stockdale Prospecting Ltd and the NLC.[14]

6.20 The exploration agreement allowed traditional Aboriginal owners to withhold consent at the mining stage. The Court found that the agreement was void because it contravened provisions of the Land Rights Act which only allowed consent to be withheld at the exploration stage. This ruling

13 *Reeves Report*, pp. 521-22.

14 *Northern Territory v Northern Land Council* (1992) 81 NTR 1.

confirmed that traditional Aboriginal owners could not withhold consent from mining activity if they had already consented to exploration.

6.21 Following the Stockdale decision, the enforceability of the provisions of agreements between exploration and mining companies and traditional Aboriginal owners became uncertain. This uncertainty may constitute a restriction on commercial agreements which, it could be argued, is unwarranted, and unnecessarily restricts the rights of parties to make agreements. Traditional Aboriginal owners and exploration and mining companies should be free to enter into agreements on such terms as can be negotiated. This may require amendments to the Act.

Remaining Sections of Part IV

6.22 Section 47 deals with disputes over the activities of an Exploration Licence holder. It allows the Minister for Aboriginal and Torres Strait Islander Affairs to stop exploration if the terms of the exploration agreement are not being met.

6.23 Section 48 sets out when and how a further application may be made once a veto has been exercised. This section is discussed in more detail below under the heading of 'Warehousing'. The section includes a number of subsections, which have only been fleetingly referred to in the Reeves Report and in evidence to the Committee.

Reeves Report's Proposals

6.24 The Reeves Report's recommendations for Part IV of the Act are underpinned by other recommendations, previously discussed, to establish Regional Land Councils (RLCs) and the Northern Territory Aboriginal Council (NTAC). The Committee has already made its views on these recommendations clear. The focus in the remainder of this chapter is on those components of the Reeves Report's recommendations that would affect exploration and mining, and which have attracted evidence to this inquiry. The recommendations, stripped of references to RLCs and NTAC, are in essence:

- retention of the Aboriginal right to withhold consent to exploration and mining with conditions under which it could be overridden;
- provision for 'reconnaissance licences' (a new class of Exploration Licence) and the renewal of mining leases;

- the continuing right for Aboriginal people to seek negotiated royalty payments (see previous chapter);
- reduction of the Northern Territory Government's involvement in the process;
- more direct negotiation between mining companies and land owners;
- removal of strict prescriptive timetables and all unnecessary statutory regulation and delays; and
- the ability of regional Aboriginal organisations to make binding and enforceable agreements.[15]

Comments on the Reeves Report's Proposals and the Committee's Recommendations

Cost and Impact of Delays in Mining

6.25 The Reeves Report records much controversy over the data analysis used to justify the varying assessments of the impact (or otherwise) of the Land Rights Act on levels of mining activity.[16] This has led to 'assertion and counter-assertion, claim and counter-claim' and 'a veritable paper war'.[17] The claim and counter claim are reflected in some equivocation in the Reeves Report. On the one hand, the Report claims that mining transaction costs have:

> undoubtedly led to a reduction in the rate of exploration and, therefore, the potential development of new mines.[18]

but also that:

> the Land Rights Act has probably had negligible impact on the costs and benefits for the mining industry itself.[19]

6.26 Ultimately, the Report argues that much of the complexity of the Act needs to be stripped away to allow freer negotiations between mining interests and Aboriginal people.[20]

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15 Minerals Council, Submissions, p. S1713, and *Reeves Report*,

16 *Reeves Report*, p. 514.

17 *Reeves Report*, p. 513.

18 *Reeves Report*, p. 563.

19 *Reeves Report*, p. 577.

20 *Reeves Report*, pp. 536-38.

6.27 However, the 'claim and counter claim' about the data analysis presented and used in the Reeves Report has also dogged this inquiry. Professor John Quiggin of James Cook University argues that the analysis in the Report:

> greatly overstates the cost of delays association with the negotiation of access to Aboriginal land for exploration and mining.[21]

6.28 The NLC told the Committee that :

> Reeves adopted an unsourced and erroneous statistical analysis of mining and exploration in the NT in an attempt to argue that the mining provisions of the Land Rights Act lead to crippling delays.[22]

6.29 The Commonwealth Department of Industry, Science and Resources (DISR) countered this suggestion saying that the rate of mineral production in the Northern Territory:

> will continue to decline as mines which began before the [Land Rights Act] reach the end of their production and are not replaced by new mines which have been stalled by the [Land Rights Act].[23]

This argument is supported by the Northern Territory Government which believes that the Act 'in its current form retards development and economic growth'.[24]

6.30 The Northern Territory Minerals Council ('Minerals Council') argues that the Act, as it impacts on the mining industry 'must be made less restrictive and more effective'.[25] The Minerals Council also told the Committee that the conclusion of the Reeves Report that:

> the record of exploration and mining has been poor, that 'just about everyone is unhappy with the existing situation' and that the provisions in the [Land Rights Act] should 'be recast and simplified' (Ch.24) are views shared by the Minerals Council. So also are reasons put forward by Reeves to explain the malaise – the

21 John Quiggin, NLC, Submissions, p. S1016; See also Ian Manning, 'Aboriginal Rights and Mining in the Northern Territory' in *National Economic Review*, 32, June 1995.

22 NLC, Submissions, p. S914.

23 DISR, Submissions, p. S377. See also Northern Territory Government (NTG), Darwin, Transcripts, p. 5.

24 NTG, Submissions, pp. S1539-40.

25 Minerals Council, Submissions, p. S1717.

> complexity of applicable mining law, the role of the two large land councils and the 'unhappy legacy of past actions'.[26]

6.31 The Minerals Council can also:

> only agree with Reeves that 'excessive transaction costs' have 'undoubtedly led to a reduction in the rate of exploration and therefore, the potential development of new mines.[27]

6.32 However, Giants Reef Mining N.L. told the Committee that:

> the problem that I have observed with the land councils is not that there were obstructions or that the two large land councils were a limiting factor, but rather that the number of staff and the people available to carry out the work have been the problem…I think that the ears of the Aboriginal groups and Aboriginal interests – or non Aboriginal interests…, say through an exploration licence – could well hear more rapidly and better if there were more staff. That probably amounts to regionalisation…[28]

6.33 The NLC believes that, in reality, market conditions are far more relevant to the decisions companies make about exploration and mining than the land access regime of the Land Rights Act.[29] Furthermore, the NLC argues that the certainty and security provided by agreements reached under the current arrangements more than offsets any delays in negotiating exploration agreements.[30]

6.34 The Committee has also received evidence that the time taken to negotiate Exploration Licence applications is decreasing. Professor Altman told the Committee that:

> My perception over a long time watching these activities is that [Exploration Licence] access is becoming increasingly streamlined on Aboriginal land – it is accelerating at the moment.[31]

6.35 The CLC also believes that '[i]t is not a problem and we have overcome those hiccups of the early part of the Land Rights Act'.[32] The National Competition Policy Review believes that the NLC was 'snowed under' by applications and the delay in handling that backlog gave them a reputation for tardiness which is now being redressed. Finally, the

26 Minerals Council, Submissions, p. S1709.
27 Minerals Council, Submissions, p. S1709.
28 Giants Reef Mining N.L., Transcripts, Darwin, p. 673.
29 NLC, Submissions, p. S912.
30 NLC, Submissions, pp. S914-15.
31 Jon Altman, CAEPR, Transcripts, Canberra, p. 237.
32 CLC, Transcripts, Alice Springs, p. 254.

National Competition Policy Review assesses the arguments in detail and concludes that calculating the costs of delay is very difficult because there is no agreed counterfactual, and because the extent and reasons for delay vary from application to application. [33]

6.36 The Committee believes that there has been some loss of opportunity and impact due in part to the Act's operation. Without doubt, however, most difficulties could have been avoided if there was less distrust, expensive litigation, and political infighting resulting in other agendas being promoted. Given improved goodwill, improved leadership and a genuine commitment to develop meaningful partnerships and work to achieve shared strategies, the Act can continue to work well for the people of the Northern Territory.

6.37 That said, the Committee concludes that some changes to Part IV of the Act and streamlining of the application processes should be considered. They are needed and can assist all parties to achieve worthwhile outcomes and an improved future.

Negotiating Agreements

Content of Agreements

6.38 The Jawoyn believe that many of the negotiation steps outlined in the mining provisions of the Act are effectively a restraint on trade. They argue, that as long as the two parties are fully informed and come to an agreement that is otherwise legal then the agreement should be allowed.[34] As the Aboriginal party directly affected in the Stockdale Decision, the Jawoyn Association believes, in particular, that parties should be able to negotiate disjunctive agreements if they so choose.

6.39 The Reeves Report recommends removal of many of the sections of the Act that control the processes and timing of negotiations for exploration and mining, on the basis that they can be covered by the negotiating parties.[35] The Report also observes that 'the question whether conjunctive or disjunctive agreements are entered into will be left entirely to the parties'.[36] The Minerals Council is more cautious, being 'strongly' opposed to disjunctive agreements and noting that the Reeves Report

33 Ian Manning, NIEIR, Transcripts, Canberra, pp. 839-40. For further evidence, see Giants Reef Mining, Transcripts, Darwin, p. 680.

34 Jawoyn Association, Transcripts, Katherine, p. 472.

35 *Reeves Report*, pp. 537-38.

36 *Reeves Report*, p. 537.

recommendations will not counter 'the misuse of the veto as a bargaining weapon' or set limits on the form of negotiated royalties.[37]

6.40 The NLC also wants the Act amended so that 'negotiations and agreement might take such form as the miner and Aboriginals and their representatives see fit'.[38] It also notes the inefficiencies inherent in overly complex legislation:

> it is probably true that wherever Government seeks in detail to regulate and prescribe the relations between other people it will take up to 5 years or longer before those affected can operate efficiently according to the new agreements. [39]

6.41 The Committee agrees with critics that the mining provisions of the Act are too prescriptive. Reducing the restrictions will allow all parties greater freedom to negotiate suitable agreements. It will also remove the distinction between conjunctive and disjunctive agreements, although negotiators will still have to respect general commercial law.

Recommendation 24

6.42 **Part IV of the *Aboriginal Land Rights (Northern Territory) Act 1976* be amended so that there are no restrictions on the contents of agreements for exploration or mining, subject to general commercial law requirements and recommendation 25.**

Withholding Consent Provisions

6.43 The Reeves Report recommends that the proposed RLCs should retain the existing right to withhold consent for exploration or mining licences on Aboriginal land. This recommendation has been generally accepted in evidence to the Committee, even if with a certain resignation by some, as the Council indicated:

> While it introduced arguments against the retention of the 'veto… the Minerals Council conceded that the allegiance of the Aboriginal traditional owners to the practice, the certain

37 Minerals Council, Submissions, p. S1714.

38 NLC, Transcripts, Darwin, p. 651.

39 NLC, Submissions, p. S925.

> opposition to abrogation and 'political reality' would ensure its survival.[40]

6.44 The maintenance of the existing veto is unequivocally supported, at least, by Aboriginal groups. As one community told the Committee:

> The people of Utopia feel the most important protection they have over their land is the ability to keep mining out.[41]

6.45 Similarly, the Jawoyn Association told the Committee that:

> The right to consent to activity, including mining on Aboriginal land is a fundamental principle of land rights.[42]

6.46 As mentioned in the section above on consent and agreement provisions, the 1987 amendments to Part IV of the Land Rights Act stipulated that there be a 'once only' veto exercisable at the exploration stage. As the Normandy Mining Group told the Reeves Review:

> Since that time [the 1987 amendments], the agreements negotiated with the Land Councils have not attempted to provide for a second veto but have sought to set out certain agreed parameters that would apply at the mining stage and be incorporated into a subsequent mining agreement. In other words, the statutory right to mine is preserved but such mining must proceed in accordance with those agreed parameters. The parameters are necessarily fairly broad in their terms. Obviously, such parameters should not impose impractical provisions which would, in effect, amount to a second veto.[43]

6.47 The Committee believes that this represents a practical approach that balances fairly both mining and Aboriginal interests. Accordingly, the Committee recommends the continuation of the existing veto provisions at the exploration stage only, but providing flexibility for traditional Aboriginal owners and exploration companies to enter into agreements on such terms and conditions as can be agreed.

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40 Minerals Council, Submissions, p. S1710.

41 Utopia Community, Submissions, p. S644; See also NLC, Submissions, p. S944

42 Jawoyn Association, Submissions, p. S843.

43 Normandy Mining Group quoted in *Reeves Report*, p 522.

Recommendation 25

6.48 **Traditional Aboriginal owners, through their land councils, should have the right to withhold consent for any exploration or mining proposal, subject to the current provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976*.**

This recommendation should be read in conjunction with recommendation 24.

Who Can Negotiate Agreements?

6.49 As recommended in chapter three of this report, the Committee believes that the Land Rights Act should be amended so that the existing land councils can delegate the power to negotiate and enter exploration and mining agreements to regional committees or councils.[44] An implicit consequence of this recommendation may be that exploration and mining agreements will no longer need to gain the consent of the Full Council of the land councils. This is significant because it confirms the real devolution of power to the regions and will also reduce one of the delays in the application process – waiting for a Full Council meeting to ratify an agreement.[45] It does not however remove the requirement for the Minister for Aboriginal and Torres Strait Islander Affairs and the Northern Territory Mining Minister to each give consent.[46]

6.50 The Committee believes that the implication of its earlier recommendation should be made explicit in the context of Part IV of the Act.

44 s. 28(1)(a)(ii), Land Rights Act.

45 The Full Council of the CLC meets three or four times a year while the Full Council for the NLC only meets twice a year. CLC, *Annual Report 1997-1998*, p. 9 and NLC, *Annual Report 1997-1998*, p. 8.

46 See ss. 42(8), (9), (10), Land Rights Act.

Recommendation 26

6.51 **Section 28 of the *Aboriginal Land Rights (Northern Territory) Act 1976* be amended so that land councils can delegate their power to approve exploration and mining agreements to regional committees or councils, subject to existing requirements for the informed consent of the traditional Aboriginal owners of the regions concerned.**

The Minister for Aboriginal and Torres Strait Islander Affairs should still be required to give consent to any agreement.

6.52 The Reeves Report recommends that RLCs be free to draw on the professional resources of NTAC when negotiating exploration and mining agreements.[47] The Committee has already argued that land councils should be able to delegate most of their powers and functions to varying degrees, according to the demands of regional committees or councils. The Committee anticipates that smaller or less confident regional committees may prefer the land council to continue exploration and mining negotiations on behalf of traditional Aboriginal owners.

Freedom to Engage Outside Advice

6.53 The Reeves Report recommends that RLCs should be able to engage any outside help they need when negotiating with mining companies.[48] Normandy Mining believes that:

> Like all other Australians, Aboriginal people should be free to choose their legal representatives for the important issues of land access and land use.[49]

6.54 The Minerals Council also argues that traditional owners 'should be able to choose their own anthropological, legal and financial advice', with land councils 'competing with others as service providers'.[50] The NLC notes that indeed, on occasions, traditional owners have engaged professional

47 *Reeves Report*, pp. 535, 540.

48 *Reeves Report*, p. 540.

49 Normandy Mining Ltd, Submissions, p. S311.

50 Minerals Council, Submissions, p. S1711.

advisers not employed by land councils or suggested that the land council engage particular professional advisers.[51]

6.55 The proposal by the Minerals Council and Normandy Mining will not be appropriate for all traditional owners, even if only because they may find the cost of hiring independent advice prohibitive. Moreover, the land councils would still not be able to give consent to an agreement until they were satisfied that the traditional owners had given their informed consent. However, on the basis of providing flexibility in the Act, the Committee believes that the Act should make it clear that traditional owners can choose their own advisers.

Recommendation 27

6.56 **The *Aboriginal Land Rights (Northern Territory) Act 1976* ('the Act') be amended to make it clear that traditional Aboriginal owners can choose their own advisers, should they wish, to assist in the negotiation of exploration or mining agreements. Unless the land council agrees, the cost of such advice should not be borne by the land council.**

Land councils, or their regional committees or councils, should still be required to endorse any agreement in accordance with section 23(3) of the Act.

Warehousing

6.57 Under s. 48 of the Act, an Exploration Licence cannot be granted for an area for a period of five years, once an application for that area has been refused by a land council. Furthermore, the unsuccessful applicant for an Exploration Licence has the right to submit the first new proposal for an Exploration Licence after the five year limit has expired.[52] If a new agreement is not reached, then the land is locked up again for another five years.

6.58 The intention of the section is to stop traditional Aboriginal owners from being continually bombarded by Exploration Licence applications if they clearly did not want exploration and mining to take place. However, exploration and mining companies can abuse the provision and freeze out other Exploration Licence applicants from the area indefinitely by refusing to negotiate in good faith. Such a practice, called 'warehousing', also

51 NLC, Submissions, p. S922.

52 See s. 48(2) of the Land Rights Act in conjunction with s. 48(9)(b).

prohibits traditional owners from entering into agreements with other mining interests.

6.59 The Reeves Report effectively removes the problem by recommending that s. 48 be deleted entirely and that Aboriginal residents through the proposed RLCs be given powers to negotiate agreements at any time.[53] Opposition to the RLCs has already been well described in this report. However, there has been considerable support for prohibiting warehousing.

6.60 Community Aid Abroad agrees that the warehousing provision should be remove on the basis that it effectively limits traditional Aboriginal owners to negotiating with one applicant, who remains 'first in the queue' once the veto period expires.[54] The Jawoyn Association believes that the warehousing provision is a restraint on trade, as some companies deliberately abuse the negotiating process and then 'lock up' tracts of potential exploration areas on a rolling five year basis under the moratorium provisions.[55] Similarly, the Anindilyakwa Land Council (ALC) and NLC seek the abolition of the warehouse provisions.[56]

6.61 The five year moratorium does offer protection to those Aboriginal people who do not want mining on their land at all or who want time to reconsider their views. For these reasons, the Committee believes that the five year period of grace in s. 48(5) should remain. However, the Act could be made more flexible to make it easier for traditional owners to reestablish exploration or mining negotiations in less than five years if they wish. The Act should also ensure that exploration and mining companies cannot freeze exploration in an area by continually negotiating in bad faith.

6.62 Any changes to the Land Rights Act will require the cooperation of the Northern Territory Government which will have to introduce complementary changes to the processes for granting Exploration Licences.

53 *Reeves Report*, p. 537.

54 Community Aid Abroad, Submissions, p. S328.

55 Jawoyn Association, Submissions, p. S843.

56 Anindilyakwa Land Council (ALC), Transcripts, Angurugu, p. 538.

Recommendation 28

6.63 **The Minister for Aboriginal and Torres Strait Islander Affairs request that the Northern Territory Government grant the Northern Territory Mining Minister powers to withdraw Consent to Negotiate an Exploration Licence if the Northern Territory Mining Minister believes that the company is not negotiating in good faith, and on any other grounds which the Minister considers relevant.**

If an application is withdrawn on this basis, other companies should be able to seek Consent to Negotiate an Exploration Licence for the affected area. The original applicant, whose licence to negotiate was withdrawn by the Northern Territory Mining Minister, should not be able to reapply for an Exploration Licence for the same area for twelve months.

Section 48 of the *Aboriginal Land Rights (Northern Territory) Act 1976* be amended so that the five year moratorium on new applications for exploratory licences after a refusal to give consent to an application can be removed, if the land councils or their regional committees or councils (on advice from traditional Aboriginal owners) and the Northern Territory Mining Minister agree that a new Consent to Negotiate can be granted.

The Role of the Northern Territory Government

6.64 If implemented, the Reeves Report's recommendations would effectively bypass the Department of Mines and Energy and limit the Northern Territory Mining Minister to a passive role.[57] The Report proposes that mining companies be able to negotiate directly with the proposed RLCs without seeking a Consent to Negotiate from the Department. At the end of the process, the Northern Territory Mining Minister should accept whatever enforceable agreements arise from the negotiations.[58]

6.65 The Northern Territory Government rejects this approach. It argues that ownership of minerals in the Territory (other than uranium which is owned by the Commonwealth) is vested in the Northern Territory

57 *Reeves Report*, pp. 534, 540.

58 Unless the Northern Territory Minister considers the agreement should fail on other grounds. See *Reeves Report*, p. 534.

Government which, accordingly, has responsibility for granting mineral titles. Government representatives told the Committee that the Reeves Report 'ignores the responsibility of the Crown oversight of the orderly development of mineral resources in the community's interest'.[59] The Territory Government also doubts the practicality of the Report's recommendation, stating that it may be anti-competitive and lead to a 'dutch auction scenario' which would be unworkable.[60]

6.66 The DISR aligned itself with the Northern Territory Government, believing that there:

> is a strong case for retaining the current arrangements which give the NT Government responsibility for assessing the suitability of exploration and mining companies' proposals and programs prior to their entering into negotiations with the land councils…[61]

6.67 The Northern Territory Minerals Council is also

> not persuaded that the essentially passive role that Reeves assigns to the Northern Territory Government is acceptable.[62]

6.68 Dr Manning too believes that the Land Rights Act should respect the processes of the Mining Act. He argues that the dual involvement at arms length of the Northern Territory Department of Mines & Energy through the Mining Act, and the land councils through the Land Rights Act, adds accountability and transparency benefits to the process.[63]

6.69 The Committee accepts these reservations and concludes the role of the Northern Territory Mining Minister and the Department of Mines and Energy should remain unaltered.

Recommendation 29

6.70 **The responsibilities of the Northern Territory Mining Minister under Part IV of the *Aboriginal Land Rights (Northern Territory) Act 1976* be retained.**

59 NTG, Transcripts, Darwin, p. 5.
60 NTG, Submissions, p. S1541.
61 DISR, Submissions, p. S382.
62 Minerals Council, Submissions, p. S1710.
63 Ian Manning, NIEIR, Transcripts, Canberra, pp. 831, 842-43.

Reconnaissance Licences

6.71 If adopted, the recommendations in the Reeves report would allow a mining company to seek a new class of exploratory licence from the Department of Mines and Energy called a 'reconnaissance licence'. A reconnaissance licence would allow the holder to conduct 'low level exploration activities', but prohibit the use of explosives or mechanical devices other than those that are held. A licence holder would not be entitled to enter Aboriginal communities or sacred sites. The appropriate RLC would be informed that a licence had been granted after the event, but would not be able to withhold consent.[64]

6.72 Reaction to this proposal has mostly been negative. It has drawn the ire of those representing Aboriginal interests because traditional owners would not be given a say over whether such a licence should be granted. The CLC considers this proposal 'provocative, intrusive and unnecessary' and 'fraught with problems if traditional land owners and their land councils are excluded from the process'.[65] Similarly, the NLC is:

> concerned about the impact of this recommendation upon the rights and interests of the traditional land owners and doubts that such a recommendation would have any real practical benefits.[66]

6.73 Community Aid Abroad objects to the recommendation for the following reasons:

- it further reduces the rights of traditional owners to control access to and the use of their lands;
- it will undermine the trust that has developed between traditional Aboriginal owners and mining companies under the current provisions;
- it does not provide adequate protection of sacred sites as the Aboriginal Areas Protection Authority is not aware of all Aboriginal sacred sites;[67]
- it fails to define 'low level' exploration, which could include rock sampling – potentially desecrating sacred sites; and
- the evidence that the current provisions have stymied exploration is not convincing.[68]

64 *Reeves Report*, p. 529.

65 CLC, Submissions, p. S 1601; Transcripts, Alice Springs, pp. 253-54.

66 NLC, Submissions, p. S916.

67 See also NLC, Submissions, pp. S917-18.

6.74 Reconnaissance licences would also give rise to some practical concerns. In evidence to the Committee, Dr Manning commented:

> The argument about reconnaissance licences is: what do they really entitle you to do? If they entitle you do things that are currently entitled under an Exploration Licence, then [the Northern Territory Department of Mines and Energy] DME does not like them because it is really exploration and not just reconnaissance. The second reason why DME is a bit suspicious of them is that, if a mining company finds anything of interest, it tends to get rather excited. If it does not have proven title to what it has got – and the DME process in fact does not give it to the company that was doing the reconnaissance – then there is all hell to pay. So it is much better to get the legalities stitched up first.[69]

6.75 This corroborates evidence from the NLC that:

> if a company has an interest in exploring an area, then it appears most unlikely that reconnaissance will enable it to make a decision not to proceed with further exploration.[70]

6.76 As an alternative to the proposed reconnaissance licences, the CLC suggests that zero or very low impact exploration activities on Aboriginal land could be excluded from the definition of exploration under s. 4 of the Mining Act 1980 (NT).[71] Mining companies would then be able to enter negotiations to undertake zero or very low impact exploration through the permit system. Such exploration would then become a matter of land access rather than land use.[72]

6.77 The Committee supports the Reeves Report's desire to streamline the procedures and reduce the costs associated with gaining access to Aboriginal land for zero or very low impact exploration. However, the Committee's objection to the proposed reconnaissance licences is that they would remove Aboriginal land owners and residents from the process. The CLC's suggestion on the other hand, keeps local Aboriginal people at the centre of negotiations.

6.78 For this reason, the Committee is inclined to support the CLC suggestion. However, the Committee notes that the practical problems identified with

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68 Community Aid Abroad, Submissions, pp. S327-28.

69 Ian Manning, NIEIR, Transcripts, Canberra, p. 837.

70 NLC, Submissions, p. S918.

71 See CLC, Transcripts, Alice Springs, pp. 2253-54; Submissions, pp. 1601-02.

72 There is some evidence that this already occurs. See Giants Reef Mining N.L., Transcripts, Darwin, pp. 677, 678.

reconnaissance licences would also apply to exploration approved through the permit system. Therefore, all parties would have to be clear that such arrangements could have no legal status under the Mining Act 1980 (NT). An Exploration Licence application lodged through the Department of Mines and Energy under the Mining Act would have absolute legal precedence over any informal exploration approved through the permit system. In practice, exploration companies may feel that using an informal arrangement through the permit system was unwise if it subsequently raised the expectations of traditional owners when negotiations for a formal Exploration Licence took place.[73] Such matters would be for exploration and mining companies to weigh up on their merits.

6.79 Nonetheless, the CLC's suggestion does have merit because it provides flexibility and choice in the Act that some may wish to pursue.

Recommendation 30

6.80 **The Minister for Aboriginal and Torres Strait Islander Affairs request that the Northern Territory Government amend the Mining Act 1980 (NT) to exclude zero or very low impact exploration on Aboriginal land from the definition of 'exploration'. Approvals to conduct zero or very low impact exploration should be processed by the land councils through the permit system with the informed consent of traditional Aboriginal owners.**

Under this arrangement, land councils should be required to advise the Northern Territory Government of the terms and conditions of any permits they issue to allow zero or very low impact exploration.

These arrangements should have no legal status in the formal processes for obtaining a Consent to Negotiate from the Northern Territory Mining Minister.

73 See Giants Reef Mining N.L., Transcripts, Darwin, pp. 677-79.

Conclusion

6.81 In summary, the Committee supports the intent behind many of the recommendations in the Reeves Report. The Northern Territory Government, mining interests and land councils alike agreed that Part IV of the Land Rights Act needed amendment.

6.82 The Committee believes that its recommendations will achieve efficiencies and encourage more exploration and mining activity in a balance with the continuing protection of Aboriginal interests. The Committee believes that this will occur with a degree of consensus, not possible if the wholesale restructuring recommended in the Reeves Report was to be implemented.

6.83 The report now turns to the recommendations in the Reeves Report concerning a related topic - access to Aboriginal land.