COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS

Reference: Reeves report on the Aboriginal Land Rights (Northern Territory) Act

WEDNESDAY, 30 JUNE 1999

CANBERRA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

INTERNET

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is: **http://www.aph.gov.au/hansard**

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS

Wednesday, 30 June 1999

Members: Mr Lieberman *(Chair)*, Mrs Draper, Mr Haase, Ms Hoare, Mr Katter, Mr Lloyd, Mr Melham, Mr Quick, Mr Snowdon and Mr Wakelin

Members in attendance: Mr Haase, Ms Hoare, Mr Lieberman, Mr Quick, Mr Snowdon and Mr Wakelin

Terms of reference for the inquiry:

The Committee shall inquire into and report on the views of people who have an interest in the possible implementation of recommendations made in the Reeves Report. In particular the Committee will seek views on:

(1) the proposed system of Regional Land Councils, including

  (a) the extent to which they would provide a greater level of self-management for Aboriginal people, and

  (b) the role of traditional owners in decision making in relation to Aboriginal land under that system;

(2) the proposed structure and functions of the Northern Territory Aboriginal Council;

(3) the proposed changes to the operations of the Aboriginals Benefit Reserve including the distribution of monies from the Reserve;

(4) the proposed modifications to the mining provisions of the Act including the continuing role of government in the administration of these provisions;

(5) proposals concerning access to Aboriginal land including the removal of the permit system and access to such land by the Northern Territory government; and

(6) the proposed application of Northern Territory laws to Aboriginal land.

The Committee shall make recommendations on any desirable changes to the proposals made in the Reeves report in the light of the views obtained.

WITNESSES

Committee met at 4.25 p.m.

CHAIR—I welcome you to this public hearing of the committee's inquiry into the recommendations of the Reeves report on the Aboriginal Land Rights (Northern Territory) Act. As many people know, over the last few months the committee has been conducting this inquiry because the Minister for Aboriginal and Torres Strait Islander Affairs, Senator John Herron, has asked us to seek people's views about the recommendations in the Reeves report. The committee has consulted very widely and travelled extensively in the Northern Territory and in fact we recently concluded our fourth visit to the Northern Territory. We have also had numerous hearings in Canberra, such as this one today. Our plan is to table a report, God willing, towards the end of August.

This hearing is open to the public and in fact is the last public hearing today. A transcript is being prepared for us—Hansard are on duty today, and we thank Hansard once again—and anyone wishing to have a copy of the transcript should ask any member of the staff of the committee for one and we would be happy to send it to you. We have taken the liberty of giving permission for filming to take place today. The committee is preparing an information video which it will be distributing widely to people—in particular the indigenous people of the Northern Territory—and the cameraman here today is working for the committee; he is not a member of the media. I hope that witnesses and members of the public will feel comfortable with the filming going on. If there is any problem, let us know and we will gladly discuss it with you.

We are very lucky today to have with us Dr Ian Manning, and I welcome him. Dr Manning is from the National Institute of Economic and Industry Research and he is the author of the National Competition Policy review of the mining provisions of the land rights act. He is here today to assist the committee at the committee's request. We are most grateful to him for that.

[4.27 p.m.]

MANNING, Dr Ian Geoffrey, Deputy Executive Director, National Institute of Economic and Industry Research

CHAIR—Although the committee does not require you to speak under oath when you are a witness, witnesses should understand that these hearings are proceedings of the Commonwealth parliament. As such they are legal proceedings, and giving false or misleading evidence naturally is a serious matter and could be regarded as a contempt of the parliament. Hansard reporters are taking a record today. It would assist us if any witnesses with names they wish to tell us—place names, et cetera—would pause and repeat them to help us to gain an accurate record of them. Before we ask questions, Dr Manning, would you like to make an opening statement about your interest in this inquiry?

Dr Manning—I could of course go on at some length about this but I had better make it plain what my role was and why I am here. I was contracted by ATSIC, in its capacity as the department responsible, to conduct a national competition policy review of part IV of the land rights act. The terms of reference were as standard for national competition policy reviews. They instructed me to determine if there were any aspect of the act which impeded competition or raised costs to business and, if this were the case, whether the benefits of the provision were greater than the costs, and also to determine that there was no less costly way to achieve the same policy goals. So that gives a triple test for any aspect of part IV which impedes competition.

The terms of reference were specifically about part IV—mining provisions—and therefore not the other parts of the ALRA, parts I to III and part V onwards. In the mining provisions, it is most important that the ALRA interacts with Northern Territory legislation, particularly their mines act. Once again, I was not instructed to review the Northern Territory Mining Act. Under national competition policy, it is for the Northern Territory government to arrange that review, not the Commonwealth. There was some discussion in the submissions about the width of the terms of reference but I took it that I was specifically not to deal with those other parts.

Submissions were received from a relatively narrow number of interest groups, namely, the Northern Territory Department of Mines and Energy, whom I keep on calling DME; the two major land councils; and the Commonwealth Department of Industry, Science and Resources, whom I tend to call Resources. I also held consultations with a number of groups in the Territory such as the Jawoyn Association and the Anindilyakwa Land Council.

An important source of data, however, was that we arranged for data sets to be prepared. I arranged for a bit of cooperation between DME and the land councils on the statistical analysis of what happened to exploration licence applications after the 1987 amendments to part IV of the act. I arranged for the two major land councils to conduct a sample survey of 100 files each, extracting data from their files as to the history of various negotiation procedures. I distributed response forms to the applicants for each of those negotiations and so got some direct feedback from the mining industry applicants. That was the major source of direct data from the mining industry since the industry did not make a submission in its

own right. Finally, DME gave me access to the results of a survey of applicants that they conducted but it was in a form so that I could not identify the respondents.

The relation of this study to the Reeves report is indirect. The terms of reference do talk about taking into account relevant outcomes of the Reeves review. Of course this turned out to be quite a problem for me because the Reeves review produced a package of recommendations which was pretty well integrated, and I think that I am not alone in the view that, whereas the Reeves package is coherent, if you take away bits of it then other bits tend not to hold together too well by themselves. Both the department of resources and the land councils encouraged me to take a broad view of the terms of reference and to discuss the Reeves package fairly broadly. DME and the Northern Territory government wanted me to be narrow and particularly to rule out of court those aspects of Reeves which involved overriding Northern Territory legislation.

Two particularly difficult questions were the question of traditional ownership, where Reeves's proposed regional land councils would not have to consult with traditional owners. That is quite a radical change from the present act and would make for radical change to the operation of part IV. For the record, none of the people who made submissions to me assumed that traditional ownership was going to become a dead letter. They all assumed that some kind of consultation with traditional owners, or some kind of permission from traditional owners, would be required for mining. The definition of traditional ownership is in part II of the act and outside the terms of reference.

The second one is the question of regional land councils, which is in part III of the act and again somewhat outside my terms of reference, but it kept on coming up in submissions. I ended up producing a report that has parenthetical discussions of this saying, 'I shall now proceed outside the TOR.' I took care not to make any recommendations that were outside part IV.

If I may briefly recapitulate the part IV process for your benefit. Essentially, part IV simply provides a process for negotiation between mining companies who want to conduct operations on Aboriginal land and essentially the traditional owners, ex parte the land councils. In fact, the whole thing repeats twice over, because slightly separate processes are prescribed for applicants for exploration licences and for mining leases, though application for exploration licence is by far numerically predominant.

The process is split very strictly into two parts: that part which is the responsibility of DME and that part which is carried out under the ALRA. In fact, the ALRA process is inserted into the middle of the normal DME process. This, of course, has advantages in that there is no doubt at any stage as to who is responsible for which. Either DME is responsible or the land councils and the ALRA process, ultimately the Minister for Aboriginal and Torres Strait Islander Affairs, are responsible.

It is DME's responsibility to maintain a list or a data set with vacant land available for exploration and to receive applications for exploration licences or for mining leases and determine whether those areas are on Aboriginal freehold land. If that is the case, the Northern Territory minister then may give his right to consent to negotiate. He does not have

to, but it is the custom of DME to give consent to negotiate on a first come, first served basis, by and large, provided the application is technically correct.

The land council process then follows. The applicant has to make a proposal to the land council. The land council has to inform the traditional owners and others, any Aboriginal parties who may be affected. It then has the duty to obtain the informed consent or refusal of the correctly identified traditional owners, and to seek the views of other affected Aboriginal persons. It also conducts the process of negotiation with the applicant. Again, in the act it is required to do so according to the interests of the traditional owners.

Now, as for the negotiation process, meetings are prescribed. There must be at least one meeting where the applicant can present their mining proposal to the traditional owners and—judging by the feedback we get from mining companies—that is usually regarded reasonably favourably; that is, the companies believe that they get a reasonable opportunity at that occasion. Negotiation can result in two outcomes. It can be a refusal, in which case the act prescribes that the exploration licence is put into what is called moratorium for five years. After the expiry of five years the same applicant has the right of submitting a new proposal, and that can keep on going. The proposal may then be refused or accepted. In fact, the acceptance rate for second proposals is currently running at 25 per cent to 30 per cent. So second proposals are by no means automatically refused. A number of traditional owner groups have changed their minds. Some of them, having seen that the mining companies have obeyed the conditions of the act in neighbouring areas, are happy to take on the conditions of the act.

Otherwise, the negotiation process may end up with a consent and an agreement is put in place. That is an agreement between the land council and the applicant which must be again in the best interests of traditional owners, and subject to the advice of other affected Aboriginal people. I might add that the number of traditional owners who are consulted or have a right to say things in agreements is often quite large. There may be something like 100 people who have to give an informed consent to an agreement. It is not just as though there is a traditional owner; there is a whole mob.

That goes for consent to the Minister for Aboriginal and Torres Strait Islander Affairs who then reports to the Department of Mines and Energy, Northern Territory, that he has given his consent. The DME process begins again. The Northern Territory minister is not obliged automatically to give his consent to a consented agreement reached under the ALRA, and he has not always done so. He usually does and, if he does, then an ordinary Northern Territory exploration licence is granted.

Exploration licences in the Territory run for a period of six years, during which gradual relinquishment takes place and, upon relinquishment, the explorer has to provide all data collected to the Northern Territory Geological Survey. That is a normal provision in mining exploration. If the explorer finds minerals upon the land, they are entitled to proceed—perhaps with an exploration retention licence—to apply for a mining lease, where the process is the same except that the traditional owners have no right of refusal. That is one of the 1987 amendments.

Agreements which have been reached under the current act do include statements of intent as to what shall happen at mining stage. Obviously, if a group of traditional owners consents to exploration in the knowledge that they are also consenting to mining and they believe that they are consenting to mining of a certain type, if mining is not of that type, they are liable to be disappointed, to say the least. Again, it puts the applicant in breach of the agreement that was originally reached. But, on the other hand, it is very difficult to think out before exploration has even commenced what kind of mine is going to take place and, therefore, what kinds of mining provisions should apply. So they are pretty generalised at that stage.

The act also has time line provisions. For example, the applicant has three months to submit a proposal. Negotiation is nominally for one year with an as-of-right extension for another year, after which further extensions may take place if the Minister for Aboriginal and Torres Strait Islander Affairs agrees. If a negotiation deadline is hit, then the land council, having consulted, has a week to refuse or agree; otherwise consent is deemed but conditions can then be determined by conciliation and arbitration. In actual practice, the deeming provisions have been triggered more by administrative mistake than for any other reason and the parties have avoided conciliation. They have either cobbled together an agreement pretty quickly, generally by copying a previous agreement, or in one or two instances the applicant has withdrawn and asked DME to issue a new consent to negotiate—which has happened, and then they have gone back to square one. There is argument as to why the deeming provisions have not resulted in conciliation. We have had the one side saying, 'Oh, it is expensive. We have actually really agreed and all we needed was a bit more time.' We have had the other side—DME for example—saying, 'No mining company is willing to get offside with the land councils.'

However, the actual experience, as statistically documented, is that the Central Land Council has been a pretty consistent performer. Its average time to negotiate a consent has been 2½ years—and that has been so from the beginning. What that means is that most agreements take two field seasons to negotiate, but a minority of agreements go over. There are various reasons that agreements go over. The death of a traditional owner can be quite important. There was a case in the Petermann Ranges where a traditional owner of very great significance died on the country and the people there were not willing to negotiate for a period of—I gather—about six years. But more frequently a death of a traditional owner plus the determination of succession causes a delay of two or three years.

Another major cause of delay is where there is disparity of views among traditional owners, where the different groups cannot agree. Sometimes this leads to splitting of an ELA so that the territory of the people who want mining gets split off from those who do not. But, again, that takes time. Another problem has been due to applicants taking their time. Whether this amounts to the great sin of warehousing depends on one's eye view. Very often applicants take their time for cash flow reasons rather than because they are deliberately trying to hold things up. Basically, they are trying to negotiate a new joint venture partner, the old one having dropped out—and this kind of thing. There was a major case where a takeover resulted in suspension of negotiations for several years. So the reasons why negotiations run long in some cases are a bit various.

The other aspect of the act is that it places restrictions on the scope of agreements. One of the restrictions I have already mentioned is that an exploration licence implies that anybody who finds a mineral can proceed to mine. The other major restriction is that there are to be no ad valorem payments in respect of exploration licences. The ad valorem payments of one sort or another which have been included in all agreements struck that I know of, starting well before the ALRA with the Groote Eylandt agreement in 1964, are discouraged and are of somewhat uncertain legal status.

The experience with actual agreements is that they involve a great number of clauses on environmental matters, preservation of the environment. Generally, traditional owners insist on standards that are greater than those in the environmental legislation. Similarly, they insist on sacred site protection to a standard which is greater than that which is in the heritage legislation.

They quite often nowadays seek employment preference from the mining company and the contractors and employment generation projects. They also place behavioural restrictions on outside mine employees; for example, they are to have no vehicles and no guns so that they do not go off in their spare hours hunting game—that kind of thing. The typical agreement that is negotiated under the ALRA has a lot more to it than the negotiation of cash rewards at mining stage for traditional owners.

In comparison with the Native Title Act, under the ALRA negotiations are available only to fully fledged native title Aboriginal freeholders. A claimant has no status under the ALRA. They do have the right of refusal to exploration licences, whereas the Native Title Act is only a right of negotiation. Parties other than traditional owners—that is, other Aboriginal people—under the ALRA who would be affected do have the right to be consulted while agreements are being drawn up.

Finally, what issues were raised in the review? Obviously, the right of refusal was raised and arguments were given for and against. The weight of evidence is for—that is, the right should be retained—and the land councils wish to retain the right as essential to the act. DME and the department of resources were opposed to the right on principle but felt that it was so deeply entrenched as a pragmatic matter that they would not actively oppose retention of the right of refusal.

On national competition policy grounds, there is the issue of freedom of entry to the exploration licence market—that is, does the ALRA contain conditions which prevent applicants from applying? Is there a Northern Territory club to which you cannot gain admission? My judgment on that one is, no. It is possible for any mining company that is willing to submit itself to the process to enter that process with a fair chance of success.

In fact, there have been a couple of recent cases of applicants. One had a change of heart; that is, they decided to forgo objections of principle to negotiation with Aboriginal people. Another was by entry from overseas; one recent entrant has applied their expertise at negotiating with the indigenous people of Canada and found that the same principles work if they are talking to Aboriginal people. So it is possible to gain the necessary expertise either locally or from overseas and to enter the market. It is a matter of being able to understand and familiarise yourself with the ALRA process.

On negotiation delay and costs: yes, there are costs of negotiation. It is a bit difficult to work out exactly what they are, because they depend very much on individual negotiations. Some negotiations which are long, drawn out and difficult for either applicant related or traditional owner reasons can be quite costly, but in the Tanami they are more or less bulk processing the things now, and the applicants say that it might cost them as little as $5,000 for the whole process on the mining company side. On the other hand, you get figures over the $100,000 mark for some of the long, drawn-out negotiations.

On costs on the land council's side: again, the land council accounts are not all that well laid out for reasons of cost accountancy, and I think there could be improvements in that area. But, again, costs are to the order of $15,000 or maybe $30,000—it depends on the amount of bush negotiation, how many planes have to be chartered to bring TOs in and so forth. Their evidence is that bush costs are the most important and that the head office costs are not large. Again, they are similar, maybe a bit more, to the applicant costs.

The way to reduce that cost is bulk negotiation—so that you put a whole lot of ELAs together when they affect the same group of traditional owners and run them through together. That also saves traditional owner costs. There are traditional owners who are getting a bit sick of mining negotiation that is taking up a lot of their time.

The question of ad valorem payments is a pretty contested one. It is opposed as a matter of principle by many people in the mining industry, but not all. On the other hand, there has been precedent for it ever since the Groote Eylandt agreement. The Groote Eylandt agreement incidentally was between the Church Missionary Society as vendor of the prospecting licence and the Groote Eylandt mining company, BHP. There is an ad valorem payment in that one.

The 1987 agreements to bear down on ad valorem payments do not seem to have succeeded. The problem is that they are a market outcome. If you have the right of granting permission to enter onto your land and want to translate that right into a payment—which occurs to the convenience of the mining companies not so much at exploration stage when they do not have cash but at a time when they have cash flow—the market does generate such a payment. I recommended that the legality of those agreements should be placed beyond doubt.

On time lines: the existing time line system should work. A minor recommendation was that time lines should be expressed in Northern Territory field seasons instead of in strict calendar years, mainly because you can only go out and consult with traditional owners from April to October and not throughout the year. The other side of it is that the contributions by the mining industry to resourcing the negotiation process should be on a marginal cost basis and should be placed beyond doubt. There are a few other minor recommendations, but I trust you will have a copy of the report before too long and you can meditate over them.

CHAIR—How long will it be before we get access to the report, appreciating that it belongs to you and ATSIC?

Dr Manning—That depends on your colleague the Minister for Aboriginal and Torres Strait Islander Affairs. Also, there are one or two late items of evidence that appeared after I

had drafted this one. For example, one of the mining companies handed in its responses to my survey only last Friday or thereabouts, and I shall slightly adjust a few figures to take that into account.

CHAIR—In a broad sense, not a judgmental sense, looking at the various systems of dealing with exploration and mining approvals and negotiations from a competition point of view, we appear to have in the Northern Territory the Territory law, which you have correctly pointed out to us was quarantined out of your inquiry, if I have described it properly; we have the land act law, which is within your terms of reference; and we have the native title laws relating to mining activity. Does having three different systems affecting the same part of Australia prima facie indicate that that would not be conducive to efficiency and would in fact become a barrier to competition?

Dr Manning—In fact, you have only two systems: you have the DME system plus the ALRA, which is relevant to quite specific lands—the titles are drawn very accurately on maps; or you have the ALRA plus the native title system. The fact that the land councils are native title representative bodies is actually not relevant to my terms of reference because a mining company knows exactly which system it is under. In one sense, because the ALRA system has been running for longer and what happens under it is reasonably well known now, the process has become relatively automatic in those areas where the traditional owners are well known; in other words, those areas where there have been quite a number of exploration licences. Because of that, I think that there is no particular problem from the competition policy point of view. It is known which act applies and the ALRA is a known devil with the advantage, of course, that it provides certainty of title to the applicant. That certainty exists in both Australian and Aboriginal law, which is a considerable advantage if you want to get on with the locals when you are there.

CHAIR—From your observations of the relativities now, 25 years down the track since the act was enacted in the Northern Territory, and the future for indigenous people of the Northern Territory and the Northern Territory generally as an important part of Australia, are you able to make a comment as to whether it is clearly important to continue to have a system which would encourage a viable, responsible, sustainable mining industry in the Northern Territory?

Dr Manning—The simple answer to that one is yes.

CHAIR—I thought you would say that but I did not want to presume it. You see it as linked up with the future of the Territory.

Dr Manning—After all, mining is currently at least the major Western economic opportunity in most of the ALRA lands. It is not the only one; there are other shall we call them industries which have importance in the ALRA lands. The pastoral industry is not particularly prosperous at the moment but it is an important industry. Tourism and related industry is increasing rapidly in importance and has rather eclipsed the mining industry as an employer in the Territory. And, of course, we should never forget defence.

Mr SNOWDON—I am interested in the reference you made to warehousing and then the provisions of section 48 in relation to the time period in which an incumbent application

can be reread, if you like. There have been some discussions, I know, that in some cases Aboriginal communities might like to open up that ELA issue in the context of having other companies come and talk to them as opposed to the company that has currently got the ELA. Would you like to make an observation about that?

Dr Manning—That was a matter of considerable discussion, as you know. I think the first thing that should be said is that traditional owners are not obliged to give a reason for refusal but often the land council has a shrewd idea, and I asked the land councils what the reasons for refusal were for a sample of 200 ELAs. It tended to come back that the refusal was cultural or environmental. Those were the major reasons. Applicant related reasons were relatively well down on the list, which is not to say that they were not important in some instances. Two sorts of cases do arise. The first is where the applicant seems to have lost interest completely, and the second is where an applicant insists on putting a proposal which is not acceptable to the traditional owners of that block. It could be that the traditional owners have unreasonable expectations and they are expecting more than the market will bear, but in some cases that is not so. You have got applicants who are sitting on ELAs and insisting on conditions which are not acceptable to the traditional owners.

Very often the applicant who is doing that will blame the land council and say that it is the land council that is being unreasonable. But, as far as I can see, and this is without going and interviewing the traditional owners in person, it is in fact traditional owner discontent that is true. Often you can get an applicant who thinks he is getting on fine with the traditional owners and he is mistaking Aboriginal politeness for agreement. In fact, they are being polite to him but they do not like his proposition at all. We therefore have cases of somnolent applicants, those who have just gone to sleep on it, and cases of applicants where there has been a refusal and it is unlikely that that particular applicant, if they re-present their proposal, will be accepted.

There have been cases where during the five-year moratorium both sides rethink. The Aboriginal side may rethink but also the applicant side may rethink. There have been occasions where the second proposal from a previously unacceptable applicant has in fact been a sufficient improvement to gain acceptance. So DME says the applicant who was refused should have a fair chance to rethink and resubmit, or, if they like, to sell out to somebody who is more adept at negotiation with Aboriginal people. You may know that on the Tennant Creek field the advent of Normandy as an applicant, with its track record already proved in the Granites, was much more acceptable to Aboriginal people than the previous firm there. The DME takes a property rights line. The department of resources is more in favour of draconian cutting off of all applicants who are refused and throwing the whole thing open.

Then there is the question of to what extent traditional owners or land councils should be able to invite applications and so direct. Again, DME does not particularly like that one. I am very dubious about it because the current split system, whereby DME selects the applicant and the land councils then do the negotiation, has the strength that you have two distanced parties involved and the possibility of a sweetheart deal is thereby much reduced. That is one argument for retaining DME's rights. The second argument is, I suppose, a states rights argument. The legal position is that the Commonwealth can change the ALRA in such a way as to override the Northern Territory Mining Act, but I do not think that is desirable

on an intergovernmental relations ground. So, if DME says that its interpretation of the mines act is that an unsuccessful applicant should have a second chance, that is DME's right to say that, because it issues the consent to negotiate and therefore that should be respected.

So my actual recommendations are that, at the end of a period of refusal, there should be a deemed expiry of the Northern Territory minister's consent to negotiate. But the minister should have the option of reissuing to the same applicant or, if the minister is convinced that that applicant is such as to be courting a refusal for one reason or another, have the right to select another applicant—but that is DME's right; it is not the land council's. In fact, DME has a policy, in so far as is possible within the very limited range of discretion that it allows itself, of favouring applicants who are in a joint venture with an Aboriginal applicant or a representative of traditional owners. So it could be that the traditional owners enter into a joint venture with another applicant and try and gain DME's approval. That is a way by which traditional owners can influence it without taking away DME's right to selection of the applicant.

Mr SNOWDON—Thank you for that. You made a comment about your quarantining of your role in terms of the national competition policy. Is the NT mines act being reviewed along those lines by the Northern Territory government?

Dr Manning—To my knowledge it is still on their business pending list.

Mr SNOWDON—If I could ask one more question relating to the nature of agreements: you made a comment about NT ministers sometimes withholding their consent to an agreement which is made, and I am thinking of the case with Stockdale. Do you have a view about whether or not there should be an ability to negotiate disjunctive agreements under the act?

Dr Manning—This is not a matter I feel strongly about, though the actual recommendation is that there should be freedom of contract. The reason for that is freedom of contract is more in line with competition principles. What that means is that a mining company which wishes to negotiate a disjunctive agreement could do so, but the mining company could still hold out for a conjunctive agreement. The evidence is that if there is a hold-up at the mining stage due to the necessity to negotiate—and that might arise if there is a disjunctive agreement—that is in fact quite costly. So I fully understand the reason for preferring conjunctive agreements but that could be reasonably left to the parties rather than forced upon them by the act.

Mr SNOWDON—Would it be possible—although I have not thought this through—if you were to allow the market situation to apply as you have described and leave it up to the parties, for you to use time limits to impose arbitration if agreement cannot be reached on that issue? Would that be reasonable or unreasonable?

Dr Manning—It would come under the general time limits proposal or provisions and therefore would ultimately come under the administration of the Minister for Aboriginal and Torres Strait Islander Affairs. I do not know how you would legally draft it so that, should a dispute arise over a conjunctive or disjunctive agreement, the conjunctive should apply without title and should not be the cause for any further negotiation after the two years is up.

Mr SNOWDON—If you had an arbitration structure in there—

Dr Manning—There is, where it should go to conciliation. I have thought a bit about that and it would be possible to encourage the use of arbitration by providing that it is not subject to a deemed consent; that is, either party can then walk away from the arbitration at the end of it if it is not acceptable, so there is still the power of refusal at the end of the arbitration.

Mr SNOWDON—And then some ministerial discretion? I think the minister may have a role at that point.

Dr Manning—You could put that but there is also the national interest provision, which is a bit different.

Mr SNOWDON—Sure, I understand that. But this is so that, on any objective criteria, if there is a recommendation by an arbitrator and either party disagrees, the minister may make a judgment that the arbitrator's recommendation should be pursued, for example.

Dr Manning—You could provide for that way too. You are beginning to go to areas of the act where there has been very little recent exploration because generally either a refusal or a consent is reached well before that stage. I toyed with other possible recommendations regarding disjunctive agreements. For example, they should be permissible but only if the Northern Territory minister gives his prior approval, which he would be unlikely to give except in special circumstances. But you can think of a circumstance whereby a group of traditional owners would wish to state, 'We do not wish to have this area mined but we are happy to let it be lightly explored for the sake of filling in the geological map,' and companies would be willing to do it on those terms. It is currently prohibited.

Mr HAASE—You mentioned the average time for approval of an agreement and some of the lengthy periods and their cause. Could you tell me the shortest period you know of for the satisfactory negotiation of an agreement and the longest period taken to negotiate an agreement that was finally satisfactorily negotiated?

Dr Manning—The shortest was, I think, about two months. That was where one piggybacked on an existing negotiation, so they just threw it into a pot; they were driving out into the bush the next day so they did it. The longest depends a bit on definition. It depends on if you count a period of refusal, five years, as part of the negotiation period. The other thing is that I have no evidence on agreements which were put in under the pre-1987 provisions. However, there were negotiations which were commenced in 1987 and which are still running, so your longest is in fact open ended. I am given to understand that most of those are coming to a conclusion.

I said that the Central Land Council had a consistent record of 2.5 years on average and nothing over five years, but that is not true of the Northern Land Council. There has been a lot of discussion as to why that may have been the case, whether it is land council bloody-mindedness or various circumstances beyond their control. The circumstances beyond their control were quite significant because they began with a very large number—147—of ELAs in their first year in 1987-88, so you can say they were probably snowed under. But also a

lot of those were rather more difficult agreements than the CLC had, because of arguments over uranium, more complicated traditional owner arrangements in the Top End and so on.

So, while there is scope for some sympathy with the NLC's predicament, I did not state that their average time was 2.5 years. It is well in excess of that. However, there is some evidence and I would expect them to be able to turn in an average time of 2.5 years or less in the period beginning now, rather than continue their past performance.

Ms HOARE—I wanted to clarify a question and answer for my colleague Mr Snowdon. You referred to a review taking place and whether there had been a review of DME or Northern Territory mining.

Mr SNOWDON—Under national competition policy guidelines they have to review their act.

Ms HOARE—That is right, yes. You said that that was still business pending with the Northern Territory government. That was one of my questions. I find it quite extraordinary that over the past 12 or 18 months there have actually been two reviews of the mining provisions of the ALRA, both commissioned by the same minister. Do you have any thoughts on that? Secondly, how much did Reeves's recommendations in his report guide you when you were conducting your investigations?

Dr Manning—I am not privy to the process whereby it was found necessary to conduct a separate and subsequent national competition policy review.

CHAIR—Separate and subsequent to what?

Dr Manning—To the Reeves review.

CHAIR—The Reeves report is not a competition policy report.

Dr Manning—Yes. It does not follow the format and the standard list of questions for the national competition policy reports which are quite specific.

CHAIR—Can I clarify what we are talking about. The competition policy review you have performed for ATSIC is part of the national competition agreement with the states and territories.

Dr Manning—Yes.

CHAIR—Which was put in place by the previous Keating government and which is continued by the current government. Is that right?

Dr Manning—That is correct.

CHAIR—So it is not a matter of commissioning two reviews, as you implied. I thought in fairness I would put that on the record, because innocent people reading the transcript might take a different view. They will not be able to do that now.

Dr Manning—At the same time as my report is cleared by the minister for you, it goes to the Office of Regulation Review to see whether I have properly fulfilled the terms of or the criteria for a national competition policy review and, if I have not, I gather I get sent back to pull my socks up.

CHAIR—Who sends you back, by the way?

Dr Manning—The Office of Regulation Review, I suppose, has the right to say that I have not done my job and, therefore, I have to do it for no further Commonwealth expenditure. To what extent was I guided by the Reeves recommendations? The terms of reference were that I should take into account the relevant outcomes of the Reeves review. The problem was that the Reeves recommendations regarding mining are actually fairly broad brush and are an integral part of his total package, so much of which was outside my terms of reference, whereas, if I applied national competition policy guidelines as if Reeves had not happened, I would then get a very different set of arguments and a very different set of recommendations.

I think you can say that I gave priority to the national competition policy task and that methodology requires that you retain the purpose of the act. If the benefits of the act exceed the costs, then any changes should be those which are justified as cost reducing without sacrificing benefit. That is the approach I have taken in formulating the recommendations.

Ms HOARE—I have one final question. In your review on competition policy, did you look at the effect of the time since an agreement was initially negotiated? For example, you said Groote Eylandt was initially negotiated in 1964. You could imagine that various takeovers of companies, mergers and things over a period of time should allow for some kind of review of existing agreements. Did you look into or investigate that aspect at all?

Dr Manning—There was a little bit of evidence. The land rights act provides that any agreement shall bind the successors of the traditional owners and of the applicant. In fact, one of the mining companies in a confidential submission did say that this is the essential clause that should not be removed under any grounds. However, the agreements that are negotiated do include internal provision for review. Though the act does not require it, the actual agreements do provide for that.

In one sense, if it is an exploration licence, because they run for a maximum of six years the need for ongoing review is not all that urgent. On the other hand, if it is a mining agreement which runs for 26 years, then there is every reason for ongoing review. My understanding is that that is included for sheer commercial reasons, and there is no need actually to command that in the act because it happens.

Mr WAKELIN—You may have mentioned this earlier, but what form did the advertising take?

Dr Manning—Advertisements in the *Northern Territory News*, the *Australian*, the *Sydney Morning Herald* and the *Age*.

Mr WAKELIN—Just one-off?

Dr Manning—Yes, just one-off. However, I did contact the obvious major parties and, in fact, held a meeting in Darwin late in January, that is, before the advertisements went out. That was attended by the Central Land Council, the Northern Land Council, the Northern Territory Minerals Council and DME.

Mr WAKELIN—As I understood earlier, you mentioned that it was quite possible to negotiate reasonable mining agreements under the land rights act, but I am trying to get a handle on any impediments and whether there are any. I have not satisfied myself in my own mind that there are not some impediments in terms of access.

Dr Manning—There is an impediment; there is cost. The cost is enough to discourage some of the small players, and some of them did complain about it. On the other hand, the cost may be of the order, at the most, of one year's exploration but is generally less, so whether it counts as an impediment to a bona fide applicant is less certain. There are skills required, and the annals of the land councils are full of complaints about poorly briefed negotiators who started to read the land rights act on the plane to Darwin. That is becoming much less of an impediment because know-how is much more widespread, and also it is either the land rights act or the Native Title Act, so applicants now expect to have to engage in a native title negotiation of some sort and are therefore better briefed to do so.

Mr WAKELIN—That is understood. In terms of impediments, I guess it was interesting to make the comparison between those under the Aboriginal land rights act and those which may not have the same legislative responsibilities. The impediments are some measurement of that, but perhaps they are not within the brief.

Dr Manning—They are within the brief, but it is very difficult to determine to what extent they are greater or less. The problem with the native title arrangements as they are at the moment is that they are yet to settle down. There is still a fair bit of uncertainty as to exact process and the exact meaning of the title that you get, which is not true of the land rights act, where the process is well laid down and there have been lots of precedents, and an applicant can very easily get the necessary expertise by talking to the right people within the industry.

Mr WAKELIN—I want to clarify whether there were any recommendations in Reeves that were interesting to you, that were able to be accepted by the competition policy review, and any that were obviously rejected.

Dr Manning—The Reeves package depends to quite an extent upon whether or not you accept the reality of traditional ownership and the rights as property owners of traditional owners, the great big group of them, the traditional owners being a whole lot of senior persons. That is also, of course, whether you believe that there is a necessity to make sure that the titles are valid in Aboriginal law as well as in Australian general law. That is one thing.

The second thing where I parted company with Reeves was that, though the legal position is that Commonwealth legislation overrides that of the Territory, I think in this case the Commonwealth should adjust to the Territory rather than vice versa. In other words, the ALRA should take the Territory Mining Act for granted. That means that, if the Northern

Territory government were to change the Mining Act so that the processes contemplated by Reeves were acceptable, or were incorporated into Northern Territory legislation, then I would be much more in favour of changing the ALRA to suit. But, since it appears that the Territory government does not want to do that, I think the ALRA should respect the Territory Mining Act process—which it does at the moment—and should not try and over-ride that process by, for example, some sort of tendering process involving land councils. That is partly also because I think the current dual involvement of two arms-length bodies has transparency benefits.

The other recommendation of Reeves is that he is keen on reconnaissance licences. DME is not. Once again, I have tended to take DME's view. There could be some scope for reconnaissance. There is something to be said for it. If an applicant wants to go out and look at the country then the land council could let them. There is a permit system that can allow it, provided that it is just 'looking at'—the things you can do under permit. I would not be against extending the time lines a bit to enable them to do it. I have not made a concrete recommendation to that end. I thought of doing it and then it did not really seem worth the candle.

The argument about reconnaissance licences is: what do they really entitle you to do? If they entitle you to do things that are currently entitled under an exploration licence, then 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.

Mr WAKELIN—Yes. We had some interesting advice on that from other witnesses.

CHAIR—From a miner.

Mr WAKELIN—So that is quite interesting and consistent, I would suggest, with that particular miner's view.

Dr Manning—A lot of this has come in partly from the industry. Though they made no public submission, various things came in from mining companies confidentially.

Mr WAKELIN—Doctor, thank you for that.

CHAIR—Thank you. I think we have reached the end of the road.

Mr SNOWDON—I have just one quick question at the end, if you do not mind. You mentioned the Canadian company which has had experience elsewhere. Did your brief go to cover the comparative competitiveness of mining on Aboriginal land in the Northern Territory as opposed to mining on land which is subject to native title or indigenous title elsewhere in the world?

Dr Manning—No, except that elsewhere in the world can provide precedents for negotiation procedures which could be a model for the ALRA. But, if you are going to import a system from overseas, the rights on which it is based and the distribution of rights—not to speak of the Aboriginal or the traditional law—may not be—

Mr SNOWDON—I was actually thinking more of the sort of spurious 'sovereign risk' argument which has been run eons ago—that this is a disincentive to invest in the mining industry—where we know that the mining companies currently investing are also investing elsewhere.

Dr Manning—If I move out from under my ALRA review hat, I have done some studies of that and have been far from convinced that that was the case. In fact, it is always interesting to notice how the multinational mining companies will say, 'Oh, we struck that one in PNG'—or whatever—'and, on the basis of that experience, we think that this might be a solution in Australia.' So the international experience has come not only via the land councils being in touch with their equivalents elsewhere but also via the mining companies knowing what has happened to them elsewhere. So PNG precedents, for example, are in people's minds.

CHAIR—Thank you Dr Manning. Thank you ladies and gentlemen. I thank you for your evidence and wish you well. We will look forward hopefully to getting access to a document, in time, for us to start considering it. Before I close the public hearing I have a submission just arrived from the Central Land Council. I ask that that submission, which is I think the third submission from the Central Land Council, be accepted as evidence to the inquiry into the recommendation of the Reeves report and authorised for publication. There being no objection, it is so ordered.

Before I close this public hearing, this being the last public hearing of this inquiry, I would like to place on record my appreciation to, firstly, my colleagues, who have travelled with me and been very supportive and helpful, for their diligence in this inquiry. It has been very much appreciated by me as chairman. Thank you to the secretariat—James and his team—for a wonderful job. The job lies ahead of us of course to deliver a good report, but I am very fortunate to have the support of James and his colleagues. Thank you to Hansard, who have been magnificent in the House and in the outback, in areas where no-one else would believe that it would be possible, where the longest extension cord in the history of the world was produced with apparent ease so we could have the wonders of electronic recording in the outback for, I suspect, the first time in history. Thank you to the members of the public throughout Australia, particularly in the Northern Territory, who have supported us and shown great interest. We hope that you will continue to show your interest and support for the committee's work. Thank you to the witnesses. Dr Manning, you represent them. We have had many very eminent people, caring Australians, people of great expertise and knowledge, who have helped us with their reports, inquiries and submissions—many of them very provocative and challenging. We will do our best to try and take on board the advice we have had and to do justice to it.

I would like to especially thank the indigenous people for their patience with me, particularly—a whitefella—as a chair. I appreciate their courtesy to me, and their help and guidance. Thank you to the community of the Northern Territory for their help and guidance.

We hope that we will soon meet again with a report which will unlock the future. There is no further business before the committee and I now declare this meeting closed and thank you all for your attendance.

Resolved (on motion by **Mr Wakelin**, seconded by **Ms Hoare**):

That this committee authorises publication of the evidence given before it at public hearing this day.

Committee adjourned at 5.42 p.m.