The University of Sydney **Faculty of Law**

SYDNEY CENTRE FOR INTERNATIONAL LAW

Law Building F10
Sydney NSW 2006
Australia

Tel: +61 2 9351 0354
Facsimile: + 61 2 9351 0200
Email: bsaul@usyd.edu.au

Dr Ben Saul BA (Hons) LLB (Hons) *Sydney* DPhil *Oxford*, Barrister

Director, Sydney Centre for International Law

Committee Secretary
Senate Economics Committee
By email: economics.sen@aph.gov.au

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Dear Committee Secretary,

Re: Inquiry into the Uranium Royalty (Northern Territory) Bill 2008

Thank you for the opportunity to make a submission to this inquiry. The Sydney Centre for International Law is a leading research and policy centre with a focus on the Asia-Pacific region. In this submission we address international law issues relevant to the potential operation of the Bill. In particular, we examine the economic rights or interests of indigenous people under international law in relation to land and mineral resources and consider how these rights or interests are affected by the Bill.

Relevant Indigenous Rights under International Law

Over time international law has increasingly recognised certain protected interests and rights of indigenous peoples. In particular, "the principle or right of self-determination applies in one way or another to indigenous peoples" and has been recognised by, for instance, the United Nations Human Rights Committee and the United Nations General Assembly (James Anaya, *Indigenous Peoples in International Law*, 2nd edition, Oxford University Press, Oxford, 2004, at p112).

Unlike the well-established positive right of international law enjoyed by "peoples" under colonial occupation, self-determination as it applies to indigenous peoples does not bring with it a right of independence. Rather, controversies surrounding the nature of the indigenous right of self-determination of indigenous peoples have increasingly been resolved by regarding it as a more limited or differentiated right but which nonetheless entails definite rights and obligations of a similar quality, but for the ultimate right to choose independence.

The contemporary articulation of indigenous self-determination is found in article 3 of the UN Declaration on the Rights of Indigenous Peoples, which provides that

> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The right also entails "the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions" (article 4), and in article 5:

> the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

The Declaration also recognises the special interests of indigenous peoples in land (articles 25-32), in particular rights (in article 32) "to determine and develop priorities and strategies for the development or use of their lands or territories and other resources"; to be consulted by the State in decision-making "through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources"; and to enjoy "just and fair redress" for such activities.

In the context of these relevant provisions, the Bill may have certain potentially negative impacts on indigenous self-determination rights.

The Consequences of the Bill's Profit-Based Royalty Scheme

Certainty for business in making investment decisions about uranium projects, and consistency in the treatment of royalties for all mineral types, are desirable public policy objectives. In addition, uranium production is assuming increasing importance in the provision of alternatives to fossil fuels in combating global climate change. However, such objectives must be balanced against countervailing public policy interests, including the self-determination rights of indigenous peoples.

A profit-based royalty scheme may have adverse impacts on indigenous communities. First, a shift to profit-based royalties privileges certainty for investors over certainty for indigenous communities, in circumstances where relative certainty is essential for indigenous peoples in planning recurrent funding for services essential to human dignity in remote communities. This is particularly the case in marginal years where no profits would be payable.

Secondly, profit-based royalties bring a potential for "creative book-keeping" by mining companies which may conceal the real level of profit. Whereas revenue-based royalties can be simply calculated on the basis of mining income and contracts, profit-based royalties are calculated following a series of possible expenses and deductions which may expand over time. These may include not only purchase of capital equipment, but also items such as bad debt provisions and depreciation – both of which are estimates (for example, the estimation of useful life of assets). Such estimations have given rise to serious difficulties in the finance industry regarding debt management, since as estimates they can be manipulated.

In contrast, revenues are typically evidence-based (such as a contract) and are therefore less malleable. Although the Northern Territory Treasury, as royalty administrator, would meet the relevant company to "agree" on the composition of deductible costs (p17 of the Explanatory Memorandum), the process of negotiation itself may be susceptible to favourable manipulation by well-advised corporations, in a process which would not appear to involve indigenous peoples (who may not enjoy the expertise or advice to meaningfully engage in highly technical discussions).

Thirdly, if profit-based royalties are to be introduced, we agree with the Central Land Council that it would be essential to ensure that traditional owner negotiated ad valorem royalties would not be deductible in calculating statutory royalties. In practical terms, this is particularly important to protect funding to indigenous communities during marginal years in which no profits would be payable.

Importantly, negotiated royalties also recognise that indigenous interests in traditional lands are not reducible to the economic value of the resource mined there. Given the special relationship between indigenous peoples and their traditional lands, recognised as an aspect of their international legal right to self-determination as noted above, negotiated royalties are also important to recognise the interference in their relationship with their land which comes about through intrusive mining practices. Negotiated royalties are a payment which recognise such non-commercial interests and ought therefore to be paid separately and additionally to profit-based royalties.

In addition, preservation of negotiated royalties ensures that meaningful indigenous participation in decision-making about use of their land is retained and not overridden by exclusive regulation by an automatic, prospective statutory formula. Such participation is an important in ensuring the continuation of the indigenous right of self-determination in future mining decisions, in accordance with articles 18 and 19 of the UN Declaration on the Rights of Indigenous Peoples:

> *Article 18*
> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
>
> *Article 19*
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

In practice, ongoing negotiation is important because negotiated royalties tend to 'progressively increase as each new agreement sets a higher minimum precedent' (J Altman and N Peterson, 'A Case for Retaining Aboriginal Mining and Veto Royalty Rights in the Northern Territory' (1984) *Australian Aboriginal Studies* 44). If there is a growing international demand for uranium in combating climate change, it may be that indigenous Australians would be in the most financially advantageous position if they could negotiate at least part of the rate rather than remaining subject to a statutory cap on profit-based royalties.

Please be in touch if you require any further information.

Yours sincerely

Ben Saul

Dr Ben Saul
Centre Director

Dr Thalia Anthony
Centre Associate

Ms Naomi Oreb
Centre Researcher

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