7

Exploration and Native Title

Legislation

Native Title Act 1993

7.1 In 1992 the High Court held that Native Title was capable of being recognised by common law provided that connection to the land has been maintained by Native Title holders since European settlement and Native Title had not been extinguished by the grant of tenure which was inconsistent with Native Title (Mabo decision). The *Native Title Act 1993* ("Native Title Act") was passed in response to the Mabo decision.

7.2 The source and content of Native Title are found in the traditional laws and customs observed and practised by the Indigenous community claiming Native Title. It is an existing legal right to lands and waters in Australia and offshore. Native Title rights and interests are not rights that are granted by government and cannot be withheld or withdrawn by Parliament or the Crown because they are not "granted", although they can be extinguished by an act of government.

7.3 The Native Title Act, among other things, sets out procedures for future acts which affect Native Title.[1] This includes a special right to negotiate for holders and registered claimants of Native Title in relation to the grant of exploration leases and mining tenements. If the right to negotiate

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1 "Future Acts" are proposed activities or developments that might affect Native Title by extinguishing it or creating interests that are inconsistent with the existence or exercise of Native Title.

provisions are followed, then Governments may validly do the future acts covered by them. There is no veto given to Indigenous people.

7.4 Consistent with the reasoning of recent High Court decisions and the provisions of the Native Title Act, mining rights prevail over Native Title rights and interests. The Native Title Act provides that, if a "mining" lease was issued, activities permitted by the lease can be carried out regardless of the existence of Native Title. The existence of Native Title interests cannot prevent the carrying on of such activities validly.

Aboriginal Land Rights (Northern Territory) Act 1976

7.5 Certain areas of the Northern Territory are subject to the provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976* ("the Land Rights Act") instead of the *Native Title Act 1993*.

7.6 The Land Rights Act conveys inalienable freehold title over certain land in the Northern Territory to its traditional Aboriginal owners and provides for the management of that land. Just over half of the Northern Territory landmass and 80 percent of its coastline has been granted to traditional Aboriginal owners under the Land Rights Act.[2]

7.7 A significant feature of the Act is that it gives traditional Aboriginal owners the right to withhold consent ("veto") to exploration (and consequently "mining" activities) on Aboriginal land in all but cases of national interest[3]. A 1987 amendment to the Land Rights Act requires that exploration agreements be conjunctive, thereby removing the 'second veto' that could block mining once an exploration licence had been granted.[4]

7.8 The Land Rights Act establishes land councils to administer the Act. Two of the major functions of the land councils are to represent the views and interests of traditional Aboriginal owners and their communities, and to protect the interests of traditional Aboriginal owners and other Aboriginals interested in Aboriginal land.[5]

7.9 The Minerals Council of Australia states that the land council structure is cumbersome and causes significant delays in the processing of applications for exploration licences. It proposes allowing Regional Councils to ratify the decisions of traditional owners in relation to

2 Northern Territory Minerals Council Inc., *Submission No. 87,* p. 1386.

3 *Aboriginal Land Rights (Northern Territory) Act 1976,* s. 40(a).

4 *Aboriginal Land Rights (Northern Territory) Amendment Act (No. 3) 1987,* ss. 46(12), (13).

5 *Aboriginal Land Rights (Northern Territory) Act 1976,* ss. 23(1), (2).

exploration submissions.[6] Newcrest Mining suggests that assistance be provided to land councils to help them to resolve difficult claims speedily.[7]

7.10 The Northern Territory Minerals Council states that the Land Rights Act is responsible for a considerable decline in exploration and subsequent development of ore bodies in the Northern Territory. It claims that:

> No new mines have opened up on Aboriginal freehold land, with the exception of the approval of subsequent deposits in the Tanami region, since the inception of the *Aboriginal Land Rights Act (NT) 1976*.[8]

7.11 The Central Land Council and Northern Land Council reject this claim, stating that several new mines have resulted from exploration carried out under exploration licences granted under the Land Rights Act. It states that:

> The "no new mines" claim has a certain superficial plausibility due to the fact that a number of these new mines use processing facilities which existed at the time of discovery. However, without the ore from mines discovered on exploration licences granted under the [*Aboriginal Land Rights (Northern Territory) Act 1976*] these facilities would have been junked 15 years ago, when the original finds ran out.[9]

7.12 The Committee does not wish to enter a debate about the extent of mining activity in the Northern Territory, but notes the concerns about processing delays for exploration licences arising out of application of the Land Rights Act. The chapter now turns to reviewing similar concerns in the context of the Native Title Act before making recommendations for both Acts.

Native Title: Impact on Exploration

7.13 Concerns by the minerals and petroleum sectors about Native Title principally relate to the process of determining claims and the granting of

6 Minerals Council of Australia, *Submission No. 81,* p. 1181.

7 Newcrest Mining Limited, *Submission No. 26,* p. 232.

8 Northern Territory Minerals Council Inc., *Submission No. 87,* pp 1385-6.

9 Central Land Council and Northern Land Council, *Submission No. 62,* p. 821.

approvals, rather than to the principles underlying land access negotiations.[10]

7.14 The lack of process efficiency is considered by the resources industry to lie at the heart of costly delays in accessing land, and the absence of a co-ordinated approach by key regulatory agencies introduces unnecessary complications and delays to the exploration process. AMEC, for instance, believes that the Native Title Act has not worked since its enactment in 1993 but AMEC remains committed to:

> making the [Native Title] Act work and in so doing ensuring the industry's ability to access land for mineral development, while simultaneously delivering economic and social benefits to Native Title claimants and holders.[11]

7.15 In fact, the Aboriginal Torres Strait Islander Social Justice Commissioner, while not necessarily accepting that there are fundamental problems in the approvals process, conceded that:

> The fact that the Act imposes extra requirements in granting exploration rights, and that grants cannot be made as "easily" as they could before 1994, should be unremarkable.[12]

7.16 The Minerals Council of Australia argues that the extreme uncertainty generated by the Native Title Act has prompted many majors to reassess investment policy with respect to their Australian operations.[13] It was claimed that as a result of the Native Title legislation, the processing and granting of tenements that have Native Title implications has come to a virtual standstill in some Australian jurisdictions.[14]

Backlog of Tenement Applications

7.17 Of particular and immediate concern is the backlog of tenement applications with Native Title implications, particularly in Western Australia and Queensland. In Western Australia in June 2002, there were approximately 11,200 mineral title applications required approval – of which some 6,000 awaited consideration under the Native Title Act.[15] In

10 Newmont Australia Limited, *Submission No. 71*, p. 973.

11 Association of Mining and Exploration Companies, *Submission No. 30*, p. 260.

12 Human Rights and Equal Opportunity Commission, *Submission No. 17*, p. 128.

13 Minerals Council of Australia, S*ubmission No. 81*, p. 1180.

14 Australian Gold Council, *Submission No. 64*, p. 893.

15 Auditor General for Western Australia, Performance Examination: *Level Pegging: Managing Mineral Titles in Western Australia*, Report No. 1, 2002, p. 26. Approximately 2, 000 of the backlog of applications had not, at that time, been referred under the Native Title Act.

November 2002 in Queensland there was a backlog of some 800 mining exploration permits awaiting Native Title clearance.[16] In the Northern Territory, no new mines have opened up on Aboriginal freehold land, with the exception of the approval of subsequent deposits in the Tanami region, since the inception of the Land Rights Act. Exploration licence applications have been vetoed, and more than half of the original applications remain outstanding.[17]

7.18 While the resources industry argued that Native Title is a major cause for exploration downturn, the backlog of mining applications is the result of a complex mix of local, regional and national economic, political and legal factors.[18]

7.19 Many of the claims about the adverse impacts of Native Title legislation on exploration investment were disputed. In the Northern Territory, for instance, witnesses argued that there was no statistical evidence that Native Title is impeding mineral exploration and pointed to new mines established since the introduction of the Land Rights Act.[19] In Western Australia, the Auditor-General found that while Native Title lengthened the time to obtain a minerals lease, significant delays also occurred in application processing by the Mining Registrar and by applicants themselves not responding to requests for information.[20]

7.20 A paper published by the National Institute of Economic and Industry Research concluded that the Native Title legislation had not prevented a high level of mining activity in the years 1993 to date. The paper also concluded that brownfields exploration was unrelated to Native Title and that Native Title was but one of many factors (and then only minor) contributing to decisions to invest overseas.[21]

Native Title: An Initial Assessment

7.21 AMEC considered that no single existing impediment was significant enough on its own to seriously affect mineral investment. However,

16 Premier, the Hon Peter Beattie MP, *Government Reforms to Improve Native Title Laws, Media Statement*, 28 November 2002.

17 Department of Immigration and Multicultural and Indigenous Affairs, *Submission No. 66*, pp 920-1.

18 Attorney-General's Department, *Submission No. 73*, p. 1000.

19 Central Land Council and Northern Land Council, *Submission No. 62*, pp 821-2.

20 Auditor General for Western Australia, Performance Examination: *Level Pegging: Managing Mineral Titles in Western Australia*, Report No. 1, 2002, pp 23-27.

21 Ian Manning, *The impact of Native Title and the right to negotiate on mining and mineral exploration in Australia*, National Institute of Economic and Industry Research, 1997.

collectively, these impediments are considered to be a major disincentive to companies seeking to access Australia as a destination for mineral investment and for companies already operating in Australia.[22]

7.22 The Committee accepts there are multiple factors which affect resources exploration investment in Australia. It is also clear that the costly delays and complex processes of Native Title assessment make Native Title one of those factors.[23] In addition to lengthening the time to obtain a tenement, Native Title has raised complex legal issues for exploration companies, thus creating greater uncertainty about land access.

7.23 The Committee also agrees with the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund that it is critical that equitable decisions on the rights of access to and use of land are delivered quickly, cheaply and with certainty for all involved. Where a process becomes too costly, it can exclude parties. Equally, when decision-making processes are too slow, or do not provide certain outcomes, it can stifle important land use decisions.[24]

7.24 On balance, the Committee believes that the Native Title processes probably cause the resources industry to choose not to seek exploration licences, rather than prevent them from doing so.

7.25 Timeliness and cost appear to be two main concerns running through the evidence provided to the Committee. Initiatives to assist Native Title holders and claimants to negotiate with the exploration industry, and thus speed up the processes, are discussed later in this chapter. In terms of cost, the Committee thinks it appropriate to recognise the imposts on the exploration industry that have arisen out of passage of the Native Title Act. Accordingly, the Committee makes the following recommendation.

Recommendation 18

7.26 **Income tax legislation be amended to allow one hundred percent immediate deductions for expenditure incurred in conducting negotiations required by the *Native Title Act 1993* or *Aboriginal Land Rights (Northern Territory) Act 1976,* whichever applies, for the purposes of permitting minerals and petroleum exploration to proceed.**

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22 Association of Mining and Exploration Companies, *Transcript, 30 October 2002,* p. 135.

23 Auditor General for Western Australia, *Level Pegging: Managing Mineral Titles in Western Australia,* p. 5.

24 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Nineteenth Report: Second Interim Report for the s.206(d) Inquiry - Indigenous Land Use Agreements,* September 2001, p. 140.

Indigenous Land Use Agreements

What is an ILUA?

7.27 The Indigenous Land Use Agreements (ILUA) system was developed after broad consultation, and it enjoyed widespread support at the time of its introduction in 1998. ILUAs are:

> voluntary agreements about the use of an area of land made between one or more Native Title groups and others (such as miners). A registered ILUA is legally binding on the people who are party to the agreement and all Native Title holders for that area.[25]

7.28 ILUAs are seen as another practical, quicker and more cost-effective means of resolving competing land uses or future acts in the Native Title context at a local level such as exploration. ILUAs can also be negotiated without entering into the usual Native Title processes and without involvement of the Courts.

7.29 According to the Attorney-General's Department, the resources industry has taken advantage of the flexibility and certainty provided by ILUAs to negotiate innovative agreements. For instance, exploration companies have entered into broad "framework" agreements that are structured to avoid the multiple negotiation of similar issues in relation to each new project or activity in an area which may affect Native Title.

State Wide ILUAs

7.30 Attempts to negotiate state-wide ILUAs by state governments, to address backlogs of exploration permits also represent growing recognition of the potential usefulness of ILUAs, "but experience to date shows that these negotiations are complex".[26] Generic ILUAs are or have been negotiated in Queensland, South Australia and Western Australia.

7.31 South Australia has achieved successful outcomes by implementing a two-fold strategy consisting of state legislation and ILUAs. Over 1 000 tenements have been granted under the state legislation. The state currently has no backlog of granting mineral exploration licences. The Government is facilitating a petroleum agreement relating to the Cooper

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25 National Native Title Tribunal, *Glossary of Native Title terms*, http://www.nntt.gov.au, accessed 2 September 2003.

26 Attorney-General's Department, *Submission No. 73*, p. 999.

Basin agreement and hopes it will be used as a template for future negotiations in the State and elsewhere.[27]

7.32 To try and reduce the burden on Native Title parties and to expedite matters for the resources industry, South Australia has commenced negotiation with key stakeholders of a state-wide Indigenous Land Use Agreement initiative.

7.33 A key aspect of the negotiations is a minerals exploration template. As proposed, this would be a generic agreement for exploration that any explorer could utilise, as Native Title parties would have agreed "up-front" to its basic terms. The generic agreement would give Native Title claimants practical recognition of Native Title rights, so they can achieve benefits and carry out their cultural and heritage obligations relating to land. It would offer explorers quick, affordable, certain and predictable access to land for exploration purposes. It would also enable the South Australian Government to provide a stable and predictable climate for economic development and to strike a fair and reasonable balance between the rights and obligations of all groups.

7.34 The State believes that if successful, the state-wide ILUA initiative will significantly expedite minerals exploration, whilst protecting Indigenous heritage and giving Native Title claimants full protection as well as a number of other benefits.

7.35 The Queensland Government has also developed a model statewide ILUA, and is hopeful that this, together with regional agreements, will provide the basis for eliminating Queensland's exploration and mining tenement application backlog by the end of 2003.[28] As of March 2003, 12 Queensland Native Title groups had adopted the ILUA template as their preferred method of negotiating land access agreements with resources companies.[29]

7.36 The Queensland Mining Council, however, considers that for greenfields exploration, the cost and delays of the generic ILUA conditions are greater than could reasonably be expected to be funded. The Council has been advised by its members that they will not seek exploration permits pursuant to the model ILUA because of the precedent set for excessive

27 Government of South Australia, *Submission No. 70*, pp 950, 958.

28 Queensland Government, *Submission No. 77*, p. 1045.

29 Minister for Natural Resources and Mines, Hon Stephen Robertson MP, *ILUAs a Boost for North Queensland Mining, Media Statement*, 4 March 2003.

implementation costs and delays, anti-commercial terms, and unacceptable risks of litigation.[30]

Multiple Claims

7.37 The resources industry claims that in many instances exploration licences are covered by overlapping Native Title claims which require the explorer or mining company to conduct negotiations with two or more claimant groups. This can result in a company having to conduct two or more sets of negotiations, with the resultant increase in negotiation, time and cost. Newcrest Mining considers that in most cases the claimant groups do not agree on a range of issues which results in delays (and cost blow outs) to land access or permit approvals.[31]

7.38 Newcrest Mining also commented that:

> The Federal Court essentially deals with most of their issues and we see many examples of Federal Court hearings where groups are told to go away and sort out an overlapping claim and it just takes forever to do it and, in fact, they do not even bother to get around to doing it.
>
> One of the biggest issues I see is that the representative body, which is responsible for resolving their problems, does not have the money or the time or the expertise to get it done.[32]

7.39 The right to negotiate is only available to registered Native Title claimants or bodies that now have to pass the new and more stringent registration test. The Attorney-General's Department believes that this ensures that those negotiating with developers have a credible claim, thereby removing the ambit and unprepared claims which were clogging the National Native Title Tribunal, causing uncertainty for State, Territory and local governments, and delaying many resource developments. According to the Department, the registration test has led to the merging of a number of existing Native Title claims, making it easier for those in the industry who deal with Native Title parties.[33]

7.40 Despite the assertions of the Attorney-General's Department, the effectiveness of the new registration test appears to have been limited. Rio Tinto Exploration advises that the interpretation adopted by the National

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30 Queensland Mining Council, *Submission No. 60*, p. 789.

31 Newcrest Mining Ltd, *Submission No. 26*, p. 232.

32 Newcrest Mining Limited, *Transcript, 24 March 2003*, p 399.

33 Attorney-General's Department, *Submission No. 73*, p. 997.

Native Title Tribunal has largely negated the intention of the amendment, and many overlapping claims remain registered. There is no incentive for competing Native Title claimants to resolve disputes if they can achieve registration of their application.[34]

7.41 AMEC also disputes the Attorney-General's Department's claims and argues that the amendments to registration requirements have delivered very little tangible benefit to the industry. This is due to a growing number of Native Title claimants amalgamating their claims merely to ensure formal registration by the Tribunal and therefore access to the right to negotiate. Following registration, many claimants who are party to amalgamated claims simply revert to individual negotiations with mineral developers, rather than undertake negotiations as an amalgamated group.[35]

Funding for Native Title Representative Bodies

7.42 Rio Tinto Ltd considers that the individual representative bodies are a fundamental component of the Native Title system and that the most significant restraint on their effectiveness is their inadequate funding.[36] Newmont Australia considers that land councils are chronically under-resourced both in terms of funds and expertise.[37]

7.43 The pivotal role of native title representative bodies in negotiations is well recognised. The Aboriginal and Torres Strait Islander Social Justice Commissioner ("Social Justice Commissioner") observed that it was widely accepted that it is easier for explorers to work through Native Title representative bodies to promote exploration. The Attorney-General's Department also noted that:

> There are very few people who work in Native Title—whether it is the local government, pastoralists or the [resources] industry—and who have to participate in negotiations or are respondents to courts who do not think that having an efficient and effective

34 Rio Tinto Ltd, Joint Committee On Native Title and the Aboriginal and Torres Strait Islander Land Fund, Inquiry into the Effectiveness of the National Native Title Tribunal, *Submission No. 17*, p. 10.

35 Association of Mining and Exploration Companies, *Submission No. 30*, p. 295.

36 Rio Tinto Limited, Joint Committee On Native Title and the Aboriginal and Torres Strait Islander Land Fund, Inquiry into the Effectiveness of the National Native Title Tribunal, *Submission No. 17*, p. 5.

37 Newmont Australia Limited, *Submission No. 71*, p. 974.

> representative body system is a very important means of ensuring that the Native Title processes are working properly.[38]

7.44 The Social Justice Commissioner also advised that the range and quantity of the responsibilities of Indigenous representative bodies had increased. Major companies are now directly funding the use of consultants or other staff in an attempt to speed up the processing of applications and heritage surveys. Rio Tinto is commonly approached by representative bodies seeking funding as a precondition to the negotiation of agreements on the basis that there is insufficient funding for negotiations to occur. If the demands are not met, the likelihood of an agreement is remote.[39] Newmont considers that this is a far from satisfactory position leading to inconsistent application of a procedure and of more concern, creating the potential for perceived lack of independence in the work which results from these arrangements.[40]

7.45 The Queensland Government advised that currently, land councils do not have the resources to fund indigenous stakeholders' attendance at meetings to undertake resources-related negotiations. At the same time, Juniors do not have the financial resources to pay travel allowances to Indigenous stakeholders. As a result, important meetings cannot be held and applicable resources tenements cannot be granted.[41]

7.46 Similarly, the Government of Western Australian considers that the Commonwealth should ensure that adequate resources are provided to Native Title representative bodies as well as to the National Native Title Tribunal.[42]

7.47 However, others, including the Western Australian Government, questioned whether additional expenditure would end up with individual representative bodies where it was most needed,:

> The issue really is that there has been an increase in funding to the Native Title system but that money has gone to the National Native Title Tribunal, the Federal Court and the Attorney-General's Department. Between 1995 and the present, that money

38 Attorney-General's Department, *Transcript, 24 March 2003,* p. 415.

39 Rio Tinto Limited, Joint Committee On Native Title and the Aboriginal and Torres Strait Islander Land Fund, Inquiry into the Effectiveness of the National Native Title Tribunal, *Submission No. 17,* p. 18.

40 Newmont Australia Limited, *Submission No. 71,* p. 974.

41 Queensland Government, *Submission No. 77,* p. 1045.

42 Government of Western Australia, *Submission No. 84,* p. 1345.

> has not actually found its way into the rep[resentative] body system.[43]

7.48 The key is to ensure that any additional funding is received by the individual representative bodies – where the funding is most needed.

7.49 Rio Tinto Ltd also considers that the effectiveness of the bodies would be improved by the provision of operational funding to enable them to access the technical administrative and logistical assistance to deal with Native Title matters within their region.

7.50 The Committee considers that it is appropriate that indigenous representative bodies should receive additional funding to expedite Native Title processes. However, any additional funds should be earmarked for expenditure on Native Title negotiations only. The funds should not be able to be directed to other functions that may be carried out by the representative bodies. Accordingly, the Committee makes the following recommendation.

Recommendation 19

7.51 **The Attorney-General and the Minister for Immigration and Multicultural and Indigenous Affairs, in consultation with relevant state and Northern Territory Ministers, provide additional resources to Native Title representative bodies. The resources should be targeted and limited to support activities that facilitate negotiation processes.**

7.52 The accountability of this additional resourcing by the Attorney-General and the Minister for Immigration and Multicultural and Indigenous Affairs is addressed in Recommendation 28.

7.53 The Committee is heartened to note that Native Title representative bodies are now required to table annual reports in the Commonwealth Parliament – which will assist them to maintain a rigorous accountability regime.

Expedited Procedures: Native Title

7.54 Section 32 of the Native Title Act allows state and territory governments to use "expedited procedures" to allow for future acts that might have minimal impact on Native Title. If these procedures are used and no objection is lodged, the future act can be done without the normal negotiations required by the Native Title Act with the registered Native

43 Government of Western Australia, *Transcript, 30 October 2003,* p. 165.

Title parties.[44] In the context of this inquiry, state governments can grant tenements for low impact exploration using the expedited procedure. Native Title claimants who want to be involved in negotiations can put in an objection application to the expedited granting of a tenement and a negotiation process must begin. Nearly 70 percent of expedited procedure applications proceed without objections by Native Title groups, allowing the relevant tenements to be granted within six months.[45]

7.55 However, expedited procedures principally have been used only by the Western Australian and to a lesser extent, Northern Territory governments. From 1 July 2003, the Queensland Government, however, started using the expedited procedures for exploration permits, although in combination with a template set of Native Title protection conditions designed to reduce the number of objections to the use of the expedited procedure.[46]

7.56 The Committee believes that expedited procedures could be used more broadly, particularly by companies involved in preliminary and low impact exploration activities. Of concern is the observation by the Strategic Leaders Group for the Mineral Exploration Action Agenda that there is an apparent lack of understanding by the exploration industry of the expedited procedures and the sorts of tenements and activity to which they could apply.[47] Accordingly, the Committee makes the following recommendation:

Recommendation 20

7.57 **The Attorney-General , the Minister for Industry, Tourism and Resources and the National Native Title Tribunal liaise with state and the Northern Territory governments and the resources industry to promote the use and better understanding of the expedited procedures contained in sections 32 and 237 of the *Native Title Act 1993,* for low impact exploration.**

44 National Native Title Tribunal, *Objections to the expedited procedure (fast-tracking)*, http://www.nntt.gov.au, accessed September 2003.

45 Human Rights and Equal Opportunity Commission, *Submission, No. 17*, p. 128.

46 Minister for Natural Resources and Mines, Hon Stephen Robertson MP, *Native Title Protection Guarantees Faster Mining Permits, Media Statement*, 16 June 2003.

47 Strategic Leaders Group for the Mineral Exploration Action Agenda (2003), *Mineral Exploration in Australia*, Commonwealth of Australia, July 2003, pp. 12-13.

Simplified Procedures: Land Rights

7.58 As already mentioned, the Committee is concerned at the amount of time expended by companies in obtaining exploration licences in the Northern Territory over land subject to the provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976*.

7.59 The Committee considers that these delays amount to a significant deterrent to minerals and petroleum explorers. There is a need to address negotiation time frames and associated costs. The Committee recommends accordingly.

Recommendation 21

7.60 **The Minister for Immigration and Multicultural and Indigenous Affairs implement a simplified and accelerated process for granting exploration licences on land granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* with a view to reducing the economic transaction costs emanating from the existing provisions of the Land Rights Act.**

A Complex but Maturing Process

7.61 As a senior officer of Native Title Division of the Attorney-General's Department observed:

> the arrangements under the [Native Title] act are extraordinarily complex. When that is combined with the arrangements that are available under state legislation, it is very easy to become confused about what arrangements apply in which states.[48]

7.62 The Native Title Act enables the states to enact their own legislation in relation to mining and relevant compulsory acquisitions in certain circumstances, enabling state governments to integrate Native Title procedures into their own land management systems. These provisions provide states with the opportunity to implement Native Title processes which are relevant to conditions at the local level.

7.63 The procedures faced by explorers in a particular state will depend on which of the legislative options a state chooses. Even if operating under the Commonwealth Act, there are still options on the form of procedures that will apply. That operation may, in turn, depend on the attitude of Native Title parties and representative bodies in that jurisdiction and

48 Attorney-General's Department, *Transcript, 24 March 2003,* p. 405.

whether any model or template agreements are in place that can be used to assist in negotiation.

7.64 The bewildering intricacy of options faced by explorers and decision makers across different jurisdictions is illustrated by the approaches of just three states:

- South Australia applies its own version of an expedited procedure to mineral exploration but not to petroleum;
- New South Wales has its own legislation for low-impact petroleum and minerals exploration, which has been approved by the Attorney-General. Explorers need an access agreement, but only when entering Native Title land. Opal miners at Lightning Ridge are excluded completely from any Native Title processes under a determination made by the Attorney-General;
- The Queensland government chooses not to use that option of excluding opal mining from Native Title processes; and
- Victoria does not require holders of exploration permits to deal with Native Title unless they access land in which Native Title may exist, in which case the right to negotiate applies.[49]

7.65 The Native Title approaches followed in the determination of access for exploration is an evolving and maturing process. The investment by states and representative bodies in the negotiation of template or framework agreements are increasingly proving their worth. The Attorney-General's Department advised that:

> The savings available to parties in both time and resources by the adoption and adaptation of off-the-shelf agreements is beginning to become apparent. Obviously it requires a fair investment of time and resources to get those template agreements agreed, but it is from them that the benefits start to flow.[50]

7.66 The Social Justice Commissioner stated that long term solutions would not be found in a return to the practices of the past. Recognition of Indigenous Australian's relationship with the land provides a structure for the interaction and increased relations between explorers and Indigenous communities. The Commissioner saw signs of a maturing of the process and a maturing of the relationships.[51]

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49 Attorney-General's Department, *Transcript, 24 March 2003*, p. 406.

50 Attorney-General's Department, *Transcript, 24 March 2003*, p. 407.

51 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Transcript, 19 June 2003*, p. 2.

7.67 The Committee was presented with no single solution to the complexities, delays and costs faced by parties involved in negotiating access agreements. There is evidence that positive outcomes are being achieved as part of a slow and evolving process, but not necessarily as a result of applying a single model. As a senior officer from the Native Title Division of the Attorney-General's Department commented:

> it is also taking some time for the [resources] industry and the representative bodies to come to a situation where they can negotiate in a fairly positive manner. That is coming about just through the building up of relationships, through the building up of goodwill and through the clarification of the law as the High Court and the Federal Court determine more Native Title applications. I do not think there is a silver bullet. I do not know that any of the submissions have identified any silver bullets.[52]

Cultural Heritage Assessments

7.68 Heritage issues are now seen as of greater concern to some resources explorers than Native Title. According to AMEC, Indigenous heritage, while an important matter in its own right, is also assuming increasing importance in terms of its relevance in Native Title claims, as a means of demonstrating ”connection to the claimed land”. Most resources exploration companies however agree and accept that Indigenous cultural heritage must be preserved and that the mining industry has an important part to play in both the identification and protection of that cultural heritage.[53]

7.69 It is important to note that the issues relating to heritage assessments are primarily the responsibilities of the states. The Attorney-General's Department observed that “heritage is a good example of one of the myriad issues that is not caused by Native Title.”[54]

7.70 The views of Newcrest Mining are typical of the comments made in submissions. Newcrest's concerns are that the law and its regulations regarding protection of cultural heritage sites are applied strictly to minerals and petroleum companies, but not to other land users. In some cases Aboriginal claimants are requiring full and comprehensive surveys

52 Attorney-General's Department, *Transcript, 24 March 2003*, pp 408-9.

53 Association of Mining and Exploration Companies, *Submission No. 30*, p. 304.

54 Attorney-General's Department, *Transcript, 24 March 2003*, p. 409.

for low impact exploration activity before they will agree to exploration licences being approved.[55]

7.71 In the event that there are two or more claimant groups (overlapping claims) there can be disagreement on who can carry out the survey work. Most claimants require that cultural heritage clearance work be carried out for each separately defined work program rather than be carried out on an area clearance basis. This requirement involves significantly increased cost due to having to bring back claimants and / or archaeologists for each individual phase of a work program, rather than carry out a clearance for the whole area in one campaign.

7.72 Numerous examples were given of frustrations and delays relating to heritage surveys. The experiences of one company are typical:

> we have had to undertake three heritage surveys representing separate groups over that single tenement…granted about three years ago. The costs are something like $100 000 per annum to hold that ground. We have completed one survey and still have two to go before we can even access the ground for exploration.[56]

7.73 In another example the company advised that the process:

> took 1½ years and about $60 000 plus to actually do the surveys and access the ground. Having done that, it took us $30,000 and eight days to do the exploration.[57]

7.74 The Australian Association of Consulting Archaeologists believes that the regulatory heritage authorities in most states are under-resourced or under-skilled to deal with and expedite the more complex heritage considerations. The Association considers that delays to resources exploration access are often due to poorly structured work programs, incomplete survey protocols and insufficient direction from heritage regulators as to the required outcomes from cultural heritage assessment and mediation.[58]

Reform of Heritage Protection Procedures

7.75 Newmont Australia stated that at present, each land council has quite different standards about what is required for a heritage survey. It believed that the Commonwealth Government should establish a standard

55 Newcrest Mining Ltd, *Submission No. 26,* pp 231-2.

56 Newmont Australia Ltd, *Transcript, 24 March 2003,* p. 392.

57 Newmont Australia Ltd, *Transcript, 24 March 2003,* p. 392.

58 Australian Association of Consulting Archaeologists Inc., *Submission No. 43,* p. 531.

for the process and content of heritage surveys (a template) which would reduce the time and expense involved in their conduct. Newmont Australia requested the development of a protocol or standard "as to what a heritage survey is and how it should be undertaken, with some time frames in terms of how quickly it can be done"[59].

7.76 AMEC argued that while a once-off procedure on a given piece of land may be reasonable, once-only surveys should be enforced and those data collected should be stored for future use by an independent authority.

Different State Procedures

7.77 States are addressing aspects of heritage in a number of ways including the establishment of data bases on cultural and archaeological sites. A key element of reforms in Western Australia, for example, will be the development of standardised heritage survey protocols that can be applied to exploration activities on titles granted under the expedited procedure.[60]

7.78 In South Australia, the current practice is that minerals exploration companies apply to the Aboriginal Heritage Sites Register for information about the location of sites on their tenements. However the current scheme does not identify appropriate custodians, can not provide a timely, efficient and cost-effective procedure for allowing exploration and does not provide certainty about compliance with various State laws. The Government is considering the creation of a new independent statutory authority, similar to the arrangements in place in the Northern Territory.

7.79 The Northern Territory Aboriginal Areas Protection Authority has the function of site protection, under the *Northern Territory Aboriginal Sacred Sites Act* 1989.

7.80 Outcomes include "minimised opportunity for socially divisive controversies over the existence of sacred sites and hence lower potential for harm to relations between Aboriginal custodians and the wider Territory population"[61]. There is also an increased level of certainty when identifying the constraints (if any) arising from the existence of sacred sites on land use proposals. A major mining and exploration company stated that:

59 Newmont Australia Ltd, *Transcript, 24 March 2003,* p. 392.

60 Government of Western Australia, *Submission No. 84,* p. 1344.

61 Aboriginal Areas Protection Authority web site, *Objectives,* http://www.nt.gov.au/aapa/text/objectives.htm, accessed 2 September 2003.

> One of the high points would be that there exists already the Aboriginal sacred site protection authority in the Territory. In the past we have found the anthropological services provided by that authority to be very professional, effective and fair to both parties. They have allowed us to get on with the job. We would appreciate that or a similar service operating where we are trying to get into at the moment.[62]

7.81 The Committee considers that the Northern Territory Aboriginal Protection Areas Authority is a model which should be examined by all states as one means of addressing the problems that clearly exist at the state level. The Committee also considers that is essential that Governments examine the feasibility of establishing national standards for the conduct and content of heritage surveys including the time frames in which they should be completed. Accordingly, the Committee makes the following recommendation.

Recommendation 22

7.82 **The Minister for Environment and Heritage consult with state and Northern Territory counterparts to formulate an action plan to review and amend the legislation governing the management and protection of Indigenous cultural heritage to ensure that it is consistent across all states and the Northern Territory.**

7.83 The Committee suggests, in a later chapter, measures that if adopted will ensure that there is no duplication between Commonwealth and state heritage assessment procedures.

Indigenous Protected Areas

7.84 The Indigenous Protected Areas (IPA) program is part of the Commonwealth's National Reserve System program, an initiative under the Natural Heritage Trust. Indigenous owners can voluntarily declare their land, or land in which they have an interest through leasehold, reserves and determined Native Title, as an IPA for the purpose of promoting biodiversity and cultural resource conservation on these lands. The land is then managed in accord with internationally recognised

62 Rio Tinto Exploration Pty Ltd, *Transcript, 30 October 2002,* p 120.

protected area International Union for Conservation of Nature (IUCN) conservation standards.[63]

7.85 The Western Australian Government and a number of industry associations expressed concern that, although the establishment of IPA's is a Commonwealth policy and is not governed by any legislation, the perception of the wider community may view the IPA declaration as being like a national park with restricted or no access. One of the requirements of the creation of an IPA requires a control on land-use activities that may affect the natural or cultural values. This management approach may result in restricting access for exploration.[64]

7.86 Further, the declaration of IPA's with management conservation categories under IUCN standards may be determined as a strict nature reserve or national park rather than a managed resources protected area, which provides for multiple use, including the possibility of exploration and production.[65] The Committee agrees and recommends accordingly.

Recommendation 23

7.87 **The Minister for Environment and Heritage ensure that the International Union for Conservation of Nature category related to multiple land use is the adopted conservation management option for Indigenous Protected Areas.**

63 Government of Western Australia, *Submission No. 84,* p. 1347.

64 Government of Western Australia, *Submission No. 84,* p. 1347.

65 Government of Western Australia, *Submission No. 84,* p. 1347.