

**DETAILED JOINT SUBMISSION TO THE COMMONWEALTH
WORKABILITY REFORMS OF THE *ABORIGINAL LAND RIGHTS
(NORTHERN TERRITORY) ACT 1976 (ALRA)***

INTRODUCTION

This paper discusses, in detail, proposals aimed at improving the “workability” of the *Aboriginal Land Rights Act (Northern Territory) 1976* (subsequently referred herein to as the Act) which have been agreed by the NT Government and the Northern, Central, Tiwi and Anindilyakwa Aboriginal Land Councils.

The submission has been developed jointly by the Northern Territory Government and the Land Councils. The proposals for amendments to Part IV (mining) developed from a joint forum (Government and Land Councils) and following consultation with the mining industry. The submission represents an historic agreement between the Northern Territory Government and the Land Councils on a series of complex and sensitive issues which have previously defied reform since the original passage of the Act in 1976.

BACKGROUND

The Act commenced in 1976 and over the 26 years of its operation approximately 44% of the area of the Northern Territory has been granted to Aboriginal Land Trusts as Aboriginal inalienable freehold land, and a further 10% is still subject to claim.

In October 1997 the Federal Coalition Government appointed John Reeves QC to carry out a review of the Act. Prior to this review, the Act had not been substantially reviewed since the report by Justice Toohey in 1983, which resulted in significant amendments.

On receipt of the Reeves’ report, and following significant controversy regarding its recommendations, the then Commonwealth Minister referred the report in December 1998, to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HORSCATSIA), which duly reported in August 1999. After extensive consultations and receipt of submissions this all-party committee rejected a number of the major recommendations of the Reeves report. There has been no substantive response from the Federal Government to the Standing Committee’s report.

In May 2002 the Federal Government provided the Northern Territory Government with an Options Paper entitled *Reform of the Aboriginal Land Rights (Northern Territory) Act 1976*, issued by the Commonwealth Minister for Immigration and Multicultural and Indigenous Affairs.

The lack of consensus over the operations of the Act over the past 15 years has resulted in a number of unfortunate consequences, not the least of which has

been the maintenance of an ongoing adversarial culture between the Land Councils and the previous Northern Territory Government.

Given the statutory roles of the Land Councils, the core principle of informed traditional owner consent and the inalienable status of Aboriginal title, the Northern Territory Government and the Land Councils have adopted the pragmatic view that these wider issues can only be realistically addressed by seeking to reach mutual agreement regarding the respective roles and responsibilities of both the NT Government and the Land Councils.

The starting point for workability proposals has centred on those areas where there appeared to have been previous common acknowledgement by the Land Councils, the HORSCATSIA Inquiry, the Northern Territory and the Commonwealth Governments of the need or at least scope for reform.

WORKABILITY REFORM PROPOSALS

Clarification of powers to create new Land Councils

The current provisions of the Act under Section 21 provide a process whereby the Commonwealth Minister can exercise a discretion to create new Land Councils provided that he is satisfied that a substantial majority of adult Aboriginals in the given area support this to occur.

The four NT Land Councils have proposed reforms to the current provisions that pick up on those proposed by HORSCATSIA in relation to consent by traditional owners and in ensuring the Minister is satisfied that the new Land Council will be capable and sufficiently resourced to fulfil its functions.

Given the salutary experience in other States following the passage of the Native Title legislation and the establishment of Native Title Representative Bodies by the Commonwealth there is strong evidence to suggest that easing existing provisions to enable the creation of more new Land Councils may well result in significant tradeoffs in terms of overall reduced capacity and effectiveness.

A more relevant consideration is to provide a greater capacity for existing Land Councils to delegate powers to the regional level and for the Land Councils and the Commonwealth to implement the ANAO reforms aimed at improving accountability and transparency (see Recommendation 2 below).

Recommendation 1

That amendments be made that include a requirement to consult with traditional Aboriginal owners and that ensure the Minister is satisfied that the Land Council will be capable of fulfilling and is sufficiently resourced to fulfil its functions.

Recommendation 1 continued...

In particular, amend section 21 to provide that the Minister must be satisfied that:

- (a) a substantial majority of adult Aboriginals living in, and the traditional Aboriginal owners and other Aboriginals with traditional interests in an area understand the nature and purpose of the proposal and, as a group, consent to it;
- (b) the Aboriginal communities and groups that may be affected by the proposal understand the nature and purpose of the proposal and have had adequate opportunity to express their views to the Minister;
- (c) the proposed Land Council will be capable of fulfilling, and is sufficiently resourced to fulfil, its functions;

and to allow the Minister to summarily reject requests for separate Land Councils where he is satisfied that the requirements are unlikely to be met.

Regionalisation of Existing Land Council Powers

The Act currently allows limited delegation of Land Council powers at the initiative of the Land Council concerned.

HORSCATSIA recommended that the Act be amended to allow Land Councils to delegate any or all of their powers except for the power of delegation itself, the power to surrender Aboriginal Land, and powers under section 35 and section 19(4) (b) of the Act. It argued that such delegations be subject to the following conditions:

- the informed consent of the appropriate traditional owners;
- accountability and workability prerequisites; and
- the ability of the body to carry out the statutory functions delegated to it.

The Options Paper released by Minister Ruddock provides a number of options to expand the types of matters that can be delegated and a number of different processes to allow groups to apply for regionalisation to occur. The options extend from application to the Land Council and the capacity to ask the Minister to review a refusal; application to the Minister; and capacity for a group to choose their own method of decision making.

As a result of negotiations the Land Councils have agreed to amendments to section 28 of the Act allowing the delegation of powers to regional and other committees of the Land Council. These delegations include:

- to make a grant or interest in land for a period that exceeds 2 years (Section 28(1)(a)(i)(A));
- to make a grant or interest where the total cumulative consideration exceeds \$100,000 (section 28(1)(a)(i)(B));
- to permit a mining interest in Aboriginal land (section 28(1)(a)(ii));
- to determine royalty payments under section 35 (section 28(1)(b)); and
- to consent to Exploration Licence Application's (ELA's) as provided for in sections 40 & 41 (section 28 (1)(c)).

The reforms outlined above provide a useful starting point towards achieving greater regionalisation and are also consistent with those which received cross party endorsement by HORSCATSIA.

Recommendation 2

With respect to regionalisation of existing Land Council powers, that amendments be made to section 28 of the Act allowing the delegation of powers:

. These include delegations to :

- make a grant or interest in land for a period that exceeds 2 years (section 28(1)(a)(i)(A));
- make a grant or interest where the total cumulative consideration exceeds \$100,000 (section (28)(1)(a)(i)(B));
- permit a mining interest in Aboriginal land (section 28(1)(a)(ii));
- determine royalty payments under section 35 (section 28(1)(b)); and
- consent to exploration licence application's (ELA's) as provided for in sections 40 & 41 (section 28 (1)(c)).

Changes to the distribution formula of mining royalty equivalents made through the Aboriginal Benefits Account

The Aboriginal Benefits Account (ABA) is a statutory fund established under section 62 of the Act to receive and distribute money received by the Commonwealth.

Under the Act, it is required that amounts equal to the sum of royalties paid to the Commonwealth and Northern Territory Governments by mining companies for their mining activity on Aboriginal land are forwarded to the Land Councils. For this reason the funds are known as Mining Royalty Equivalents (MREs).

The ABA is currently administered by a section of the Northern Territory Office of ATSIC.

Although the ABA invests money that is surplus to immediate needs, the primary function is currently to act as a clearinghouse, rather than an investment fund.

Under the 40/30/30 formula contained in the Act, 40 % of MREs are paid by the ABA to the four Land Councils to meet their administrative costs, with the Commonwealth Minister determining what proportion of the 40 % is distributed to each Land Council.

30% of MREs are forwarded to Land Councils for them to distribute to Aboriginal organisations in areas affected, which are often referred to as 'Royalty Associations'. Hereafter these monies will be referred to as 'Area

Affected Monies'¹. Royalty Associations can also receive income or benefits from other sources including negotiated royalties over and above MREs, rents and other payments by Commonwealth and Territory Governments (such as certain National Park "gate monies") and other commercial activities.

The residual amount of 30%, although not defined as a percentage in the Act, covers costs that include a grants program for Aboriginal people resident in the NT (subject to recommendations from an ABA Aboriginal Advisory Committee to the Commonwealth Minister), and the administrative costs of the ABA. They can also be applied (and have been) to meet the administrative costs of Land Councils (known as supplementary monies) when the Commonwealth Minister is satisfied that payments made to Land Councils under 64(1) are insufficient to meet their administrative expenses.

Since 1995 successive Commonwealth Ministers have restricted Land Council 'draw downs' on ABA funds to approximately 10%. In other words, for the past 7 years or so ABA funds have been distributed as follows: 50% Land Council expenses, 30% as 'Area Affected Monies' and 20% for the benefit of Aboriginal Territorians more generally.

The HORSCATSIA Inquiry agreed that the operations of the ABA has suffered from the lack of a clear statement of purpose and recommended that the Act be amended to include a statement of purposes for the distribution of the funds in the ABA.

The HORSCATSIA committee split on party lines when it came to consider changing the 40/30/30 formula.

Government members of the committee argued that the proportion of MREs reserved for 'areas affected' by mining be increased to 40% to provide an incentive to traditional owners to agree to mining ventures on their land. Non-government members argued for retention of the current arrangements in the absence of compelling evidence to the contrary.

The Commonwealth Options paper presents 3 options for the distribution of ABA funds. The stated intention is 'to better reflect the funding requirements of the Land Councils and to promote economic development on Aboriginal land'. There is a certain lack of clarity in these Options in that they do not clearly define the meaning and use of the term "Aboriginals Affected", as opposed to the current definition of 'Areas Affected' under section 35(2) of the Act.

¹ The relevant section of the Act which covers funds usually referred to as 'Area affected monies' is as follows:

Section 35(2) "Moneys paid to a Land Council under subsection 64(3) shall be paid, within 6 months of their receipt by the Land Council, to:
Aboriginal Councils the areas of which are, whether in whole or in part, included in the area affected by the mining operations by reason of which the moneys have been paid to the Land Council; and
any Incorporated Aboriginal Associations the members of which live in, or are the traditional Aboriginal, owners of, the area affected by those mining operations;
in such proportions as the Land Council determines."

A number of changes relating to the management of the ABA do not require legislative amendment but can be sorted out via negotiation with the Commonwealth Minister.

At this point, it is not proposed to favour any change to the distribution formula but to indicate, subject to the adoption of the Australian National Audit Office (ANAO) finding, support for adjustments to the Land Council Budgets to reflect their realistic requirements and to ensure they are adequately resourced to carry out their statutory functions (see Land Council funding below).

Recommendation 3

At this point, that no change to the distribution formula be made but rather, subject to the implementation of the ANAO recommendations, that adjustments be made to the Land Council budgets to ensure they are adequately resourced to carry out their statutory functions (see Recommendation 5).

Commonwealth Proposed Reforms of the ABA

This area was also subject to close examination by the ANAO as part of their performance audit. ANAO concluded that there is a lack of transparency in decision-making and information to key stakeholders under the current arrangements.

Minister Ruddock has now circulated a discussion paper which proposes to set up a new body which would replace the existing ABA Advisory Committee and administrative support from ATSIC.

The new body would be accountable to the Commonwealth Parliament through the Federal Minister and to Aboriginal people in the NT through a majority of members being nominated by the Land Councils.

The advantage of the proposal is that apart from expending funds consistent with the Act it also places a particular emphasis on the revised fund supporting economic development on Aboriginal land. Its disadvantage is that the Federal Government's proposal does not specifically address support of land management nor does it present justification for continuing to incur over a half a million dollars in running costs to distribute grants currently amounting to a mere \$3.5 Million dollars per year.

From an NT Government perspective ideally the ABA should have a clearer focus in respect to land management and economic development and serve as a valuable conduit for joint venture financing with Indigenous interests.

Recommendation 4

That reforms to the ABA be made to ensure that it has better governance and accountability consistent with the ANAO recommendation, including a clearer focus for the application of the moneys.

Land Council Funding

On one view, since the Land Councils are Commonwealth statutory authorities, the management of the funding of these bodies is a matter purely for the Federal Government.

The matter is not that simple - if the Land Councils do not or cannot adequately perform their statutory functions, development exploration activity and land administration in the Territory suffers. This can take the form of delays or imposition of 'charges' by the Land Councils to perform their statutory duties.

These delays and expenses can be viewed as an impost on competitive development in the Territory and was the subject of extensive debate in the HORSCATSIA Inquiry.

In this context, as with the ABA, the Land Councils were subject to a recent and comprehensive performance audit conducted by the ANAO.

The ANAO report signals the need for reforms which have largely been accepted by the Land Councils and the Commonwealth Government.

Consistent with implementation of the ANAO findings, amendments are supported that would place Land Council funding on a triennial basis, clarify their ability to recover costs, carry forward surpluses and lift the current limited threshold to enter into contracts.

Recommendation 5

Consistent with the ANAO findings, that amendments be made to place Land Council funding on a triennial basis, facilitate their ability to recover costs, carry forward surpluses and lift the current limited threshold to enter into contracts.

Specifically, amendments be made to:

- s.34(2) and s.35(1) to clarify that Land Councils may utilise "recoveries" without having first to obtain approval of the Minister under s.34(2);
- s.35(1) to provide for funding surpluses to be carried forward;
- s.34(1) and s.35(1) to allow for triennial funding; and
- s. 27(3) increase the amount for which Ministerial approval is required for contracts entered by Land Councils to \$1,000,000.

Reforms to Improve the Operation of Royalty Associations

The Commonwealth Options Paper notes a perception that these Associations are poorly managed, lack transparency and have no clear purpose for the expenditure of funds. By contrast the HORSCATSIA Inquiry noted, however, that a number of associations appear to operate effectively.

It is the case, however, that there is not enough co-ordinated oversight of these organisations regarding the receipt of mining royalty equivalents and little financial transparency and data upon which to evaluate their individual or combined performance. Associations are currently required to provide financial statements to the Land Councils, however, the Land Councils are not provided with powers to either ensure that appropriate information is provided, or act on it. The current lack of a specific function in relation to royalty associations limits the Land Councils' ability to ensure that the interests of traditional owners and "affected areas" people are protected.

HORSCATSIA therefore identified two sets of varying options for improving the transparency and accountability of Royalty Associations regarding the receipt of mining royalty equivalents. HORSCATSIA also strongly recommended that the Act be amended so that Royalty Associations cannot forward mining royalty equivalents without a specific purpose with a view to removing the negative impact of individual cash payments.

As a result of the negotiations the Land Councils have agreed to amendments to assist in the management and regulation of royalty associations regarding mining royalty equivalents largely consistent with the HORSCATSIA proposals.

These include amendments to sections 23 and 35A that:

- enable Land Councils to enter into agreements with Royalty Associations about the payment and distribution of mining royalty equivalents;
- specify a function for the Land Councils in providing advice and assistance to Aboriginal royalty receiving associations;
- require associations to provide more comprehensive information to Land Councils.
- ensure information provided to Land Councils includes a statement of specific purposes for the intended application of mining royalty equivalents to be forwarded by a Land Council.
- give Land Councils appropriate powers to demand and act on this information, including the power to withhold funds until such time as the information is received and found to be satisfactory; and allow for the extension of the period for distribution of monies from Land Use Agreements to 12 months.

Recommendation 6

That amendments be made to assist in the management and regulation of royalty associations largely consistent with the HORSCATSIA proposals. These include amendments to sections 23, 35 and 35A that:

- enable Land Councils to enter into agreements with Royalty Associations about the payment and distribution of mining royalty equivalents;
- specify a function for the Land Councils in providing advice and assistance to Aboriginal royalty receiving associations.
- require associations receiving monies pursuant to Section 35, to provide more comprehensive information to Land Councils.
- ensure information provided to Land Councils to include a statement of specific purposes for the intended application of mining royalty equivalents to be forwarded by a Land Council.
- give Land Councils appropriate powers to demand and act on this information, including the power to withhold funds until such time as the information is received and found to be satisfactory; and allow for the extension of the period for distribution of monies from Land Use Agreements to 12 months.

The additional reporting requirement (dot point 3) should be instituted to apply to providing the relevant report within 90 days of the commencement of the next financial year after the amendment becomes law. Thereafter the time described in section 35A would apply.

Exploration and Mining

The unfortunate historical legacy in relation to the mining provisions of the Act is summarised in the bipartisan finding of HORSCATSIA:

'Without doubt... most difficulties could have been avoided if there was less distrust, expensive litigation, and political infighting resulting in other agendas being promoted. Given improved goodwill, improved leadership and a genuine commitment to develop meaningful partnerships and work to achieve shared strategies, the Act can continue to work well for the people of the Northern Territory.'

The *NT Mining Act* includes minimal special provisions applicable to Aboriginal land, but Part IV of the ALRA provides detailed processes for the negotiation of mining tenements on Aboriginal land. In recent years these mining provisions have been reviewed, for the Commonwealth, by Mr John Reeves QC in 1998, the National Institute of Economic and Industry Research (NIEIR) in 1999 and the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HORSCATSIA), also in 1999.

The Commonwealth has not implemented any of the recommendations flowing from these three reviews, even though the HORSCATSIA review included

bipartisan recommendations for improving the workability of the mining provisions.

As part of the negotiations over ALRA reforms, in September 2002 the Northern Territory Government along with the Northern and Central Land Councils agreed to consider options for improving the workability of Part IV of the Act and its relationship with the *NT Mining Act*.

Dr Ian Manning and Mr Bill Gray AM were commissioned to act as independent convenors to assist in identifying options that may lead to agreement on relevant administrative and legislative reform. Under their Terms of Reference the convenors were required to examine the recommendations of the three reports listed above. Unlike the three reviews of the ALRA, they were also in a position to recommend complementary changes to the *NT Mining Act*. They were further required to discuss the operation of Part IV with representatives of the NTG, Land Councils as well as industry and other stakeholders.

In this regard the convenors held discussions with the NT Minerals Council, the Minerals Council of Australia, various individual representatives of companies in the industry, and the Aboriginal and Torres Strait Islander Commission (ATSIC) (Darwin).

As a result of their examination of the three reports (Reeves, NIEIR and HORSCATSIA), the convenors found a common view that the processes by which the mining industry gains access to Aboriginal land should be made less complex and more flexible, while enabling Aboriginal people to continue to control and benefit from activities on their land.

All three reports concluded that:

- the Traditional Owners' right to consent to or refuse exploration and mining activity on their land should be continued;
- there should be no restrictions on the content of agreements, leaving the parties to be governed by general commercial law;
- the warehousing of applications should not be allowed;
- the moratorium provisions should be either deleted (Reeves) or made more flexible;
- Land Councils should be given the capacity to delegate their power to approve exploration and mining agreements to the regional level.

Consultations with the Land Councils, the NTG, and industry produced further areas of potential agreement and these were put before the NTG and Land Council joint forum held in October 2002.

Principles

In considering the options, the parties proceeded on the basis of a set of agreed principles. These principles guided the discussions and led to the outcomes identified in Attachment A. The principles are as follows:

- The balance struck between the legitimate interests of the relevant parties in the current Part IV of the Act should be preserved.

- However, the processes under Part IV should be made less complex and more flexible.
- The role of the Commonwealth Minister should be reduced where such reduction would result in less procedural complexity and more timely decision making.
- A more collaborative relationship should be established between the parties to ensure the efficient and effective administration of the Act. Such collaboration would recognise that there is considerable overlap between the NTG and Land Council aims.
- It was recognised that productive dialogue will be required between the parties on an ongoing basis and that consultative mechanisms will need to be established at an early date if desired outcomes are to be achieved.
- The parties sought a more efficient interface between the operation of Part IV of the ALRA and the relevant provisions of the *NT Mining Act*.

The outcomes of the Forum were subsequently provided to the NT Minerals Council for comment.

The outcomes address the major recommendations flowing from the three Commonwealth reports, which have previously examined the operations of Part IV of the ALRA. In addition, the agreed positions go significantly further than was suggested in the reports and meet many of the concerns brought forward by stakeholders in discussion with the convenors and not covered in the previous recommendations, particularly in relation to a series of non legislative administrative reforms.

Nonetheless, the NT Minerals Council raised a number of concerns with the recommendations. Following further consultation with stakeholders a number of additional reforms were agreed, including:

- Further changes to administration
- Negotiation period
- The role of the Commonwealth Minister
- Arbitration
- Representative of the NT Government to attend meetings
- Renewal of mining leases.

The proposed workability reforms are outlined in Attachment A.

It will be important that the Part IV proposals are adopted in a manner that provides for an objective and independent assessment of NLC and CLC resourcing requirements to effectively service the Part IV provisions and to establish credible throughput measures (see Land Council Funding above).

Recommendation 7

With respect to amendments to the mining and exploration provisions in the Act, that the package of amendments be implemented as detailed in Attachment A (note: Attachment A deals with both legislative reforms and administrative and other arrangements which have been reached for workability reasons).

Finalise Outstanding Land Claims and Claims that cannot proceed.

This topic covers a multitude of complex issues. A number of the issues that arise have either been determined by the Courts or are currently listed for hearing. All attempts to expand land available for claim and have potentially significant implications for the Territory.

The Northern Territory Government and the Land Councils are in the process of developing proposals for resolving a number of outstanding claims through negotiation. At this stage, it is preferred to fully examine the option of negotiated settlement of outstanding issues.

In a related issue, the Land Councils have agreed to provisions that allow for dealings in land under claim consistent with existing provisions for mining and exploration, 11A and 48A

Also, currently the Act requires amendment for every grant of Aboriginal Land following a land claim settlement, which makes land grants await the parliamentary process each time. This is an unwieldy mechanism. The Land Councils have agreed to an amendment that would permit land to be granted to Land Trusts following a land claim settlement, without the need to amend the Act by inserting a description of the land in Schedule 1. This can be achieved by a simple amendment to Section 11 allowing the Minister, where satisfied that the parties to a s.50(1)(a) inquiry have agreed to the grant of area, to recommend that the Governor General grant the area to a Land Trust.

These represent a useful set of amendments, which provide for dealings in land subject to legitimate claim.

Recommendation 8

That the issue of finalising outstanding land claims and claims that cannot proceed be addressed through negotiation rather than legislative amendment at this stage.

Amendments are supported to:

- allow for provisions that allow for dealings in land under claim consistent with provisions for mining and exploration (11A and 48A);
- allow the Minister, where satisfied that the parties to a s.50(1)(a) inquiry have agreed to the grant of area, to recommend that the Governor General grant the area to a Land Trust.

Land Management

There are significant policy issues involved in use of land and provision of infrastructure services that are critical to the long-term sustainability of communities. There will be future challenges arising from demographic growth and peoples' needs for local services and employment opportunities. In particular there is scope to move to both agree to, and clarify, the respective roles of Land Councils and rights of Traditional Owners on the one hand, with those of Aboriginal local governance and service delivery organisations and residents on the other.

Opportunities to provide housing and infrastructure to Indigenous communities on Aboriginal land are limited because of difficulties attracting private capital investment. One of the difficulties is that the Act (section 19 (8)) prevents the grantee of an estate or interest from transferring this interest to another person. The need arising from section 19 to obtain consent before a mortgagee could exercise power of sale is apparently a major impediment to lending institutions contemplating investment on Aboriginal land. Of more immediate and pressing interest in resolving this issue is to clear the way for a public/private partnership to provide Government Employee housing for local recruits in remote Indigenous communities.

The Indigenous Housing Association of the NT (IHANT) has, from time to time, raised the issue of ownership of assets placed on Aboriginal land. This refers to housing and associated infrastructure, which, as fixed assets, becomes the property of the relevant Land Trust. The IHANT Board's difficulties arise over matters relating to rent collection, maintenance and augmentation of infrastructure and the establishment of a home ownership regime due to an inability to mortgage land by individuals.

This issue also arises in relation to local governance on communities and has an unfortunate history with respect to the tensions created between the Land Councils and the previous Government with respect to the implementation of NT Local Government legislation.

This is related to earlier suggestions to amend section 19 and in particular section 19(8), which restricts the transfer of existing interests. For example, a Housing Association could gain security of tenure over its houses (effectively the property of the Land Trust) or to provide for the case of an individual capable of servicing a housing loan.

It is possible under the current provisions of the Act to enter into agreements and leases in relation to Aboriginal land and using the land leased to raise capital. This was used to particular effect to secure funding for the Alice Springs to Darwin railway.

However the current provision under section 19(8) appears to have the implication of restricting a mortgagee's ability to enforce a mortgage over a lease (or other interest) in Aboriginal Land by providing that the consent of the Land Council and the Minister is required at the time of enforcement.

As a result of negotiations the Land Councils have agreed to an amendment which clarifies that it applies subject to the terms and conditions on which the initial grant of the estate or interest was made.

They have also agreed to an amendment to lift the Ministerial approval for all land use agreements to only those “above \$1M (section 27(3))”, and to insert a new provision that ensures that such agreements can include provisions for entry of persons on Aboriginal land for purposes related to the agreement. They have also agreed to an ‘urgent circumstances’ amendment that allows the Land Councils to issue licences in land for up to a period of 3 months rather than rely on existing provisions that requires comprehensive consultations and documentation – such as where it is necessary to ensure that a community store can continue to operate.

Land Trusts

The Land Councils have proposed reforms designed to streamline the administrative functions of Land Trusts. These reforms would simplify the arrangements for Land Trusts to sign off on documents requiring the common seal, and extend the maximum period of membership of a Land Trust.

Recommendation 9

Amendments be made to:

- clarify that section 19(8) applies subject to the terms and conditions on which the initial grant of the estate or interest was made;
- lift the Ministerial approval for all land use agreements to only those “above \$1M (section 27 (3))”, and to insert a new provision that ensures that such agreements can include provisions for entry of persons on Aboriginal land for purposes related to the agreement;
- allow for an ‘urgent circumstances’ amendment that allows the Land Councils to issue licences in land for up to a period of 3 months rather than rely on existing provisions that requires comprehensive consultations and documentation; and
- s.19(11) to provide that licenses and any other interests granted under the Mining Act relating to the mining of extractive minerals cannot be granted until the Land Trust has, in accordance with directions of the Land Council given in accordance with s.19(5) (and the Minister’s consent as per s.19(7)) signed and enters an agreement with the proposed grantee.
- provide that any 3 members of a Land Trust may sign documents requiring the common seal and none need be the Chairman.
- Extend the maximum period for membership of a Land Trust from three to five years.

Compulsory Acquisition of Interests in Aboriginal Land for Public Purposes

The inability of the Territory Government to acquire Aboriginal land in the public interest has been historically viewed as a significant impediment to development. To address concerns that this power should not be used capriciously, the Commonwealth Options paper has proposed a number of safeguards. For example the power would only be used to acquire easements or leases (that is some interest less than full freehold) and that these interests only be acquired in the public interest. A further proposal is that any acquisition would require a Commonwealth Minister's consent, or alternatively that each acquisition would require a separate Act of the Legislative Assembly.

Under the proposed amendments, which presumably would adopt the Land Acquisition Act processes:

- a consultation process would be necessary;
- an easement could be acquired;
- 'just terms' compensation could either be agreed or determined;
- there would be a sites clearance; and
- underlying land ownership to revert to the traditional owners.

The Land Councils have been opposed to such proposals in the past arguing the existing provisions of section 19 of the Act are adequate. This was also the conclusion reached by HORSCATSIA. The Government's approach to date has been to negotiate with the Land Councils consistent with the approach adopted to secure the railway corridor and current negotiations regarding the gas corridor to Gove.

Recommendation 10

With respect to compulsory acquisition of interests in Aboriginal Land for public purposes, the current approach to negotiated settlements should be pursued.

Clarification of the Application of Territory Laws

The current Act provides that Territory laws apply to Aboriginal land to the extent that they are capable of operating concurrently with the Act. Because the Act gives no guidelines as to what type of legislation can operate concurrently, there is an argument that uncertainty arises as to the application of Territory laws.

It has been suggested that some mechanism needs to be put in place to ensure that there is no question regarding the application of certain types of Territory legislation. It is further suggested that this mechanism should not upset the existing presumption that all Territory laws apply.

The Territory tends to assume the validity of its laws in their application to Aboriginal land unless there are good grounds for finding some inconsistency

based on other specific provisions of the Act. Where there is some inconsistency, the Territory relies on sections 59 or 59A of the *Interpretation Act*.

To date, there would not appear to have been any occasions where this has become an issue or where Territory laws have been challenged in this way.

Recommendation 11

Unless a specific example arises where Territory laws are challenged, this issue should not be pursued at this stage.

Clarification Of Powers Of Land Councils Concerning Sacred Sites

Subsection 23(1)(ba) of the Act provides for Land Councils to assist Aboriginals to protect sacred sites wherever they occur.

Section 73 of the Act of the Federal Parliament has vested the function of making laws for the protection of sacred sites in the Northern Territory Legislative Assembly. The Territory Parliament has established the Aboriginal Sacred Sites Protection Authority (the Authority) and set up a legislative regime for the protection of sites.

The legislation has provided for sacred sites off Aboriginal land to be protected, offences against the Act have been successfully prosecuted, traditional Aboriginal owners or custodians are able to access sites off Aboriginal land and there are highly developed procedures to avoid sacred sites during land developments. The Authority believes it has the confidence of Aboriginal site custodians and lands use proponents and that the issues surrounding sacred sites are no longer the public controversy they once were.

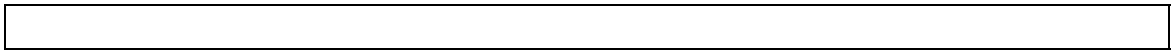
Both the Central and Northern Land Councils have been consistently critical of the current Northern Territory legislation and aspects of its implementation.

The Authority believes there are undeveloped opportunities for co-operative arrangements between both bodies. There are, for example, many occasions when the Authority's records of sacred sites and custodians have been essential to the performance of Land Councils' functions and vice versa.

As a result of the negotiations the Land Councils have agreed to move to negotiate a set of protocols between them and the Authority.

Recommendation 12

With respect to the clarification of powers of Land Councils and the AAPA concerning sacred sites, a more useful approach at this point is to pursue the negotiation of a set of protocols between the Land Councils and the NT Aboriginal Sacred Sites Protection Authority.



ATTACHMENT A

WORKABILITY PROPOSALS FOR PART IV OF THE ABORIGINAL LAND RIGHTS (NT) ACT 1976 (ALRA)

Administration reforms

- All Exploration Licence Applications (ELAs) should continue to be processed on a first-come first-served basis.
- Grounds for refusing an application need to be clarified and made the subject of consultation between Land Councils (LCs) and the Department of Business, Industry and Resource Development (DBIRD).
- DBIRD and LCs to meet as required to achieve more efficient scheduling of meetings with Traditional Owners (TOs) to minimise costs and expedite negotiations.
- DBIRD to support meeting schedules by timing *consents to negotiate* to fit in with the schedules.
- DBIRD and the LCs to produce an updated manual for applicants.
- DBIRD and the LCs to liaise regarding forwarding information on the ALRA processes to individual applicants.
- Applicants to be advised by DBIRD/LCs as to the likelihood or otherwise of TOs supporting exploration in areas applied for.
- LCs would address cost-effectiveness, budgeting and accounting in relation to their Part IV obligations.
- Cost-recovery could be standardised and made more transparent.
- LCs would look to improve their organisation and distribution of resources to meet their Part IV obligations.

The Land Councils have also agreed to support amendments to allow delegation of the approval processes for relevant Part IV provisions to the regional level.

Legislation reforms and other arrangements

The Negotiating Period

- It was agreed that the core negotiating period should include two field seasons (April to October inclusive) rather than the 12 month period currently stipulated under S42(13). All core negotiating periods (incorporating the two field seasons) to commence from 1 January of the year following the date on which the *consent to negotiate* was granted (this would not preclude the process from beginning as soon as the *consent to negotiate* was given).
- With regard to extensions, the applicant and the LC would be free to agree to one initial extension of two years plus agreement to extensions of one year beyond the core period of time (i.e. two field seasons), with such extensions notified to the Commonwealth and NT Ministers. In the event of

a failure on the part of the applicant and LC to agree on an extension, a deemed withdrawal of the *consent to negotiate* would result.

- As a circuit breaker, the NT Minister would be able to set a deadline for negotiation on a particular ELA, following consultation with the parties and the Commonwealth Minister. The Minister could act on his own initiative or on representation from one of the parties and/or the Commonwealth Minister.
- The deadline could not be imposed prior to the expiry of the core-negotiating period and the minimum notice of a deadline would be 12 months.
- If the deadline was not met, a deemed withdrawal of the *consent to negotiate* would result, with the NT Minister determining any subsequent action in consultation with the parties.

Other Timelines

It was agreed that other timelines prescribed by Part IV of the Act could be amended or deleted with a view to simplifying and facilitating the processes.

These included:

- SS41(2) and 41(3) be amended to provide that a lodgement of a proposal by an applicant be made within a reasonable period (rather than the 3 month period currently prescribed) and discretion for the NT Minister to withdraw the *consent to negotiate* if this was not done.
- S41(7) be deleted removing the obligation upon the LCs to “cause notice of the application to be sent to any Aboriginal community or group that may be affected by the grant of the licence.” The LCs indicated that the notice served little purpose and frequently led to confusion within communities. It also had the potential to provide grounds for challenging the validity of an agreement at a later stage.
- S42(8) be amended to delete reference to “30 days” and instead read “as expeditiously as possible” and the consequent removal of the deeming of consent provision under sS42(9).

Arbitration

The parties acknowledged that the arbitration procedures set out under S44 had not been used and that both the miners and the LCs would continue to avoid the use of the S44 procedures. It was agreed that with the provision for deemed withdrawal of *consent to negotiate* (rather than a deemed consent as currently provided by S42(7)) there would be no need for the S44 arbitration procedures. Commercial arbitration would be available to the negotiating parties under normal commercial law. S44 could therefore be deleted.

Content of Agreements (between the LC and the applicant)

- Conjunctive agreements should be retained
- Restrictions under 44A be removed; and
- Normal commercial law should apply.

Moratorium Period

- The moratorium period should remain at 5 years.
- The Act be amended to allow a moratorium to be removed at any time on the initiative of the LC, on the instruction of TOs, *and* if the NT Minister considers the lifting of the moratorium desirable
- At the end of a moratorium, existing practice should be followed, save that the applicants updated/new proposal would be assessed by DBIRD in light of current standards applying for assessment of new applications. If the revised proposal was not up to standard, the NT Minister would withdraw *consent to negotiate*.
- If an ELA is withdrawn during moratorium, DBIRD will inform the LC. At its discretion, the LC may activate procedures under S48(3), save that S48(3)(d) would not apply.
- DBIRD and LCs to further discuss how to discourage applications (or re-applications) over areas highly likely to be refused.

Warehousing

- NT Minister to be empowered to withdraw *consent to negotiate* if satisfied that the applicant is not pursuing negotiations adequately
- The circumstances in which a *consent to negotiate* could be withdrawn will require definition to avoid inequitable treatment of applicants. Withdrawal of the *consent to negotiate* by the Minister could be made subject to administrative appeal.

Role of Commonwealth Minister

- The Commonwealth Minister should continue to consent to agreements.
- The Minister should have a reduced involvement in day to day administration as there would be no need for approving extensions
- under delegation from the Commonwealth Minister, that the NT Minister should be able to exercise the power to place a minimum 12 month deadline on negotiations following the core negotiation period
- Following where a *consent to negotiate* is deemed to be withdrawn, and following inquiries by the NT Minister there is a "fresh" consent to negotiate issued to the same applicant, the Land Councils have also agreed that the process would pick up from the point at which it left off. That is to say that statutory milestones such as meetings etc. would not need to be re-visited.

Reconnaissance

- The LCs accepted that reconnaissance of ELA areas by an applicant, authorised under entry permit issued by a LC, may be desirable in two circumstances:
 - An applicant wishes to undertake work with potential for significant cost saving (usually by withdrawal of the ELA); and
 - The ELA is in advanced stage of processing and the applicant wishes to begin preliminary work.
- The current practice of allowing some reconnaissance under permit issued by a LC, with DBIRD endorsement, would continue.
- Further work will be done by LCs to define other circumstances as to when reconnaissance, authorised by way of an entry permit, might be appropriate and the procedures to be adopted.

EPA and ELA Administration

It was agreed that refusal or consent to an EPA does not imply any decision regarding an ELA covering all or part of the same ground, and vice versa.

Delegation Of Power

It was agreed that LCs should be able to delegate power to their regional levels to approve exploration and other mining agreements.

Representative of NT Minister

The Land Councils and the NT Government have agreed to develop arrangements whereby the NT Government may be represented at meetings of Traditional Owners comparable to the current arrangements in relation to the representative of the Commonwealth Minister under S42 (5).

Renewal of Mining Leases

Subject to transitional arrangements, an amendment is supported that removes any doubt that mineral leases can be renewed in accordance with the NT Mining Act without consent.

Note

The parties noted that the position set out above has been struck on the basis that they constitute a “package” and that the selective implementation of only some of the proposals (“cherry picking”) could invalidate the position reached.

Transition

Transitional arrangements

Most of the proposed amendments could take effect without requiring any transitional arrangements. As a matter of principle it is preferable to minimise

transitional arrangements so as to reduce complexity and administrative problems which may arise where there are dual systems – old and new – running side by side.

Where transitional arrangements are going to be needed they should be drafted in accordance with principles which ensure as far as possible that they minimise disadvantage to all parties, they minimise the administrative complexity which may arise with dual systems, and they are in force for the shortest period possible consistent with reducing disadvantage.

The following parts of the Part 1V package have been identified as possibly requiring a transitional arrangement –

- Negotiation period;
- Warehousing - withdrawal of consents to negotiate;
- EPA and ELA administration; and
- Mineral lease renewal.

The Commonwealth should consult with the Northern Territory Government, Land Councils and the Mining industry in identifying appropriate and practicable transitional arrangements that are as fair as possible to all relevant parties.