ABORIGINAL LAND RIGHTS IN WESTERN AUSTRALIA

By Michael W. Hunt*

Aboriginal land rights in Western Australia? There are none — if the concept of Aboriginal land rights requires that an Aboriginal community has rights of ownership of land other than the right to own land which is generally available to any person.

There are secondary or derivative rights conferred upon an Aboriginal community to use and enjoy land which has been reserved by the Crown as land for the use of Aboriginals. However, at no time does title or control of the land divest entirely from the responsible Minister.

With those words I commenced my paper to the Aboriginal Land Rights Conference conducted by the New South Wales Branch of AMPLA in Adelaide in February 1981.[1] The situation in Western Australia is no different now, over four years later. However, over this period, there have been a number of important happenings on the Western Australian Aboriginal Land Rights scene.

BACKGROUND

With its election in February 1983, the Burke (Labor) State Government found itself obliged to honour one of its policy platforms — that of introducing Aboriginal Land Rights to Western Australia. It acted with commendable expedition and three months after the election announced the terms of reference of the Aboriginal Land Inquiry, appointing a Perth Queen's Counsel, Mr. Paul Seaman as Commissioner.[2] It is important to note that the terms of reference related to the implementation of Aboriginal Land Rights. It was not an inquiry into whether to introduce Land Rights — it was an inquiry into how to introduce Land Rights. On 17 September 1984, Seaman delivered his report to the Government.[3] It was released to the public ten days later accompanied by the Government's statement of its intentions.[4]

The Government then established a drafting committee comprising members of various interested groups which over a period of four months settled two major pieces of legislation, the Aboriginal Land Bill 1985 and the Mining Amendment (No. 2) Bill 1985. The provisions of the Aboriginal Land Bill were designed to permit and regulate the grant of land. The provisions of the Mining Amendment (No. 2) Bill were designed to permit access to Aboriginal land for mining purposes. The Government

* B.A., LL.B. (Hons.) (W.A.) Solicitor W.A.

1 Hunt M. W. 'The Legislation Relating to Aboriginal Land Rights in Western Australia' 1982 4 *A.M.P.L.J.* 201.

2 The terms of reference and details of the Commissioner's appointment were discussed in (1983) 2 *AMPLA Bulletin*, 46.

3 W.A. Report of the Aboriginal Land Inquiry (1984) Paul Seaman Q.C.

4 General Statement on Aboriginal Land Claims, News Release, Department of Premier and Cabinet (W.A., 27 September 1984).

accepted the legislation as drafted and introduced it into the Western Australian Parliament in mid-March 1985.

In the Legislative Assembly, where the Labor Government has a comfortable majority, the legislation was passed. However, it was defeated in mid-April 1985 in the Legislative Council where the Liberal/National Country parties have the majority.

Since then the State Government appears to have publicly adopted a 'wait and see' attitude to the Commonwealth Government's proposals for uniform land rights legislation. I imagine that privately the State Government is expressing its concern at the potential for electoral damage which the imposition of Federal land rights could introduce and no doubt is negotiating with the Federal Government in an attempt to modify the national preferred model for land rights.

A public opinion poll commissioned by the *West Australian*[5] indicated that 70% of the Western Australians surveyed were opposed to the introduction by the Federal Government of uniform national Aboriginal land rights legislation. Only 20% of those surveyed supported the State Government's proposed Aboriginal Land legislation.

In 1983 Barker wrote 'it is possible to conclude that the issue of land rights for Australian Aborigines is no longer an idea awaiting its day — indeed its day would seem to have come. Rather, the issue now is the nature and extent of the rights to be granted to Aborigines in respect of land . . .'[6]

The same writer expressed a similar view a year later — 'No longer, therefore, do Australians stand at the policy crossroads debating whether land rights is a good or bad thing. Rather, there are now tasks at hand, tasks to produce effective and workable land rights law.'[7]

In 1983 and 1984 Barker's assertions appeared justified. In 1985, they can no longer be regarded as accurate insofar as the Western Australian Parliament and a majority of Western Australia's population are concerned.

What has happened? It seems necessary first to review the existing law relating to Aboriginal land and then to examine the developments over the past two years.

EXISTING WESTERN AUSTRALIAN LEGISLATION RELATING TO ABORIGINAL LAND

The existing Western Australian legislation relating to Aboriginal land has been examined in detail elsewhere[8] and at this stage I propose only a summary of the more important factors.

5 'W.A. Gives Land Rights Warning to Hawke', the *West Australian* (Perth) 4 May 1985.

6 Barker M. 'Aborigines, Natural Resources and the Law' (1983) 15 *University of Western Australia Law Review* 245.

7 Barker M. 'Aboriginal Land Rights Law in Australia: Current Issues and Legislative Solutions' [1984] *AMPLA Yearbook*, 483.

8 McDonald G. 'Aboriginal Land Rights in Western Australia (1979) 2(1) *A.M.P.L.J.* 282; Rogers v. 'Aboriginal Land Rights: An Update' (1980) 2(2) *A.M.P.L.J.* 92; McDonald G. 'Western Australia' in Peterson N. (ed.) *Aboriginal Land Rights: A Handbook* (1981) 221; Hunt *supra* n.1.

No Aboriginal Land Rights

On even the broadest definition of Aboriginal land rights, it is difficult to argue they exist in Western Australia. There is no freehold ownership of land by Aboriginal individuals or corporations (apart from small areas purchased as such). As McDonald has explained,[9] such rights as are enjoyed by Aboriginal individuals or corporations in relation to land are 'secondary'. They are rights granted over unalienated Crown land, first by reserving that land, secondly by placing it under the control of the responsible Minister, and thirdly by granting to a body (the Aboriginal Lands Trust) the control of that land.

It seems to me that such rights do not meet Barker's definition of 'land rights' as 'rights in land granted to Aborigines individually or in groups, including land councils, but does not include land held or acquired by government authorities, such as the Commonwealth Aboriginal Development Commission, for Aboriginal purposes.'[10]

Aboriginal Affairs Planning Authority Act 1972

The principal Western Australian statute to be considered is the Aboriginal Affairs Planning Authority Act 1972 ('the AAPA Act'). The person appointed as Commissioner for Aboriginal Planning under this Act serves also as the departmental head of the State Department responsible to the State Minister with Special Responsibility for Aboriginal Affairs.

Aboriginal Affairs Planning Authority

The Aboriginal Affairs Planning Authority ('the Authority') is constituted under the AAPA Act. The Authority is the State Minister with Special Responsibility for Aboriginal Affairs ('the Minister') and his Department (headed by the Commissioner for Aboriginal Planning).[11]

Aboriginal Lands Trust

One of the statutory corporations established by the AAPA Act is the Aboriginal Lands Trust ('the Trust').[12] Subject to the Minister's power to give directions,[13] the Trust has power to deal with property but, in the case of real property, only with the prior approval of the Minister.[14] The Trust comprises the Chairman and presently nine other members, all of Aboriginal descent, and all appointed by the Minister[15] after he has received recommendations from the Aboriginal Area Consultative Committees. It is fair to comment that the Trust is an advisory body and that real decision making power remains with the Minister.[16]

9 McDonald *supra* n.8(c) 221.
10 Barker *supra* n.7, 483.
11 Aboriginal Affairs Planning Authority Act 1972, s.8.
12 *Ibid.* s.20.
13 *Ibid.* s.7.
14 *Ibid.* s.20.
15 *Ibid.* s.21.
16 See comments by Barker *supra* n.6, 263.

Reservation of land, vesting of reserves and leasing

The first step in conferring on Aboriginals the use and enjoyment of land is the creation of a reserve. The next step is the vesting of that reserve and finally its occupation, whether formal or informal.

The scheme which appears to be envisaged by the AAPA Act is:

(1) Any Crown land may be reserved by the Governor — Land Act 1933.[17]

(2) The Governor may then declare the land reserved for persons of Aboriginal descent — AAPA Act.[18]

(3) The land thereby becomes 'reserved land' within Part III of the AAPA Act.[19]

(4) As a consequence, the land is automatically vested in the Authority.[20]

(5) The Governor, on request of the Authority may then place the reserve under the control and management of the Trust.[21]

(6) The Trust then may permit an Aboriginal community to occupy that land or, presumably in the name of the Authority, may lease that land to an Aboriginal community.

Other reserves should be mentioned:

(a) Community Services Reserves — Under the Community Services Act[22] a community services reserve may be created and vested. These reserves are generally small in area and are located adjacent to town sites. Under the Government's policy, which has been in force for several years, these reserves will be phased out with the resettlement of Aboriginal families within the town itself through the State Housing Commission. The Government considers that such reserves which become depopulated should vest in the Trust as a matter of policy.

(b) Temporary Reserves — The Land Act permits the Minister to create a temporary reserve (for not more than 12 months) for the use or benefit of Aboriginal inhabitants.[23] It was under this power in 1980 that the Aboriginal community which had been evicted by the pastoral lessee of Gordon Downs Station was offered the use of a 35 square kilometre area of vacant Crown land at Ringers' Soak for 12 months pending the longer term resettlement of that community.

(c) The AAPA Act permits the Governor to proclaim a right of exclusive use and benefit for Aboriginal inhabitants of an area if they can establish normal residence within the area.[24] The section is called 'the customary tenure provision'. In 1979 McDonald indicated he knew of no case in which this provision had been used.[25]

17 S.29.
18 *AAPA* s.25(1)(a).
19 *Ibid.* s.26(b).
20 *Ibid.* s.27.
21 *Ibid.* s.24(1).
22 Formerly the Community Welfare Act.
23 Land Act 1933 s.36.
24 AAPA s.32.
25 McDonald *supra* n.8, 263.

Since then the Trust's 1980 Report revealed that the Trust resolved on 29 March 1980 to support the Yungngora Community Inc. in its effort to prevent Amax Exploration (Australia) Inc. from drilling for petroleum on Noonkanbah Station thereby violating sacred sites (as the Community saw it). The Trust subsequently delivered to the Governor a letter requesting him to exercise his authority under section 32 and thus to reserve Noonkanbah Station for the use and benefit of Aborigines. His Excellency was advised by the Government that the Pastoral Lease status should remain and so declined the Trust's request.

Land held by the Trust

The Trust 'holds' land totalling nearly 21 million hectares made up of more than 19 million hectares of reserved land, a small amount of freehold, 1½ million hectares of pastoral lease and 57,000 hectares of other leases.

Entry

Insofar as reserved land is under Part III of the AAPA Act, an entry permit is required. It is an offence for a person to be on land to which Part III applies unless that person is of Aboriginal descent, a Member of Parliament on official duties or authorized under the Regulations.[26]

Regulation 8 under the AAPA Act governs the entry permit procedure. Previously application was required to be made to the Commissioner for Aboriginal Planning who made a recommendation to the Minister. In 1978 a problem arose when the Commissioner (after consulting the local community) declined to recommend an entry permit. The Minister discovered he was without power to overrule the Commissioner's failure to recommend the permit.

Thus, Regulation 8 was amended and it now provides that an application for an entry permit is to be made to the Minister. Before granting permission, he is obliged to consult the Trust but he is not bound by the Trust's recommendation. If the Trust's recommendation and the Minister's decision differ, the Minister must table a report on the matter and his reasons for decision in Parliament.

In the case of a simple entry permit for the travelling public, various officers of the Aboriginal Affairs Planning Authority have been authorized to grant a permit. The Minister has delegated his power to employees of the Authority to grant entry permit applications and sign permits on behalf of the Minister.

For other than routine applications, the local community will be consulted and the Trust at its full meetings will consider the local community's views and then reach its own view. This process can take considerable time especially since the Trust meets only quarterly. All permits (other than transit and other routine entry permits) are considered by the full Trust. The Trust then makes a recommendation to the Minister.

26 AAPA s.31.

Mining Act 1978

In relation to the application procedure for a mining tenement over an Aboriginal reserve, the Mining Act imposes no restrictions on marking out and/or applying for a mining tenement over the reserve.[27] A prospecting licence or a mining lease requires physical entry on the reserve to mark out the tenement. An exploration licence is not required to be marked out, and thus no physical entry is required for the application. Of course, all three tenements generally require physical entry for the purpose of exercising the rights of prospecting, exploring or mining conferred by the tenement.

The Mining Act provides procedures relating to 'mining' (which is defined to include 'prospecting' and 'exploring') on reserves which differ according to the nature of the reserve. In relation to Aboriginal reserves, it provides in section 24(7)(a) that mining can take place on an Aboriginal reserve provided the written consent of the Minister for Minerals and Energy is given. Before giving his consent the Minister for Minerals and Energy is required to consult with (but not necessarily obtain the concurrence of) the Minister with Special Responsibility for Aboriginal Affairs pursuant to section 24(7)(b). An entry permit under the AAPA Act is required insofar as the reserved land is under Part III of the AAPA Act.[28]

Petroleum Act 1967

Section 15(2) of this Act allows land which has been reserved under the Land Act or any other Act (thereby including the AAPA Act) by proclamation to be declared Crown land for the purposes of the Petroleum Act. However, even though such a declaration has been made and an exploration permit has been granted, there remains the necessity to apply for an entry permit under the AAPA Act.

Royalties

Subject to the approval of the Treasurer the Authority (the Minister) for the benefit of Aboriginals (generally or a specific class) may receive any rental, royalty, share of profit or other revenue that may be negotiated or prescribed in relation to the use of reserved lands or the natural resources on that land.[29] The Trust may receive the delegated powers of the Authority.[30] No such delegation has yet been made for purposes of section 28(a).

The question arises as to who is envisaged by the section to have the power to negotiate for royalty or share of profits — the Authority, the Trust, the Treasurer or the Mines Department?

The answer in law at present is the last in that the Mines Department sets the rates of royalties for mining (which are prescribed by

27 s.26(2)(c).
28 Mining Act, 1978 s.24(7)(c).
29 AAPA s.28(a).
30 *Ibid.* s.24.

regulations under the Mining Act). The role of the Treasurer under section 28(a) is limited to approval (presumably of 'receipt'). The Authority and the Trust would appear to have no role albeit that the statute would appear to contemplate giving them a role in this area.

The answer in practice may be different.

As just mentioned the Trust may indirectly receive some rents and royalties from mining. It receives by way of *ex gratia* payment from the State a share of rents and royalties derived from mining and petroleum tenements situated on Aboriginal reserves as follows:[31]

Annual Collection of Rents and Royalties	**Amount Payable to Aboriginal Lands Trust**
Up to $50,000	100%
$50,000 to $150,000	$50,000 plus 50% of the excess over $50,000.
$150,000 to $250,000	$100,000 plus 30% of the excess over $150,000.
$250,000 to $450,000	$130,000 plus 15% of the excess over $250,000.
$450,000 to $700,000	$160,000 plus 10% of the excess over $450,000.
$700,000 to $1,000,000	$185,000 plus 5% of the excess over $700,000.
$1,000,000 and over	$200,000 plus 3% of the excess over $1,000,000.

These amounts are the total annual financial remuneration the Treasurer may approve for any mineral and petroleum exploration and production on and from all Aboriginal reserves in the State.

There is no statutory recognition of these payments. Their character is simply a payment from Consolidated Revenue which payment is calculated by reference to mining and petroleum operations on Aboriginal reserves.

The Trust, through its own decision, allocates amounts thus received as follows:

(a) 40% is retained by the Trust;
(b) 30% is paid to the community where the mining operations occurred;
(c) 30% is paid to communities and organizations in the general area of the mining operations (but not limited to the particular reserve on which the mining operations were conducted).

In 1984–1985 the amount to be paid by the Treasurer to the Aboriginal Lands Trust is expected to be $95,000.

Of course, the prescribed scale ignores other factors related to the operations of mining and petroleum explorers whether contingent upon issue of entry permits or otherwise; for example, the 'sweetheart deals'

31 There is no authority or regulatory basis for this scale of payments. Its character is simply that of an informal arrangement evidenced by correspondence between the Aboriginal Lands Trust and the then Premier.

entered into with either the Trust or the local community whether as the price of granting an entry permit or otherwise. These are not necessarily paid in cash.

An extension of this principle is the agreement relating to the Argyle diamond area made between CRA Exploration Pty. Ltd. and members of the Mandangala Community, the published details of which indicate that CRA agreed to incur expenditure to a level of $200,000 in the first year of the Agreement to be applied in rehabilitating the pastoral station occupied by the community and providing housing and other facilities on that station and to a level of $100,000 per annum (indexed to allow for inflation) thereafter. This was not the price paid for an entry permit (there was no reserve involved) but for the agreement of the Community to refrain from objecting to mining taking place in the area of a site of traditional interest to the members of the Community.

Aboriginal Heritage Act 1972

This Act was amended in 1980 as a direct result of the Noonkanbah dispute. Essentially the amendments in 1980 increased the powers of the Minister to exercise control over the Trustees of the Museum.

The Act relates to artifacts and sacred, ritual or ceremonial sites of importance and special significance to Aborigines. Responsibility for the protection of sites is specifically vested in the Trustees of the Museum who are advised by the Aboriginal Cultural Materials Committee established under the Act. The Minister now has power to give directions to the Trustees. The validity of directions by the Minister, even though evidence disclosed the Trustees would have taken a contrary view, was upheld by the Western Australian Supreme Court in a matter arising out of the Noonkanbah dispute.[32]

Any person who without authority of the Trustees or consent of the Minister excavates, destroys, damages, conceals or alters any Aboriginal site commits an offence.[33]

Section 18 applies to 'the owner of any land' which expressly includes the holder of a mining tenement or privilege and the holder of a petroleum exploration permit on which an Aboriginal site is located. The owner is required to notify the Trustees if he proposes to use the land for a purpose which would involve an offence under section 17. The Trustees must then evaluate the significance of the site and report to the Minister. The Minister may consent or decline to consent to the proposed use of the land. Appeal lies by the 'owner' (as defined) to the Supreme Court but there is no right of appeal by either the Trustees or the Aboriginal community involved.

Aboriginal Communities Act 1979

This statute empowers certain Aboriginal communities to manage and control their community lands.

32 *Noonkanbah Pastoral Co. Pty. Ltd. v. Amax Iron Ore Corporation* Brinsden J., S.C. of W.A. 27 June 1979 (unreported but noted in 1979 A.C.L.D. 470).

33 Aboriginal Heritage Act, 1972 s.17.

Five communities have so far been empowered and additional communities will be empowered by proclamation in the near future.

The Act confers upon the community powers similar to those of a country local shire (*e.g.* traffic and land use control) and minor police-type powers including powers governing the use of alcohol.

THE ABORIGINAL LAND INQUIRY (THE SEAMAN REPORT)

As noted earlier, the State Government in May 1983 announced the terms of reference for an inquiry into the implementation of Aboriginal land rights and appointed Paul Seaman, Q.C. as Commissioner. He commenced his task in September 1983 having previously issued invitations for written submissions. He conducted a series of hearings in September and October 1983.

In January 1984 he issued a Discussion Paper, the purpose of which was not an Interim Report but to give interested parties 'some indication of my present thoughts so that they may have a reasonable opportunity to influence my mind before the Inquiry is concluded'. The Discussion Paper was very detailed. Its proposals have been summarized elsewhere.[34]

Further hearings were conducted by Seaman based upon the Discussion Paper.

The Report of the Aboriginal Land Inquiry (commonly referred to as the Seaman Report) was delivered to the Minister with Special Responsibility for Aboriginal Affairs by Mr. Seaman on 17 September 1984. It was publicly released by the Western Australian Government on 27 September 1984.[35]

At the same time as releasing the Report, the Government issued a general statement on Aboriginal land claims and a statement of principles which the Government proposed to adopt in relation to land rights.[36]

Seaman Report

The Seaman Report was the result of more than a year's work, assessment of more than 200 submissions and arising from contact with thousands of Aborigines and persons of non-Aboriginal descent in all parts of the State. Seaman said that Aborigines had not been equal before the law and special measures were needed to correct the balance. He was satisfied that a subtle system of Aboriginal land law did exist in Western Australia.

Seaman proposed a system of Aboriginal land claims based either on traditional relationships with the land or on long association by residence on or by use of land. He proposed land claims be granted under an inalienable freehold title.

The Report recommended that Aborigines should have the right to control exploration and mining on their lands. Seaman said Aborigines should have a right of veto over whether or not exploration and/or mining

34 Snelling J. 'The Aboriginal Land Inquiry, W.A.' (1984) 3 *AMPLA Bulletin* 18.
35 *Supra* n.3.
36 *Supra* n.4.

can take place on Aboriginal lands. He drew a parallel with section 29(2) of the Mining Act 1978 which confers on the owner of private land an absolute veto over the grant of a mining tenement on his land unless limited below 30 metres from the surface where the land is under cultivation (broadly defined to include pasturing and grazing).

In Seaman's opinion the Western Australian sacred sites legislation (the Aboriginal Heritage Act) has failed to protect sacred sites from desecration. He called for Aboriginal administered protection for certain sites, maps and lists to be prepared outlining zones where traditional Aboriginal sites occur, constitution of a tribunal to hear disputes over sites and award compensation, and greater protection for sites of significance of living and traditional cultures as opposed to sites of archaeological interest.

Additional recommendations included:

- Private land and pastoral leases (other than those held by Aboriginals) should not be subject to Aboriginal land claim. However, if pastoral leases become available for purchase, they should first be offered to Aboriginals who may then claim them.
- Aborigines should be able to claim any unalienated Crown land.
- A series of Aboriginal regional bodies should be established to look after the interests of Aborigines and their land.
- An independent land tribunal be constituted under judicial chairmanship which would emphasize negotiation between disputing parties and hear compensation claims.
- Aborigines to have the power to permit or refuse entry to their lands.
- The holding of Aboriginal land by a modified title under which the Aboriginal landholder could neither sell nor use the land as security without the permission of the Tribunal.

Government's Statement

The Seaman Report comprised 261 pages plus 201 pages of appendices. The Government's Statement comprised three pages and was issued to put on record the Government's first reaction to the Seaman Report.

The Government's Statement was in the form of a Statement of Principles and was not worded in specific terms. It used little of the wording employed in the Seaman Report and this made it difficult to gauge the detail of the Government's reaction to the Report — for example, the Government referred to a 'protective and secure title' as opposed to the Seaman Report's call for a 'modified freehold title'.

The Government stated it wished to provide for the conciliatory resolution of conflicts over land by a process of negotiation and agreement. The Government said it would introduce legislation to establish an Aboriginal Land Tribunal to act as an arbitrator and assessment forum for land claims made by Aboriginal people where negotiated settlements cannot be achieved.

The Tribunal's jurisdiction would not extend to privately owned

land (freehold title) nor so as to deprive pastoral lessees of their pastoral leases. The Tribunal would be able to assess claims lodged only in respect of certain categories of Crown land.

In assessing a claim, the Tribunal would use criteria of traditional affinity or long association and would be required to have regard to questions of existing or future public use.

The Tribunal would be 'independent and judicially based'. It would have the means to appoint 'independent consultants' on issues as they arise during the process of hearings.

The Government stated its intention to amend the Aboriginal Heritage Act, and in particular its provisions relating to sacred sites to be 'more certain and effective'.

The Government Statement asserted that minerals are the property of the Crown. Control of royalty payments would remain the prerogative of Government. However, the Government recognized that a share of its revenue from royalties should be directed towards the welfare of Aboriginal people. The Government wished to develop a system where all landholders have equal rights in relation to mining and prospecting. No Aboriginal veto of exploration or mining would be permitted.

THE ABORIGINAL LAND LEGISLATION

After issuing its Statement of Principles the Government established a committee to settle the legislation necessary to implement them.

The legislation was drafted by Parliamentary Counsel but with extensive input from the committee which was chaired by Mr. Graham McDonald, a Perth solicitor with a great deal of experience in Aboriginal matters and who had acted as the Assistant Commissioner in the Seaman Inquiry into Aboriginal Land Rights. Participating on the Drafting Committee were representatives from the mining industry (Chamber of Mines, Australian Mining Industry Council and Association of Mining and Exploration Companies), the petroleum industry (APEA), the rural industry (Pastoralists and Graziers' Association and Primary Industry Association), the Commonwealth (Department of Aboriginal Affairs) and various Aboriginal organizations (including the Aboriginal Lands Trust, the Aboriginal Advisory Council and the Federated Land Councils).

At the end of an intense period of settling the draft legislation amongst the Committee (spread over a period of nearly four months) a consensus view was reached amongst members of the Committee and is incorporated in the legislation.

The two major Bills in the legislative package comprised the Aboriginal Land Bill 1985 and the Mining Amendment (No. 2) Bill 1985. They were introduced into Parliament in mid-March 1985 together with the Acts Amendment (Aboriginal Land) Bill 1985 which proposed to effect necessary consequential amendments to the Aboriginal Affairs Planning Authority Act 1972, the Conservation and Land Management Act 1984, the Land Act 1933 and the Petroleum Act 1967.

The legislation was complex, being both lengthy and detailed. The Aboriginal Land Bill comprised 232 sections (191 pages). The Mining

Amendment (No. 2) Bill comprised only 25 sections (48 pages) but its smaller size was more than made up for by its complexity.

In summary, the provisions of the Aboriginal Land Bill were designed to permit the grant of land. The Mining Amendment (No. 2) Bill was designed to permit access to Aboriginal land for mining purposes.

The legislative package was passed by the Legislative Assembly but was defeated in the Legislative Council, in which chamber the Government is in the minority.

Despite its defeat in Parliament, the legislation is worthy of examination as being a unique example of legislation drafted by a committee representing diverse interests but on which a substantial degree of consensus was achieved. I propose now to highlight the major features of the legislative package.[37]

Vesting of current reserves

Each current reserve for Aboriginal persons or purposes would vest automatically in the relevant regional Aboriginal organization in trust for ultimate distribution to local Aboriginal land corporations. Apart from this automatic vesting of current reserves, certain other land would be available for claim.

Claimable land

Land available for claim falls within the following categories:

(a) vacant Crown Land;
(b) Mission lands;
(c) 'living areas' within pastoral leases (see below).

Land which is not claimable

Land unavailable for claim includes:

(a) private land;
(b) pastoral leases (other than for 'living areas');
(c) land reserved for use by the public as a road, street, highway or stock route;
(d) land leased from the Crown;
(e) mining leases, general purposes leases and miscellaneous licences under the Mining Act 1978 and production licences under the Petroleum Act 1967;
(f) land the subject of ratified State Agreements;
(g) areas of land of mineral potential and petroleum production areas (as declared by the Minister for Minerals and Energy);
(h) forest reserves;
(i) foreshores;
(j) banks or beds of water courses within two kilometres of a public access point.

37 In preparing this summary of the legislative package I was greatly assisted by a summary prepared by Mr. John Stewart (Solicitor, Perth) who represented the Chamber of Mines on the Drafting Committee. I also appreciated Mr. Graham McDonald's assistance in reading this paper and offering comments — although, of course, he accepts no responsibility for its contents.

Land claim procedure

A land claim must be filed with the Aboriginal Land Tribunal. Each claim must be advertised and notice served on interested parties (including the holders of all mining and petroleum tenements which may be affected by a grant of the land).

A public hearing before the Tribunal will then follow and each interested party is entitled to be represented. The Tribunal must ascertain whether:

(a) the claimant has a 'prescribed association' with the subject land (see below);
(b) the claimed land is available for claim; and
(c) the land claim may be granted in such a manner that protects the exercise, use and enjoyment of any existing interest or right and so as to accommodate any probable requirement for the future use or management of the subject land.

The Tribunal is required to make a positive or negative recommendation to the Minister who must then make a recommendation to the Governor as to whether the subject land should be granted or the application should be refused.

Entitlement to claim

Claims may be made by 'Aboriginal land corporations' whose members have entitlements in respect of the land in accordance with 'local Aboriginal tradition'.

'Local Aboriginal tradition' is defined, in relation to an area of land or the seas, as meaning 'the body of traditional observances, customs and beliefs of a community or group of Aboriginals relating to that area'.

Claims can also be made on the basis of associations with the land by reasons of Aboriginal persons having resided on or used the land for substantial portions of their lives, whether or not that residence or use has been continuous. Additionally, claims can be made on a 'needs' basis for specific purposes.

Aboriginal Land Corporations

The scheme of the legislation is to vest title in local Aboriginal groups which would be incorporated under the Aboriginal Land Bill and which would be called Aboriginal Land Corporations.

These corporations must comprise at least seven adult Aborigines. With consent of the registrar, existing Aboriginal associations incorporated under the Associations Incorporation Act 1985 would be able to convert to Aboriginal Land Corporations under the Aboriginal Land Bill.

Regional Aboriginal Organizations

There would be a maximum of ten 'regional Aboriginal organizations' with the State being divided into an equivalent number of regions. These organizations would be granted title to existing Aboriginal

reserves and would be required to hold them in trust for ultimate transfer to 'Aboriginal land corporations'. In respect of land other than reserves, it would be up to an Aboriginal land corporation to apply to the Tribunal for its claim to any land to be considered.

Initially the executive of the regional Aboriginal organizations will be appointed by the Minister. However, after 18 months all will have been selected by the Aboriginals within the region in accordance with their preferred method of appointment.

Form of Title

All Aboriginal land will be held under an 'inalienable' freehold title issued by the Registrar of Titles and recorded at the Titles Office in Perth.

The title would be a 'modified freehold title' which could only be sold or mortgaged with the consent of the Minister who must have regard to strict criteria before giving such consent. Title will not vest in Aboriginal individuals. The aim is to vest title in Aboriginal land corporations although in the short term many areas will be vested in regional Aboriginal organizations.

Granted land would be rateable but cannot be sold if rates are not paid by an Aboriginal land corporation. In that event, the regional Aboriginal organization would be liable to pay the rates. Granted land would not be subject to State Land Tax.

Any grant of land must be made subject to any interest or right affecting the land immediately before the grant and may be made upon such conditions (if any) as the Governor considers necessary in order to protect the exercise, use and enjoyment of any interest or right affecting the land or affecting other land.

Claim Period

The claims procedure is subject to a 'sunset' clause. The 'sunset' is four years but this period has been extended to allow 1½ years for the election or selection of the executive of regional Aboriginal organizations. Thus, there would be a maximum period of 5½ years from proclamation of the legislation in which any eligible Aboriginal land corporation may make a claim for the grant of land.

Access to Aboriginal land

Access for grass roots exploration or marking out of a mining tenement would be by way of a permit issued by the mining registrar or warden. If either refuses to grant a permit, the applicant has a right of appeal to the Minister.

Granting of a permit may be subject to conditions in respect of social and behavioural matters which may vary from region to region. The term of a permit would be a maximum of four months but it may be renewed on any number of occasions. A bona fide explorer may be granted exemption by the Minister from the need to obtain a permit. A permit may be revoked if the holder utilizes it without good faith.

Access to Aboriginal land for all other purposes will be subject to the normal laws of trespass. The existing entry permit system under the Aboriginal Affairs Planning Authority Act 1972 (mentioned earlier in this paper) will be phased out over a 5½ year period.

The position regarding applications for mining and petroleum titles

The areas of land, the subject of pending applications for mining and petroleum titles, would be claimable. However, if a successful land claim is made, the title in respect of the relevant areas would be held in escrow until such time as the application for the title is either refused or, if granted, until such time as the Minister for Minerals and Energy declares that the area is no longer required for mining.

Whilst any such title is held in escrow the holder of the mining title can proceed to any 'follow on' titles (*e.g.* converting a prospecting licence to a mining lease) as if the grant of the land to the Aboriginal land holder had not been made.

Obtaining tenements on Aboriginal land

There is no power of veto in the Aboriginal land holder over mineral or petroleum exploration or production on Aboriginal land. The principle of Crown ownership of minerals has been preserved.

It would be possible to obtain a mining tenement on granted Aboriginal land by following the proper procedures.

Once an application for a tenement is made, the applicant must serve notice of it on the Aboriginal land holder (either the Aboriginal land corporation or the regional Aboriginal organization) within 21 days and affix a copy of the application on the subject land.

The application for the mining tenement would then be heard by the warden in open court in the normal manner.

Objections against the grant of an application cannot be heard by the warden if the basis of the objection is:

(a) that the land should not have been granted as Aboriginal land;
(b) that, being Aboriginal land, the land should not be used for mining;
(c) that, being Aboriginal land, title to the land should not have been granted to that particular Aboriginal land holder;
(d) that the effects of the mining would be detrimental to the use of the land by Aboriginal persons; or
(e) any other matter in respect of which recommendations may be made by the Mining Compensation Tribunal.

Upon having heard the matter, the warden is required to make a recommendation to the Minister for Minerals and Energy as to whether the tenement should be granted.

The relevant Aboriginal land holder may, within a period of 60 days after service of the notice of the application or 30 days after the warden's recommendation (or such other period as may be agreed or determined by the Minister) forward a 'Notice of Aboriginal Interest' to the applicant.

A 'Notice of Aboriginal Interest' is required to set out:

(a) the location of any Aboriginal residential areas;
(b) the location of any dam, bore or waterhole;
(c) the location of any other improvements;
(d) the location of any cemetery or burial ground; and
(e) the location of any area of special significance to Aboriginal persons and onto which entry should be either prohibited or made subject to conditions.

If the parties are able to reach an agreement a copy of that agreement must be filed with the mining registrar. The process of granting the relevant tenement then proceeds in the normal manner.

If the parties cannot reach such an agreement within 60 days of the service of the 'Notice of Aboriginal Interest', either party may refer the matter to the Mining Compensation Tribunal for hearing. The applicant for the mining tenement has a right to seek an expedited hearing before the Tribunal.

The Tribunal is recommendatory only with the exception of matters relating to compensation in which it will have a decision making role. The Tribunal must have regard to the public interest in the facilitation of mineral exploration and mining as well as the need to protect areas of special significance to Aboriginal persons.

Where the applicant for the tenement and the Aboriginal land holder do not conclude an agreement a mining tenement may be granted:

(a) by the Minister for Minerals and Energy if the Mining Compensation Tribunal recommends the grant without any prohibitions; or
(b) by the Minister subject to the concurrence of the Governor if the Tribunal recommends the grant subject to any prohibitions.

Once a mining tenement is granted on Aboriginal land, the conditions applying to it or to any renewal of it continue to apply unless there is a substantial extension or significant alteration in the exploration or mining programme and there is a change in development proposals which will result in loss or damage to improvements or to an Aboriginal residential area. In such event the Aboriginal land holder may request the Minister for Minerals and Energy to review the applicable conditions.

If the holder of the mining tenement considers that any such conditions are likely to impede mining, that holder may apply to the Minister for a review of the relevant conditions and the Minister is empowered to review such conditions and direct that they be varied.

Any review of conditions or restrictions is not permitted to increase, either in quantity or size, the locations within Aboriginal land where exploration activities or mining operations are prohibited or made subject to conditions.

Compensation

No compensation is payable or claimable in respect of the value of any mineral which is or may be on or under the surface of any land or in relation to any loss or damage for which compensation cannot be assessed

according to common law principles in monetary terms (*i.e.* there will be no compensation payable or claimable for 'spiritual matters').

The compensable items will be:

(a) for being deprived of the possession or use of the natural surface of land;
(b) for damage to the natural surface;
(c) for severance of land from any other land used by the same land holder;
(d) for any loss or restriction of a right of way or easement;
(e) for loss or damage to improvements;
(f) for 'social disruption' (see below);
(g) for any proper expense reasonably incurred in reducing or controlling damage resulting or arising from mining.

Social disruption is not taken to have occurred in relation to any Aboriginal residential area unless there is a substantial diminution of or substantial interference with:

(a) the right of the members of an Aboriginal land corporation and their families to reside on the residential area;
(b) their reasonable comfort in and enjoyment and peaceful and quiet occupation of that residential area; or
(c) the use of any structures or improvements thereon.

An 'Aboriginal residential area' is defined to mean an area of Aboriginal land permanently or regularly occupied for residential purposes and for their ancillary domestic, social or community needs by Aboriginal persons and their families who occupy the land as members of, or with the express or implied consent of, the Aboriginal landholder.

In general terms, the compensation provisions are similar to those applicable to the compensation payable to holders of pastoral leases.

Areas of mineral potential and petroleum production areas

The holder of a mining tenement or the holder of a petroleum production licence may apply to the Minister for Minerals and Energy for a declaration of an 'area of mineral potential' or a 'petroleum production area'.

For an area of mineral potential to be declared, the Minister must be satisfied that the relevant area contains mineralization that has the potential to become or form part of an ore body of significance to the economy of the State, whether in the short term or long term, and that the capacity to develop that area would be impaired if rights were conferred on Aboriginals in respect of that area.

For a petroleum production area to be declared, the Minister must be satisfied that the relevant area is for the time being, or will in the near future be, required for the construction, installation or operation of works for the recovery of petroleum or for purposes ancillary to it.

In the event that such a declaration is made, the subject area becomes 'land set aside for development'. No Aboriginal land application can be made for or in respect of land set aside for development.

Seas

The Governor would be empowered to make regulations enabling specified Aboriginals to enter and use seas contiguous with existing Aboriginal reserves in the North West of Western Australia. Such regulations cannot regulate access to or conduct in a particular area to a greater extent than the Governor considers necessary to enable that area to be used in accordance with local Aboriginal tradition nor so as to prevent the transit of a vessel through that area or interfere with the enjoyment of any interest or right which a person has in respect of that area.

An application can be made by an Aboriginal land corporation which holds Aboriginal land contiguous to the particular area specified in the application or a regional Aboriginal organization on behalf of Aboriginals who have entitlements in accordance with local Aboriginal traditions to use the seas proposed to be specified in the regulations.

All interested parties will have a right to object to any application before a hearing by the Tribunal.

In the case of the seas, no title will be issued to an Aboriginal land corporation. Any rights granted to Aboriginals in respect to the sea cannot derogate from the provisions of the Mining Act 1978, the Petroleum Act 1967 or the Petroleum (Submerged Lands) Act 1982 nor affect the operation of any licence under the the Pearling Act 1912.

Access for hunting, fishing, *etc.*

The Governor may by order grant to specified Aboriginals a right to enter any specified land to hunt or fish for or gather food for domestic purposes provided they can show a traditional entitlement to do so.

These provisions apply to 'public land', *i.e.* any unallocated Crown land and land to which the Conservation and Land Management Act 1984 applies.

The normal rights of objection apply and any application for rights of this nature is heard by the Aboriginal Land Tribunal which is required to make a recommendation to the Minister.

Living areas on pastoral leases

Pastoral leases are available for the grant of one living area if the pastoral lease is used primarily for the grazing of sheep and two living areas if the pastoral lease is used principally for the grazing of cattle.

A living area is an area of land for the use of members of an Aboriginal land corporation and their families to meet their residential and domestic requirements including appropriate social or community needs.

Claimants must have a prescribed association with the particular land in accordance with local Aboriginal tradition and, again, the normal rights of objection apply with a hearing before the Aboriginal Land Tribunal and a recommendation to the Minister.

A pastoral lessee is entitled to be compensated by the State in respect of the grant of any living area, the compensation being assessed in accordance with the Public Works Act 1902.

No excision of a living area may be made if it would unreasonably affect the economic viability of the pastoral lease.

Special management areas

The Governor may by order declare any national park, nature reserve, marine park or marine nature reserve to be a 'special management area' and may appoint a management committee to have the functions set out in the Conservation and Land Management Act 1984.

The Minister may cause a lease to be granted to specified Aboriginal persons in respect of any special management area where such Aboriginal persons can successfully prove to the Tribunal that they have entitlements in respect of such area in accordance with local Aboriginal tradition or associations with the land by reason of having resided on or used the land for a substantial portion of their lives.

The normal rights of objection before the Tribunal apply and the Tribunal is obliged to make its recommendations to the Minister.

Tribunals

There would be two Tribunals exercising functions under the Aboriginal land legislative package:

(a) the 'Aboriginal Land Tribunal' constituted under the Aboriginal Land Bill; and

(b) the 'Mining Compensation Tribunal' constituted under the Mining Act.

The Commissioner of the Aboriginal Land Tribunal would be a Supreme Court Judge. The President of the Mining Compensation Tribunal would be a District Court Judge.

In both cases, appeals lie to the Supreme Court on questions of law.

The role of the Mining Compensation Tribunal goes beyond the matters the subject of the Aboriginal Land legislative package. It has the task of assessing compensation not only in respect of Aboriginal land but also in respect of private land and pastoral land under the Mining Act.

Commonwealth legislation

The Aboriginal Land Bill provides that the Governor shall repeal it and revest Aboriginal land in the Crown should the Commonwealth Government enact a law conferring Aboriginal land rights in Western Australia or conferring rights, powers or privileges in relation to Aboriginal land additional to those conferred by State legislation.

CONCLUSION

In my view, the Burke Government has tried to introduce a sensible, practical and moderate system of Aboriginal land rights with commendable realism unclouded by the politically unattainable and practically undesirable objectives advocated by many of the proponents of Aboriginal land rights.

In my opinion, it is unfortunate that the legislation was defeated. The consequence may be a Federal uniform land rights scheme which will not suit the mining and petroleum industries of Western Australia and which, I think, will be politically and racially divisive.

My hope is that the Federal Government will have regard to the principles of the Western Australian Aboriginal land legislative package in the drafting of any national legislation.