THE ATTITUDE OF THE MINING INDUSTRY COUNCIL TO ABORIGINAL LAND RIGHTS

By James Strong*

Firstly, it is necessary to examine briefly the early origins of Aboriginal land rights in Australia to give some perspective to the continuing debate, and to avoid being transfixed by the *status quo.*

Secondly, it is important to understand that mining industry comments on policy and legislation in the area of land rights concentrate upon the fundamental issue for that industry — access for exploration and mining to land which may be granted to Aboriginal ownership. This is only one aspect of land rights, but the critical area for the mining industry.

Thirdly, too much of the discussion on Aboriginal land rights and its effects on mining is conducted at an abstract level, as broad principles or philosophy. The mining industry has found to its regret that broad principles mean different things to different parties, and an apparent understanding or expectation of the way in which broad principles will work does not always produce the same results in practice.

This paper directs attention to practical effects of policies and legislation and their results, to focus attention on these realities.

HISTORY

Gove Land Rights Case

Government action to transfer land from Crown ownership to Aboriginals had its genesis in what has become known as the 'Gove Land Rights Decision' in 1971 by Mr. Justice Blackburn in the Supreme Court of the Northern Territory.

Important extracts from the summary of that case are as follows:

> Held . . .
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> (3) In the circumstances of the case, the natives had not established that, on the balance of probabilities, their predecessors had, at the time of the acquisition of their territory by the Crown as part of the colony of New South Wales, the same links to the same areas of land as those claimed by the natives.
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> . . .
>
> *The doctrine of communal native title contended for by the natives did not form, and never had formed, part of the law of any part of Australia.* Such a doctrine has no place in a settled colony except under express statutory provisions.
>
> Throughout the history of the settlement of Australia any consciousness of a native land problem inspired a policy of protection and preservation, without provision for the recognition of any communal title to land.
>
> . . .
>
> However, *the relationship of the native clans to the land under that system was not recognizable as a right of property* and was not a 'right, power or privilege over, or in connexion with, the land' within the meaning of the definition of 'interest' in land

* Barrister N.S.W., Executive Director of the Australian Mining Industry Council.

> contained in s. 5 (1) of the Lands Acquisition Act 1955-1966, relating to the acquisition of land on just terms.
>
> The natives had established a recognizable system of law which did not provide for any proprietary interest in the clans in any part of the areas claimed.[1]

These findings by Mr. Justice Blackburn on the strict application of 'European law' meant that the Aboriginals did not have title to the land.

Therefore if Aboriginals were to be given title to areas of land under 'Australian' law, it would be necessary to enact special legislation enabling the Government to make grants of such land.

Woodward Commission

The 1971 ALP Conference in Launceston introduced Aboriginal land rights into the ALP Platform.

In 1973 the then Federal Labor Government led by Mr. Whitlam appointed Mr. Justice Woodward as a Commission to inquire into and report upon:

> The appropriate means to recognise and establish the traditional rights and interests of the Aborigines in and in relation to land, and to satisfy in other ways the reasonable aspirations of the Aborigines to rights in or in relation to land, and in particular, but without in any way derogating from the generality of the foregoing:
> (a) arrangements for vesting title to land in the Northern Territory of Australia now reserved for the use and benefit of the Aboriginal inhabitants of that Territory, *including rights in minerals and timber*, in an appropriate body or bodies, and for granting rights in or in relation to that land to the Aboriginal groups or communities concerned with that land; . . .[2]

RESULTS OF 'WOODWARD' LEGISLATION

The Right of Veto

Mr. Justice Woodward used this term in his report, and based his whole approach on a phrase which, from a mining industry point of view, was perhaps the most significant aspect of the entire findings, and one which has echoed throughout the ensuing eleven years.

> I believe that to deny to Aborigines the right to prevent mining on their land is to deny the reality of their land rights[3]

In his summary of recommendations, Mr. Justice Woodward included the following:

> (i) Minerals and petroleum on Aboriginal lands should remain the property of the Crown.
> (ii) However Aborigines should have the *right to prevent* exploration for them on their traditional lands.
> (iii) This Aboriginal power of veto should only be over-ridden if, in the opinion of the Government, the national interest required it.[4]

1 *Milirrpum v. Nabalco Pty. Ltd.* (1971) 17 F.L.R. 141, 142 (emphasis added).
2 *Aboriginal Land Rights Commission Second Report* (April 1974) (Woodward Report) 1 AGPS (emphasis added).
3 *Ibid.* 103 (emphasis added).
4 *Ibid.* 122 (emphasis added).

However, there is no such legislative provision as a veto. This is merely a shorthand phrase. Instead, the existing Northern Territory legislation prevents any access without Aboriginal consent. This *requirement of consent* empowers Aboriginals to 'veto' exploration and mining.

The effect of section 40 of the Aboriginal Land Rights (Northern Territory) Act 1976 is that a mining interest on Aboriginal land will not be granted unless the Land Council for the area in which the land is situated has consented.

Effects of Land Rights Legislation

There is clear factual evidence to illustrate the paralysis of exploration and mining where land has been granted to Aboriginals under legislation based upon the recommendations of the Woodward Report.

It is well known that a Government freeze on such activities operated up to mid-1981. Since the end of that freeze 42 mining companies have been offered, by the Northern Territory Government, 165 mining exploration licences.

However, up to early 1985, not one single agreement had been fully negotiated with Aboriginal owners. Not one.

Much has been made of the fact that mining agreements have been reached on Aboriginal land in the Northern Territory using the Gove Project, Groote Eylandt, Ranger and the Granites as examples. All of these projects are based on mining titles existing before the Land Rights Act came into force. Aboriginals did not have a right of veto over them. These cases give no support to those who seek to use them as examples of successful negotiation under that law.

Defenders of the legislation say that the mining companies have not been interested in seeking to reach agreements. It is accepted that not every one of the companies has been in a position to proceed. A survey of the 42 companies revealed that half of their number were willing to negotiate, and half of those had received notifications from Land Councils of willingness to negotiate. Clearly, these statements cannot explain away no new agreements in four years.

Exploration activities in the Northern Territory have fallen dramatically over the last three years. Expenditure figures are:

1981/82	$32 M.
1982/83	$25.6 M.
1983/84	$11.8 M.

Again, defenders of the legislation try to attribute this slump to the poor market prices for mineral commodities. However, the national average decline in expenditure on mineral exploration was about 5% compared with the Territory's fall of the order of 60%.

From any perspective, the granting of large areas of land in the Northern Territory to Aboriginal ownership on the terms of the Aboriginal Land Rights (Northern Territory) Act has had a severe and harmful effect on the industry which constitutes one of the largest revenue earners for the Northern Territory and which has vast potential for growth to increase

Government tax receipts, to stimulate the general Northern Territory economy by flow-on economic activity and to create jobs.

In South Australia, the only real test of the Pitjantjatjara legislation resulted in an oil exploration company walking away from grossly excessive demands for compensation and the uncertainty of a new form of arbitration on such demands.

In summary, mining companies are being put off by long delays, frustration, uncertainty as to future title, as to terms and conditions, and increased costs.

Aboriginal land presents an unattractive alternative to other land where such impediments do not exist, either in Australia or overseas.

NEED FOR RE-ASSESSMENT

The Crossroads

Events during the last year have brought us to a critical decision point (or crossroads) in this complex and difficult area. Governments, and the Australian people, have before them a clear picture of an unsuccessful policy approach in the past, which has caused severe economic harm to a large area of Australia, the Northern Territory. They have to face up to that reality. By any test, the impact of present rules governing exploration and mining on Aboriginal land has been extremely detrimental.

That has occurred because an unrealistic view was taken a decade ago of the ability of legislation to provide a system to reconcile the ideal of Aboriginal control over land granted to them by Government, with the important contribution mining development had made to Australia's economy and the need for this to continue. The system wanted both, but achieved something else — an unworkable system of delays and frustration with little benefit to Aboriginals and stagnation of an industry which is one of the mainstays of the economy of the Northern Territory, and Australia.

Why? Because in seeking to take into account the ideal of Aboriginal control over land to protect spiritual and cultural aspects it created what is, and can only be, a legal/commercial system which leaves virtually total negotiating power in the hands of Aboriginals and their advisers. In fact Government ceded its control over the development of the mineral resources, which belong to the Government.

It hoped to create a system where the law would provide a framework for parties to negotiate workable arrangements. By the only true test, that is, practical results, it has failed. Instead it gave such a degree of control and tactical advantage to Aboriginals and those representing Aboriginals in a legal/commercial sense, that negotiations have not resulted in progress, and there has not been balanced development.

As a result more and more companies are 'voting with their feet' and abandoning the Northern Territory. When this is combined with the growing areas of environmental restrictions in the Northern Territory, the mining industry is being choked by rapidly growing obstructions to access to land for exploration. The impediments are forcing companies away to other land which has easier access, in Australia or elsewhere.

This is what is happening to an industry which last year earned 44% of Australia's export income, over 11 billion dollars, and paid 63% of its profits (before tax payable and resource taxes are deducted) to Governments — over 1 billion dollars. An industry whose difficult economic conditions are being compounded by Government restrictions and controls to make it even more difficult to be internationally competitive. An industry which occupies a small fraction of 1% of Australia's total land mass, an industry which practices good environmental management and is subject to the most rigorous controls before development can take place, by way of exhaustive environmental impact and feasibility studies, and multiple Government approvals. An industry which has always accepted the need to protect Aboriginal sites of significance and living areas, and the need to compensate for loss or damage resulting from exploration or mining.

The realities are a legal/commercial system and very complex legislation which are harming the mining industry, but not achieving original idealistic aims.

Growing Awareness of Problems

During 1985 a series of events crystallized to Governments the problems resulting from the Northern Territory legislation, and the need to re-examine that legislation.

In this context, it is interesting to refer back to some comments by Mr. Justice Woodward.

> Future review of arrangements
>
> In arriving at these recommendations, I have experienced great doubt on a number of issues — particularly those relating to mineral rights and to traditional claims in pastoral lease areas. Although I believe the steps recommended to be those most likely to achieve the aims set out at the beginning of this report, there must be uncertainty as to the way in which many of the proposals will turn out in practice.[5]

In 1984 it became clear that developments in the Northern Territory, and the approach being adopted by the Western Australian Government, had precipitated a review of Commonwealth Government policy in this area.

One interpretation of those developments by a commentator was as follows:

> What happened? Broadly, controversy over Aboriginal land rights got closer to the homes of those who vote. The debate was no longer restricted to an exotic argument between distant miners and Aboriginals over the control of apparently worthless desert.
>
> ...
>
> ... Northern Territory experience had shown that access negotiations had become intolerably lengthy, costly, and open-ended. ... Consequent upon this was the possibility that the contribution of mineral production to Australia's balance of payments might be circumscribed, thus eventually affecting the value of Australia's currency, and the standard of living of all of its population, Aboriginal or otherwise.
>
> ...

5 *Ibid.* 132.

> In Canberra, the view that the mining industry could easily absorb the added costs of land rights was based on ignorance of the returns to mining investment.
>
> More importantly, few governments thought hard about what the Woodward approach might mean for the electorate.[6]

Whatever individual interpretations may offer as the reasons, it is clear that significant developments occurred in 1984.

Western Australian Draft Legislation

Late in 1984 a set of Bills was drafted in Western Australia with the assistance and advice of interested parties in a Government-sponsored working group. It is now a matter of record that those Bills were rejected in the W.A. Upper House. However, the considerable effort of the parties in Western Australia in tackling the detailed practical aspects required for legislation was a valuable contribution. It resulted in a set of rules which the mining industry said it would accept as workable to govern access to Aboriginal land for exploration and mining, if the W.A. Government granted the land to Aboriginal ownership. In other words, it produced an alternative to the Northern Territory approach.

It is important to note that it was a fundamentally different approach in terms of a Government making a policy decision which governed all subsequent rules, rather than having no clear policy, and leaving each case to be fought out case by case, as proposed by the later Federal Model (see later comments).

The policy decision taken by the W.A. Government accepted the importance of mining to the whole community, and its legislation was based on the W.A. Government's policy that exploration and mining would proceed, with appropriate protection for Aboriginal sites of significance, Aboriginal living areas and compensation for actual damage caused.

Contrasting Federal Approach

On the other hand, the Federal Government continues to refuse to look at the problem from any perspective other than the *status quo* of the existing Northern Territory legislation, and how far it can claw back that unsuccessful regime.

In doing so, the Federal Government still states its recognition of the need for exploration and mining to proceed. If it is Government policy for exploration and mining to proceed, the legislation should be based on that premise, and concentrate on appropriate protection for Aboriginal people including sites of significance, living areas and compensation.

Need for Fresh Approach

If the Federal Government is proposing new laws which will make it possible for vast areas of Crown land throughout every State in Australia to be claimed as Aboriginal land, it should not apply rules governing access to

6 Duncan T. in *Policy Issues No. 1 — The Land Rights Debate: Selected Documents* (1985) 2 Institute of Public Affairs.

that land for exploration and mining which will effectively lock up that land to a large extent and thereby significantly inhibit Australia's potential for future mining development, with vital export earnings, huge Government taxation revenues, economic stimulation via private investment and creation of jobs, with flow-on to other sectors.

It is the crossroads for Governments to review what is a fair basis for conditions attaching to that land, given the need for balance in Government policies, between a desire to assist Aboriginal people (and still grant them land), and the essential contribution of mining to Australia's economic future.

If Australia passes this point and continues down the same path of a demonstrably disastrous legislative approach, it will be nearly impossible to change course if those rules have been extended beyond the Northern Territory throughout Australia.

It is the considered view of the mining industry that the Commonwealth proposals, whilst touching upon most of the mining industry's concerns as expressed previously to the Government, deal with those concerns in a way which had been specifically indicated by the industry in previous discussions as being unsatisfactory, and not capable of resolving the problems shown by practical experience to have virtually paralysed exploration and mining on Aboriginal land in the Northern Territory and South Australia, to the detriment of those areas.

PROPOSED NATIONAL LEGISLATION

Federal Government Reaction — National Model

Confronted with this growing dilemma, the Federal Government has reacted by attempting to improve that system, but at the same time, to extend it to every State throughout Australia.

The mining industry is extremely unhappy about that approach because:

- firstly, the mining industry does not believe Government has faced up to the realities of the imbalance in the legal/commercial system it has created and therefore its proposed improvements will not solve the fundamental problems which have emerged; and
- secondly, the mining industry views with dismay the proposal to extend that unsatisfactory system, apparently with or without State Government co-operation, to the rest of Australia.

At the very least, the Federal Government should accept responsibility for making the Northern Territory system workable, and demonstrate that it is workable, before even considering thrusting it upon any other part of Australia. There is no logic in Government's headlong rush to impose an unhappy experience on State Governments who are faced with the task and responsibility of managing the mineral resources which they own on behalf of all the people in their respective States.

This is the crossroads or critical decision point for Governments on the important and sensitive issue of land rights and access to Aboriginal land for exploration.

Current Position of the Mining Industry

The Federal Government is aware by virtue of detailed responses from every State mining organization and from AMIC, the mining industry is opposed to:

(1) the whole concept of Federal legislation, *and*
(2) the fundamental principles of the 'Preferred National Land Rights Model'.

This opposition is based on real fears as to the potential impact of such an approach on the future of the industry.

Concept of National Legislation

An interesting statement to begin the discussion of Federal/State aspects is set out below:

> To acquire land compulsorily or to impose a system of land administration upon an unwilling State would be politically, legally and administratively difficult. Under the Australian Constitution it would also involve compensation to be paid to the State. It would invite confrontation and divisiveness which could harm not only the interests of the wider community but also the long-term interests of the Aboriginal people who are dependent on the State Governments for a wide range of services.[7]

Constitutional Chaos

Minerals in the ground vest in the Crown in right of the State Governments and of the Northern Territory. In other words they are owned by the Government on behalf of the community, which benefits substantially from taxes generated by mining development (over $1 billion in 1983–1984 excluding petroleum).

State Governments have long-established laws which control and govern access to minerals for exploration and development. Those laws require consultation, prevent the digging up of homes, buildings, improvements, living areas *etc.* and provide for compensation.

Federal Aboriginal land rights legislation would superimpose a complete new layer of regulation over the State system. More importantly, the Commonwealth proposals are so unclear as to how any legislation would interact with the position of State Governments and their policies and legislation relating to Aboriginal land as to cause the industry to believe that it would be left with 'the worst of all worlds' and possibly caught in an inter-governmental conflict.

There has been no clarification of the form, structure or method of application of the proposed national legislation. Any mining company could well be faced with conflicting requirements from a State Government, which owns the minerals and grants the mining title, and the Commonwealth Government which controls mining by indirect methods such as export licences.

7 Department of Aboriginal Affairs *Aboriginals in Australia Today* (1982) 8 AGPS.

Position of the States

What is likely to be the attitude of the various State Governments to national legislation, and to any attempts to impose uniform legislation on them?

Queensland has made its total opposition very clear.

Tasmania appears to have a similar attitude.

Western Australia made very clear its inability to accept important aspects of the Federal proposals, the main disagreement being over those aspects relating to access for exploration and mining.

New South Wales has stated publicly its opposition to the Model legislation because it would upset the balance of its own existing laws.

In South Australia, any national law would extend land rights legislation to all Crown lands, whereas currently only two specific Acts cover the Maralinga and Pitjantjatjara lands.

Victoria has spent two years trying to draft its own laws, on a different basis to the Federal Model.

That leaves only the Northern Territory, where any improvement in the existing law would be welcome. However, the Government has made plain its preference for the Western Australian draft legislation.

Opposition to National Legislation

The numbers of Aboriginals in every State of Australia vary, as does the amount of land available for grant to them, as does the continuity of their occupation of land.

Various State Governments have legislated, or are examining legislation, with an overall approach to suit the particular circumstances of their State.

National legislation:

- is not necessary;
- will cause constitutional difficulties;
- will contradict and derogate from State laws;
- will result in greater complexities, increased litigation and increased costs.

If the Commonwealth law seeks to 'cover the field' it may invalidate any State law in its entirety.

If the Commonwealth law is 'compatible', to the extent that it contains the same prescriptions, it is superfluous and unnecessary. To the extent that it is not coincidental, it will 'top up' State legislation if it is more beneficial. If it is less beneficial, it will be of no effect.

The Model contains a statement that the Federal legislation will 'add rights to those accorded under State laws where necessary.' This is a very unacceptable concept. It would seem to mean that whatever the overall balance of a comprehensive scheme of State legislation, the Commonwealth law would simply add further rights or benefits in any particular area where its provisions are more beneficial than the State law. It would not take away from rights or benefits, as it would not operate where less beneficial than State laws.

That is, it would have an eclectic effect, giving 'the best of both worlds'.

Such an approach would contradict the efforts of any State Government to legislate a package of measures judged to suit local circumstances in that State.

It is not clear where the burden of any increased cost or greater obligation would fall if resulting from Federal legislation.

In summary, the mining industry throughout Australia is totally opposed to the concept of national legislation. When faced with the possible extension of unacceptable principles from the Northern Territory to the rest of Australia's land mass, the industry must treat this as a very serious situation and act accordingly.

Crown Ownership of Minerals

The Commonwealth has treated this aspect as though it was an important development.

The Model proposals do not contain any change in this concept. Minerals on-shore have always vested in State Governments and the industry and the Commonwealth Government apparently agree on the need to reaffirm this principle.

However, its practical importance is that Aboriginal land legislation should not allow Aboriginals to exercise powers *as if they owned minerals* by controlling access and demanding a share of mineral values as compensation for access. Instead Governments should continue to control and be responsible for mineral exploration and development on behalf of the general community, whilst providing protection for Aboriginal sites and living areas. The Commonwealth proposals have not addressed properly those questions of access and compensation, as illustrated later.

It is interesting to note that in his Discussion Paper issued in January 1984, Mr. Paul Seaman, Q.C., when conducting the W.A. Aboriginal Land Inquiry, made the following observation:

> 6.12 At the moment it seems to me that the reservation of the minerals to the Crown in the Northern Territory legislation has limited meaning. Any person who has an absolute power of veto over mining would try to bargain for a price for his consent to mine which reflected to some extent, the value of the minerals. An agreement of that sort might express the price in terms of compensation or royalties merely because they are convenient descriptions of the outcome of complicated negotiations.[8]

By way of interest, Mr. Justice Woodward made the following remarks on Crown ownership:

> There are however . . . important areas in which I do not feel able to recommend that the Aboriginal claims should be granted in full. These relate to the ownership of minerals, . . .
>
> . . . I do not see the granting in full of the claims as being necessary for the protection of any important Aboriginal interest.[9]

8 Seaman P. Q.C., *W.A. Aboriginal Land Inquiry* 40 Discussion paper.
9 Woodward Report 3.

And later:

> I have stopped short of recommending Aboriginal ownership of minerals for several reasons. The chief of these is my belief in the general approach adopted in this country that minerals belong to all the people. . . .
>
> Secondly, I think that the legitimate objectives of Aborigines in this connexion would be met if the recommendations I have made were accepted. To go further would be unnecessarily divisive and could lead to reactions among other members of the community which, in the long term, would not be in the best interests of Aborigines.
>
> Thirdly, the whole of Australian mining law is based on the assumption that minerals belong to the Crown. To provide otherwise in a particular case could well create problems and sorting these problems out could delay necessary legislation[10]

Retention of Initial Veto

As described earlier, Aboriginals have been able to prevent mining in the Northern Territory by a prescription requiring Aboriginal consent to the grant of any mining title. This concept of Aboriginal landowners having a right to refuse consent is perpetuated by the national Model. The new aspect added by these proposals is that after a certain time period, a Tribunal may review either a refusal of consent by Aboriginals, or unreasonable conditions attached to a consent. Having given Aboriginals the right to refuse access, the legislation would construct a cumbersome mechanism whereby a Tribunal and/or the Minister could override that refusal.

De Facto Veto

Within its national Model the Commonwealth set out the following statement:

> 9.3 Mechanisms to resolve disputes over access to Aboriginal land not to constitute a de facto veto[11]

Unfortunately, the Commonwealth has never defined what it would consider to be a *de facto* veto.

The mining industry has made it clear that it considers a *de facto* veto to be any procedure required before gaining access to land which is likely to cause such delay, extended court proceedings, legalities, repeated negotiations, increased costs and uncertainties as to deter exploration and mining on that land.

The mining industry considers the Model provisions amount to a *de facto* veto. They give power, by legislation, for Aboriginals to refuse consent to access, which may only be overridden by a process of going to a Tribunal. If access is going to occur it requires the Tribunal, after hearing (probably) lengthy argument on the spiritual and cultural justifications for the denial of access, to reject that submission and recommend access to the Minister and/or for Aboriginal owners.

Practical experience shows that any requirement for consent becomes inextricably interwoven with claims for compensation and

10 *Ibid.* 110, 111.
11 Commonwealth Government *Preferred National Land Rights Model* (1985) 8.

conditions. It is a powerful bargaining weapon and would not be greatly diminished by the possibility of an 'appeal procedure' requiring Tribunals or Governments to overturn specific Aboriginal objections based on broad spiritual or cultural grounds.

Any opposition in a Tribunal system (by Aboriginal groups) to access onto their land is most likely to be based on spiritual/cultural/social ground with extensive anthropological and other evidence. This would create extreme difficulties for a Tribunal to recommend overriding those Aboriginal wishes on the basis of economic benefit to the State or area. The Minister or Government will be placed in the same position in considering the recommendation, and extreme public pressure is likely in individual cases. Repeatedly, if the Government wishes development to proceed, it will have to override the initial right it purported to give to Aboriginals to refuse access.

The mining industry believes this approach is likely to increase confrontation between the mining and Aboriginal communities via Tribunal hearings and in addition, drag the Government into that conflict, if the Government wants mining to go ahead.

The 'case by case' approach means constant agonising over the rights of the parties and the balance of interests.

Aboriginal Support for Mining

The mining industry is told that this view of the Tribunal mechanism is unduly pessimistic, and Aboriginals now support mining and recognize its potential value to them.

Firstly, all laws have to be examined from both an optimistic and pessimistic view, the latter being necessary to show the extent of risk involved in deciding whether to commit funds. Investments are made in mining for the purpose of earning a reasonable return on the funds. An unduly optimistic attitude does not usually return good dividends.

Secondly, where is the evidence of Aboriginal support for mining? The only mining projects operating in the Northern Territory were not subject to Aboriginal veto.

In addition those finalized after the Northern Territory Act commenced entitled Aboriginals to claim unrestricted compensation. Aboriginals may well favour mining development, provided it is at the right price, as the current Act allows. If the rules of compensation are to be changed, as the Government appears to intend, Aboriginal attitudes may change.

It should now be clear that Australia's mining industry is struggling to stay competitive, and every additional cost, putting Australia at a disadvantage, makes that task more difficult.

Compensation

This is a most important issue as it goes to the basic viability of mining. The Commonwealth claims to have solved the industry's problems in this area. The Commonwealth Model provides that compensation is not to take into account or have regard to the value of

minerals proposed to be mined. This may prevent a mathematical royalty formula for compensation, but it does not place any other limitation. Normal compensation for exploration and mining is based on making good any damage caused and loss of use of land.

However the Commonwealth proposals specifically provide for damages based on spiritual and social factors which are not measurable by any economic formula.

> 9.15 In determining compensation for actual damage payable to Aboriginal people under a mining agreement, the Tribunal to have regard to any special sensitivity involved in the relationship of the land for the Community and to loss or damage (social or spiritual) suffered or likely to be suffered by the Aborigines affected . . .[12]

This approach perpetuates the ability of Aboriginal groups to claim unlimited compensation on grounds which are incapable of economic measurement or assessment. Ambit claims will be encouraged and the trend will be to the maximum possible amount the particular project can bear, regardless of the impact of the work or the actual damage caused. This is contrary to all concepts of compensation for use or damage to land.

Broad statements that compensation will not be based on the value of the minerals do not confine the possible extent of demands in any way. The prospect of arbitration on large claims is viewed with trepidation, given the classical arbitration experienced when faced with ambit claims. It is not clear what mining royalty equivalents (paid to Aboriginals by Government), are meant to compensate for, if not special Aboriginal circumstances.

Protection of Existing Mining Titles

Although the Government considers it has given adequate protection in the Model to existing tenements, the mining industry considers the position to be most unsatisfactory. No protection is given to an application for a mining title. An exploration or mining lease in existence when land is claimed and granted to Aboriginal owners will be protected and will not require negotiation of terms and conditions or compensation.

The Model also gives a right to renewal of that title, or progression to another form of title, but with full requirement for agreement on terms and conditions and compensation, or reference to a Tribunal.

As a result, any title less than a mining title, and any mining title requiring renewal, will be subject to new additional terms and conditions, negotiations, possibly Tribunal hearings, new compensation costs, all of which were not required when exploration, proving up, feasibility study, or development funds were committed and spent.

In other words, there is a retrospective change of rules and conditions, and a penalty beyond the control of the title holder. The expenditure may amount to millions of dollars.

This is an unfair proposal, placing unforeseen additional costs and obligations on a company which has risked funds in good faith.

12 *Ibid.* 11.

IMPACT ON MINING

Effect of Additional Costs

Clearly, mining is a significant part of Australia's economy and will be for many years to come. It is a well known fact that mining has been experiencing difficult market conditions for a number of years. There is not yet any clear evidence of a sustained recovery.

However, such difficulties should not be used as a basis to excuse placing additional costs and administrative burdens upon the industry. Every possible step must be taken to control costs and to make the industry as competitive as possible. Additional costs will damage recovery prospects.

Impediments to Exploration

Over recent years, the exploration industry has suffered increasingly from diminishing or more difficult access to land caused by increasing Government regulation in pursuance of other policy initiatives.

The extension of Aboriginal land rights on the basis proposed by the national Model, on past experience will accelerate the choking of the industry's future by reducing exploration expenditure. Inevitably there will be fewer new projects, less investment and fewer jobs.

BROADER PERSPECTIVES

Position of Aboriginal People

The mining industry does not in any way detract from the need for Government action on a broad range of policy areas to specifically benefit Aboriginal people. Areas of greatest need are housing, health, education and employment, for Aboriginals throughout Australia, including the large urban populations.

The debate about one single aspect of land rights (*i.e.* access for exploration and mining) which is but one area of Government action to help Aboriginal people, occupies an inordinate amount of time and attention.

Indeed, the industry asks only for a reasonable, balanced framework which will allow it to explore and mine to produce revenue which goes towards making such Government activities possible. Laws which unduly restrict exploration and mining will ultimately do even greater harm by slowly destroying the country's financial capacity to carry out such worthwhile and necessary programmes.

Aboriginals and miners should be partners in development not opponents in a commercial/legal power game. However, so long as the Government remains transfixed by the Northern Territory precedental law, and measures every possible change against that unsuccessful first attempt at legislation, the position will not improve. The law was based on idealistic assumptions, and experience has shown it to be unworkable.

The issue is at the crossroads. Unless Government makes a fresh, realistic and practical assessment of long range implications, not only the parties involved, but Australia as a whole, will be damaged.