CONTENTS ENVELOPE 6751

TENEMENT: Not Applicable.

TENEMENT HOLDER: Not Applicable.

S.A. DEPARTMENT OF MINES AND ENERGY

COMMENTS ON THE COMMONWEALTH POSITION PAPER: "PREFERRED NATIONAL LAND RIGHTS MODEL"

June, 1985.

CONTENTS

Summary

Legislation along the lines set out in the Commonwealth's "Preferred National Land Rights Model" would have a negative effect on exploration and resource development in South Australia. Approximately 132 000 square kilometres of Unallotted Crown Land in S.A. (13% of the area of the State) would be available for claim by Aboriginals under this model. Much of this area is considered to have significant potential for petroleum and/or mineral deposits, with 75% currently held under Petroleum and Mineral Licence. This is especially true of Crown Land in the north and northeast of the State (which includes the Daralingie and Wancoocha gas and oil fields) as well as in the Roxby Downs area.

The Department of Mines & Energy (D.M.E.) recognises the aspirations for land rights over Unallotted Crown Land by Aboriginal people who can demonstrate strong traditional and historical bases for their claim. This, however, must not be achieved to the detriment of the resource industry, on which the well-being of the majority of Australians depends to such an important degree.

South Australia pioneered important aspects of Land Rights legislation, and as a result 18% of the State (179,050 out of 984,377 square kilometres) is currently granted to the Pitjantjatjara and Maralinga peoples. Difficulties with initiating exploration in the Pitjantjatajara Lands has demonstrated that land rights for Aboriginals may not benefit the community at large. Any future land rights legislation must recognise the legitimate interest of the Resources industry and the rights of all citizens of South Australia. The principles within the W.A. Aboriginal Land Bill 1985, are more acceptable in this regard.

DME's major concerns with the Preferred National Land Rights Model are that:

- The proposal does not preserve exploration licence holder's rights under the Petroleum and Mining Acts to a production licence in the event of a discovery - these rights should apply to both existing as well as future exploration licences awarded after any land grant;
- Any compensation should be related to actual physical damage and be a matter which is subject to Government approval. Compensation on the basis of social or spiritual loss or damge is very difficult to quantify in dollar terms. The uncertainty of the results of such a determination could act as a major deterrent to many potential explorers;
- The dispute-resolving mechanism could result in excessive delays and put the economic viability of proposed developments at risk;
- The 10-year time limit in which claims can be lodged should be reduced and repeated claims not permitted;
- Front end payments are not banned;
- There remains uncertainty that Commonwealth powers could be used to override State legislation and administrative procedures. This would be unacceptable.

There are, however, a number of positive features of the Commonwealth proposal in comparison with the Pitjantjatjara Land Rights Act (PLRA):

- the final decision in the event of a dispute lies with the government after hearing the advice of an independent tribunal (as against the decision of an arbitrator being final in the PLRA);

- the terms of reference for the independent tribunal are weighted more evenly with respect to industry and aboriginal considerations;
- there is a mechanism for sacred sites to be identified and declared;
- rights of access over public roads are preserved;
- a miner's right gives access authority;
- compensation is not to be related to the value of the mineral or petroleum deposit involved.

Recommendations

Any State response to the Commonwealth "Preferred National Land Rights Model" should stress:

1) South Australia pioneered important aspects of Land Rights legislation. As a result 18% of the State is currently granted to the Pitjantjatjara and Maralinga peoples. Considerable difficulties have been experienced in initiating exploration in this area since land grant, despite its attractive potential for petroleum and minerals.
2) The State response is based on a long and direct experience of the issues involved and a sympathetic attitude towards the aspirations of the Aboriginal people. Land Rights, however, should not be achieved to the detriment of the resource industry, on which the well-being of the majority of Australians depends to such an important degree.
3) The Western Australian Aboriginal Land Bill 1985 compared to the Commonwealth model has achieved considerable industry support and is more attuned to the needs and aspirations of all Australians rather than one minority group.

4) Unallotted Crown Land in South Australia occupies 13% of the area of the State and much is prospective for petroleum and minerals. For example, the Wancoocha oilfield and Daralingie gasfield lie within Unallotted Crown Land.

5) Approximately 50,000 square kilometres of Unallotted Crown Land lies within Petroleum Exploration Licences 5 and 6 held by Delhi and Santos. The Cooper Basin (Ratification) Act 1975 restricts the State's ability to limit the existing rights of these particular licensees.

6) Major concerns with the Commonwealth model are:

- The proposal does not preserve exploration licence holder's rights under the Petroleum and Mining Acts to a production licence in the event of a discovery - these rights should apply to both existing as well as future exploration licences awarded after any land grant;
- Compensation should be related to actual physical damage and be a matter which is subject to government approval. Compensation on the basis of social or spiritual loss or damage is very difficult to quantify in dollar terms. The uncertainty of the results of such a determination could act as major deterrent to many potential applicants;
- The dispute-resolving mechanism could result in excessive delays and put the economic viability of proposed developments at risk;
- Front end payments are not banned;
- The 10-year time limit in which claims can be lodged should be reduced to 4 years and repeated claims not permitted;

- There remains uncertainty that Commonwealth powers could be used to override State legislation and administrative procedures. This would be unacceptable.

7) South Australia is not prepared to finalise its position until after the Commonwealth legislation is in place.

Introduction

In late February the Commonwealth Minister for Aboriginal Affairs, Mr. Clive Holding, released a discussion paper entitled "Preferred National Land Rights Model". Interested parties were invited to respond to the proposal outlined in the discussion paper.

In brief, the discussion paper proposes that all Unallotted Crown Land in Australia plus former Aboriginal reserves, mission land and Commonwealth National Parks would be made available for claim by Aboriginal groups.

- An independent tribunal would assess claims and make recommendations to the government;
- Following land grant, access would generally be subject to the consent of the Aboriginal landholder;
- Although mineral licences in existence prior to land grant would continue, exploitation of any discoveries would require approval of the landholder, or in the event of a dispute the government acting on the recommendation of an independent tribunal. Application for new licences over existing Aboriginal land would entail similar procedures;
- Aboriginals would have access to a share in royalties and could seek compensation for damage which, in the case of production licences would include compensation related to social or spiritual loss or damage;

- Sites of significance would be identified and declared and those having special and sacred significance could only be disturbed in the national interest.

The Minister for Aboriginal Affairs has stated that he intends to introduce legislation in Parliament to give effect to the Commonwealth proposals during this year's budget session. The States have been invited to introduce parallel legislation. The Commonwealth model is intended to provide guidelines for a minimum set of conditions and the Commonwealth legislation will prevail if there are no equivalent State legislative provisions.

The Importance of the Resource Industry to S.A. & Australia

In the early days of the Australian colonies mineral rights were granted to the landholder. Throughout the Commonwealth the policy of the various State Governments has been to restore these rights to the Crown. In S.A. this had been achieved by the early 1970's. The surrender of defacto control of subsurface rights in the Pitjantjatjara Land Rights Act 1981 was a reversal of this process. Any additional consideration of defacto granting of subsurface mineral and petroleum rights via land grants as for the Commonwealth and Pitjantjatjara models takes out of the hands of government the power to manage its own resources - resources which could be used to benfit all of the State's citizens.

Currently S.A. produces 40% of Australia's requirements of natural gas and the State is close to being self sufficient for its liquid petroleum needs. In 1985, the value of petroleum produced will be almost $900 million on which royalties of $50 million will be paid to the State. The recently completed $1.5

billion Cooper Basin liquids scheme has been vital to the State's economic viability and has created thousands of jobs and injected much needed money and infrastructure into the economy.

In 1984 the ex mine value of minerals and materials produced exeeded $170 million on which royalties of over $2 million were paid. The Roxby Downs Uranium-Gold-Copper mine will inject a further $1.5 billion into the State's economy over the next 5 years and also be an important revenue earner and job creator for decades to come.

Currently 37% of Australia's income is derived from the resource industry, compared to 43% for farming and 26% in manufacturing. In 1983, the Australian governments received revenues from mineral and petroleum production of over $6 billion. In addition savings in foreign exchange for imports exceeded $5 billion for oil alone.

As far as the impact on the landscape of exploration and mining activities, it should be realised that the area of disruption is small and predominantly related (especially at the exploration stage) to the making of access tracks. These tracks are generally used for only a short duration unless kept open by the landholder or tourists. If this does not occur, experience has shown that in the majority of cases, tracks rehabilitate within a couple of rainy seasons. Exploration companies now follow specific codes of practice as far as the construction of tracks is concerned, designed to minimise any permanent effect on the environment.

The surface area occupied by mines, quarries, surface oilfield facilities and currently unrehabilitated exploration tracks in South Australia would cover an area less than that occupied by Adelaide and its inner suburbs. The value of mineral

production produced from this land now exceeds $1 billion per year. This contrasts dramatically with the comparable area occupied by agricultural activities and the value per unit area derived.

It is evident therefore that ore and petroleum deposit occupy only a minute fraction of land. To locate such deposits requires considerable exploration effort - in ideas, techniques, men and equipment. Exploration is the lifeblood of the industry and exploration requires access to land - not just limited areas but to all land. Finding an economic deposit is like seeking a handful of needles in a haystack, if parts of the haystack are made inaccessible, some of the needles will not be found.

Petroleum and mineral exploration carries considerable risks. To explore is not to guarantee that an economic discovery will be made. Moreover, an area declared barren after one exploration program may be shown to have potential during subsequent programs. And when the discovery is made it is necessary for a large scale capitally intensive investment decision to be made. For reasons of economics it is desirable to recover the investment quickly - generally in the first 4 to 5 years. However, this is not always possible because of many uncertainties involved when a deposit is developed. Not the least of these are world markets, exchange rates, changes in the tax regime and industrial problems.

A company's decision to invest money in a certain area depends on a range of factors including perceived prospectivity, logistics and access, tax regime, political stability, likely value of product, etc. Creating additonal problems via uncertain land access and compensation provisions will act to make projects

non viable and drive the investment dollar to areas and countries where such conditions are more certain and predictable.

In South Australia there is currently a critical shortage of gas contracturally available to supply the State's needs after 1987. As S.A. depends on gas for 76% of its electricity generating requirements, additional supplies are critical for our continued economic stability and prosperity. Any factor which discourages exploration will act against the State's interests.

Attitudes of the Resource Industry

The petroleum and mining industries have made responses through their associations (copies of APEA and AMIC comments are attached). In general, the petroleum industry is supportive apart from a number of serious reservations relating to protection of existing rights, access and compensation. APEA is also supportive of the W.A. Aboriginal Land Bill 1985, which was recently rejected by that State's Upper House. AMIC has adopted a more critical stance and announced that the Commonwealth discussion paper is "totally unacceptable", although AMIC was supportive of the W.A. Aboriginal Land Bill.

Industry has had considerable experience with the N.T. Aboriginal Land Rights Act, which has proven to be unworkable in relation to its exploration and mining provision. No exploration titles have been granted on Aboriginal land since 1972. 165 exploration licences were offered to 42 separate companies since mid-1981 which were subject to agreement being reached with the Aboriginal Land Council. Not one application has resulted in completion of an agreement to undertake exploration.

Further information on this subject is contained in the N.T. Dept. of Mines and Energy report of May 1984 entitled "Delays to Mineral Exploration Resulting from the Aboriginal Land Rights Act".

The W.A. Aboriginal Land Bill, 1985

A precis of the W.A. Aboriginal Land Bill 1985, is attached. As industry has indicated support for this Bill, the main provisions which relate to mining are worth stating as they ensure that there is no Aboriginal veto over mining or exploration and that minerals remain the property of the Crown:

- land available for claim comprises vacant Crown land, Mission land, existing reserves and existing living areas on pastoral leases;
- claims must be lodged within 5½ years;
- land granted will be via "modified freehold title" which can only be sold or mortgaged with the approval of the Minister having regard to strict criteria;
- notice of application for a tenement is lodged with the Aboriginal landholder and the application is heard by the Mining Warden in open court. The Warden's recommendation is forwarded to the Minister and the landholder can lodge a 'Notice of Aboriginal Interest' to the applicant. If agreement cannot be reached, a Tribunal hears the case and makes a recommendation to the Minister on what conditions should be attached to the tenement;
- compensation is not to be related to the value of the minerals involved. In general terms, compensation provisions are similar to that applying to pastoral leases, but can include matters relating to social disturbance;

- the Minister for Mines having regard to special criteria can declare an area of mineral or petroleum potential, which cannot be subject to land claim.

Current Situation in South Australia

Much of the 130,000 square kilometres of Unallotted Crown Land in S.A. (13% of the State), is considered to be prospective for petroleum - primarily that area lying within Petroleum Exploration Licences (PEL's) 5 and 6 held by Delhi-Santos and partners, and secondarily within the area recently issued as PEL 33 over the Eucla Basin. The Daralingie gasfield and Wancoocha oilfield lie within Unallotted Crown Land. Crown land in the Roxby Downs, and Stuart Shelf areas has obvious mineral potential, while an additional significant block surrounds Coober Pedy.

Small land grants have been made to Aborigines under the Aboriginal Lands Trust Act and two major land grants have been made under separate legislation - the first by the Pitjantjatjara Land Rights Act 1981, and the second by the Maralinga Tjarutja Land Rights Act, 1984. Together these Acts granted inalienable freehold title to 0.2% of the State's population over an area of 18% of the area of South Australia (179,050 square kilometres).

The landholders rights under these two Acts are in excess of those comprised in the Commonwealth proposal. This especially relates to the lack of Government power to control access for exploration for minerals and petroleum.

As a result, no exploration has occurred in the Pitjantjatjara lands since land grant, despite protracted negotiations with Hematite who applied to undertake a $35 million exploration program in 1981. Negotiation broke down over the

single issue of compensation for cultural disturbance, which Hematite was unwilling to consider. The application was eventually withdrawn in 1984. As a result, the benefits which would have flowed to the State have been denied.

The petroleum potential of the Officer Basin within the Pitjantjatjara lands was highlighted by the discovery of oil shows in a Department of Mines & Energy corehole, Byilakaoora No. 1, drilled in 1979. The lands are also considered to have significant mineral potential.

In recognition of this fact, following Hematite's withdrawal of their application in June 1984, the Minister of Mines and Energy called for new applications over the area. A few applications were received with a number of companies advising that they would not apply due to perceived problems in negotiations with the landholders. One application was received from Anangu Pitjantjatjaraku (A.P.).

Recognising that A.P. did not have the technical or financial resources to qualify as a sole licensee under the Petroleum Act, the Minister advised A.P. that their application would have more substance if they were to include companies with the required qualifications and a proven track record in petroleum exploration. This has been achieved and the final application is currently being processed together with one competing application.

The Minister of Mines and Energy and his Department are hopeful that after 5 years it may now prove possible to see the commencement of exploration in the Officer Basin, which hopefully will prove to be of benefit to the landholders and to the people of South Australia generally. The way may also be opened for additional areas to be made available for both mineral and

petroleum exploration within Pitjantjatjara Lands. The time delays and difficulties associated with gaining access to the Pitjantjatjara Lands have demonstrated that great care should be exercised in framing any legislation which denies access rights to the vast majority of the population.

One Petroleum Exploration Licence (PEL 23) issued to Comalco in 1983 and several mineral exploration licences extend into and predate grant of the Maralinga lands. Exploration by Comalco has continued since proclamation of the Maralinga Tjarutja Act in December 1984 under an access agreement negotiated before land grant. No applications have been received for exploration in the lands subsequent to the land grant, although PEL 33 is currently being issued in the Nullarbor Plains area extending from the coast north to abut the southern boundary of the Maralinga lands. It was the intent of the applicants that the licence would not extend into the Aboriginal land due to the complications they considered would ensue.

Unallotted Crown Land in PEL's 5 and 6

Legally, the S.A. Government appears to be in the position of not being able to grant Unallotted Crown Land within PEL's 5 and 6 (see figure 1) to any Aboriginal group without the agreement of Delhi-Santos.

The Crown Solicitor has given an opinion (of 4.9.84 in DME SR 27/2/4) in which it is pointed out that 6(4) of the Cooper Basin (Ratification) Act Indenture provides that the State "Shall ensure that the terms convenants and conditons of such PELs (5 and 6).... remain as at the date of grant thereof and that the State will not by legislation regulation order or administrative action restrict the producers from giving effect to their

rights..." and that 6(2) of the Act provides "The Premier, the Minister and the Government of the State are hereby authorized empowered and required to do all things necessary or expedient for the carrying out or giving full effect to the Indenture".

These provisions would seem to act to limit the ability of the Government to legislate such that a land claim could be made within PEL's 5 and 6 under the terms set out by the Commonwealth proposal, as this would restrict some of the rights currently enjoyed by Delhi-Santos.

D.M.E. Comments on the Commonwealth Proposal

1) Summary Comments

The main disincentives to exploration are:

- A requirement for aboriginal consent to obtain an exploration licence. If this consent is refused the resolution mechanism (which leaves the ultimate decision in government hands) will result in considerable delays (probably at least a year after an application is first lodged). In addition there is the likelihood of payment of compensation and uncertainty as to the likely outcome of the application. This is especially critical when a potential explorer evaluates the likelihood of ever being issued a production licence if exploration does prove to be successful.
- Current exploration licence holder's rights to a production licence are also subject to the above conditons.
- Existing licence holder's rights are not preserved.
- The extent of compensation is quite uncertain as it relates to "social and spiritual" loss or damage which is very difficult to quantify in dollar terms. The government has no discretion on this issue as the determination of the independent tribunal on compensation is to be final.
- Which government, State or Federal, is to make the final decison in the event of a dispute (assuming the State has enacted similar legislation)? Considerable confusion is likely relating to overlying State and Commonwealth Laws. The State's powers over its own minerals and access to its lands will be limited on Aboriginal lands by the overriding Commonwealth powers.
- Front end payments are not prohibited.

- The 10 years suggested as being the period in which land claims can be lodged is too long - it should be reduced to 4 years. Repeated claims should be disallowed.

As described above, the resource exploration industry depends largely on access to land and a careful evaluation of all of the risks and uncertainties involved. The risks will of necessity be increased via uncertainties and delays to gaining access for exploration, delays on developing discoveries (with perhaps vital economic consequences), uncertainties on likely compensation decisions, etc. Many companies will decide these risks are too great (cf. Pitjantjatjara Lands) and spend their exploration dollar elsewhere. This will be an especially vital factor for South Australia with our dependence on currently dwindling supplies of indigenous natural gas.

There are, however, a number of positive features of the Commonwealth proposal in comparison with the Pitjantjatjara Land Rights Act (PLRA):

- the final decision in the event of a dispute lies with the government after hearing the advice of an independent tribunal (as against the decision of an arbitrator being final in the PLRA);
- the terms of reference for the independent tribunal are weighted more evenly with respect to industry and aboriginal considerations;
- there is a mechanism for sacred sites to be identified and declared;
- rights of access over public roads are preserved;
- a miner's right gives access authority;
- compensation is not to be related to the value of the mineral or petroleum deposit involved.

COMMONWEALTH PREFERRED NATIONAL LAND RIGHTS MODEL

Commonwealth Proposal	D.M.E. Comment
1. General Principles	
1.1 Commonwealth Legislation to: - be capable of operating concurrently with compatible State legislation; - be capable of embracing proposed as well as existing State laws; - add rights to those accorded under State laws where necessary.	1. It is difficult to see how provision for future State legislation is to be embraced. Commonwealth powers to "add rights" to State laws is a cause for considerable concern. Confusion, uncertainty & litigation appear likely if there is to be overlying Federal and State legislation. If the State decides not to enact its own legislation however, it will lose all effective control over any of its resources lying within Unallotted Crown Land.
1.2 The Aboriginal Land Rights (Northern Territory) Act 1976 to be amended consistent with the Commonwealth preferred model.	
1.3 The Commonwealth not to seek to override State land rights legislation which is consistent with the Commonwealth's preferred model. - The application of Commonwealth legislation to depend ultimately on the action of the State's to implement land rights legislation.	
1.4 Aboriginal land to be subject to normal Commonwealth laws and to State laws to the extent they are consistent with the principles in Commonwealth legislation.	

Commonwealth Proposal	D.M.E. Comment
2. Title to Aboriginal Land	
2.1 Title to Aboriginal land to be vested in local, or as appropriate regional, Aboriginal bodies established for this purpose.	2. Do not support the idea of large "Land Councils" or equivalent overriding tribal elders and local aboriginal groups with direct association with the land.
- These bodies to be supported by regional and local organisations to represent community interests, facilitate land claims and to administer matters in respect of Aboriginal land.	
2.2 Land vested in these Aboriginal bodies as a general rule to be held under inalienable free-hold title	
- and not to be sold, mortgaged or otherwise disposed of by the holders of this title.	
2.3 Alternative forms of title (including partially alienable title) to be permitted in limited circumstances:	
- to ensure consistency with surrounding title such as in non-tribal or urban areas;	
- where Aboriginal people so require and land is granted as a result of direct negotiation with the relevant Government.	
2.4 Grants of inalienable freehold title should be made in respect of:	
- Aboriginal reserves and mission land currently occupied by Aborigines; and	

Commonwealth Proposal	D.M.E. Comment
- land granted as a consequence of successful land claims.	
3. Claiming and Vesting of Lands	
3.1 All Aboriginal reserves and mission land currently occupied by Aborigines to be available for direct grant to relevant Aboriginal bodies.	
3.2 Land to be available for claim by Aborigines:	3.2 It appears likely that much if not all Unallotted Crown land, Aboriginal reserves and mission land will be subject to claim comprising 13% of the area of S.A. (cf. very little of the area of N.S.W. & Victoria) much of which is considered to be prospective for petroleum and mineral deposits.
- former Aboriginal reserves and mission land which are currently vacant Crown land, unoccupied and unallocated;	
- vacant Crown land which is subject to a mining interest or tenement (Subject to considerations set out in Section 10);	
- all other vacant Crown land which is unused and unallocated for other purposes;	
- Commonwealth National Parks, where applicants can establish that they have a traditional entitlement or historical association with the land and are willing to accept a grant of land conditional upon its continued use as a National Park.	
3.3 Land not available for claim:	3.3 The definition of private land requires clarification.
- all private land;	

Commonwealth Proposal	D.M.E. Comment
- land set aside for public purposes, including stock routes and stock reserves;	
- existing public roads;	
- any other alienated land, including land such as pastoral leases in which all interests are held by or on behalf of Aborigines.	
4. Land Claim Procedures	
4.1 Aboriginal claims for land grants to be on the basis of:	
- traditional entitlement;	
- historical association;	
- long term occupation or use; and/or	
- specified purposes (for example, the needs of town campers).	
4.2 Applications for land grants to be made within 10 years of the proclamation of the legislation.	4.2 10 years is too long. 4 years is suggested as an absolute limit. Repeated applications for the same land should be disallowed.
5. Assessment of Claims	
5.1 Provision to be made for respective parties to resolve claims to vacant Crown land through a process of negotiation and agreement.	

Commonwealth Proposal	D.M.E. Comment
5.2 An independent Tribunal or other appropriate authority to be available in each State and Territory to consider and recommend on applications for land grants where: - there is a dispute with respect to an application; - competing claims are made over the same area; - issues of detriment (or other issues) arise.	
5.3 All parties with an interest in the claim to have an opportunity to put their case to the Tribunal. - Governments to ensure that all parties have equal rights in presenting their case in respect of land claims, including access to legal aid.	
5.4 The Tribunal to assess the merits or otherwise of each application and to make appropriate recommendations to Government concerning the granting of the land as Aboriginal land. - The Tribunal to determine the compensation to be payable in respect of property, improvements and other interests in the land which is subject to a successful land claim or site protection.	

Commonwealth Proposal	D.M.E. Comment
5.5 Where the Government does not accept in part or full the recommendations of the Tribunal on the granting of the land claim, relevant parties to be advised of the reasons for that decision.	
6. Protection of Prior Interests	
6.1 All legitimate prior interests in land the subject of claim or grant to be protected, including: - existing recreation and mining interest (See Section 10); - existing rights to use of water courses through and other bodies of water within claimed areas; - right of access to travel over public roads.	
6.2 New roads constructed over Aboriginal land, not being land previously set aside for that purpose, to be the subject of negotiations with affected Aboriginal communities including as to terms and conditions of use: - if necessary with reference to an independent Tribunal for recommendation to Government.	6.2 Governments should have the <u>right</u> to construct new roads with due regard to comment and concerns of Aboriginals.

Commonwealth Proposal	D.M.E. Comment
7. Community Living Areas	
7.1 Provision to be made in each State and Territory for Aborigines to apply for excision of community living areas from pastoral properties within five years of the proclamation of the legislation.	7.1 Disagree with excision of living areas from pastoral properties except where there is proof of long term association extending into recent times.
- This procedure to apply primarily, if not exclusively, in the Northern Territory and Western Australia where legislative proposals are currently under consideration.	
7.2 Applications for such excisions to be on the basis of long term residence on or use of the land by the applicants or their parents.	
- Such excisions to relate to living area needs only and not form the basis of land claims.	
7.3 Aboriginal people to be permitted access to pastoral properties for the purposes of preparing a claim for excision, subject to appropriate safeguards to:	
- protect the privacy of the pastoralist and other residents on the property;	
- avoid disruption to the pastoral operation.	

Commonwealth Proposal	D.M.E. Comment
7.4 An independent Tribunal or other appropriate authority to assess applications and make recommendations to Government on the granting or otherwise of the excision, having regard to relevant criteria including: - the continued viability of the pastoral property; - the privacy of other residents.	7.4 If a mining tenement is current, the effect on the rights of the holder must be considered.
7.5 Secure title to be granted to community living areas excised from pastoral properties. Title to rest with the Aboriginal community concerned. - In the event of long term abandonment (but not less than three years), the pastoralist on the property from which it was excised may apply for return of the area.	
7.6 Compensation to be payable to the pastoralist in respect of property, improvements and other interests in the land excised.	
7.7 Commercial activities on the excision, such as the running of cattle, to be undertaken only with the agreement of the pastoralist and to be subject to any statutory approval.	
7.8 Living areas to be subject to normal Commonwealth laws and State laws to the extent they are consistent with Commonwealth law.	7.8 State laws, not Commonwealth should apply.

Commonwealth Proposal	D.M.E. Comment
8. Access to Aboriginal Land	
8.1 Access to Aboriginal land generally to be subject to the consent of the Aboriginal landholder.	8.1 State officers in the performance of their duties must have unrestricted access to Aboriginal land.
8.2 Appropriate recourse to the law to be available to Aborignal landholders in respect of a breach of conditons applicable to entry to and use of Aboriginal land, with appropriate penalties to be provided. - A breach of conditons under the permit of entry for general prospecting purposes to result in a penalty, suspension or revocation of the permit for that area, as appropriate.	
8.3 Right of access for Commonwealth and State officials on duty to be preserved.	
9. Mineral Exploration & Development on Aboriginal Land	
9.1 Aborigines are to be able to exercise substantial rights over exploration and mining on their land and be given an opportunity to seek a negotiated settlement or to raise objections and argue their case before an appropriate Tribunal if they do not wish activity to proceed.	9.1 Rights should be restricted to the normal rights for disturbance and damage, not rights to negotiate terms of access. The creation of a Tribunal will also lead to delays and uncertanties.

Commonwealth Proposal	D.M.E. Comment
9.2 There is to be no veto over exploration or mining on Aboriginal land: - the final decision on whether exploration or mining is to proceed on Aboriginal land to rest with Government.	9.3Decision should rest with the State not Commonwealth Government.
9.3 Mechanisms to resolve disputes over access to Aboriginal land not to constitute a de facto veto.	
9.4 Aborigines to be entitled to appropriate compensation for actual damage or disturbance to their land, such compensation not to take into account the value of minerals likely to be discovered or mined (i.e. no private royalty to be payable).	
9.5 Aborigines to have access to payments in the nature of mining royalty equivalents, i.e. a payment made by Government which represents a proportion of theordinary royalties received by Government in respect of mining on Aboriginal land. The relevant Government to determine the proportion to be so paid and the distribution of such payments to the Aboriginal people, including those affected by mining operations.	9.5 This section gives Aborigines partial rights to minerals below the surface of the land and is in conflict with Crown ownership of all minerals.
(a) General Prospecting (Pre-Title)	
9.6 Entry to Aboriginal land for general prospecting purposes (i.e. pre-title) to require an appropriate permit of entry issued under relevant State or Territory mining legislation.	

Commonwealth Proposal	D.M.E. Comment
(b) Exploration Title	
9.7 Title to prospect or explore for minerals or petroleum on Aboriginal land not to be granted except:	9.7 Implies front end payments before exploration can start which is not acceptable.
- with the prior consent of the Aboriginal landholder and agreement as to the terms and conditions on which such exploration is to take place; or	
- on such terms and conditions as are approved by the Government.	- on such terms and conditions as are <u>determined</u> by the Government.
9.8 In the event that either:	9.8 The time to take depositions should be kept short (one month) and recommendations passed to Government within one additional month. Any delays built into the system act as a positive deterrent to making application in the first place.
- consent of the Aboriginal landholder is withheld; or	
- consent is granted subject to terms and conditons which are unacceptable to the applicant; or	
- the landholder fails to decide on an application for exploration within six months	
the matter to be referred to an independent Tribunal or other appropriate authority for consideration and recommendation within a specified time to Government.	
9.9 In considering its recommendations on whether exploration should take place on Aboriginal land, the Tribunal/authority to have regard to specific criteria including:	9.9 Mining and petroleum companies must continue to have their current rights to exploit discoveries made during the course of exploration (over which the State currently exercises reasonable control).

Commonwealth Proposal	D.M.E. Comment
- the nature and extent of the benefits flowing to the economy as a whole from exploration and any subsequent mining activity; - the size, location and type of activity to be carried out; - the wishes or objections of the Aboriginal landholder to exploration and any subsequent mining activity taking place on their land; - proposals by the applicant to minimise any disruptive activity.	
9.10 After considering the Tribunal's recommendations Government to determine within a specified time whether and on what terms and conditions exploration is to take place on Aboriginal land, having regard to: - the views of the landholder and the applicant; - the recommendations of the Tribunal/ authority; - terms and conditons set out in legislation for exploration on Aboriginal land, including protection of declared sacred sites and compensation for damage or disturbance to the land.	9.10 Time for Government consideration should be limited to one month, except in exceptional circumstances.

Commonwealth Proposal	D.M.E. Comment
9.11 Consent by the Aboriginal landholder or approval by Government to exploration on Aboriginal land to include the applicant's right to apply for renewal of that title, subject only to the terms and conditions agreed with the landholder or determined by the Minister remaining appropriate.	9.11 Only the Government should have the right to impose new conditions on a licensee's renewed licence.
9.12 Consent by the Aboriginal landholder or approval by Government to exploration to include the applicant's right to apply for a mining or production lease on that land.	9.12 An explorer who currently makes a discovery has considerable confidence that he will be granted a production licence. This is necessary if a company is going to be willing to explore in the first place.
(c) Mining or Development Title	
9.13 Title to mine for minerals or petroleum on Aboriginal land to be granted subject to an agreement with the relevant Aboriginal landholders on the terms and conditons under which development is to take place.	9.13 A tribunal immediately places a mining company and Aboriginals in a confrontation situation. Same comments on length of time for tribunal's activities and reporting as above.
9.14 If agreement cannot be reached within a further specified period, the Tribunal/ authority to determine the compensation to be payable for such mining on Aboriginal land and to recommend to Government such other terms and conditons it considers should be acceptable to both parties.	

Commonwealth Proposal	D.M.E. Comment
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 and to take into account: - proposals by the applicant to minimise or rectify such loss or damage; - the wishes of the Aborigines as to the form of compensation that would best suit their requirements; but not to have regard to the value of minerals proposed to be mined.	9.15 How can a realistic assessment of compensation for spiritual or social loss or damage be made? The uncertainty as to what sums of money are likely to be involved will discourage many companies from exploring in the first place. A register of all sites of significance on the area of the tenement should be provided by the landholders to provide the basis for any access and compensation determinations.
9.16 In making recommendations on other terms and conditions to Government, the Tribunal/ authority to have regard to: - the nature and extent of the benefits flowing to the economy as a whole from mining activity; - the size, location and type of activity to be carried out; - the requirement for general purpose leases and ancillary leases for housing and other facilities and services and the needs of the applicant for access to the mining area;	

Commonwealth Proposal	D.M.E. Comment
- the need to minimise the impact on the way of life and Aboriginal tradition of landholders and of any Aboriginal community or group which may be affected by the proposed mining activity;	
- objections raised by the landholders or groups with regard to any interference and proposals made by the applicant to accommodate these;	
- the impact of the proposal terms and conditons, including compensation, on the economic viability of the project.	
9.17 After considering the Tribunal's recommendations, Government to decide on what terms and conditions mining is to take place on Aboriginal land.	9.17 See above for comments on speed of decisions. Any decision on compensation should rest completely with the Government.
- The determination of the Tribunal as to compensation to be definitive.	
9.18 If the applicant is unable to proceed with the mining proposal on the basis of the compensation determined by the Tribunal and other terms and conditions determined by Government, continuation of its interests in that land to be subject to the relevant provisions of State or Territory mining legislation.	9.18 Compensation must be determined by the Government in the State's interest, not by a Tribunal.
9.19 Where because of changed circumstances implementation of the mining plan departs significantly from that originally approved, Government to retain the right to determine whether the terms and conditions determined remain appropriate:	

Commonwealth Proposal	D.M.E. Comment
- the matter to be referred to the Tribunal for consideration as appropriate.	
9.20 Approval to mine to include the right to apply for renewal of that title and any ancillary leases.	
10. Existing Mining Interests	
10.1 Where a claim is made in respect of land that is subject to an existing exploration licence or mining lease (or ancillary leases), that claim, if successful under provisions of Section 5, to be granted subject to the continuation of that interest and any renewal of that interest or related interests.	
- Grant of Aboriginal title to overlie the existing interest which is to remain fully protected at law and not subject to an agreement on terms and conditions or compensation with the Aboriginal landholders.	
10.2 A new mining or production lease taken out as a consequence of an existing tenement (e.g. an exploration or prospecting licence) to be granted subject to an agreement with the relevant Aboriginal landholders as to the terms and conditions under which such development is to take place.	10.2 This is a derogation of the rights of an existing licensee and is unacceptable.

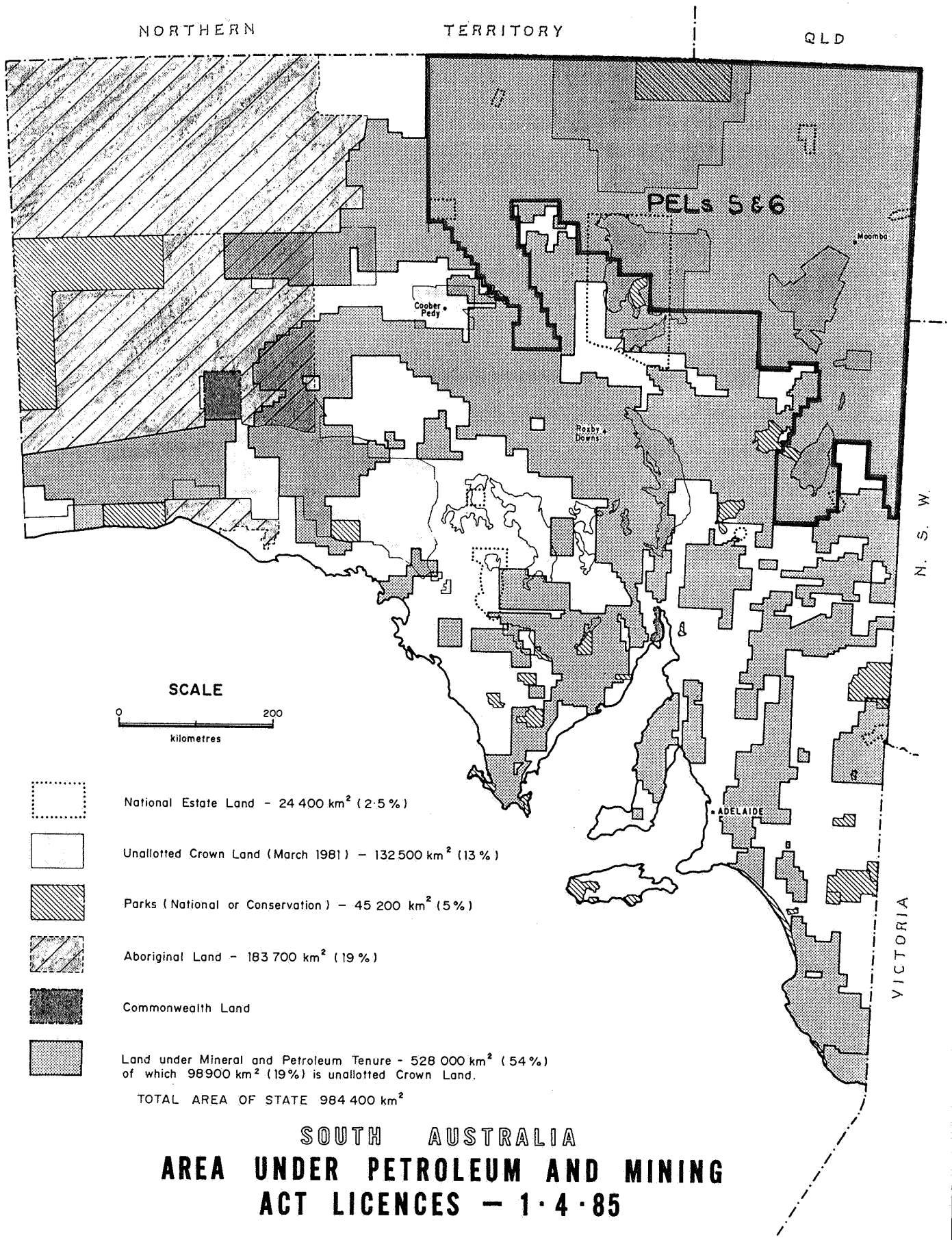
Commonwealth Proposal	D.M.E. Comment
10.3 Where agreement cannot be reached within a specified period, the matter to be referred to a Tribunal/authority for consideration.	10.3 Compensation decisions to be in the hands of Government, not a Tribunal.
- The Tribunal to determine whether compensation is to be payable in respect of the proposed activity and to recommend to the Minister such other terms and conditions it considers should be acceptable to both parties (based on the criteria set out in para. 9.14).	
10.4 After considering the Tribunal's recommendations, Government to decide on what terms and conditions such activity is to take place on Aboriginal land.	
11. Sites of Significance	
11.1 Mechanisms to be available in each State and Territory for the identification and declaration of sites of significance to the Aboriginal people.	
11.2 Primary responsibility for protection of sites of significance to Aborigines to rest with the States. Sites declared under State law as having a special and sacred significance to Aborigines not to be disturbed by activities such as exploration or mining and their continued protection not to be open to negotiation.	11.2 It should be left to Aborigines in the main to decide the fate of their own sites, except for sites of national significance.

Commonwealth Proposal	D.M.E. Comment
11.3 A separate independent Commonwealth Authority to be established to conduct hearings and to evaluate claims in respect of heritage protection: - in particular, to examine claims and to evaluate the merits of declaring sites to be of such special and sacred significance as to warrant protection, including from exploration and mining activities.	
11.4 The Commonwealth Authority to operate in the first instance only where States lack legislation protecting sites: - the Authority to act in the nature of an appeal in the States only where protection is not granted under existing State laws.	
11.5 On the basis of the findings and recommendations of the Commonwealth Authority, Government to decide whether or not to declare the site and the nature of protection to be accorded to it: - sites so declared as having a special and sacred significance to be given the full protection of the law and not to be subject to negotiation in respect of mining, exploration or other activity, save only in the national interest.	

Commonwealth Proposal	D.M.E. Comment
11.6 In the event that Government does not accept in full the recommendations of the Authority, a statement of reasons to be tabled in the Parliament.	Note: In referring above to Government decisions it is taken to mean that the decision is to be made via Proclamation.

FIG 1

039



SOUTH AUSTRALIA

AREA UNDER PETROLEUM AND MINING ACT LICENCES — 1·4·85

3796

DEPARTMENT OF MINES AND ENERGY — SOUTH AUSTRALIA

DRAFT.....2
PLAN No. 85 - 274

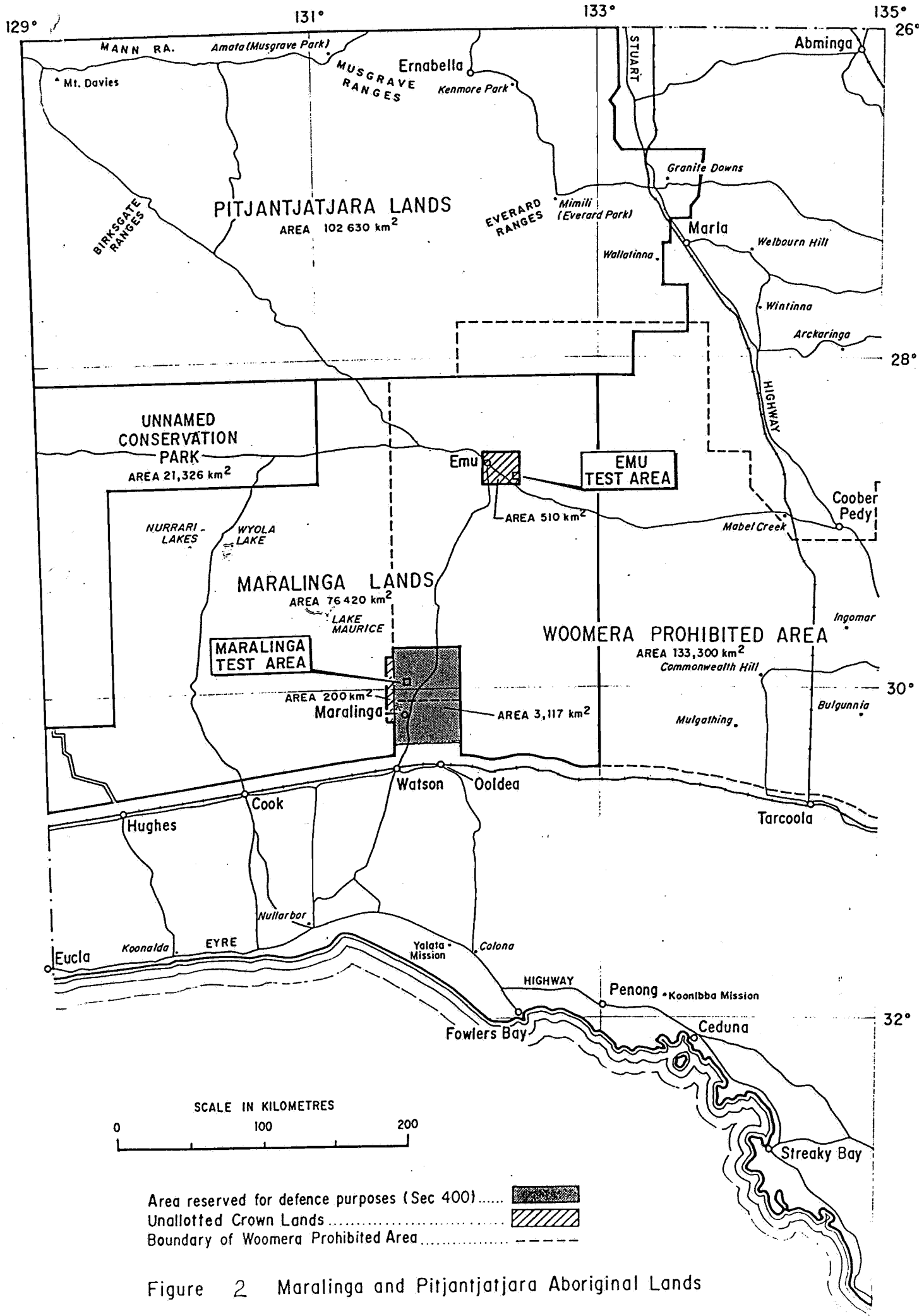


Figure 2 Maralinga and Pitjantjatjara Aboriginal Lands

APPENDIX I

AUSTRALIAN PETROLEUM EXPLORATION ASSOCIATION LIMITED
4th FLOOR, 60 PITT STREET
SYDNEY, N.S.W. 2000

041

MEDIA RELEASE

The Australian Petroleum Exploration Association said today that passage of the Western Australian land rights legislation was essential if uncertainty over the future of exploration in the State was to be eased.

The Association, which represents more than 100 petroleum explorers and producers who spend in excess of $400 million a year in the search for oil in onshore Australia, was releasing the latest issue of its advisory booklet for member companies on dealings with Aboriginal landholders.

APEA said the Western Australian legislation came sufficiently close to the Association's principles for combining resource activity with protection of Aboriginal interests to merit industry support. The Association believed that, once the Western Australian legislation was working, both Aboriginal communities and explorers would find that it provided adequate coverage of their interests.

APEA added that it did not believe there was a need for national land rights legislation. A wholesale revision of the Northern Territory legislation, which was at present extremely unsatisfactory, along with action by State governments to protect Aboriginal heritage and living areas could eliminate the need for Federal Government intervention.

The Association said the Western Australian Government had made a decision in favour of encouraging exploration and development of resources while seeking to protect Aboriginal interests and to minimise conflict. The 'preferred model' devised by Canberra -- while recognising certain important concerns of the industry -- still had potential to considerably delay exploration and to impose heavy compensation payments on successful explorers.

APEA said it did not believe that there was a realistic choice in Australia today between some form of Aboriginal land rights and no land rights at all. Expectations of the Aboriginal community had been raised to the extent where failure to provide an adequate form of protection for their interests would create long-term unrest and thereby continuing uncertainty for explorers.

Keith Orchison
Executive Director
Australian Petroleum Exploration Association
60 Pitt Street
SYDNEY NSW 2000

(02) 27 9651

14 March 1985

AUSTRALIAN PETROLEUM EXPLORATION ASSOCIATION LIMITED
4th FLOOR, 60 PITT STREET
SYDNEY, N.S.W. 2000

APEA

11 March 1985

042

The Hon. G.J. Evans, QC
Minister for Resources and Energy
Parliament House
CANBERRA ACT 2600

Dear Minister

The Association appreciated the opportunity to meet you and the Minister for Resources and Energy to discuss the Federal Government's 'preferred national land rights model.'

In reacting to the meeting the Association wishes first to re-iterate its support for the Government to take the earliest opportunity to convene an appropriate forum for discussions on the land rights issue between the key interested parties.

Secondly, the Association confirms its intention to provide, at the Government's invitation, a paper arguing the important concerns of the industry with regard to compensation and access to land. It is expected that this paper will be produced before 31 March.

Lastly, APEA should like to take the opportunity in writing this letter to canvass its continuing concerns on the land rights issues:

1. Protection of existing interests

   The Association, along with other bodies, has negotiated legislative provisions with the Government of Western Australia which will protect current exploration permit holders from adverse retrospective terms and conditions being imposed on them at the exploration or development phase in the event of a successful land claim. The Federal 'model' does not offer similar adequate provisions for existing titleholders.

2. Access to Aboriginal land

   The Association supports the Federal Government's decision not to allow a veto on exploration or development to Aboriginal landholders. However, the 'model's' proposals to require consent from landholders to entry has the capacity to create a de facto veto as has happened in the past in South Australia. APEA urges the Government to adopt the position that resource activity, as a general rule, should be permitted to go ahead as is allowed for in the relevant onshore petroleum Acts providing protection is given to areas of cultural importance to land holders and to their living areas.

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INCORPORATED IN N.S.W.

3. Compensation

The Association asserts that the attachment of a traditional Aboriginal community to its land cannot be given a meaningful value expressible in terms of financial compensation for disturbance to that attachment.

APEA urges that the compensation provisions in the various State and Territory mining and petroleum Acts, and precedents relating to land disturbance in the context of these Acts should be sufficient to cover all lands.

Specific conditions of access to Aboriginal land which ensure the preservation of important sites and traditions should remove the need for special compensation provisions.

Yours sincerely

Keith Orchison
Executive Director

APEA

AUSTRALIAN PETROLEUM EXPLORATION ASSOCIATION LIMITED

4th FLOOR, 60 PITT STREET
SYDNEY, N.S.W. 2000

SUBMISSION TO SENATOR THE HON. GARETH EVANS, QC,
MINISTER FOR RESOURCES AND ENERGY,
AND THE HON. A.C. HOLDING, MP
MINISTER FOR ABORIGINAL AFFAIRS

RE: 'PREFERRED NATIONAL LAND RIGHTS MODEL'

1. The Association, whose members are engaged in onshore petroleum exploration at a cost of $400 million per year, appreciates the opportunity to discuss the 'land rights model' with the Federal Government.

2. The Association welcomes the Government's indication of significant changes to its policy to accept Crown control of resources on Aboriginal land, as elsewhere. It also welcomes the willingness of the Government to provide reasonable time for interested parties to comment on the 'model' paper and to make available officers of both departments to explain the Government's attitudes.

3. Specifically, the Association strongly supports the Government's decisions to:

   * Abandon the concept of an Aboriginal veto on exploration or development

   * Provide for royalties to be paid only to governments

   * Provide for compensation not to be based on the value of minerals

   * Revise the Northern Territory legislation to reflect its change in policy

4. However there are a number of aspects of the Federal Government's proposals which are of concern to the Association and some which are fundamental to efficient management of resource development.

5. By way of background, the Association observes that the essential difference between the approach of the Western Australian Government and that of the Federal Government is that the State Government has made a decision in favour of encouraging exploration and development while seeking to protect Aboriginal interests and to minimise conflict; on the other hand the Federal Government is trying first to give control of resources to Aborigines while promoting resource activity, and its provisions for access, compensation and arbitration are likely to institutionalise conflict on a case by case basis. The Federal Government 'model' has considerable potential for delay and heavy cost at the expense of the industry.

6. For APEA, the key issues are:

* The cumbersome process of giving Aborigines the right to refuse entry on to their land and then using a tribunal and finally government decision-making to over-ride refusals. This will lead to costly delays, uncertainty and, very likely, to considerable Aboriginal ill-feeling.

* The potential for inter-government conflict and confusion through Federal Government legislation overlaying State laws.

* Highly unsatisfactory compensation provisions at both exploration and development phases. APEA strongly urges the Federal Government to accept that, once adequate provision has been made at the exploration phase to protect Aboriginal heritage and living areas, all compensation should be on the same terms as laid down in the onshore petroleum Acts. At the development stage the prospects for compensation to be awarded on ill-defined, and possibly undefinable, concepts is a cause of concern.

7. In addition, the Association makes the following observations on the 'model':

* If agreement has been reached between an explorer and a community or landholder (9.7), there is no reason for terms and conditions to have government approval

* (9.13) Once agreement between an explorer and a community or landholder has been reached the explorer should have an automatic right to proceed to development if successful

* (10.2) Explorers holding existing permits which are subject to a successful land rights claim should have an automatic right to development if they make discoveries.

8. The Association believes the allowance of ten years for land claims to be made is excessive.

Keith Orchison
Executive Director

27 February 1985

c.c. The Hon. Brian Burke, MLA, Premier of Western Australia
The Hon. Ian Tuxworth, MLA, Chief Minister of Northern Territory

APPENDIX II

Australian Mining Industry Council incorporated in the ACT

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Mining Industry House 216 Northbourne Avenue Canberra ACT Telephone 49 8955

Media Release

MR-3-85/26 February 1985

In responding to comments made today by Mr Clyde Holding, the Minister for Aboriginal Affairs, regarding AMIC's reaction to the Commonwealth Government's "Preferred National Land Rights Model", the Executive Director of the Australian Mining Industry Council Mr James Strong said that recent events illustrated the problems in conducting discussions at the level of broad principles which mean all things to all men.

Mr Strong said that whilst the Commonwealth proposals touched upon most of the mining industry's concerns as expressed to the Prime Minister and Mr Holding, they dealt with those concerns in a way which was specifically indicated by the industry in those 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.

Months of detailed discussions on Western Australian legislation had confirmed that a fundamentally different approach in legislation was necessary to overcome these problems.

However the Commonwealth was proposing modifications to the existing legislation which would continue to damage Australia's potential growth in private investment and vital export earnings at a time when it could least be afforded.

Most importantly the Commonwealth proposals were 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.

Mining industry leaders would hold further discussions with the Commonwealth following the release of the Commonwealth proposals.

Mr Strong said it is important for those discussions to address detailed aspects and practical effects, rather than broad descriptive principles which have been identified as not bringing about the required changes.

Canberra, 26 February 1985

PRELIMINARY COMMENTS ON COMMONWEALTH GOVERNMENT'S "PREFERRED NATIONAL LAND RIGHTS MODEL"

The Commonwealth has stated that its proposals deal with the concerns of the mining industry.

Whilst the proposals do touch upon most of the industry's concerns, they deal with those concerns in a way which has been specifically indicated 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, causing the loss of potential growth in investment, jobs, government revenues and vital export earnings at a time when Australia can least afford it.

Set out below are detailed comments on the aspects of the proposals mentioned by the Minister for Aboriginal Affairs as "dealing with particular industry concerns".

1. Crown Ownership of Minerals

The 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 merely agreed 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 below.

2. Aboriginal "Veto" and Access

There is no such legislative provision as a veto. This is merely a short-hand phrase. Instead, the existing N.T. legislation prevents any access without Aboriginal consent, thereby empowering Aboriginals to "veto" exploration and mining.

The Commonwealth proposals perpetuate this concept of Aboriginal consent being necessary before any exploration is carried out.

The new aspect added by these proposals is that after a certain time period, a tribunal could 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 judge and/or the Minister could over-ride that refusal.

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 over-riding 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 public pressure is likely in individual cases. Repeatedly, if the Government wishes development to proceed, it will have to over-ride 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.

This is the problem of merely modifying the N.T. legislation. It becomes as unsatisfactory as the S.A. legislation, as clearly indicated by the industry to the Commonwealth during discussions last year. The continuing need for consent or recourse to a tribunal faced with a difficult task to recommend that the Government take away an apparent right, amounts to a de facto veto which will hinder or prevent exploration and mining.

In contrast, the W.A. legislation adopts an entirely different approach by initially deciding that its policy is for exploration and mining to go ahead, and framing its legislation on that fundamental premise. The draft legislation gives right of access for exploration and concentrates on protection for Aboriginal sites of significance (sacred sites) and living areas for Aboriginals, and provisions ensuring consultation between the exploration or mining company and the Aboriginals on practical aspects of associated terms and conditions. This provides a workable and realistic basis.

3. Compensation

The only reference in the Commonwealth statement to compensation is that it 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. In practice, there is no new limitation placed on compensation by the proposals. Again, the W.A. legislation avoids this situation by limiting damages to the more direct effects on defined areas.

4. Protection of Existing Mining Titles

Another area of major deficiency is the retrospective effect of the proposals on existing exploration title areas. It is possible that where a Company has spent money on exploration, possibly millions of dollars, the Commonwealth will change the rules from those existing at the time the Company decided to undertake that exploration, to now require the Company to negotiate terms, conditions and compensation with subsequent Aboriginals owners.

This is an unfair proposal, placing unforeseen additional costs and obligations on a Company which has risked funds in good faith. It would not be tolerated in any other area of business.

This approach together with the attitudes of unrestricted compensation is in accordance with the opinion still held in some areas that the mining industry can afford to kep paying. Clearly it cannot. It pays over 60% of its pre-tax profits to Governments, has had years of returns below the Government bond rate, and is competing on a cut-throat international market where costs of production are the main criterion. Adding increasing costs to an industry which earns 40% of Australia's export income is going to cause further severe damage to that industry and to Australia's future.

news release

L - 050

CLYDE HOLDING RESPONDS TO AMIC - NATIONAL LAND RIGHTS LEGISLATION

The Minister for Aboriginal Affairs, Mr Clyde Holding, said today that he was disappointed at the initial reaction of the Australian Mining Industry Council to the Commonwealth Government's proposals on National Land Rights.

Mr Holding said that in recent months AMIC had been given direct access to the Prime Minister and other senior Ministers and had made very clear their various concerns to the Government before the paper outlining the Commonwealth's preferred national land rights model had been prepared.

"AMIC has consistently over the years and more recently in discussions with the Prime Minister and myself, identified four concerns that it has with land rights legislation. These related to:

1) Crown ownership of minerals

2) Aboriginal veto in relation to mining

3) Compensation based on the value of the minerals

4) Tribunal mechanisms which mounted to a de facto veto."

The proposals, as put forward by the Commonwealth Government deal with each and every one of those particular concerns. "Given that situation I am particularly surprised that the Executive Director of AMIC would now suggest that the proposals could be described as "totally unacceptable to the Mining industry".

The Minister called on AMIC to make a positive contribution to what is a very important debate rather than simply dismissing the Federal Government's preferred position out of hand.

Mr Holding said that whilst he appreciated that AMIC was a lobby organisation whose objective was to achieve the best possible position for its clients, the Commonwealth Government was bound to ensure that other legitimate interests such as those of the Aboriginal people, Primary Industry and others were also given equal consideration.

CANBERRA
26 January 1985

H85/120

Australian Mining Industry Council incorporated in the ACT
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Mining Industry House 216 Northbourne Avenue Canberra ACT Telephone 49 8955

Media Release

001.146
001.151

MR-2-85/21 February 1985

RELEASE OF "PREFERRED NATIONAL LAND RIGHTS MODEL"

The Executive Director of the Australian Mining Industry Council (AMIC) Mr James Strong today described the "Preferred National Land Rights Model" by the Federal Government released yesterday to the press as "totally unacceptable to the mining industry" and "a grave disappointment".

He said despite Government consideration of this issue since 1983 there had not been a single detailed discussion of the paper with the industry prior to its release and the first sighting of the document was more than 24 hours after it had been given to the national press.

Mr Strong said a quick analysis of the document revealed that it was a modification of the existing Northern Territory legislation, to bring it more into line with the South Australian legislation. Practical experience showed that not one new mining exploration title had been finalised under either set of legislation.

An excellent opportunity had been missed to look at a completely new approach to avoid the disastrous effects the legislation had had in the Northern Territory and South Australia. By contrast, the industry supported the new legislation being drafted in Western Australia.

Mr Strong said that the difference was that 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.

By contrast the Commonwealth proposals erected hurdles by giving Aboriginals the right to refuse any entry onto Aboriginal land. It then attempted to overcome that obstacle by making it possible for a Tribunal and the Government to over-ride the Aboriginal refusal.

This approach had been shown to have a tremendous propensity to encourage conflict between Aboriginals and mining companies. This conflict would now involve the Government, if it over-ruled the Aboriginals.

B. Witham
W. Harris

If it was Government policy for exploration and mining to proceed, the legislation should be based on that premise, and concentrate on appropriate protection for sites of significance and living areas.

The Tribunal hearings and Government discretion would lead to uncertainty, delay and animosity and would deter companies from exploring on Aboriginal land. It was a de facto veto which the Government had pledged to avoid.

The spiritual and cultural grounds which would be advanced as reasons to refuse mining would make it very difficult for any Tribunal or Government to over-turn Aboriginal wishes. This whole process was avoided in the W.A. model by allowing access on controlled conditions without the hurdles and argument.

Mr Strong said that one of the most disappointing aspects of the proposal is the continuing total lack of clarification of the form, structure and method of application of the proposed national legislation.

"We do not know if the legislation will operate on a top up basis over State legislation to get the best of both worlds.

"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 exports licences.

"It is a recipe for constitutional chaos", Mr Strong said.

Mr Strong said whilst many areas of concern emerged from the national proposals, the mining industry found three critical matters to be unacceptable - restricted access to the land, unlimited compensation and insufficient protection of existing mining titles.

In the case of access, whilst the absolute right for Aboriginals to refuse access had been changed to a conditional right which the Government may over-rule, the cumbersome procedures and uncertainties would not make it any more likely for companies to risk large sums of money on exploration.

Compensation had not been changed in any practical sense. The proposal merely said a formula could not relate to the value of the minerals, but it was not otherwise restricted and could be based on the immeasurable concepts of spiritual or social damage, actual or potential. Compensation was still a totally unknown quantity.

L 053

WESTERN AUSTRALIAN ABORIGINAL LAND BILL 1985 AND ASSOCIATED LEGISLATION.

PRECIS

1. WHAT LAND WILL BE CLAIMABLE?

Land available for claim will fall within the following categories :

(a) Vacant Crown land.
(b) Existing Aboriginal Reserves.
(c) Mission lands.
(d) "Living areas" within pastoral leases (see below).

2. WHAT LAND IS NOT CLAIMABLE?

Land unavailable for claim will be as follows :

(a) Private land.
(b) Pastoral leases (other than for "living areas").
(c) Land reserved or declared for, or dedicated to, use by the public as a road, street, highway or stock route.
(d) Land leased from the Crown.
(e) Mining leases, general purpose leases, miscellaneous licences under the Mining Act and production licences under the Petroleum Act.
(f) Land the subject of ratified State Agreements.
(g) Titles ancillary to (e) and (f).
(h) Areas of land of mineral potential and petroleum production areas (as declared by the Minister for Minerals and Energy).
(i) Forest reserves.
(j) Foreshores.
(k) Banks or beds of water courses within two kilometres of a public access point.

3. LAND CLAIM PROCEDURE

(a) A land claim must be filed with the Land Grants Tribunal.

(b) 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).

(c) A public hearing before the Tribunal will then follow with each interested party able to be represented.

(d) The Tribunal is to ascertain whether :

(i) the claimants have a "prescribed association" with the subject land (see below);

(ii) the claimed land is available for claim; and

(iii) that the land 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.

(e) The Tribunal must then 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 therefor refused.

4. ENTITLEMENT TO CLAIM

(a) Claims may be made by "Aboriginal land corporations" which are to be local groups consisting of seven or more adult Aboriginals who have entitlements in respect of the land in accordance with "local Aboriginal tradition".

(b) "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 particular community or group of Aboriginals relating to that area".

(c) 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.

(d) Additionally, claims can be made on a "needs" basis for specific purposes.

5. ORGANISATIONS.

There will initially be a maximum of ten "regional Aboriginal organisations" with the State being divided into an equivalent number of regions. These organisations will be granted title to existing Reserves and required to hold the same in trust for ultimate transfer to "Aboriginal land corporations". In respect of land other than Reserves it will be the Aboriginal land corporations which will apply to the Tribunal for their claim to any land to be considered.

6. FORM OF GRANT

(a) For all grants to Aboriginal land holders the title will be a "modified freehold title" which can only be sold or mortgaged with the consent of the Minister who must have regard to strict criteria before giving such consent.

(b) Granted land will be rateable but cannot be sold if rates are not paid by an Aboriginal land corporation. In that event, the regional Aboriginal organisation will be liable to pay the subject rates.

(c) Any grant of land must be 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.

(d) Granted land will not be subject to State land tax.

7. CLAIM PERIOD.

There will be a maximum period of 5½ years in which any eligible Aboriginal land corporation may make a claim before the Tribunal for the grant of land.

8. ACCESS TO ABORIGINAL LAND.

Access for grass roots exploration or marking out of a mining tenement will 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 will be for a maximum of four months and may be renewed on any number of occasions. A bona fide explorer may be granted exemption from the need to obtain a permit by the Minister. A permit may be revoked if the holder thereof utilises the authorisation conferred thereby without good faith.

Access to Aboriginal land for all other purposes will be subject to the normal laws of trespass.

9. THE POSITION REGARDING APPLICATIONS FOR MINING AND PETROLEUM TITLES.

The areas of land, the subject of these applications, will be claimable. However, if a successful land claim is made the title in respect of the relevant areas will 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 as if the grant of the land to the Aboriginal land holder had not been made.

10. OBTAINING TENEMENTS ON ABORIGINAL LAND.

The procedure for obtaining a mining tenement on granted Aboriginal land is as follows :

(a) Once an application for a tenement is made the applicant must serve notice thereof on the Aboriginal land holder (either the Aboriginal land corporation or the regional Aboriginal organisation) within twenty one days and affix a copy of the application on the subject land.

(b) The application for the mining tenement is then heard by the Warden in open court in the normal manner.

(c) Objections against the grant of an application cannot be heard by the Warden if the basis of the objection is :

(i) that the land should not have been granted as Aboriginal land;

(ii) that, being Aboriginal land, the land should not be used for mining;

(iii) that, being Aboriginal land, title to the land should not have been granted to that particular Aboriginal land holder;

(iv) that the effects of the mining will be detrimental to the use of the land by Aboriginal persons; or

(v) any other matter in respect of which recommendations may be made by the Tribunal.

(d) Upon having heard the matter the Warden is required to make a recommendation to the Minister in the normal fashion.

(e) The relevant Aboriginal land holder may, within a period of sixty days after service of the notice of the application or thirty 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 :

(i) the location of any Aboriginal residential areas;

(ii) the location of any dams, bores etc;

(iii) the location of any other improvements;

(iv) the location of any cemetary or burial ground; and

(v) the location of any area of special significance to Aboriginal persons and onto which entry should be either prohibited or made subject to conditions.

(f) In the event that the parties are able to reach an agreement a copy of such agreement is required to be filed with the Mining Registrar. The process of granting the relevant tenement then proceeds in the normal manner.

(g) If the parties cannot reach such an agreement within sixty days of the service of the "Notice of Aboriginal Interest" either party may refer the matter to the Tribunal for hearing. The applicant for the mining tenement has a right to seek an expedited hearing before the Tribunal.

(h) 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.

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

(i) if the Tribunal recommends the grant without any prohibitions etc. by the Minister; or

(ii) if the Tribunal recommends the grant subject to any prohibitions etc. by the Minister subject to the concurrence of the Governor.

(j) Once a mining tenement is granted on Aboriginal land the conditions applying thereto or to any renewal thereof shall continue to apply unless there is a substantial extension or significant alteration in the exploration or mining programme or there is a change in development proposals which will result in loss or damage to improvements or an Aboriginal residential area. In such event the Aboriginal land holder may request the Minister 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.

11. COMPENSATION.

(a) No compensation will be 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").

(b) The compensable items will be :

(i) for being deprived of the possession or use of the natural surface of land;

(ii) for damage to the natural surface;

(iii) for severance of land from any other land used by the same land holder;

(iv) for any loss or restriction of a right of way or easement;

(v) for loss or damage to improvements;

(vi) for "social disruption" (see below);

(vii) for any proper expense reasonably incurred in reducing or controlling damage resulting or arising from mining.

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

(i) the right of the members of an Aboriginal land corporation and their families to reside on the residential area;

(ii) their reasonable comfort in and enjoyment and peaceful and quiet occupation of that residential area; or

(iii) 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 land holder.

(d) In general terms, the compensation provisions are akin to those applicable to the compensation payable to holders of pastoral leases.

12. 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 the former to be declared the Minister must be satisfied that the relevant area contains mineralisation 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 for purposes ancillary thereto.

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

13. SEAS.

The Governor will be empowered to make regulations enabling specified Aboriginals to enter and use seas contiguous with existing Aboriginal Reserves in the north-west. 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 or 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 organisation on behalf of Aboriginals who have entitlements in accordance with local Aboriginal traditions to use the seas sought 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 and any rights granted to Aboriginals with respect to the sea, cannot derigate from the provisions of the Mining Act, the Petroleum Act or the Petroleum (Submerged Lands) Act or affect the operation of any licence under the Pearling Act.

14. 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.

These provisions apply to "public land", i.e. any unallocated 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 are heard by the Tribunal which is required to make a recommendation to the Minister.

15. 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.

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 Tribunal and a recommendation to the Minister.

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

16. 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 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.

17. EXECUTION OF AGREEMENTS.

Where an Aboriginal land corporation affixes its seal to a document the document shall be deemed to have been duly executed by that corporation except in the case of fraud or forgery.

18. TRIBUNALS.

There will be two Tribunals, namely :

(a) The "Aboriginal Land Tribunal" constituted under the Aboriginal Land Bill.

(b) The "Mining Compensation Tribunal" constituted under the Mining Act.

The Commissioner of the Aboriginal Land Tribunal will be a Supreme Court Judge and a Registrar will be appointed to assist the Commissioner.

The President of the Mining Compensation Tribunal is to be a District Court Judge and one or more Deputy Presidents may be appointed. Similarly a Registrar will be appointed to assist this Tribunal.

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

The Mining Compensation Tribunal will have the task of asessing compensation in respect of all private land, pastoral land and Aboriginal land.

NOTE: **The above is a general summary of the legislative package and should not be taken as a substitute therefor.**

NORTHERN TERRITORY DEPARTMENT OF MINES AND ENERGY

DELAYS TO MINERAL EXPLORATION RESULTING FROM THE ABORIGINAL LAND RIGHTS ACT

MAY 1984

DELAYS TO MINERAL EXPLORATION RESULTING FROM THE ABORIGINAL LAND RIGHTS ACT

INDEX

DELAYS TO MINERAL EXPLORATION RESULTING FROM THE ABORIGINAL LAND RIGHTS ACT

INTRODUCTION

The purpose of this submission is to examine the nature of the delays imposed on the mining industry by the current legislative provisions and administration of the Aboriginal Land Rights Act in the Northern Territory. The submission includes statistical findings of a survey of all companies who have applied for exploration licences over Aboriginal land and who have received offers of licences from the Minister for Mines and Energy. It considers the proposals put by Justice Toohey in his recent report "Seven Years On" and discusses a number of possible solutions to the problems, delays, uncertainty and associated costs of exploration on Aboriginal land.

SUMMARY

The Aboriginal Land Rights Act appears, on the evidence and experience to date, to be unworkable in relation to its exploration and mining provisions.

The main reason is the veto that Aboriginals can exercise over exploration for and mining of Crown minerals. If, as the terms of reference for Toohey J's review suggests, such a veto remains, then significant changes beyond those proposed by Justice Toohey will be needed. Toohey J does not address a number of fundamental concerns of the Territory Government and the mining industry in regard to resource management policy. As such, his recommendations will not solve the key problems of delays, uncertainties and costs.

Mr Seaman Q C,[1] in his discussion paper on the Western Australian Aboriginal land inquiry expresses the opinion that the reservation of the minerals to the Crown in the Northern Territory legislation has limited meaning and recognises some of the other impediments inherent in the Land Rights legislation of the Northern Territory as it applies to exploration and mining. He is of the view that legislation based on the Northern Territory model would be inhibiting to exploration activity and would have an adverse effect on the Western Australian economy.

Seaman also expresses difficulty in understanding the Northern Territory legislation which gives the Aborigines the opportunity to receive "compensation" in respect of disturbance to their land but also allows them benefit from some portion of the Crown's mining royalties.

He feels "considerable unease" about a system which demands complicated and artificial negotiations before initial exploration can take place. He is further of the opinion that the arbitration provisions of the Northern Territory legislation have no practical application.

A recent survey undertaken by the Department of Mines and Energy indicates that an aura of uncertainty and frustration pervades the industry with respect to mineral exploration on Aboriginal land.

The uncertainties, delays and extra costs inherent in the Land Rights legislation and in its application are a major constraint to the orderly development of the Territory's mineral resources.

The situation at present follows.

- No exploration titles granted on Aboriginal land since 1972.

- 165 exploration licences (EL's) offered to 42 companies since June 1981 (subject to an agreement being reached with the Aboriginal Land Council).

- No agreement to undertake exploration completed.

- Negotiations commenced with only 1 company.

33 companies (79%) responded to a questionnaire relating to exploration on Aboriginal land. Of these:

- 22 companies (67%) have approached Land Councils (Companies have made in excess of 140 approaches).

- 21 of the 22 (95%) have indicated to the Land Councils that they are prepared to enter negotiations.

- 9 of the 21 (43%) received indication from Land Councils that they are willing to negotiate.

- 14 companies (42% of respondents) have, or are considering, reducing exploration expenditure as a result of problems with the Aboriginal Land Rights Act. Average reduction in exploration expenditure is 75%.

PROBLEM

No title for exploration has been granted on Aboriginal land since 1972. Although some 165 exploration licences involving some 42 companies have been offered by the Minister since June 1981, no agreement to undertake exploration has been completed. The dollar

value of proposed exploration commitments in 1981 was $19.3 million. As a result of the lack of progress on agreements none of these funds have as yet been committed. Much of the investment has been diverted to areas other than the Territory where exploration is possible. This level of investment will not be available now for a considerable time on Aboriginal land.

The problem (ie the freeze on Aboriginal land from 1972 until now) has been compounded by a "freeze" on the processing of all exploration and mining title applications in respect of unalienated Crown land from 1972 until Self Government in 1978, and on land actually the subject of claim from 1978 to 1983. The latter freeze, and the freeze on processing of applications on Aboriginal land until June 1981, were introduced by the Territory Government following Self-Government in order to give the Land Councils a "breathing space" in which to establish themselves.

The result has been a complete breakdown for some 11 years, in mineral exploration and development over some 45% of the Territory (in 1983, the breakdown was reduced to 30% - 35% as a result of Territory decision to process applications on land claims not the subject of a recommendation). Further, uncertainty created by the possibility of continuing land claims has acted as a deterrent to exploration on other Territory land.

Exploration, proving of reserves, mine feasibility evaluation and development are all time-consuming and costly activities. The development of a new mine from initial exploration could take 10-15 years. Even if intensive exploration were commenced immediately, the 11 year hiatus and the continuing lack of action on exploration offers has imposed a significant cost to the development potential of the Territory and the

potential income of all inhabitants. This lack of action is also inhibiting the Territory's ability, pursuant to the Memorandum of Understanding, to lessen its economic dependence on the Commonwealth.

Appendix 1 summarises the status of exploration licences offered on Aboriginal land since June 1981 in terms of progress towards reaching agreement on exploration. Survey responses indicate that most companies have approached the Land Councils on numerous occasions in an effort to commence negotiations.

Land Councils have indicated a willingness to negotiate to only 9 companies on the exploration licences, about which they have been approached. The survey demonstrates that despite the lapse of nearly 3 years since the first offers and despite numerous approaches, serious negotiation to finalise an exploration agreement is underway in only one case.

The mining industry is losing interest in investing in the Territory. A number of companies have withdrawn from the Territory and have placed their exploration dollars elsewhere.

The impact of the Aboriginal Land Rights Act is such that some companies will not operate in the Territory and others have closed their operations or are maintaining only a watching brief. Examples include Esso, Mobil, Western Mining Corporation and Geopeko. Many staff have been retrenched.

MINING AGREEMENTS

Since the Act came into effect, only 6 agreements for development projects have been completed. All relate to projects for which the exploration was completed before 1972 and which did not require Aboriginal

consent under the Act. Negotiations concerning these agreements involved considerable time and cost to the companies concerned (Appendix 2). As a result of the high value of the minerals involved in the majority of the cases, an unreal expectation has been created with regard to financial compensation. The expectations of such payments prior to exploration do not take account of the high risk nature of exploration, the low rate of success and the relatively low profitability of the mining industry as a whole. As one industry submission indicated to the Seaman Inquiry, for every thousand prospects initially explored, only one becomes a mine.

There is a lack of understanding on the rarity of a multi million dollar mine eventuating from the exploration stage, and if a mine does result, on the long time and large resources involved in its development.

The Department of Mines and Energy conducted a survey in April amongst the 42 companies who had received offers for exploration licences (Appendix 6). From the responses to date it has been possible to identify some key problem areas and to determine the extent of, the reasons for and the effect of the delays.

ANALYSIS OF PROBLEM

The survey shows that some 22 companies made an attempt to approach the relevant Land Council while 9 companies decided to make no approach. The complexities of procedures along with the lack of effective guidelines, the lack of precedent for negotiations and costs were the factors most influencing company decisions not to approach Land Councils. (Appendix 3, Table 1).

The veto that can be exercised by Aboriginals over exploration and mining is the main impediment to the working of the Act. (Appendix 4 provides comparisons with other States).

The uncertainty, delay and increased cost resulting from the Aboriginal Land Rights Act derive fundamentally from:

- the extreme bargaining position accorded to sectional interests over Crown minerals (ie veto),
- the consequent ability to take unrealistic positions contrary to Territory and national interests, and
- the breakdown of the normal recognition of the miners right, to explore and to develop, as agent of the Crown, any economic deposit which may be discovered.

These rights of veto negate the principle of Crown ownership of minerals and the responsibility of government for resource management in the interest of all Territorians. Aboriginal interests are sufficiently protected, without the veto, by the mechanisms necessary for entering into a compensation agreement with the developer, and the various government legislative and administrative arrangements that have to be met. Such arrangements would conform to the private land provisions of the Mining Act.

The Act is framed such that in principle consent to explore and subsequently mine is separated from the question of specific conditions and compensation relating to disturbance to land and people. In reality, however, consent seems consequent upon price and the completion of a "compensation agreement", but there is difficulty in fulfilling the criteria set by Land Councils for "substantial accordance"(2) with the initial mining proposals presented at the exploration stage. The result has been an industry-land council

stand off to which the Land Councils' main response has been to request a second round right of veto over any proposals to mine that should result from successful exploration, rather than to reach a realistic position on "substantial accordance".(3) To the extent that such a position increases uncertainty to industry, it is not a general solution to the problem.

The Northern Territory Government has recognised the need for certainty if investment is to be attracted. The Mining Act provides security and logical progression of tenure even to the extent of compensating explorers if their rights are later abrogated consequent upon a decision of the Territory.

The uncertainties miners face are not confined, however, to this right of veto, nor simply to Aboriginal land. The uncertainty extends to all unalienated Crown land and land which may at some time in the future become unalienated or alienated to Aboriginal interests, and therefore subject to claim. If a claimant can continue to lodge claims over areas for which he has been unsuccessful, there will always be considerable uncertainty and delays in respect of future planning and development. The mining industry sees second and subsequent claims as a major threat to its security of tenure and to allow this practice to continue indefinitely will inhibit exploration and development and inhibit the rights of lease holders to rationalise and deal in their lease holdings.

When the open ended nature of this right to <u>claim land repeatedly</u> is combined with Justice Toohey's recommended changes to the status of land under claim,(4) the risk to investment in exploration on land potentially available for claim will be unacceptably high for most companies.

In addition to any physical restrictions, there is the further uncertainty as to the extent of financial demands which will follow in consent and compensation agreements, together with the prior cost of negotiating such agreements. Together with the delays in obtaining the right to explore in the first place, the effect of all these uncertainties is to increase the cost of exploration and mining in the Territory, so that even the most prospective of lands are becoming unattractive.

The major factor delaying the start of negotiations according to the Land Councils is their failure to identify traditional owners. Appendix 3, Table 2 summarises the reasons given by the Land Councils.

Failure to identify traditional owners is quoted by 77% of respondents as a reason why the Land Council has refused to negotiate, and is identified by 86% of respondents as the factor delaying the start of negotiations, when the Land Council has agreed to negotiations.

Land Councils have indicated their willingness to enter negotiations to 9 companies. Of these, only 1 has advised that negotiations have commenced.

One of the underlying concepts behind the justification for the Aboriginal Land Rights Act is the bond between the traditional owners and land. Failure to identify traditional owners and to fully represent their wishes undermines this basic justification. Justice Toohey's recommendation to make the compilation of a register optional is only likely to exacerbate this problem.

The Land Rights Act makes it a function of a Land Council to negotiate on behalf of the traditional Aboriginal owners. The identification of traditional

owners is therefore the first step towards meaningful negotiations. This major responsibility of the Land Councils has not been met in the 7 years operation of the Act.

Related to this is the Land Council's contention that they lack resources. This was the reason given to 60% of companies by the Land Councils for their unwillingness to enter negotiations.

The Councils seem overly concerned at duplicating matters the responsibility of Government. The problem, instead of being one of a lack of resources may be one of reallocating resources to the primary responsibility of identifying traditional owners and away from collecting and amassing economic and technical information on exploration and mining.

The third factor given for a refusal to negotiate is inadequate information supplied by the EL offer holder. 30% of companies were advised that the Land Councils were unwilling to enter negotiations because of insufficient information provided by the applicant. There are exhaustive government procedures and regulations relating to exploration, environmental impact assessments before mining and control of mining should it proceed. Despite this, Land Councils require an excessive amount of information relating to geological, economic and environmental matters and this introduces major delays and costs in negotiations to undertake exploration. This information has to be duplicated in each negotiation for agreement with the Land Council.

This factor could be connected with the lack of precedent for agreements and the lack of guidelines on information requirements or the desire to establish a price for consent. It does, however, have implications with respect to the perceived lack of resources by the Land Councils.

Exploration over any particular area may vary greatly in terms of expenditure. Exploration over areas about which little is known may involve small sums of the order of $20 000 - $30 000 per annum, but in a few cases may increase substantially as greater knowledge is accumulated and the prospect of developing a potential mine becomes more likely. Because exploration is by its very nature high risk, it is impossible at an early stage to know whether a mine might result and if so what kind of mine might be appropriate to the mineral which is discovered in economic quantities. It is therefore quite unrealistic to require detailed proposals on possible mining techniques from each and every explorer before that exploration commences. The cost of individually preparing such proposals and presenting them to Land Councils or traditional owners may be greater than the actual exploration programme that would result.

The survey carried out by Mines and Energy indicates that a number of companies believe that revised mechanisms for initiating arbitration procedures would assist exploration activity over Aboriginal land.

Of the 33 companies surveyed, 12 considered that such mechanisms would significantly assist exploration activity. While only one indicated it as <u>the</u> most significant issue this is perhaps a reflection of the fact that no companies have reached this stage of negotiations.

Of the 9 companies who have decided not to approach the Land Council <u>all</u> gave as their reasons the complexities of procedures/lack of effective guidelines and the lack of precedent for negotiations as strong reasons for not even approaching the Land Councils.

Appendix 3, table 5 summarises company views on measures to assist exploration activity over Aboriginal land.

There is overwhelming consensus on the need for increased certainty for exploration and mining on Aboriginal land within the broad ambit of the Aboriginal Land Rights Act.

This is ranked most important in 16 of 33 responses. The problem is how to translate this into practice within the intent of the Act. A starting point would be the lessening of bargaining power of the Land Councils.

The result of the lack of guidelines or precedent, the high costs of negotiations, the delays and the general uncertainty created by the ALRA has been a reduction in the extent of exploration in the Territory. In some cases exploration/mining companies are abandoning the Territory. Appendix 3, Table 4 summarises company attitudes to this.

The mining industry in the Territory, which offered the prospect of a major potential growth path, is at a severe and unjustifiable disadvantage relative to other parts of Australia. Already a number of companies have pulled out of the Territory or have severely limited their activities because of the constraints imposed by the Aboriginal Land Rights Act.

ATTEMPTS TO FACILITATE ADMINISTRATION

The majority of the terms and conditions for exploration agreements are likely to be common to all companies wishing to explore. In view of this the NT Chamber of Mines prepared a standard agreement which was presented to and discussed with the NLC. It was intended to cover issues common to all license

applications and provide a framework for discussion of specific points with the purpose of reducing legal costs and negotiating times. The NLC however rejected this standardised approach. The reason seemed to relate to a perceived weakening of bargaining position. In view of this rejection and the development of guidelines by the NLC which further dismayed the industry, the Department of Mines and Energy approached the NLC and the Chamber of Mines with a view to adopting guidelines which would provide a practical framework in which the existing Land Rights Act could work. After some seven months of tripartite consultation guidelines were developed in August 1983. The Land Council has not yet accepted these agreed guidelines or sought further discussion. (Appendix 5)

PROPOSALS TO FACILITATE ACT

There are a number of basic principles which are fundamental to the Northern Territory's approach to the Land Rights Act, particularly as it affects the development of its mineral resources.

- The principle of Crown ownership of minerals is paramount. The Aboriginal Land Rights Act, as contained in section 12, reinforces the concept of Crown ownership of minerals, but the right of veto in section 40 negates this principle and makes the operation of the Land Rights Act difficult.

- If there is a consent to explore this should, in principle, embrace subsequent mining, and such consent should be separated completely from the question of specific conditions and compensation.

- The intent and scope of the existing provisions with respect to exploration and mining should be incorporated, so as to reduce the opportunities for obstruction.

Some of Justice Toohey's proposals offer potential for some improvement in the situation. In particular his proposals in relation to questions concerning registration of sacred sites, definition of group consent, right to access, consideration of detriment and a clearer definition of matters to be considered by an arbitrator would lead to distinct improvements. Similarly his proposal in relation to "substantial accordance" would also represent a potential improvement, although the alternative, namely the introduction of a disjunctive agreement would result generally in the failure of the mining industry to invest. The insistance by the Land Councils that agreements must be disjunctive will not lead to many exploration and very few mining agreements. In general, however, his recommendations do not provide solutions to the fundamental problems.

The most important step towards increasing certainty for exploration and making the provisions of the Act workable would be the removal of the veto.

If this veto is not removed from the Act, a number of other measures beyond Toohey J's recommendations are essential, first to make the Act work, and, second, to facilitate the process of decision-making in a way which reduces the uncertainty and risk to companies interested in undertaking exploration on Aboriginal land.

To provide for the orderly development of the mining industry in the Territory it is essential that the concept of consent, if it remains, is separated from the question of compensation. The Act needs to be tightened to clearly define the separation of the two.

Specifically the Act should:

- clearly state that consent to exploration and mining is given or refused solely in consideration of its impact on Aboriginal land and culture (that is whether Aboriginals, in principle, want exploration and mining or not) and prohibit payment of money as a means of procuring consent;

- prohibit the withholding of consent as a means of procuring unreasonable terms or payments for a mining compensation agreement;

- ensure that, once consent has been given subsequent agreements pay full regard to the protection of Aboriginal interests with appropriate compensation provisions; and

- define procedures for dealing with consent and compensation agreements.

The criteria for establishing compensation should be clearly set out in the Act, should be in harmony with the private land provisions of the Territory Mining Act, and thus should be restricted to compensation for:

- being deprived of the use of the surface or part of the surface of the land;

- damage to the surface of the land through mining activities conducted thereon;

- being deprived of the use of improvements on the land;

- the severance of the land from other land owned or occupied by the same or related groups; and

- all other damage to the land or improvements on the land arising out of mining or other work under a mining interest.

Alternatively guidelines could be set out in regulations or administrative procedures.

One suggested cause of the difficulty in identifying traditional owners is a lack of resources in the Land Councils. If this is so, the Commonwealth should increase the available resources, and/or look at alternative methods of identification.

There would appear to be considerable scope for simplifying the identification of traditional owners. As a first step, relevant Aboriginals in the Land Council or particular district should be asked to identify traditional owners. If a consensus cannot be reached, anthropologists could be asked to conduct studies aimed at resolving problems. A third step would be to provide a mechanism of redress for those Aboriginals who believe they have a claim to be traditional owners, but have not been recognised as such (such a mechanism was suggested by Justice Toohey 376b).

Such a three stage process is preferable to universal and exhaustive anthropological studies and should lead to a quicker but fair identification of traditional owners. It places responsibility for the first stage of identification with those in the best position to carry it out - the Aboriginals. At the same time, it provides mechanisms for resolution and redress in cases of lack of consensus or conflict. It should make the task of compiling a register of traditional owners much less onerous, by removing final responsibility for excluding an individual from the register from the Land Council, without jeopardising the individual's rights.

This should help reduce delays in entering negotiations, when an exploration proposal is lodged.

There also seems considerable scope for Land Councils to reallocate resources and not concern themselves with areas which are the responsibility of Governments.

Some reduction in uncertainty and increased investment would result from placing a definite time limitation on the right to claim unalienated Crown land and on the ability of Aboriginals to make repeat claims to land. Almost all claimable unalienated Crown land is already under claim, and the real issues are therefore the questions of repeat claims and allowable claim over alienated Crown land.

If there is not a defined end to the land claim process, there should be a requirement for claimants to establish a prima facie case before a second or subsequent land claim is lodged.

A number of Toohey's recommendations provide for arbitration on key issues. The Act needs to specify the criteria for arbitration, namely:

- the size, type and location of the proposed activity and the applicants requirements for access, housing and other facilities;

- the way of life of the traditional owners which may be affected;

- the wishes of those traditional owners with respect to the proposals;

- the rights of those Aboriginals as specified under the Aboriginal Land Rights (Northern Territory) Act 1976;

- the benefit of the proposed activity of the wider community; and

- the amount payable under an agreement, having regard for all loss and damage likely to be suffered by traditional owners as a result of the mining proposal, which shall not take into account the value of any mineral.

Specifically the Act should be amended:

- to allow for the automatic appointment of an arbitrator should negotiations prove unsuccessful after a period of one year from the start of negotiations;

- to provide for consultation between the Northern Territory and Commonwealth Governments before the appointment of an arbitrator and for the setting of the terms of reference for arbitration; and

- to allow the Northern Territory Government to seek arbitration in order that it can fulfil its executive responsibilities.

An alternative to the automatic appointment of an arbitrator would be a requirement for Land Councils and mining companies to "show cause" as to why negotiations have not commenced or have failed to make progress.

A company is under commercial pressure to find a negotiated solution. The proposals above would go some way to placing Land Councils under equal pressure. These proposals would also be seen by the industry as a positive step in ameliorating the already excessive delays which they are subject to. It would not jeopardise the principles of the Act.

One measure identified with general consensus by companies is the desirability of <u>standardised guidelines or procedures</u> for the negotiation of terms and conditions of agreements entered into under the

Aboriginal Land Rights Act. As discussed, two attempts have been made to introduce guidelines, but have not been successful so far.

The second area of consensus for improvement is the desirability of negotiations face to face with traditional owners (ranked most important in 10 of the 33 responses). The intention is not to exclude Land Councils from negotiations but rather to open direct lines of communication, so that proposals and options can be discussed and traditional owners' concerns fully understood and reflected in any subsequent proposals without any filtering through intermediaries. Such direct lines of communication could do much to remove unnecessary delay and inconvenience.

The third area identified by companies is the need for enhanced administration by the Bureaus of Land Councils (ranked most important in 5 of 33 responses). This probably relates to frustrations experienced in delays in dealing with Land Councils or, for example, the difficulties Land Councils have cited with identifying traditional owners.

CONCLUSION

The themes of excessive delays, uncertainty and associated costs have been identified repeatedly as reasons for concern with the operations of the Aboriginal Land Rights Act but have been ignored repeatedly by the Commonwealth. This submission has sought to examine the nature of those delays and uncertainties. It is backed up by the statistical fundings of a survey of all companies who have been offered exploration licences by the Minister for Mines and Energy on Aboriginal land.

There are some major issues of principle which have not been resolved. In particular reference is made to the right of Aboriginals to fully control mining on Aboriginal land which is in direct contradiction to the principle of Crown ownership of minerals. The problem of Crown sovereignty is only part of the problem for resource management which stems from defacto Aboriginal ownership of Crown minerals.

No exploration has occurred on Aboriginal land in the Territory for over 10 years. So long as Aboriginals control mining on Aboriginal land, and are able to exercise all the powers that go with this control, no significant commitment on Aboriginal land of exploration activity can be expected.

This submission highlights some of the practical difficulties in the Act and its administration. It shows that:

- the veto is the main impediment to the working of the Act and should be removed;

- as the Act now stands, consent to explore and subsequently mine should be separated from the terms of any compensation agreement;

- the Act needs to specify clearly the criteria upon which compensation agreements are to be based;

- the failure to identify traditional owners is given by Land Councils as the major factor in delaying the start of negotiations and simpler mechanisms need to be developed;

- Land Councils claim to lack resources but are overly concerned at duplicating matters the responsibility of governments;

- Land Councils require excessive amounts of information not relevant to their responsibilities;

- the ability of Aboriginals to make repeated land claims has added to uncertainty and, if there is no cut off for claims, claimants should be required to establish a prima facie case before second or subsequent land claims are lodged;

- arbitration provisions of the Act require modification so as to avoid the possibility of protracted negotiations; and

- there is a need for enhanced administration by the Bureaus of the Land Councils.

REFERENCES

(1) Paul Seaman, QC - The Aboriginal Land Inquiry - Discussion Paper, January 1984, Section 6

(2) Justice Toohey - Seven Years On, December 1983, Chapter 19

(3) Justice Toohey - Op cit, Chapter 19

(4) Justice Toohey - Op cit, Chapter 18

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STATUS OF EL OFFERS

YEAR OF ISSUE	1981	1982	1983I	1983II	1984	NOT STATED	TOTAL
* Number of EL's Offered	47	67	27	1	-	2	144
** No. of companies involved	11	19	8	1	-	1	40
No. of companies which approached Land Councils (Q4)	8	15	5	1	-	1	30
Companies willing to negotiate (Q6)	7	15	5	1	-	1	29
Land Council willing to negotiate (Q8)	1	7	2	-	-	1	11
Negotiations commenced (Q10)	-	-	-	-	-	1	1

* Respondents to the survey represent 144 EL's (or 87% of the original 165 offered by the Minister for Mines and Energy.

** 33 separate companies responded to the survey. Some companies received, however, multiple offers spanning a number of years. Hence the inflated figure in the total column.

NEGOTIATING DELAYS IN CONSENT AND COMPENSATION AGREEMENTS

APPLICANT	PROJECT NAME	DATE MINING APPLICATION LODGED MONTH/YEAR	DATE COMMENCED FORMAL* NEGOTIATIONS LAND COUNCIL MONTH/YEAR	DATE SIGNED AGREEMENT LAND COUNCIL MONTH/YEAR	DATE TITLE ISSUED BY NT MONTH/YEAR	CURRENT STATUS
(Koongarra Ltd) Denison Australia Pty Limited	Koongarra	09/70 11/70 (discovered 1969)	01/81	N/A	N/A	Agreement near completion
Pancontinental Mining Limited (65%) and Getty Oil Development Co Ltd (35%)	Jabiluka	10/73 (discovered 1971)	06/81	07/82	08/82	Complete No mining due to Commonwealth policy
Queensland Mines Limited	Nabarlek	10/70	8/74**	03/79	03/79	Mining
North Flinders Mines Limited	Granites	10/75	08/79	08/83	N/A	Final feasibility studies
Energy Resources of Australia	Ranger	N/A Memorandum of Understanding with Commonwealth 10/74 (discovered 1970)	10/77	11/78	N/A D.41 authorization 01/79	Mining

3.12 aa(1)

NEGOTIATING DELAYS IN CONSENT AND COMPENSATION AGREEMENTS

APPLICANT	PROJECT NAME	DATE MINING APPLICATION LODGED MONTH/YEAR	DATE COMMENCED FORMAL* NEGOTIATIONS LAND COUNCIL MONTH/YEAR	DATE SIGNED AGREEMENT LAND COUNCIL MONTH/YEAR	DATE TITLE ISSUED BY NT MONTH/YEAR	CURRENT STATUS
Magellan Petroleum Australia Ltd	Palm Valley	10/76	3/82	11/82 (Sig)	11/82	Production commenced
United Canso Oil Co (NT) Pty Ltd and Magellan Petroleum (NT) Pty Ltd	Mereenie	10/73	3/77	11/82 (Sig)	N/A	Appraisal Drilling

NOTE:

* This date refers to formal negotiations. In most cases the mining companies attempted unsuccessfully to open negotiations considerably before this date (eg Koongarra late 1978).

** Verbal agreement was reached in August 1974, negotiations commenced some time before this.

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TABLE 1

REASONS FOR DECISION NOT TO APPROACH LAND COUNCILS (question 5).

Number of companies involved = 9

		Strong	Mild	Weak	Not Important
(a)	Complexities of procedures/lack of effective guidelines	7	-	1	-
(b)	Apprehension in entering negotiations under ALRA.	4	2	-	1
(c)	Perceived high cost of negotiations	4	4	-	-
(d)	Lack of precedent for negotiations	6	-	1	1
(e)	Insufficient time since offer to take this action	-	-	1	6
(f)	Other, (give details)	*			

Total number of ELs covered: 28

* 3 companies indicated other reasons for their decision not to approach, namely

- concern at Commonwealth Government policy with respect to uranium
- awaiting guidance from progress of other applicants.
- company not yet ready to commence negotiations.

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TABLE 2

REASON GIVEN BY LAND COUNCIL FOR REFUSAL TO NEGOTIATE
(question 9)

Number of companies = 13

		Given	Not Mentioned
(a)	Traditional owners not identified	10	3
(b)	Insufficient resources	7	6
(c)	Backlog of requests to negotiate	4	9
(d)	Insufficient information provided by applicant	4	9
(e)	No reason given	1	1
(f)	* Other (give details)	1	-

Total number of ELs involved: 71

Number of Approaches: 141+

* Inability to define guidelines and identify material required.

TABLE 3

REASONS FOR NON-COMMENCEMENT OF NEGOTIATIONS

(question 10)

Number of companies involved = 7

(a)	Awaiting Land Council's action to commence negotiations	4
(b)	Land Council to identify traditional owners	6
(c)	Traditional owners being briefed on proposals	2
Total number of ELs involved:		41

TABLE 4

REDUCTION IN PROPOSED EXPLORATION EXPENDITURE.

(question 15)

	Not given	25%	50%	75%	90%	100%	Total
No of Companies	1	-	2	5	1	5	14

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TABLE 5

MEASURES TO ASSIST EXPLORATION ACTIVITY

(question 18)

Total No of Respondents: 33

		Significant	Not Significant	Ranked MOST Important
(a)	Increased certainty for exploration and mining on Aboriginal land within the broad ambit of the Act.	29	-	16
(b)	The improvement of the current substantial accordance provisions in the Act as recommended by Justice Toohey (Section 40[2]).	18	7	2
(c)	Standardised procedures for the terms and conditions of agreements entered into under the ALRA.	26	3	5
(d)	The introduction of statutory mechanism for facilitating negotiations.	16	10	2
(e)	Mechanisms for initiating arbitration procedures (more a last resort mechanism).	12	12	1
(f)	Enhanced administration by Bureaus of Land Councils.	19	9	5
(g)	Changes to current financial arrangements under Act.	9	15	1
(h)	Reduction in geotechnical data required by the Land Councils.	15	12	1
(i)	Negotiations face to face with Traditional Owners.	24	3	10

CONTROL OF MINING AND COMPARISONS WITH OTHER STATES

Veto negates the principal of the Crown's ownership of minerals and attacks the foundation of Territory sovereignty. This attack is exemplified by Toohey J where, inspite of his recommendations which reinforce the principle of Crown ownership of minerals, he suggests that a mechanism be introduced whereby "Aboriginals could institute long term regional resource and development planning." Such planning is clearly the right of the Crown to be undertaken for the benefit of all Territorians.

This problem is resolved in the South Australian Legislation by removing the ultimate decision for resource management on Aboriginal land from Aboriginal hands. In New South Wales the problem is resolved by severely restricting the definition of claimable land, continuing all rights under mining interests which predate the Act and by retaining responsibility for the management of key minerals in the hands of the government.

Similarly the Western Australian Government appears to be moving toward introducing Land Rights Legislation without Aboriginal control of mining on Aboriginal land. Recently it was quoted in the media that a spokesman for the West Australian Government went so far as to say that:

> "West Australia is clearly concerned that any section (ie of the community) should have a veto over mining."

It is anomalous that Aboriginals in the Territory should be the only Territorians with a power of veto over mining proposals. Territory Aboriginals may become the only Aboriginals in Australia with an effective power of veto over mining.

GUIDELINES FOR SUBMITTING PROPOSALS FOR AN EXPLORATION LICENCE ON ABORIGINAL LAND IN THE NORTHERN TERRITORY

INTRODUCTION

Exploration Licence applicants who have been offered a licence by the Minister for Mines and Energy are required to obtain an agreement under the Aboriginal Land Rights (NT) Act (ALRA, S.40(1a)). An agreement has to be approved by the Commonwealth Minister for Aboriginal Affairs before any licence can be granted over Aboriginal Land.

This paper provides the recommended format and content of proposals for submission to the Northern Land Council (NLC). These proposals will be assessed by the NLC and presented to the traditional owners. On the basis of these proposals, the traditional owners will decide whether to consent to the exploration licence application. Given the consent of the traditional owners the NLC will negotiate, in association with traditional owners, an agreement with the Licence Applicant.

At the exploration stage, very little is known of the mineral deposit(s) that might be discovered as a result of the work to be undertaken. To develop a mining agreement based on a hypothetical deposit would be untenable. On this basis, it is considered more practicable to develop a two stage agreement as provided for under the Aboriginal Land Rights (NT) Act. The initial agreement, at the exploration licence stage, is a consent agreement for exploration and, in principle, mining. If economic mineralisation is located during the term of the initial agreement, a second agreement outlining the terms and conditions to apply to mining would be negotiated and would be subject to arbitration if negotiations become deadlocked (provided for under ALRA S.45(1)).

These guidelines are provided for the purposes of assisting the mining companies concerned. The NLC may require additional information on any matter so that the impacts of the applicant's proposals on the land and people can be clarified.

FIRST STAGE - EXPLORATION OR CONSENT AGREEMENT

The main subject of any submission should be the exploration program (planned and extrapolated), its likely impact on the land and traditional owners, and the measures proposed to minimise that impact.

Applicants are advised to submit in addition, descriptions of a wide range of possible mining scenarios if the possibility of a second "consent" at the mining agreement stage is to be avoided (ref sec 40(2) Aboriginal Land Rights (NT) Act).

PM/SN:151
2.3 hh1

To ensure that the exploration approach and its impact is fully understood applicants should submit a general description of a range of possible techniques that could be employed.

It is understood that the NT Chamber of Mines is in the process of producing a booklet describing all aspects of exploration, mine development, production, and rehabilitation in order to facilitate EL submissions.

As exploration progresses there will be a need to liaise with traditional owners on the exploration programs and to discuss any possible relocation of proposed works so as to avoid damage to sacred sites and also to discuss details of the program as it develops.

At the exploration agreement stage, applicants are asked to make certain commitments which would be, if mining commences, incorporated into a future mining agreement.

Information submitted, as far as practicable, should be in a form suitable for presentation to the traditional owners and it is recommended that each submission contain the following information:

(1) a brief description of the company and its activities (where available an annual report or company prospectus may suffice);

(2) the position of the tenement under application with a map showing its location in relation to roads, topographical features, settlements, etc;

(3) a copy of letter of offer by Minister for Mines and Energy and any conditions to be placed on the licence;

(4) an outline of the proposed program stating the location, approximate time scale and period of activity, the likely effect of the proposed work and proposals to minimise the effect of such exploration works and including the following aspects -

(i) exploration techniques;

(ii) base camp requirements (water, waste disposal, number of personnel etc);

(iii) proposed method and amount of vehicular access both into and throughout the exploration licence with special reference to any proposals to construct roads, landing strips, helipads etc; and

(iv) any water, timber or other requirements to be obtained from Aboriginal land;

(5) a description of possible mining scenarios and all applicable exploration techniques that may be employed. This may be presented by reference to a booklet such as that being developed by the NT Chamber of Mines;

(6) arrangements for the setting up of liaison meetings with representatives of the traditional owners once an agreement has been reached;

(7) applicants' proposals concerning Aboriginal employment, in particular where opportunities exist for the employment and training of Aboriginal people such opportunities should first be offered to local Aboriginals and preference should be given to using local Aboriginal businesses where they offer a competitive service; and

(8) the annual compensation payable for exploratory work on the exploration licence should reflect the intensity of activity and could be formulated on the basis of area of the exploration licence and annual work expenditure

ie (Licence Area km² x $.) + ($ Annual Expenditure x %)

= annual compensation payable.

(9) Commitments need to be entered into during the formulation of the exploration agreement which provide for the basis of a mine development agreement. These commitments should include the following:

- aboriginal employment and training;
- compensation payments; and
- other matters relating to Aboriginal welfare.

Explorers may wish to incorporate as part of that initial agreement a provision for the granting of Exploration Retention Leases (ERL), without the need for further consent, on which detailed exploration may continue once the exploration licence expires. As ERLs are merely an extension of the exploration activity, these leases would not require further technical submissions from the applicant, provided the exploration proposals are in substantial accordance with those submitted at the EL stage.

SECOND STAGE - MINING OR COMPENSATION AGREEMENT

Exploration Licence holders when applying for subsequent tenements (Mineral Lease, Extractive Mineral Lease) are required to develop a further agreement with the NLC.

Given that the proposals are in substantial accordance with those proposed in the exploration licence agreement, no further consent will be required from the NLC. The negotiation of an agreement however, will be required.

Applicants for a mineral lease, or extractive mineral lease, are considered as applications for mining. Proposals for such mining tenements should address the following matters.

1. Environmental Impact Statement along the lines set out in the attached paper.

2. The likely benefits to be received by Aboriginal Benefit Trust Fund under section 63 of the Aboriginal Land Rights (NT) Act.

3. Possible requirements outside the area of the lease under application eg water, gravel, sand etc.

4. Proposed access route stating type of construction and amount of usage.

5. Terms and Conditions on the lease to be issued by the Minister for Mines and Energy.

6. Details of Aboriginal sacred sites in the region and the effect, if any, of the proposed operations on these sites.

7. Details of the commitments made by the applicant to the development, training, employment, welfare and education of the Aboriginal people.

8. Details of compensation payable.

In presenting any proposal, it is important that the applicant provides adequate data so that the traditional owners can fully understand the proposed work, how it will affect the land/lifestyle and the applicant's intention with regard to measures to minimise impact on the environment, and to rehabilitation of the mine site.

Either the NLC or the applicant may ask the Minister for Aboriginal Affairs to appoint an arbitrator to resolve deadlocked negotiations for a mining agreement given that "consent" has been given.

PM/SN:151
2.3 hh4

CONFIDENTIAL 100

DEPARTMENT OF MINES AND ENERGY

QUESTIONNAIRE ON EL APPLICATIONS ON ABORIGINAL LAND

Initial Approach to Land Council

1. No. of EL's covered by this response ☐

	1981	1982	First Half 1983	Second Half 1983	1984
2. Year of offer of EL:	☐	☐	☐	☐	☐

3. Number of EL's in each Land Council area covered by this response?

NLC ☐ CLC ☐

4. Have you made any attempt to approach the relevant Land Council?

Yes ☐ No. of approaches ☐ PROCEED TO QUESTION 6

No ☐ continue to Question 5.

5. If you decided not to approach the Land Council, indicate the degree to which the following factors influenced your decision. (Mark relevant box with X)

	Strong	Mild	Weak	Not Important
(a) Complexities of procedures/lack of effective guidelines	☐	☐	☐	☐
(b) Apprehension in entering negotiations under ALRA.	☐	☐	☐	☐
(c) Perceived high cost of negotiations	☐	☐	☐	☐
(d) Lack of precedent for negotiations	☐	☐	☐	☐
(e) Insufficient time since offer to take this action	☐	☐	☐	☐

(f) Other, (give details) .....

PROCEED TO QUESTION 15.

Return, marked CONFIDENTIAL, to the Director of Mines by 6 April 1984.

Preparedness to Negotiate with Land Council

6. Have you indicated to the Land Council that you are in receipt of an offer of an exploration licence from the NT Department of Mines and Energy and that you are prepared to enter negotiations under the terms of the Aboriginal Land Rights Act?

Yes ☐ PROCEED TO QUESTION 8.

No ☐ Continue to Question 7.

7. If you have not indicated a willingness to enter negotiations with the Land Council indicate the degree to which the following factors influenced your decision.

		Strong	Mild	Weak	Not Important
(a)	Complexities of procedures/lack of effective guidelines	☐	☐	☐	☐
(b)	Apprehension in entering negotiations under ALRA.	☐	☐	☐	☐
(c)	Perceived high cost of negotiations	☐	☐	☐	☐
(d)	Lack of precedent for negotiations	☐	☐	☐	☐
(e)	Insufficient time	☐	☐	☐	☐

(f) Other, (give details) .....

PROCEED TO QUESTION 15.

8. Has the Land Council indicated its willingness to enter negotiations?

Yes ☐ PROCEED TO QUESTION 10.

No ☐ Continue to Question 9.

9. What reason has the Land Council given for its refusal to negotiate?

	Given	Not Mentioned
Traditional owners not identified	☐	☐
Insufficient resources	☐	☐
Backlog of requests to negotiate	☐	☐
Insufficient information provided by applicant	☐	☐
No reason given	☐	☐

Other (give details) .....

PROCEED TO QUESTION 15.

10. Status of Negotiations:

Negotiations commenced — Continue to Question 11. ☐

Negotiations not started

(a) Awaiting Land Council action to commence negotiations ☐

If so, how long have you waited? ☐

(b) Land Council has to identify traditional owners ☐

(c) Traditional owners are being briefed on proposals ☐

PROCEED TO QUESTION 15.

11. If negotiations are underway, outline status of negotiations by marking appropriate box.

		YES	NO	N/A
(a)	Proceeding satisfactorily	☐	☐	☐
(b)	Proceeding unsatisfactorily	☐	☐	☐
(c)	Stalled (i) by mutual consent	☐	☐	☐
	(ii) despite your efforts	☐	☐	☐
	(iii) despite Land Council efforts	☐	☐	☐
(d)	Land Councils awaiting further instructions from traditional owners	☐	☐	☐
(e)	Traditional owners currently being briefed on project	☐	☐	☐

(f) Other (give details) .....

12. Have you been able to have face to face contact with traditional owners concerning this EL or group of EL's?

YES ☐ NO ☐

13. In negotiations, have any of the following matters proven a problem?

		YES	NO
(a)	Confusion between granting of consent, and the need for agreement on terms and conditions prior to consent	☐	☐
(b)	Lack of agreed guidelines or standardised arrangements for terms and conditions of agreement	☐	☐
(c)	Introduction of separate agreements over the exploration and mining stages with the possibility of subsequent veto	☐	☐
(d)	Communicating technical aspects of proposals	☐	☐
(e)	Amount of detail requested by Land Councils	☐	☐
(f)	Unrealistic negotiating positions (provide example)	☐	☐

(g) Other (give details) .....

14. Would improved arbitration provisions assist you at this stage of your negotiations? YES ☐ NO ☐

Further Information

15. Have you reduced or are you considering reducing your proposed exploration expenditure commitment in the NT as a result of your perception of the ALRA? If so indicate the approximate percentage reduction.

YES ☐ NO ☐ 25% ☐ 50% ☐ 75% ☐ 100% ☐

16. Have you abandoned your interest in exploration on Aboriginal land?

YES ☐ NO ☐

17. Have you considered abandoning your interest in exploration on Aboriginal land?

YES ☐ NO ☐

18. Which of the following would most assist exploration activity over Aboriginal land?

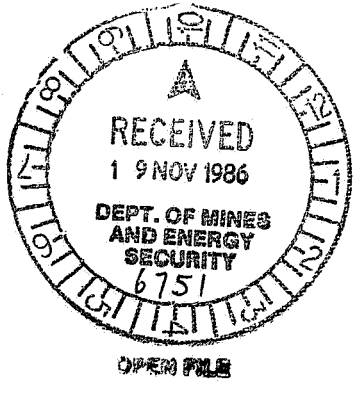
	Significant	Not Significant
(a) Increased certainty for exploration and mining on Aboriginal land within the broad ambit of the Act.	☐	☐
(b) The improvement of the current substantial accordance provisions in the Act as recommended by Justice Toohey (Section 40[2]).	☐	☐
(c) Standardised procedures for the terms and conditions of agreements entered into under the ALRA.	☐	☐
(d) The introduction of statutory mechanism for facilitating negotiations.	☐	☐
(e) Mechanisms for initiating arbitration procedures (more as last resort mechanism).	☐	☐
(f) Enhanced administration by Bureaus of Land Councils	☐	☐
(g) Changes to current financial arrangements under Act.	☐	☐
(h) Reduction in geotechnical data required by the Land Councils	☐	☐
(i) Negotiations face to face with Traditional Owners	☐	☐

19. Which of the issues in Question 18 do you consider to be the most important?

☐

Aboriginal Communities and Petroleum Exploration & Development

— advice for members of the Australian Petroleum Exploration Association Limited



APEA

February 1985

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1.0 Introduction

The Australian Petroleum Exploration Association Limited represents almost all the companies, Australian and foreign, engaged in exploration for and production of oil and gas in this country.

Its membership stands at 100 exploration and production companies and 150 companies servicing the industry.

The Association is governed by a Council of 16 companies which are elected by the membership. The Council has a number of sub-committees including one on Aboriginal Affairs – which, along with staff of the Association, has been engaged over a period of years in monitoring contact between members of the industry and Aboriginal communities and their representatives.

APEA has also published a booklet of advice for its members when dealing with Aboriginal communities.

1.1 APEA member activities

APEA member companies:

a. Carry out exploration in diverse geological, geographic and political environments in Australia.
b. Operate under widely different laws including heritage, environmental planning, protection of sites and national parks Act, as well as the Petroleum (Submerged Lands) Act and the onshore petroleum Acts of the States and the Northern Territory.
c. Encounter Aborigines of differing lifestyles, associations with land, aspirations, attachment to tradition, and understanding of exploration and development activity.

APEA member companies working in remote areas have established sound principles for contact with Aboriginal communities and exploration is carried on quietly and efficiently by companies in accordance with the law and without disturbing Aboriginal culture, way of life or traditional and important sites.

1.2 APEA Aboriginal affairs policy

The Association acknowledges (as would most other Australians) the right of Aboriginal people to:

1. Choose to maintain aspects of their traditional lifestyle.
2. Be involved in decisions concerning their own affairs.
3. Protect sites of cultural importance.
4. Develop greater self-reliance,

and believes that these objectives can be achieved while Australia maintains its position as one nation with one community of people.

The Association accepts the principle of government activity to enable Aboriginal communities to obtain title to appropriate areas of land as a means of preserving their cultural heritage and aspects of their traditional lifestyle.

The Association, however, maintains that governments in seeking to give effect to land rights legislation must bear in mind the following key elements:

1. Continuation of Crown ownership of minerals with governments, not quasi-governmental bodies controlling access to land for exploration;
2. Availability of land without unreasonable restrictions on exploration access and resource development;

3. Payment of royalties from development only to governments, with no difference between those payable on Aboriginal land and those on other lands;
4. Compensation provisions for landholders to exclude payment for consent to access, to be unrelated to the value of minerals as well as spiritual or religious factors, and to relate only to actual disturbance to land or actual effects on landholders as laid down in the onshore petroleum Acts
5. Access or compensation disputes to be referred to independent tribunals which have power only to make recommendations to governments who take responsibility for decisions;
6. Government acceptance of responsibility for identifying sensitive areas before exploration permits are gazetted for bidding;
7. Access for development to follow automatically on approval of access for exploration; and
8. Efficient administration procedures to prevent undue delay or excessive administrative cost hindering resource development.

1.3 Points of concern

The Association appreciates that exploration and development on lands where Aboriginal communities have current occupation or historical and ritual involvement is a significant social and political issue in Australia today.

The Association's belief is that petroleum exploration and development can be compatible with the long-term interests of Aboriginal communities.

The Association accepts that it is the responsibility of government to weigh the social factors involved in petroleum exploration and development, to decide in the interests of the total community whether or not activity should proceed and, if so, under what conditions.

The Association believes the following points require particular attention by governments which seek to achieve resource development as well as the establishment of land rights legislation:

A. Governments have the right to control access to land for exploration and the right and responsibility to control exploitation of minerals discovered by explorers. Alienation of land areas from exploration and resource development through national parks Acts, declaration of agricultural land and the prohibition of resource activities in some regional planning schemes is creating a serious impediment to future activity. The industry is not concerned with who owns the land, whether it is owned by Aboriginal Australians or any other Australians. However land granted to Aboriginal Australians should be accessible to the industry on the same terms as would apply to land owned by any other Australians.
B. How much land should become Aboriginal land? This question is only of concern where rights attaching to Aboriginal land differ from rights attaching to other land. APEA considers that it is not in the national interest to allow any tracts of land to be subject to unreasonable restrictions on exploration access and resource development.

C. The partnership of Crown ownership of minerals and private enterprise decision-making should be maintained. The concept of Crown ownership has worked efficiently for Australia since its introduction in the 19th Century, and is essential to ensure that mineral exploration and development can proceed to the benefit of all Australians. Particularly in more recent times when large scale capital intensive mineral development has come to depend on stability of legislation, it has become essential that governments alone assume the right to set the regulating framework within which development should take place.

D. As a general principle the Association believes that compensation provisions for exploration in the various State and Northern Territory mining and petroleum Acts, and precedent relating to land disturbance, should cover all land in Australia. APEA believes the resources industry should not be responsible for funding Aboriginal welfare or providing amenities to any greater extent than any other part of the community.

The Association is concerned that in the past decade Aboriginal land legislation has granted one group of Australians unique rights controlling access to minerals on their land, and that such rights may be extended by future legislation to cover even larger areas of Australia.

Aboriginal landholders are placed thereby in a position to prohibit exploration and development, or to impose conditions which make projects commercially non-viable.

This must have the long term effect of reducing opportunities for national economic development.

2.0 Advice for APEA Members

APEA is concerned that member companies and their employees are fully aware of the complexities of the relationship between the resources-based industries and Aboriginal communities.

The Association draws the attention of all members to the complicated and sensitive issues included in Federal, State and Territory levels of administration and urges members to explore all aspects of contact with Aboriginal communities before undertaking fieldwork.

The following is not a set of guidelines because a wide range of communities as well as governments are involved in Aboriginal affairs. Aborigines in Australia today live in a broad range of lifestyles, from traditional to urban, and any approach to Aboriginal affairs needs to recognise the range of communities and the range of their needs. No one set of principles will suffice. This is an area where corporate social responsibility must be exercised according to the circumstances prevailing in each case.

3.0 Meeting Obligations

Exploration in many parts of Australia has attracted increased political and media attention in recent times because of concern about misunderstandings and confrontations on the subject of sites and significance to Aborigines.

Much of the comment gives little indication of the complex nature of the problems faced by exploration companies. It has been suggested that the various controversies also overlook the advantages and disadvantages that Aboriginal people see arising from exploration activities.

There has been a tendency to present these issues as a simple choice between development and the integrity of an ancient culture.

The Association's belief is that petroleum exploration and development can be compatible with the long term interests of Aboriginal communities.

3.1 Legal obligations

In addition to fulfilling their legal obligations, APEA member companies should remain sensitive to the traditions and culture of Aboriginal communities and strive to avoid any undesirable social and environmental impact in any area of activity.

APEA brings to the attention of member companies the complementary responsibilities of elected governments – State, Territorial and Commonwealth – in meeting obligations to Aboriginal communities. While it is the final responsibility of governments to consider all factors and to approve exploration and development, APEA urges member companies to continue to seek a proper understanding of all relevant environmental and social factors when embarking on exploration and production activities.

As an association, APEA seeks an acceptable balance between the interests of all involved in an area attracting exploration and development.

3.2 Differing traditions

There are many Aboriginal communities in Australia with significantly differing traditions and current interests. The Association accepts that Aboriginal tradition involves a deep affinity with the land and that particular sites have had and may continue to have significance in particular Aboriginal cultures. However, there are marked differences in the levels of significance, and the precise meaning of the term 'sacred sites' has been distorted in public debate. In the Northern Territory, for example, the legal definition of the term 'sacred site' is very broad and cannot be given a precise meaning.

No simple set of guidelines will suffice for all exploration activity across Australia. To produce such guidelines would be to imply that there is a uniformity in Aboriginal culture and aspirations – which is manifestly incorrect.

Aborigines in Australia today live in a broad range of lifestyles, and it is failure by some of those involved to recognise differing needs of Aboriginal communities which has led to much of the confrontation and confusion experienced in recent times.

In the interests of petroleum exploration and development for the benefit of all Australians, including Aborigines, and, at the same time, to properly provide for the accommodation of special Aboriginal interests, the Association recommends the following general practices to member companies.

4.0 Broad Principles

These notes cover the broad principles under which a company should conduct its operations, including exploration for and production of petroleum on Aboriginal freehold areas, land which is in or near lands claimed by Aboriginals to have tribal significance or lands gazetted by governments as reserves. They do not attempt to set out detailed procedures to cover all circumstances.

4.1 Legal framework

Resource development is controlled by a series of Federal and State government laws, which set out terms and conditions under which exploration and other operations can take place. Aboriginal affairs are administered under a variety of legislative and other authorities which may have a bearing on exploration or mining. Conditions governing land usage where Aboriginals are concerned are laid down by Commonwealth and State laws.

At the time of writing, three governments are considering land rights legislation. Victoria has tabled and withdrawn legislation for redrafting; the Commonwealth is considering uniform legislation to supplement State legislation; and Western Australia has advised that the legislation it is developing will be based upon the following principles:

- vacant Crown land only available for claim
- no Aboriginal veto over mining or exploration
- minerals remain the property of the Crown
- an effective dispute resolving mechanism

Individual projects may be the subject of an agreement with a government which may include obligations imposed to support Aboriginal advancement.

Section 6 of this booklet gives an indicative list of the main legislation in each State and Territory governing the activities of resource explorers and developers on land in general and on land associated with Aborigines in particular.

4.2 Community considerations

It is recognised that special factors may be involved when operations impinge upon Aboriginal communities and on their tribal lands or reserves, and that those responsible for such operations should seek the goodwill, support and understanding of the communities involved. In these circumstances companies should:

4.21 respect the traditions, customs and culture of Aboriginal communities with which they come into contact;

4.22 consult Aboriginal communities in advance of exploration on those matters which could affect their cultural wellbeing, their social and economic objectives, and their ability to enjoy their traditional way of life;

4.23 assist in community development, where this is appropriate, and is in accordance with the wishes of the local Aborigines and the relevant government authorities; and

4.24 where required by law, consult with Aboriginal land councils.

4.3 Sites of significance

There is a general lack of understanding among non-Aborigines on the nature and significance of various types of Aboriginal sites. Sites may vary in size from those which cover a small area and are well defined, such as a group of rocks, to those which are less obvious and which may cover a considerable distance, such as "dreaming paths". They will also vary in purpose and degree of significance, from those which act as landmarks or specify traditional tribal areas, to those which are identified with ancestors or mythical or religious beings, or are otherwise of spiritual importance. Knowledge of the location and associated ritual and meaning of these latter sites may be restricted to certain adult Aboriginal people, with severe sanctions prescribed for breaches of secrecy.

In some States the responsibility of exploration companies in relation to Aboriginal sites is specified in legislation. In general, however, companies intending to operate in areas where there is still an Aboriginal association with the land are advised to consult with the appropriate Aborigines on the most suitable method of ensuring that important sites are not disturbed.

The approach used may also depend on the type and stage of the proposed program of exploration. In some cases, a carefully selected Aboriginal guide or adviser could be employed on the exploration team to identify sites likely to be affected. Alternatively, it may be considered necessary to identify and document all sites in the exploration area prior to commencing operations. In other cases, it may be sufficient to have appropriate Aborigines check a proposed programme and indicate where it should be changed, without specifying the precise locations of sites. This last method may be preferred by Aborigines where secret sites are involved. It may also be necessary to engage an anthropologist to help identify the most appropriate Aborigines to be advisers, or to assist in site surveying itself.

It would be fair to say that some disputes on Aboriginal sites have arisen because of reluctance to reveal places of secrecy before they are under serious threat, and others because all Aborigines with knowledge of sites in that area were not initially consulted. This emphasises the importance of careful consultation at an early stage. Disputes may also arise concerning the area surrounding an important site, and Aborigines may also be concerned that operations do not take place too close to a site for fear of accidental damage. Disputes where they arise should be settled by a process of consultation and negotiation between the parties concerned.

4.4 Employment

In resource development projects which take place near an Aboriginal community, companies should employ Aborigines from that community in positions which they are competent and willing to fill, on the same terms and conditions as other employees in comparable jobs.

4.5 Community development

It is APEA's view that the primary responsibility for community development rests with governments and with the communities themselves. However, companies should be willing, where appropriate, to help those Aboriginal communities affected by exploration and development operations and who wish to undertake social and other development projects. Such help could include financial, technical and managerial assistance for suitable enterprises, and providing opportunities for Aboriginal people to acquire the administrative and technical skills to operate them.

4.6 Mineral royalties and compensation

Under Australian law, minerals are normally the property of the Crown and royalty payments are generally specified by and made directly to government. This principle applies generally to Aboriginal land except in NSW, where royalties must be negotiated with the appropriate land council and paid to the NSW Aboriginal Land Council.

Under land rights legislation in NSW and the NT, an exploration or mining tenement on Aboriginal land will not be granted until the applicant has reached an agreement with the appropriate land council concerning terms and conditions of access.

Under South Australian legislation, a mining tenement on Aboriginal land requires prior agreement on compensation for disturbance to the Aboriginal way-of-life. For Pitjantjatjara land this is also required for an exploration tenement.

As a general principle, the Association believes that mineral royalties should be payable directly to government, and that other payments for access and disturbance should be consistent with the onshore petroleum Acts.

4.7 Negotiations

The following approach to negotiations with Aboriginal communities, which is based on the successful activities of several companies, is provided as an indication as to how negotiations may proceed.

As noted before, no two situations are likely to be identical. Consultation with Aborigines is a highly professional activity, requiring considerable experience in the field of Aboriginal studies and affairs and in addition a good deal of political acumen and sensitivity.

4.71 Well in advance of contemplated operations a company should advise the local community in sufficient detail of the proposed programme, the consequences of that programme, the equipment involved and the places where the work is expected to be undertaken.

4.72 Well in advance of any discussions communities should be asked to nominate negotiators who can fully represent their views. This is

particularly pertinent in areas where land councils may be at variance with traditional owners.

4.73 A meeting should be held between representative negotiators from both sides to discuss the programme and any conditions pertaining to the programme; a company negotiator should indicate his awareness of Aboriginal beliefs and traditions. More than one meeting may be required to reach agreement.

4.74 There should be a continuity of the same negotiator on behalf of the company to establish the credibility of both the individual and his company; for this reason the negotiator must have the authority to give an undertaking without seeking head office approval and in the knowledge that such an undertaking would be honoured by head office.

4.75 Aborigines may not want to divulge where sacred sites are and therefore may not advise a company of their position. After a visit to the areas covered by the programme by representatives of all parties, a map and description of the proposed programme should be used to enable the Aborigines to indicate if and where they would like the programme to be changed.

4.76 The conditions of any agreement reached in this manner are legally binding and should be conveyed to company employees – and made legally binding on contractors and subcontractors.

4.77 The agreement and conditions for carrying out the operation should be documented, and the negotiators or representatives of the parties should indicate their understanding by signing such a document.

4.78 The possibility of employment of local Aborigines should be considered.

4.79 Where appropriate, compensation for damage to property or loss of land use as allowed for in relevant legislation should be discussed and agreed (see 4.6).

4.8 Protection of environment

A company should endeavour to ensure the protection of the general environment in which Aborigines live. These measures should include protection of the purity of water, and flora and fauna as well as the minimisation of dust and noise pollution. A company should also endeavour to ensure that the land affected by the activities is rehabilitated.

5.0 Types of Aboriginal Lands

5.1 Reserves

Entry on to reserves generally requires the issue of an entry permit granted by government after consultation with the local Aboriginal community. There may be special conditions attached to the permit which govern to some extent the form of consultation required. Reserves in the Northern Territory, South Australia, Western

Australia and New South Wales have been or are in the process of being transferred to Aboriginal freehold title.

5.2 Aboriginal lands
(granted under land rights legislation)
Entry on to Aboriginal land requires a permit to be granted by the Aboriginal land council responsible for that area. Access for exploration and development requires a prior agreement with the land council, which may in some instances be subject to arbitration (or tribunal recommendation), on the terms and conditions which must be met.

5.3 Other Aboriginal lands
These include pastoral leases and freehold land owned by Aborigines under normal title. Since such lands are subject to the provision of the State onshore petroleum Acts in the same way as any leaseholder or freehold landowner, there is no requirement for a permit to enter upon these areas. They are subject to the same provisions relating to compensation etc.

However, as a matter of common courtesy and operational and political pragmatism it is obvious that most of the practices suggested should be considered when dealing with Aborigines on all types of land.

On the basis of its member companies' experience in the field, APEA believes that by following these practices the petroleum industry can achieve the following objectives:

5.31 A greater awareness between the industry and local communities of the need to increase Australia's self-sufficiency whilst at the same time promoting a wider understanding of the importance of the Australian Aboriginal heritage;

5.32 The identification and protection of a larger number of Aboriginal sacred sites which might otherwise have been inadvertently disturbed; and

5.33 The recognition of individual Aboriginal communities as identities within the Australian community as a whole.

6.0 Relevant Legislation

Commonwealth

1. Aboriginal Land Rights (Northern Territory) Act 1976
2. Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984

New South Wales

3. Aboriginal Land Rights Act 1983
4. Mining Act 1968
5. National Parks and Wildlife Act 1974
6. Petroleum Act 1955

Queensland

7. Community Services (Aborigines) Act 1984
8. Community Services (Torres Strait Islanders) Act 1984
9. Land Act (Aboriginal and Islander

Land Grants) Amendment Act 1982
10. Mining Act 1968
11. Aboriginal Relics Preservation Act 1967
12. Aurukun Associates Agreement Act 1975
13. Petroleum Act 1927

Northern Territory

14. Aboriginal Community Living Areas Act 1985
15. Native and Historical Objects and Areas Preservation Act 1955
16. Aboriginal Land Act 1978
17. Aboriginal Sacred Sites Act 1978
18. Mining Act 1939
19. Petroleum (Prospecting and Mining) Act 1954

Western Australia

20. Aboriginal Land Rights Act 1985
21. Mining Act 1978
22. Petroleum Act 1967
23. Aboriginal Heritage Act 1972
24. Environmental Protection Act 1971

South Australia

25. Maralinga Tjarutja Land Rights Act 1984
26. Pitjantjatjara Land Rights Act 1981
27. Mining Act 1971
28. Aboriginal and Historic Relics Act 1975
29. Aboriginal Lands Trust Act 1966
30. Petroleum Act 1940

Victoria

31. Archaeological and Aboriginal Preservation Act 1972
32. Mines Act 1958
33. Petroleum Act 1958

Tasmania

34. Mining Act 1929
35. Aboriginal Sites and Relics Act 1975

Australian Capital Territory

36. Mining Ordinance 1930

7.0 Resource Material

A very large amount of literature on Australian Aborigines is in existence and recommended reading depends heavily on individual needs and backgrounds.

Members may refer to APEA for general advice on reading but should seek further information regarding specific areas from relevant State authorities.