AMENDMENTS TO *PART IV (MINING) OF THE ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) ACT 1976* (CTH) INTRODUCED BY THE *ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) AMENDMENT ACT 2006* (CTH) [*]

Those conducting or seeking approval to conduct exploration or mining activity in the Northern Territory, including exploration and mining on Aboriginal land, must comply with a hybrid of Northern Territory and Federal legislation and common law. Mineral exploration and mining in the Northern Territory is regulated primarily by the *Mining Act 1980* (NT) and the *Mining Management Act 2001* (NT). Part XI of the *Mining Act* regulates exploration and mining on Aboriginal land and sets out the processes required to be followed before a mining interest may be granted. However, the grant of a mining interest in respect of Aboriginal land is subject to the provisions of both the *Mining Act* and the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('ALRA'). Part IV (Mining) of the ALRA provides an administrative regime to control exploration and mining on Aboriginal land in the Northern Territory. Slightly separate processes are prescribed for applicants for exploration and mining leases, however applications for exploration licence proposals predominate.

The Commonwealth Government has recently legislated a series of significant changes to the ALRA with the introduction of the *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* (Cth) ('the Amendment Act'). The objectives of the Amendment Act are stated as being:[6]

- to allow changes to land tenure in Aboriginal townships;
- quicker processes for exploration and mining;
- to provide for the establishment of "devolved decision making structures" for Aboriginal people; and
- facilitating economic development.

The amendments to Part IV of the ALRA are aimed at gaining greater access to Aboriginal land for development, particularly mining, and to expedite the current processes for decision-making with respect to exploration and mining on Aboriginal land.[7] The Commonwealth has identified two areas for reform:

- capping negotiation timeframes for exploration agreements; and
- restricting the ability of some mining companies to stockpile or "warehouse" large areas of Aboriginal land without pursuing exploration.

Commencement

The Amendment Act was introduced to the House of Representatives on 31 May 2006 and received Royal Assent on 5 September 2006. The Amendment Act provides for three commencement dates with some amendments commencing on Assent and most amendments coming into effect on 1 October 2006. The remaining provisions, primarily those relating to Part IV, are expected to commence on 1 July 2007 at the same time as complementary Northern Territory legislation is introduced.[8]

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6 Media Release, the Hon Mal Brough MP dated 31 May 2006 and entitled "Historic Reforms to NT Land Rights," available at <www.atsia.gov.au/media/media06/3506.aspx>.

7 Revised Explanatory Memoranda at 3.

8 Revised Explanatory Memorandum at 18.

Principal Amendments

The amendments to Part IV of the ALRA are largely procedural. The principal features of the amendments are the delegation of most Part IV decisions and day to day administration from the Commonwealth to the Northern Territory and the introduction of time frames which limit and regulate negotiations regarding exploration proposals.

Delegation

The Amendment Act repeals section 76 of the ALRA dealing with the delegation of the Commonwealth Minister's powers. Ministerial powers and functions under Part IV are only delegable to the Northern Territory Minister for Mines and Energy and are subject to certain exceptions. Functions and powers exercisable by the Northern Territory Minister for Mines and Energy introduced by the Amendment Act include the authority to:

- grant an applicant a limited extension of three months within which to lodge its exploration proposal with the relevant land council for the area for consent to the grant of the exploration licence;
- following the standard negotiating period, by consent, grant a further extension of 12 months;
- set a final deadline of at least 12 months, once the initial standard negotiating period has concluded, for the parties to conclude negotiations;
- withdraw consent to negotiate (issued under the *Mining Act* (NT)) if the applicant is not pursuing negotiations actively and in good faith; and
- withdraw consent to negotiate if the Land Council does not make a decision by the end of the negotiating period to consent to the grant of the exploration proposal.

In addition to the above, the Amendment Act provides for more direct and local administration by delegating administrative processes previously undertaken by the Department of Families, Community Services and Indigenous Affairs/Office of Indigenous Policy Coordination[9] to the Department of Primary Industry, Fisheries and Mines.

Time frames

As indicated above, the Amendment Act introduces caps on the negotiating procedures for exploration agreements. Previously the ALRA provided for a negotiating period of 12 months with the option of extensions. Timeframes for negotiations included as of right extensions for a further 12 months, after which further extensions could be granted, by consent, by the Commonwealth Minister.

The Amendment Act introduces the following time frames for negotiations:

- introduction of a core negotiating period of a minimum of two field seasons (22 months April to October) from the date the exploration proposal is received, after 1 January in the year

[9] On 24 January 2006, the Office of Indigenous Policy Coordination (OIPC) became part of the new Families, Community Services and Indigenous Affairs (FaCSIA) portfolio, formerly the Department of Family and Community Services (FaCS).

following receipt of an application in which it is expected that most exploration applications will be finalised;[10]

- extension of the core negotiating period, on application by the parties, for a period of two years;
- further extensions of 12 months may be granted by the Northern Territory Minister for Mines and Energy, on application by the parties;
- authority to the Northern Territory Minister for Mines and Energy to set a final deadline of a further 12 months for bringing negotiations to a conclusion following the end of the initial negotiating period;
- an initial three month period and a maximum six month period for making applications for consent regarding exploration licences after receiving the consent of the Northern Territory Minister for Mines and Energy pursuant to the *Mining Act* (NT);
- complementary amendments to the *Mining Act* (NT) enabling the Northern Territory Minister for Mines and Energy to withdraw an applicant's consent to negotiate to restrict the practice of "warehousing;"[11]
- deemed withdrawal of applications for consent to negotiate regarding exploration licences if the Northern Territory Minister's consent is withdrawn pursuant to the *Mining Act* (NT), including deemed withdrawal if the relevant Land Council does not make a decision either consenting or refusing to consent to the grant of an exploration licence before the end of the negotiating period.

Related amendments include the following:

- the right of traditional owners to consent or withhold consent (veto) mineral exploration or mining on Aboriginal land, subject to the national interest override contained in the ALRA, remains unchanged. However, the Amendment Act provides that the Land Council may, by consent, apply to the Minister to lift the previous five year moratorium on further applications for exploration licences at any time after refusal of the first application such that negotiations may recommence at any time within the moratorium period;[12]
- devolution of decision making, including decisions regarding exploration and mining, from Land Councils to incorporated regional bodies;
- amendments to the arbitration provisions of the ALRA to provide for any arbitration covered by the ALRA (where the parties have agreed to arbitration) to be carried out in accordance with the *Commercial Arbitration Act* (NT); and

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10 The core negotiating period may be extended by agreement between the parties for a further two year period. Following that, the period may be extended by agreement for 12 months at a time.

11 "Warehousing" is the practice of stockpiling exploration licence application areas by applicants without the applicant making any genuine attempt to engage in negotiations with the relevant Land Council to reach agreement for exploration. The practice has the effect of restricting access to areas by other applicants willing to explore in the application area.

12 The *Amendment Act* introduces a new s 48(1A) which provides that where there is a refusal of consent to the grant of an exploration licence for petroleum in respect of an area of land, that refusal will trigger the moratorium provisions in respect of further applications for the grant of an exploration licence for petroleum in respect of that area, but will not prevent applications for exploration licences for minerals other than petroleum in respect of that area and vice versa.

- amendments authorising a representative of the Northern Territory Minister for Mines and Energy to attend negotiation meetings (if consent to attend is given by traditional owners);

The *Amendment Act* provides that the Minister must cause an independent review of the operation of Part IV of the ALRA to be undertaken as soon as practicable after five years from commencement of the mining provisions (1 July 2007). The review is primarily to test whether timeframes are being observed.

QUEENSLAND

MINING CLAIM RESTRICTIONS*

Krco v Mining Registrar, Emerald [2006] QLRT 28 (Smith DP)

Mining Claim – mining – purpose of mining – safety procedures – restrictions – prohibited machinery.

Background

The applicant was the holder of a mining claim with conditions. In July 2004 the applicant made a request for authorisation to use prohibited machinery to remove previously worked material and slurry and rehabilitate a dangerous area created by previous mining. Authorisation was given by the Mining Registrar on 3 September 2004.

On 30 September 2005 the Mining Registrar alleged that the applicant had breached its authorisation by using prohibited machinery for the purpose of mining. The applicant denied such allegations and on 2 December 2005 the Mining Registrar advised that no penalty or cancellation of the mining claim was warranted but maintained that the applicant was not entitled to recover minerals from earth moved by the machinery.

The applicant subsequently instituted proceedings in the Tribunal against the Mining Registrar seeking an order that the applicant be given consent to mine the area of the claim in accordance with hand mining regulations and without any restrictions.

Use of prohibited machinery

Section 112 of the *Mineral Resources Act 1989* ('MRA') provides that the Mining Registrar may authorise the use of prohibited machinery for purposes other than mining. In determining the 'purpose' of the applicant's actions in using the prohibited machinery, Deputy President Smith considered the observations of McHugh J in *News Ltd v South Sydney District Rugby League Football Club Ltd*[1] and McPherson JA and Thomas J in *Gonzo Holdings No 50 Pty Ltd v McKie*,[2] and applied an objective test of whether or not the carrying on of the operation was for the purpose of winning minerals.

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1 (2003) 215 CLR 563.

2 [1996] 2 Qd R 240.