NORTHERN TERRITORY*

NTDME — POLICY SHIFT ON NATIVE TITLE

The Northern Territory became the first jurisdiction in Australia to grant inalienable freehold land to Australian Aboriginals through the auspices of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) (ALRA).

With the introduction of the *Native Title Act* 1993 (Cth) (NTA), the Northern Territory now has two (overlapping) indigenous land tenure systems. Interesting questions as to whether native title can be claimed over granted Aboriginal freehold land arise, although there is some authority[1] for the proposition that such a claim can be made and that both the ALRA and the NTA can comfortably co-exist.

It is of interest to observe how the Mines Departments in each State and Territory throughout Australia have reacted to the NTA.

I think it is true to say that Western Australia has adopted the most cautious approach to the issue of mining titles. Conversely New South Wales seems to have adopted a rather more bullish stance. Perhaps this is because the likelihood of native title remaining unextinguished is significantly reduced in New South Wales, whereas in other parts of Australia (notably Western Australia and the Northern Territory), this is not the case.

Following the *Waanyi* decision by the High Court, the Northern Territory government through the Department of Mines and Energy (NTDME) has reviewed its approach to the issue and renewal of mining titles.

Prior to the *Waanyi* decision, NTDME adopted a robust view based on an assumption that pastoral leases extinguished native title. In fact there is a window in time in the early part of this century when pastoral leases in the Northern Territory were issued without reservation. Many Northern Territory pastoral leases can be traced back to this point in time. As the majority of mining titles applied for in the Northern Territory exist over pastoral leases, we have to date seen little delay in the grant of mining titles.

With the recent High Court decision, however, and bearing in mind the likelihood that the Commonwealth of Australia will not legislate to confirm that pastoral leases extinguish native title, the NTDME has revised its approach.[2]

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1. The ALRA and the NTA do not cover exactly the same area. The ALRA does not apply to land in a town and claims can only be made over unalienated crown land. The NTA has no such limitation. Refer *Pareroultja v Tickner* (1993) 177 ALR 206 where it was held that the grant of freehold title to a land trust under ALRA does not extinguish native title under *Mabo* principles. It is important to note that this case was considered before the NTA was introduced and was only based on common law principles as espoused in *Mabo*. An application for special leave to the High Court was refused. In so doing Mason CJ, when refusing to grant special leave, was "not to be taken as necessarily agreeing with the conclusion of the Full Court that the grant of an estate in fee simple to a land trust under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) is consistent with the preservation of native title to the land the subject of that grant".

   It is therefore important to ensure when negotiating exploration agreements with land councils that some consideration as to native title be given.
2. At the date of this article, a proposal is being released on behalf of Senator Nick Minchin, Parliamentary Secretary to the Prime Minister, stating that draft amending legislation to the NTA will be introduced, but that the government will not legislate to confirm pastoral leases extinguish native title — rather it will put its case to the High Court in the *Wik* case (stated to commence 11 June 1996) that pastoral leases extinguish native title as a matter of law. Attempts to overcome the *Waanyi* decision by requiring a positive prima facie case to be made before claims are registered at the National Native Title Tribunal.

Rather than issue "swiss cheese" titles, NTDME will now attempt to "share the risk" with the mining industry.

In the future, or at least for the time being, NTDME will continue to grant exploration titles on land that is the subject of pastoral leases (irrespective of reservation), over which no native title termination or application has been made, after a basic risk analysis has been completed by NTDME. The exploration titles include exploration licences and extractive mineral permits under the *Mining Act* 1980 (NT) and petroleum exploration permits under the *Petroleum Act* 1984 (NT). Such risk analysis for exploration purposes is to be minimal, no doubt based on the assumption that if there is to be disturbance of the land, it is unlikely to seriously affect any native title claimants. Miners would be well advised to continue to conduct their own due diligence and risk assessment over any land in which they intend to explore, especially with respect to sacred sites or objects for which they have a legal responsibility. Should a native title claim exist over land that is the subject of the exploration title, more detailed risk analysis will be required and consideration will be given to following the Right to Negotiate procedure in the NTA.

In relation to production tenements on pastoral leases (irrespective of reservation), a detailed risk analysis will be conducted prior to any grant. Such production tenements include exploration retention licences, mineral leases, mineral claims and extractive mineral leases under the *Mining Act*, and petroleum retention leases and petroleum production permits under the *Petroleum Act*. The detailed risk analysis will no doubt include extensive tenure histories, ascertaining any Aboriginal activity in the area, past use of land, existence of sacred sites and whether any application for native title determination has been lodged.

Presumably, in the vast majority of cases where applications for production tenements are made, the NTDME will follow the NTA Right to Negotiate procedures prior to any grant.

NTDME has indicated that where any tenure has been granted without following procedures set out in the NTA, the applicant will be advised at the time of grant that such tenure has been granted on the basis of extinguishment of native title by pastoral leases. Should any titles granted since 1 January 1994 be invalid because of native title, the *Mining Act* will be amended so that the holders of those titles have a priority right to reapply for and be granted the same tenure over the same area of land, but subject to the NTA.

Furthermore, the NTDME will be developing regulations to set up a Northern Territory arbitral body to arbitrate on native title compensation claims.

The concept of sharing of risk with industry by the NTDME is welcome. However, any proposed amendments to NTA may well reduce the detailed risk analysis anticipated.