Why the NT's mining laws
make us dumb

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The importance of community participation in environmental decision making is widely recognised throughout Australia and internationally. One key aspect of community participation is the ability to challenge decisions made by those in power. Sadly, in the Northern Territory, opportunities for members of the community to challenge the decisions of Ministers, government departments, and creatures of statute are notably absent. The effect of this is a silencing of the community; it makes us unheard, or "dumb".

As the Northern Territory looks to its future in terms of its development, it must also review and improve the regulatory frameworks that will underpin this development. Legislative amendments are required to ensure that the community can meaningfully participate in the development of the Territory.

Meaningful participation requires more than the opportunity to attend informal enquiries or make submissions. Those things must be coupled with the ability to challenge the decisions of those in power and to bring actions where the regulator fails, or is unwilling, to do so. This article will look specifically at the regulation of mining the Territory and identify the extent to which the community's rights to challenge decisions are restricted.

The importance of third party review rights

Decisions that affect the environment, affect all of us. Decisions made now will have implications for our children and their children. The environment cannot speak for itself; it relies on a system of law that prevents its unsustainable exploitation and, to a great extent, the dedication of concerned individuals and groups standing up for the places they love. In doing so, those individuals and groups give a voice to the voiceless.

Because of this, it is important that laws provide rights to individuals, and groups, other than those with vested interests, to challenge environment decisions on their merits.

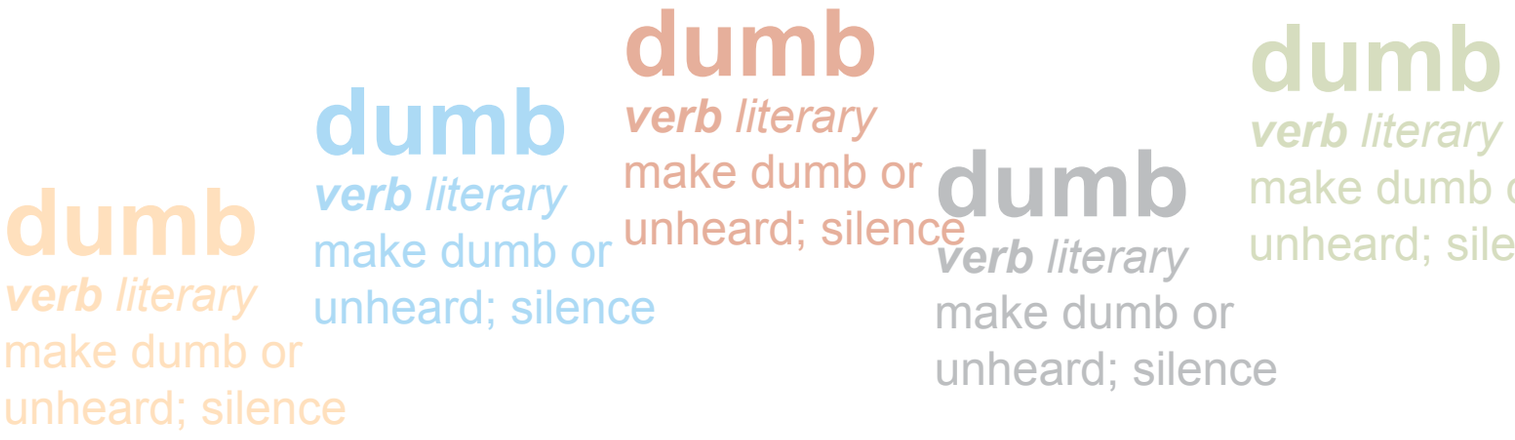
The importance of community participation in environmental decision making has been long recognised. In 1992, Principle 10 of the Rio Declaration on Environment and Development, to which Australia is a signatory, stated:

Principle 10

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. **Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided[1].**

In 1998, 45 states and the European Union signed the Aarhus Convention which set ambitious targets for public participation in environmental decision making. The Aarhus Convention grants the public rights regarding access to information, public participation and access to justice, in governmental decision-making processes on matters concerning the local, national and trans-boundary environment. It focuses on interactions between the public and public authorities.

The Aarhus Convention set out 'pillars' for public participation in environmental decisions. The third pillar set out in Article 9 is Access to Justice[2]. That article provides that the public has a the right to judicial or administrative recourse procedures in case a party violates or fails to adhere to environmental law. In the Northern Territory effective access to justice and, importantly, merits review mechanisms are severely lacking.



Third party rights in relation to mineral titles

In the Northern Territory there are very few opportunities for concerned citizens to appeal a decision on the merits; as such it is necessary to use judicial review as the default means of appeal. The problems with this are two fold; firstly, judicial review presents far more challenges in terms of having a decision invalidated, and secondly, the process exposes the litigant to potentially devastating costs orders. For community groups this risk of costs often represents an insurmountable hurdle.

In terms of mining specifically, there is really no other way to say it; the rights for members of the community to appeal decisions to allow mining are effectively non-existent. It is time for the community to be given a voice in these matters.

The Northern Territory Department of Mines and Energy (DME) is responsible for the approval of mining and exploration projects. It is also responsible for the administration of mining law and its regulation and enforcement. In my view, there is significant tension between the stated mission of DME, namely to "to work with our partners to stimulate and sustain economic development throughout the Territory"[3] and DME's statutory role as regulator of the environmental impacts caused by mining.

The legislation applicable to a particular mine will depend on what is being mined and the status of the land on which it is being mined. It is not the purpose of this article to examine those issues, so we shall skip straight to the provisions dealing with the approval of mineral titles and the opportunity for the public participation in relation to those approvals.

Titles allowing the exploration for, and mining of, minerals and extractive materials (gold, sand etc.) are granted under the *Minerals Titles Act* (MT Act). Titles allowing the exploration for, and mining of, oil and gas are granted under the *Petroleum Act*[4]. Just trawling through the sections would seem quite a dry way to explore this issue, so let's consider a hypothetical for a moment.

All That Glitters Pty Ltd is proposing a large open cut mine for gold south of Darwin. The potential impacts of the mine, as detailed in the project's Environmental Impact Statement include (among others), vegetation clearing, habitat fragmentation, risks to some threatened species, threats to natural watercourses through release or potential spills of wastewater and water extraction. These impacts will not be confined to the mine site; they clearly have wider implications for not only the owner(s) of the land but for the community as a whole.

The Minister for Mines and Energy announces their intention to grant a mineral title for the mine. Notification of this decision is placed in the NT News (once) on a Wednesday[5].

So, what are the rights of an individual or community group concerned about the mine? People who are concerned about the mines implications for the health of surrounding waterways on which they rely; people concerned about the health of local fish populations, people concerned about additional pressure on already threatened species. As we have seen, the international community through the Rio Declaration and the Aarhus Convention emphasizes the importance of people being able to involve themselves in these decisions, so how does that play out in the NT?

Firstly, the concerned community group (let's call them Blight's River Community Group (BRCG) can make a submission under section 71(e) of the MT Act. The submission must be made within 30 days of the notice in the NT News and is submitted to the Minister. Following this period the Minister then forwards copies of the objections and submissions to the applicant to allow them an opportunity to respond.

Under section 78 of the MT Act, before making a decision to grant or refuse the application, the Minister is required to take BRCG's submission into account, along with any other objections or submissions and responses from the applicant made under section 72 of the MT Act.

The Minister, having considered

LAND OWNERS & TRADITIONAL OWNERS

The owner of land is able to make an objection under section 71(d) of the MT Act. An additional layer of rights is afforded to Indigenous landowners under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), essentially, as owners of Aboriginal Land, traditional owners have veto rights to stop mining occurring on their land[1].

the submission of BRCG, decides to approve the mineral title. What can BRCG do? Sadly, in most cases the answer will be nothing in circumstances such as this, where third parties are provided no right to have a decision reviewed on its merits, it would be necessary for BRCG to use judicial review as the default mechanism for an appeal.

This situation is all the more extraordinary considering that regulation 117 of the *Minerals Titles Regulations* allows applicants significant rights to review the merits of the Ministers decision to:

- refuse a mineral title application under section 70(1) or (2) of the MT Act;
- refuse to approve a transfer of a mineral rights interest under section 123(3) of the MT Act;
- refuse to register a devolution of a mineral rights interest under section 124(3) of the MT Act;
- refuse to register a general dealing relating to mineral rights interest under section 125(3) of the MT Act;
- refuse to convert a corresponding mineral title to another type of title; and
- refuse to convert a non-compliant existing interest to a mineral title.

OIL & GAS...

Change the scenario for a second and imagine the mine is actually a fracking operation for Natural Gas. Now the only people with legal rights are persons with an estate of interest in the land, or people with an estate of interest in land bordering the application area. The right to make an objection is restricted to the exploration stage. There is no opportunity for objections when the Minister considers whether to grant a production licence (this excludes applications which affect native title rights and interests).

The relevant sections of the *Petroleum Act* provide:

> *Section 18 (1) The Minister must cause to be published, at the expense of the applicant, in a newspaper circulating in the part of the Territory in which the application is situated, or in any other publication that the Minister thinks fit, a notice containing:*
>
> *…*
>
> *(e) A statement to the effect that a person who has an estate of interest in relation to land comprised in, or land contiguous with land comprised in, an application area may, within 2 months after the notice is published in the newspaper or other publication, lodge in writing with the Minister an objection to the grant.*
>
> *Section 18(3) A person who does not have an estate or interest in relation to land comprised in, or land contiguous with land comprised in, an application area is not entitled to lodge an objection to the granting of an exploration permit in respect of the application area.*

Once a Mineral Title has been issued, All that Glitters Pty Ltd will be required to obtain an Authorisation and have a Mining Management Plan (MMP) approved by the Minister under the *Mining Management Act* (MMA). There is no opportunity for public submission on the grant of authorisations or the approval of an MMP.

We note that before mining commences, the mining proposal may become subject to the environmental assessment provisions under the *Environmental Assessment Act*. The Environmental Protection Authority (EPA) decides whether or not the mine is capable of having a significant impact on the environment. Actions that are capable of having significant impacts on the environment will be assessed according to the process set out in the *Environmental Assessment Administrative Procedures* (Administrative Procedures).

The Administrative Procedures provide opportunities for members of the public to comment on the scope of the environmental assessment and the environmental assessment itself.

At the end of the assessment process, the EPA is responsible for preparing an assessment report about the proposed action. The EPA provides that report to the Minister for Lands, Planning and Environment. The Minister for Lands, Planning and Environment may comment on the Assessment Report and must then provide the report, together with any comments to the Responsible Minister. In the case of mining, the Responsible Minister is the Minister for Mines and Energy. Ultimately, the power to refuse or approve a mine sits with the Minister for Mines and

Energy and he is not bound to follow the recommendations in the EPA's assessment report. As detailed above, there is no merits review available under the *Mining Management Act* to review the Minister's decision to approve a mine, even if the EPA assessment report recommends against it.

The problem with this state of affairs is that the community has no avenue of redress if the Minister, while not making any error of law, made a bad decision on the merits.

Rights to bring actions for breach of laws applying to mining

Let's continue with our hypothetical but use it to consider community rights to enforce the laws designed to protect the environment. A few years down the track it becomes apparent that All That Glitters Pty Ltd.'s operation is actually a pretty poor one, inadequate management procedures and a major, but not extraordinary, wet season causes some of the mines waste to spill into the surrounding natural watercourse.

Now it's not only the BRCG that are concerned, but also the local community downstream who are impacted by the pollution of the waterway. They want to see All that Glitters Pty Ltd punished for the damage they have caused, however, it appears that the Department of Mines and Energy are not going to take action under Division 3 of the MMA. The community looks to the EPA, however, they also are not going to take action under the *Waste Management Pollution Control Act* (WMPCA), either by prosecution or by the issue of a pollution abatement notice.

Legal advice is sought about what actions can be taken to hold All that Glitters Pty Ltd accountable for the pollution they have caused. The opportunities to bring an action are as follows:

- Under section 78 of the MMA, any individuals wanting to prosecute All that Glitters Pty Ltd for the environmental offences under Division 3 of the MMA will require the written approval of the Chief Executive Officer of the Department of Mines and Energy.
- Under section 105 of the *Water Act*, any individuals wanting to prosecute All that Glitters Pty Ltd for the prohibition of pollution offences under section 16 of the *Water Act* will require the written consent of the Controller of Water Resources.
- Under the WMPCA the public has no right to appeal the decision of the NT EPA to not issue a pollution abatement notice. It appears, however, that the community could bring a private prosecution for offences under the WMPCA because section 94 does not specifically exclude the public bringing a prosecution.

The impact of the absence of merits review and recommendations

While the above was purely hypothetical, it is not hard to imagine. The EDO's experience is that many members of the Northern Territory community have already experienced the frustration and injustice that arise from restricted rights to access appeal mechanisms and redress and remedies. The reaction of non-lawyers to these realisations is one of surprise; how does the law afford so few opportunities for me to access justice they ask? The quote that immediately springs to mind is "law and justice are not always the same. When they aren't, destroying the law may be the first step towards changing it"[6].

The Environmental Defenders Office would encourage this government to recognise the benefit to the community as a whole in having merits review procedures available and introduce legislative amendments to provide the community with the voice they are denied, to stop making the community dumb, silenced, unheard.

(Endnotes)

1. Report of the United Nations Conference on Environment and Development – Annex 1 - Rio Declaration on Environment and Development - **http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm**
2. Convention on access to information, public participation in decision-making and access to justice in environmental matters, done at Aarhus, Denmark on 25 June 1998, Article 9.
3. Department of Mines and Energy, Annual Report, 2012-2013 **http://www.nt.gov.au/d/Content/File/p/AR/2012-13/DME_AR1213.pdf**
4. Offshore exploration and mining for oil and gas is regulated by the *Petroleum (Submerged Lands) Act*.
5. All published mining notices can be found under 'Alerts' on the edo website – **www.edont.org.au**
6. Quote attributed to Gloria Steinem

The Environmental Defenders Office is a community legal centre which exists to provide access to justice in environmental matters. On 17 December 2013 the Federal Government announced that it would no longer fund EDOs. It saddens me that this service may soon be lost to the Northern Territory community many of whom do not have the means to access private legal services. EDONT is a membership based organisation and new members are very welcome, as are donations. People wishing to become a member or make a donation can do so at **www.edont.org.au**.