Northern Territory

Ashton Mining – Merlin project

Diamond production is due to start early next year on Ashton Mining's Merlin project after development consent was gained from native title claimants. The Wurdaliya and Wuyaliya landholdings groups consented to the Northern Territory Government's grant of the mining leases. Ashton and partner Aberfoyle Resources, have agreed to provide employment and training opportunities, to protect sacred sites and to pay compensation for disturbance of native title. *(Aus,17 June, p30)**

AMENDMENTS

National

ATSIC has stopped funding the National Indigenous Working Group who were responsible for devising its response and strategy in relation to the proposed amendments to the *Native Title Act*. Aboriginal Affairs Minister John Herron, according to senior Indigenous sources, had been under pressure by other ministers to prevent the Working Group staying active during a Federal election. The Working Group officially left its premises on Friday, but continues to run with the help of volunteers. *(CT, 2 June, p3)**

After the One Nation Party polled strongly in the lead-up to the Queensland election, Independent Senator Brian Harradine indicated he was prepared to compromise on the Government's Native Title Amendment Bill, including the Government's demand for a tough threshold test, in order to avoid a double dissolution election over race. He is also prepared to negotiate on other Government sticking points such as the sunset clause and the issue of subjecting the NTA Bill to the Racial Discrimination Act. (*SMH, 5 June, p1)**

The Prime Minister rejected Senator Harradine's offer to negotiate on the Government's NTA Bill, saying a double dissolution election on *Wik* would only be avoided if the Senate passes the NTA Bill unamended. *(SMH, 6 June, p5)**

The Federal Government added to speculation that a double dissolution is looming by setting a deadline of only weeks for compromise to be found on their NTA Bill. *(CT, 8 June, p3)*

The Prime Minister, Mr John Howard, said further compromise on the Government's NTA Bill would assist Pauline Hanson's One Nation party and would be a tactical mistake. *(FinR, 11 June, p8)**

Federal Cabinet has endorsed a decision to hold a double-dissolution election as early as August if the NTA Bill is not passed in the Senate within 16 days. *(Age, 17 June, pA1)**

The Prime Minister, John Howard, has dulled hopes of a compromise on the Governments' proposed amendments, indicating that there is still a 'fair gap' between these and Senator Harradine's proposal. The Government rejects Indigenous claims to a legally enforceable right to negotiate on pastoral leases. Senator Harradine is willing to compromise on this, and has suggested that that the Indigenous right to negotiate be limited to significant heritage sites. *(Aus, 23 June, p2)**

The Federal Government has negotiated a deal with Senator Harradine so that the NTA Bill can be passed in the Senate. The Government is consulting with State Governments and

farming and mining stakeholders to iron out technical and legal concerns they may have, without jeopardising the deal. Aboriginal leaders condemned the negotiation process, saying they were shut out of the talks. *(FinR, 1 July, p5)*

ATSIC Chair, Mr Gatjil Djerrkura, has indicated his concern and dissatisfaction with the fact that Indigenous Australians were specifically excluded from the process of negotiation about their rights through the NTA Bill, while miners, farmers, states and territories were all consulted. *(ATSIC Media Release, 1 July, p1)**

Under the agreement:

- The right to negotiate for developments on pastoral leases and in towns and cities is replaced with procedural rights of consultation and mediation to protect significant Aboriginal heritage sites.
- The sunset clause, which put a six-year limit on the lodging of claims under the *Native Title Act*, is dropped.
- The *Native Title Act* will be read and construed subject to the *Racial Discrimination Act*. There is however, no direct reference to making the whole Act subject to the RDA.
- The threshold test stays tough as in previous Government proposed amendments, although the test extends to include, in some cases, claimants whose parents had a physical connection to the land, but were themselves locked out from properties or prevented from being on the land by Government policy. Such claimants will be able to ask the Federal Court to endorse their rights to lodge applications.
- State based bodies will determine claims and allow for mediation. If the decision is against native title claimants/holders, it can be reviewed by relevant State ministers. *(SMH, 1 July, p1) (Aus, 2 July, p4) (FinR, 2 July, p1&2) (WA, 2 July, p4)**

The National Indigenous Working Group is considering a constitutional challenge to the latest NTA Bill. The challenge would centre on the Government's use of its race powers. Working Group member, Mr Aden Ridgeway, said lawyers were prepared to work free of charge on a High Court case. If the challenge failed, Indigenous people could then take their case to an international court. *(SMH, 3 July, p6)*

Mining and farming groups have endorsed the compromise deal on the NTA Bill, saying that it would end years of uncertainty and produce a stable investment climate. *(FinR, 3 July, p3)**

Deputy Leader of the Opposition, Mr Gareth Evans, has said that if the NTA Bill passed through Parliament, a Labor government would amend the legislation after consultation with all stakeholders. *(FinR, 6 July, p3)*

The redrafted NTA Bill was passed through the House of Representatives on 3 July 1998. *(WA, 4 July, p4)**

The Labor Party has amended its promise to hold a round-table meeting on the NTA Bill if elected to Government. They now say that such discussion would occur when the re-negotiated Bill collapses from constitutional and other legal challenges. *(FinR, 4 July, p3)*

Chief Minister of the Northern Territory, Mr Shane Stone, said yesterday that mining, land development and the Alice Springs to Darwin railway would be the big winners from the

compromise deal over the NTA Bill. He said that changes to the NTA would allow the Government to acquire those pastoral leases under native title claim along the rail corridor that came under the NTA. *(NTN, 5 July, p4)*

ATSIC has released their analysis of the Howard/Harradine agreement over the NTA Bill. ATSIC Chair, Gatjil Djerrkura, released the analysis on the eve of the Senate's consideration of the NTA Bill to assist an informed debate in the Parliament. The analysis considers the Bill as a whole, including the four newly negotiated 'sticking points', in recognition that the overall amendments impact significantly on the native title of Indigenous people. *(ATSIC Media Release, 5 July, p1, 2)**

ATSIC on the Howard/Harradine compromise

1. Racial Discrimination Act (RDA) Amendment
The proposed amendment to the RDA means that State/Territory native title regimes must operate in a non-discriminatory way and any ambiguous terms in the NTA are to be interpreted in light of the RDA. This clarifies the operation of the current provision and is a minor improvement. The amendment does not leave any scope for challenging the provisions of the NTA as amended on the ground of inconsistency with the RDA. This means that a clear provision of the NTA will override protection available under the RDA, and will permit State and Territory laws to have a similar effect.

2. Registration test
The registration test will apply to claimants who wish to use the Right to Negotiate. The Government's 'traditional physical connection' test is maintained with the Howard/Harradine agreement providing for an exception to the test when physical connection cannot be established because a parent was removed from their traditional country. But where the connection of a parent is relied on, registration can only be by a court order which would be difficult to achieve within the time provided under s.29 that the Government intends to issue a mining lease or compulsorily acquire land.

3. Sunset clause
The Government has agreed to abandon the sunset clauses. This is a significant improvement.

4. Right to Negotiate (RTN)
Under the NTA the RTN applies to exploration and mining, and to all compulsory acquisitions of native title for the benefit of a third party. Under the alternative scheme the RTN will likely only apply to mining, i.e. if the Commonwealth Minister considers State laws allow adequate consultation before exploration; and only to some compulsory acquisitions for the benefit of a third party.

The main differences to the Government's previous amendments are a loss of the obligation on the government to negotiate in good faith and the reduced scope of consideration by the independent body. In effect, this will allow existing State structures (typically a mining warden's court making recommendations to a Minister) to be used to deal with native title issues relating to mining on pastoral leases. Overall, while the alternative scheme will give registered native title holders some leverage, it will be less than the Right to Negotiate.

Conclusion

The Howard/Harradine agreement is an improvement on the Government's Bill. But the benchmarks for the Indigenous evaluation of the agreement are the current NTA, the *Wik* Decision and the position of the NIWG in the Yellow Document (Co-existence – Negotiation and Certainty). Against these benchmarks the Bill as a whole reduces the ability of Indigenous people to have a meaningful say in what happens on their traditional country but not as much as the Government originally wanted to.

In particular, the Bill's passage will mean:

- A reduction in the say native title holders have about exploration in their traditional country, moderated to some extent by alternative schemes for consultation.
- The opportunity for States and Territories to replace the Right to Negotiate on pastoral leases with an alternative scheme that has many elements of the Right to Negotiate. The practical effect will depend on what schemes are actually implemented by the various State governments.
- The full range of primary production activities will be allowed on what are now pastoral leases without negotiating with the native title holders. While there are some limits on this, they are mostly ineffective.
- That despite some improvement in procedural rights for native title holders, overall it makes it easier for State governments to pursue the complete extinguishment of native title on pastoral leases by compulsory acquisition of co-existing native title rights and upgrading the lease to freehold, thereby extinguishing all native title rights.
- Interim statutory access rights to pastoral leases will be available to some but not to those Indigenous people who have been locked out of their traditional country or for some other reason did not have regular physical access at the date of the *Wik* decision.
- Native title holders will have less of a say in a whole range of Government activities on their traditional country including the management of national parks, forest reserves and other reserves, public facilities and water resources.
- Although some of the extinguishment pre-empting the common law has been removed, it still says what kinds of leases (in the Schedule) extinguish native title before the courts have had a chance to consider them.
- Native title holders, as in the current NTA, will not be able to have a meaningful say in offshore fishing and mining which impacts on native title rights.

- To get the Right to Negotiate some native title holders will be required to prove traditional connection and in addition establish physical connection with the land. However the Howard/Harradine agreement does provide a significant "locked gates/stolen generation" exception.
- It will be harder for native title holders to present their case in a claim hearing. Under the present Act the court must take account of Indigenous cultural concerns. Under the Government's Bill taking account of cultural concerns is made optional. Also the strict rules of evidence will apply unless the claimants can convince the court otherwise.

Compiled from ATSIC Analysis, ATSIC 5/7/98

In a joint statement issued today, ten constitutional experts and leading barristers warned that the constitutional validity of the revised NTA Bill was still in doubt. They suggested that the Bill would be vulnerable under the constitution's race powers because it waters down the NTA. They also said that the Bill's system for assessing compensation to native title holders was inadequate. *(Age, 6 July, pA3)**

The National Indigenous Working Group warn that the amendments deny Indigenous people the protection of being able to negotiate the grant of future commercial fishing licenses or participate in joint management of the sea. *(NIWG Media Release, 6 July, p1)*

Queensland Premier Peter Beattie and NSW Labor premier Bob Carr, will consider a joint approach to State legislation on native title. *(Aus, 7 July, p2)**

The Federal Court has found that native title could exist over areas of sea and the sea-bed. Justice Howard Olney ruled on a native title claim covering seas surrounding Croker Island off the Northern Territory. Traditional owners warned that this finding could be over-ridden by the amendments to the NTA proposed by the Federal Government. *(SMH, 7 July, p5)** Senator Nick Minchin said he was confident that the Croker Island decision would not affect the Government's planned amendments. *(Aus, 7 July, p1)** The Bill has provisions to allow governments to regulate and manage water, to grant mining and fishing rights and to pay compensation for impairment or extinguishment of offshore native title. *(CT, 7 July, p1,2)*

A rally, hosted by Australians for Native Title and Reconciliation, was held outside Parliament House yesterday. The people present were protesting against the Government's NTA Bill. *(CT, 7 July, p2)*

Following the Croker Island decision, Queensland's commercial fishers have called for other claims over sea and water resources to be reframed to provide for co-existence rather than exclusive access. *(CM, 8 July, p2)*

After 105 hours of debate on the NTA Bill, the Senate voted to pass the amended legislation as negotiated between Senator Harradine and the Prime Minister. *(Aus, 8 July, p2)**

The Council for Aboriginal Reconciliation has asked that the NTA Bill be re-negotiated with Indigenous people, saying they felt powerless and alienated from the political process. *(CT, 8 July, p3)**

Mr Dick Wells, Executive Director of the Minerals Council of Australia said that the industry was pleased that the NTA had been amended, saying all groups involved have recognised the need for amendments. *(Minerals Council Media Release, 8 July, p1)**

The Human Rights and Equal Opportunity Commission says that while the latest amendment to the Racial Discrimination Act clause is an improvement on the clause in the present *Native Title Act*, it may still not protect native title interests from racially discriminatory treatment. The new 'RDA clause' provides that the States and Territories must exercise their powers in a non-discriminatory way, and that where the amended Act is ambiguous it must be interpreted consistently with the RDA. Where the amended NTA is not ambiguous, however, and its effect *is* discriminatory, the RDA will not apply. It will be overridden. *(HREOC Media Release, 8 July, p1)*

ATSIC Chair, Mr Gatjil Djerrkura, is seeking an early meeting with the Prime Minister following the passage of the native title legislation through the Parliament today. Mr Djerrkura wants to discuss the implementation of the legislation with Mr Howard, saying ATSIC and the native title representative bodies expect to be fully consulted in the development of alternative State schemes for the administration of native title. *(ATSIC Media Release, 8 July, p1)*

The National Farmers Federation has welcomed the passing of the Government's native title legislation, saying it would approach the legislation in good faith to make it workable. *(FinR, 9 July, p5)**

National Native Title Tribunal President, Justice Robert French, projects that the tough new registration test will disallow about half of the 700 claims before the Tribunal. The new test will pose an administrative problem for the Tribunal, which will have to reassess all of the claims before it in the light of the new legislation. *(SMH, 11 July, p7)*

The ATSIC Commissioner with responsibility for Native Title, Commissioner Geoff Clark, says Native Title Representative bodies will not be de-registered and then asked to re-apply for accreditation as reported on the ABC News in Cairns last Friday.
The facts are:

- The *Native Title Amendment Bill 1997* establishes a new process for the determination of Native Title Representative Bodies.
- Over a transition period of a year, following the commencement of the amendments, all existing NTRBs will be required to re-apply for Representative Body status.
- Existing Representative Bodies will continue to perform their functions during the transition period. They will also be given priority in invitations from the Minister to apply for Representative Body status under the new regime.

Commissioner Clark said that any renomination of Native Title Representative Bodies should not be politically motivated, pointing out that existing Representative Bodies have nothing to fear as long as they are carrying out their functions under the legislation – that is, representing the native title holder. *(ATSIC Media Release, 21 July, p1)*

Father Frank Brennan has warned Indigenous groups that a constitutional challenge to the Government's native title legislation could leave them worse off. Father Brennan feels that changes on the Bench of the High Court would make it unlikely that any decision on the legislation would leave them better off. *(SMH, 24 July, p18)*

The *Native Title Amendment Act 1998* received royal assent on 27 July 1998. A commencement date is yet to be announced. *(Anthropological Society List, electronic bulletin board, 30 July)*

Queensland

Queensland Premier, Mr Peter Beattie, emphasised the need for a 'national approach' to native title because of concerns about the effect of different laws on cross-border developments. He said he was unlikely to implement a right to negotiate regime that was more extensive than the other States. *(FinR, 10 July, p9)** Mr Beattie hopes to hold discussions with the other State leaders on native title, and to deal with the issue within six months. *(CT, 10 July, p3)**

Mr Beattie has announced the formation of a task force to find an alternative to the Federal right to negotiate regime through State legislation. *(CM, 15 July, p4)**

The Queensland Government yesterday began negotiations with stakeholders to discuss the Government's approach to native title. After discussions with Premier Beattie, ATSIC commissioner Terry O'Shane said the talks were a 'step in the right direction'. *(Aus, 17 July, p5)*

Queensland Premier, Peter Beattie, said that his State would pass legislation on native title within three months. The Government's first piece of legislation will be to validate leases issued between the *Mabo* and *Wik* decisions. This legislation will go before Parliament on July 30. The Government agreed to notify Indigenous groups within six months, as to where leases had been granted. Preliminary talks on the legislation took place with Aboriginal, mining and pastoral representatives. Mr Beattie said a working party, which includes three representatives from each interest group as well as government appointees, has been set up to discuss the right to negotiate, regional agreements and compensation and other issues. *(WA, 18 July, p6)**

The validation bill that deals with 'intermediate period acts' made between 1994 and 1996, will effectively extinguish native title over 13,000 leases. *(FinR, 28 July, p8)** The Government is looking at future opportunities to assist Aboriginal people as a method of compensation. Mr Beattie suggests projects such as infrastructure to improve water supply and housing may be fair and equitable. *(CT, 28 July, p2)**

Western Australia

The WA Government is planning to set up its own native title tribunal this year. The current system for dealing with native title claims will be scrapped and replaced by a new State system of registering claims. According to a State Government negotiator, the WA Government hopes to reduce the number of claims, the size of claims and the rights being claimed. Under the WA regime, Indigenous claimants will lose the right to negotiate over mining on pastoral leases. This right will be replaced with procedural rights as held by other stakeholders. *(WA, 3 July, p1)*

Tasmania

Tasmanian Aboriginal Centre legal manager, Mr Michael Mansell, said the new threshold test for lodging native title claims would seriously impact on Tasmanian Aboriginal people. The requirement that claimants show a continuous physical link with the land will exclude most people because of government removal policy. He hopes to do a deal with the State Government over any native title claims that may arise out of the High Court's *Wik* decision. *(LE, 10 July, p11)*

GENERAL NATIVE TITLE ISSUES

International

Agreement has been reached in Canada's province of British Columbia between the province and the Nisga'a community. The 6,000 people of the Nisga'a community live in BC's north-western corner, close to the border with Alaska. The Treaty guarantees the Nisga'a title to 1,930 square kilometres of land, some $C200 million ($216 million) in compensation and control over the region's natural resources. Negotiators are pleased with the agreement that should act as a model for other claims. *(FinR, 18 July, p8)*