CENTRAL LAND COUNCIL

Supplementary Submission to the Joint Standing Committee on Northern Australia

Inquiry into the Opportunities and Challenges of the Engagement of Traditional Owners in the Economic Development of Northern Australia

February 2020

Introduction

The Central Land Council (CLC) makes this Supplementary Submission in response to statements made at the Inquiry's December 2019 hearings and questions from the Committee. We address the administration of mining and energy project approvals and section 19 leases issued under the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA). This submission demonstrates that the CLC has facilitated significant economic development that involves traditional owner consent and substantial capital investment, and that the section 19 process works well to grant interests in land needed by traditional owners and their corporate entities.

The CLC's long-standing relationships with traditional owners have for decades underpinned major projects in our region. The largest of these is Newmont's world class Tanami gold mine, originally the result of a 1983 agreement with the CLC, which now employs close to 1000 people. This very successful project is located on Aboriginal freehold land 550km northwest of Alice Springs. Last year Newmont's board agreed to expand the mine's life beyond 2040 at a cost of more than $1 billion..

Similarly, the CLC has facilitated major agreements with traditional land owners enabling the Alice to Darwin railway and in the last three years has negotiated two pipeline projects that have together involved investment of more than $1 billion. Furthermore these lease arrangements are not limited to major projects as the CLC has also negotiated lease/licence agreements under section 19 of the ALRA on over 2450 lots of aboriginal land ranging from housing blocks to grazing licences over the past decade.

Traditional owners benefit from these projects by the receipt of individual benefits, the use of royalty equivalent and rent payments for community development projects facilitated by the CLC, and the opportunity to obtain employment on major projects and community development projects. These development have occurred through processes under the Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA) which allow traditional owners to protect sacred sites and manage the way that access to their country occurs while providing economic benefits to the NT community at large.

Mineral Resources - Legal context and Timeframes

The CLC engages with traditional owners and native title holders regarding mining and exploration matters under two Commonwealth laws, the ALRA and the *Native Title Act* (NTA). The CLC's area of responsibility spans 750,000 square kilometres—a remote region almost the size of New South Wales—with approximately half of this area being Aboriginal freehold land secured under ALRA and held by Aboriginal Land Trusts (Aboriginal land). On Aboriginal land, traditional owners have the right under s.42 of ALRA to either consent to or refuse an exploration licence application. It is a requirement under ALRA for land councils to convene meetings with traditional owners to consider exploration proposals and the terms and conditions offered by proponents.

The ALRA specifies a negotiating period for reaching agreements with proponents, and long term data confirms that negotiations are being concluded in a timely way. For the decade between 2002 and 2012 the average time for processing exploration applications by the CLC was 2.5 years. (CLC Submission to Mansfield Review p8) Data published in the CLC 2018-19 annual report shows that the average number of years between the receipt of an exploration application and a decision by Traditional Owners under ALRA has declined from 4 years in 2014-15 to 1.3 years in 2018-19.[1] The CLC's analysis of its Traditional Owner liaison shows that it has avoided duplication by presenting multiple proposals at meetings. This reduces costs for industry and accelerates the approval process. In 2018–19, the CLC conducted 10 consultation meetings with traditional owners who considered 37 individual exploration titles. The comparable figures for 2017-2018 were 25 titles at nine meetings, and 35 titles were presented at 11 meetings in 2016–17.[2]

Outside Aboriginal land, Aboriginal people have considerably weaker rights in respect to their traditional country where claims have been registered or determined under the NTA, as this Act affords only a right to negotiate. Should the native title group and the proponent be unable to reach an agreement after six months of negotiations, proponents are able to seek a resolution by taking the matter to the National Native Title Tribunal (NNTT). However, NNTT data shows that no proponents have sought to use this mechanism in the CLC's region.

Major projects

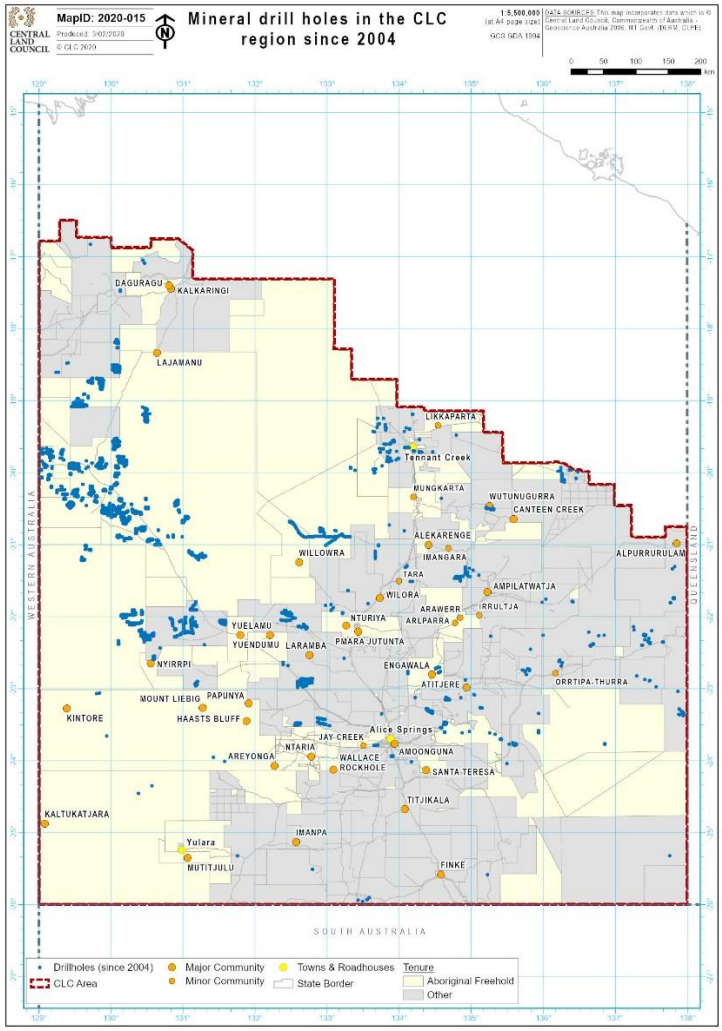
Recent projects completed in the CLC's region present informative insights into the effectiveness of the CLC's work given the extensive area for which it has statutory responsibilities. The 622km Northern Gas Pipeline, completed in January 2019, required negotiations with traditional owners from multiple Aboriginal Land Trusts and native title groups. Jemena, the project developer, commended the work of the CLC and the Northern Land Council which secured agreements over a period of about 12 months. Jemena's Northern Gas Pipeline project director Jonathan Spink said after the conclusion of the agreements that the company was "grateful for the hard work and efforts of the Northern Land Council and Central Land Council". He added: "It was an extremely tough consultation process given the vast physical distance needed to be covered to ensure agreement by all parties."[3] The project is transformational for the Australian gas market because it allows gas sourced from the NT to be piped into the eastern states' pipeline network.

The Tanami pipeline supplies gas from the Amadeus pipeline northwest of Alice Springs to the Newmont operations. According to the operator, AGIG, the pipeline required agreements to be negotiated "with the Central Land Council (CLC) representing three separate native title groups, with three Indigenous Land Use Agreements (ILUAs) and five Section 19 deeds of the Aboriginal Land Rights (Northern Territory) Act 1976"[4]. These negotiations were concluded in nine months. The pipeline extends over the Yuendumu, Yalpirakinu, Ngalurrutju, Central Desert and Mala Aboriginal Land Trusts. With these agreements in place, the construction by DDG Operations Pty Ltd commenced in June 2018 and was completed six months later.

Does ALRA inhibit activity by mining companies?

The CLC rejects claims that there is little activity by mining companies on Aboriginal land in comparison to the activity on land covered by pastoral leases, and that consequently there is more economic activity on pastoral leases by mining and exploration companies[1]. The level of mineral exploration within the CLC region shows no correlation with land tenure. In the past 15 years (including the resource boom) more producing projects came on line on Aboriginal land than elsewhere.

It is a false assumption that the number of exploration licenses granted correlates to the amount of exploration occurring. A large number of granted ELs are never explored in depth. The number of drill holes is a more appropriate metric of exploration levels. Exploration generally involves an initial broad brush survey, followed by a drilling program to investigate any anomaly. All anomaly definition involves drilling. A map of drill holes in the CLC region since 2004 **(Figure 1)**, shows that 63% of the drill holes have occurred on Aboriginal land. The spatial distribution of drill holes shown clearly follow geological patterns rather than land tenure. **Figure 1**



Potential causes of delay in the grant of Exploration Licences on Aboriginal Land Trusts

[1] Official Committee Hansard, Joint Standing Committee on Northern Australia, 10 December 2019, p 40.

It is the experience of the CLC that the key cause for delays in finalising agreements for exploration licence applications is a practice called warehousing. Some companies seek to maximise the number of titles they hold without having to pay rent to the Northern Territory Government or land access fees to Traditional Owners, or incur exploration costs. These companies make applications for tenements on Aboriginal land for which they don't have the resources to explore. They then refuse to productively engage with, or intentionally delay the negotiation process set out in ALRA through a range of strategies. This allows them to keep rights over large areas without incurring significant costs, in the hope that a larger company will seek to buy out some or all of their interests.

In 2019 sixty percent of the EL applications on Aboriginal land in the CLC region which reached the end of the ALRA negotiating period fell into the warehousing category. A further twenty percent involved companies progressing negotiations but at a slow pace.

The reality is that the majority of companies that the CLC deals with do not have the resources to develop their projects and do not seek to actively progress negotiations. A study by the CLC of its current EL applications reveals that 64% of the applications are held by individuals or relatively junior companies (unlisted or less than $40 million market cap usually with nil production). Where the CLC has not agreed to extend the negotiating period with companies who do not appear to be actively negotiating, the NTG often re-issues the consent to negotiate to the company, so the process begins again. Resources of the CLC are tied up with many fruitless negotiations over extended periods. With bona-fide companies who negotiate in good faith and have both the resources and intentions to explore, the typical negotiating period is within 18 – 24 months. For these reasons the CLC categorically denies that any amendments are required to ALRA to erode the rights of traditional owners vis-à-vis mineral resource companies.

Did the NT miss out on the last resources boom?

It was suggested in evidence to this Committee that the NT 'missed out on the last resources boom' and inferred that this was because access to land takes too long because of negotiations with traditional owners (Darwin ts p 38). The evidence does not support this view or the speculation that Aboriginal interests inhibit investment in the NT.

The CLC points out that a number of new mines and oil and gas projects were developed in the NT during the last resource boom, and all of these projects in the CLC region were on Aboriginal land. The reason these projects are no longer operating relates to geology and market forces: the implication that land rights are somehow responsible for these projects closing is patently false. The lie is demonstrated in the spurious suggestion that the ALRA is responsible for the dearth of operating mines in this period by the fact that no operating mines opened in this period on the balance of land in the NT covered by pastoral interests.

The CLC further points to the conclusions of a 2012 report into the level of mineral exploration activity in the NT over the previous 12 years by Dr Hugh Saddler, an economist at the Australian National University. Dr Saddler found that exploration for new deposits had grown more rapidly in the NT than the rest of Australia during that period; that unlike other states, there was little slow down in the growth of exploration expenditure during the peak of the global financial crisis; and that the NT had performed at least as well as any other state in attracting investment in mineral

exploration during the previous decade[2].This study demonstrates that any differences in mining activity between the NT and other jurisdictions cannot be the result of land rights.

Further, during the resources boom, the CLC's Minerals and Energy section received an exceptionally large number of EL applications. We conducted a series of large 'mega-meetings' attended by hundreds of Traditional Owners and dozens of mining companies to successfully process this influx (a massive logistical feat). This resulted in a large number of EL and EP grants, and ultimately some mineral and energy production licenses being negotiated and granted. That 'boom-time' projects may no longer continue to operate reflects current commodity price reality, geological prospectivity and market conditions.

Should there be amendments to the exploration licence application provisions in Part IV ALRA?

One witness suggested that traditional owners should only be able to exercise the right to refuse an exploration application at the first meeting, where currently traditional owners instruct the CLC to enter into negotiations for a particular piece of country. This witness proposed that the ability to refuse consent should no longer apply to negotiation of the terms and conditions of exploration or production agreements. (Darwin pp40-41) This would remove the principle of free, prior and informed consent from Part IV.

This proposition harks back to the views of opponents of land rights in the 1990s, views that were rejected in reviews of ALRA at the time and since. It can be inferred from statements made by this witness that the intention is to reduce the negotiating power of traditional owners and consequently the economic benefits they receive from mineral exploration and mining on Aboriginal land[3], supposedly to boost the NT economy from increased mining activity. As noted above there is no evidence that the benefits received by Aboriginal people have inhibited exploration or mining expenditure in the NT. The proposition further ignores the benefits to local NT economies from the receipt of individual and community benefits under ALRA and Native Title agreements.

Barring exceptional circumstances traditional owners have not given the CLC instructions to negotiate an agreement for a piece of land, and then subsequently refused the grant at a further meeting due to inadequate terms and conditions. Refusing to consent to the grant of an EL results in the EL being placed into a five year moratorium, which is a negative outcome for Traditional Owners who had indicated they wanted that area explored. The process as it stands ensures that companies have an incentive to enter into agreements with generally standard commercial terms, and the right to refuse consent is only used where cultural imperatives require or in response to applicants who fail to negotiate in good faith (we note the moratorium period can also be used as a warehousing tactic). When we look at the number of ELs that reached the end of the prescribed negotiating period in 2019, the amount that fall into that category are less than 15% of the total.

The representative of the Northern Territory Cattlemen's Association suggested that it was time to review whether Part IV of ALRA should be amended to allow disjunctive agreement processes[4]. The issue has been considered at length in previous focused reviews on the mining provisions of the

[2] Mineral Exploration in the Northern Territory 2001 to 2012, Report prepared for the Central Land Council and the Northern Land Council, 30 November 2012.
[3] Official Committee Hansard, Joint Standing Committee on Northern Australia, 10 December 2019, pp 38-41.
[4] Official Committee Hansard, Joint Standing Committee on Northern Australia, 11 December 2019, p 21.

ALRA and the CLC continues to support the following recommendations of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs in this regard;[5]

> "**Recommendation 24**
> Part IV of the Aboriginal Land Rights (Northern Territory) Act 1976 be amended so that there are no restrictions on the contents of agreements for exploration or mining, subject to general commercial law requirements and recommendation 25.
> **Recommendation 25**
> Traditional Aboriginal owners, through their land councils, should have the right to withhold consent for any exploration or mining proposal, subject to the current provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976*. "

Section 19 leases – legal requirements and timeframes

Section 19 provides that a Land Council cannot direct an ALT to grant a lease or licence unless the traditional owners:

- understand the nature and purpose of the proposed grant;
- as a group, consent to the grant;
- any Aboriginal person or group who may be affected by the grant has an opportunity to express their views to the Land Council about the grant; and
- the terms and conditions on which the grant is to be made are reasonable.

The requirement of a decision *as a group* does not mean that a unanimous decision of all traditional owners is required. Traditional decision making processes occur, with senior traditional owners being critical to the resolution of issues and providing for informed choices.

The CLC does not agree with the generalisation by some witnesses that section 19 applications take several years to process and notes the evidence of the Roper Gulf Regional Council whose experience is that section 19 applications are dealt with by the NLC in a neat, scheduled program[6]. CLC timeframes for processing applications for section 19 interests are not untoward given the complexity of the consultation process that is often required. Many section 19 interests in the CLC region are granted within a year of application, some within a few months.

Where there are applications that take longer to reach a conclusion the issues may involve the need for applicants to properly particularise their proposal or deal with conflict of interest matters. The timing of meetings once threshold matters are dealt with depends upon a range of factors including: logistics (distances for participants to travel, availability of resources required to convene meetings); the availability of traditional owners to attend meetings due to other commitments; and the need for meetings to not be arranged over summer months for cultural and health reasons. More than one meeting may be required if traditional owners request more information or request time to consider the application, or if senior people are unavailable who are required for a decision to be made in accordance with traditional law.

[5]August 1999 'Unlocking the Future' House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs

[6] Official Committee Hansard, Joint Standing Committee on Northern Australia, 11 December 2019, p 24.

Granting interests to traditional owners

There were several comments made by Committee members about the possible utility of a delegation under section 28A of ALRA to a traditional owner entity as a way to facilitate traditional owners obtaining section 19 interests on their land in a quicker way with less cost to the traditional owners. The CLC notes that an entity that has been delegated powers under section 28A to grant section 19 leases must comply with section 19(5), which requires consultation with traditional owners and other affected Aboriginal groups about land use proposals. Most of the factors listed above regarding potential delays with consultations would also apply to consultations by a delegated entity.

It is CLC's experience that section 19 processes do not unduly inhibit the aspirations of traditional owners for economic activity. There are currently leases and licences in the CLC region over approximately 200 NT Portions and Lots to traditional owners and their corporate entities. The purposes of these leases and licences include, amongst other things, pastoralism, art centres, community stores, staff accommodation, community health centres, women's centres, tourism, media, horticulture, training, contracting and service provision.

The CLC has not charged traditional owners or their corporate entities fees to conduct consultations for section 19 applications. There are standard section 19 template agreements that are used for most leases and licences, depending on the nature of the proposed land use and most proponents do not require legal assistance with CLC's section 19 process.

A benefit of the consultation process required by section 19(5) is that all traditional owners and affected Aboriginal groups are informed about the proposal. Traditional owners should be aware of and have the ability to withhold consent to the grant of a lease or licence that will impact on the rights of all traditional owners, particularly a lease that grants exclusive possession.

The potential for conflict between traditional owners is reduced when broad consultations occur prior to the grant of these interests. While applications by traditional owners are usually supported by the broader traditional owner group, the CLC has experience of such applications that are not consented to by senior traditional owners. Factors such as the unsuitability of the proposal or ability of the applicant to carry out the operation can be relevant.

While the Commonwealth Government is currently conducting a review of section 19A, there is no comparative evaluation taking place to determine whether a section 19A lease facilitates a quicker process for the grant of leases and licences than section 19 processes (Evaluation of the Township Lease Measure for the Department of Prime Minister and Cabinet by Yaran Business Services Pty Ltd). The CLC also notes that the National Partnership for Remote Housing NT Joint Steering Committee is currently conducting a review of the remote housing model in the Northern Territory, which includes a review of leasing processes on Aboriginal land. Any recommendations about changes to sections 19 or 19A are premature in light of these reviews and at this point the CLC has not determined whether any amendments are warranted to the processes set out in sections 19 and 19A to promote the interests of traditional owners.

Dennis Kunoth and Ley Fitzgerald

The CLC notes concerns raised by Dennis Kunoth with respect to his applications for leases in the CLC region, although the exact nature of his concerns is unclear. It should be noted that the views of traditional owners are not always homogenous, and that several traditional owner entities may be interested in the same area, so processing applications and assisting traditional owners is not always straightforward.

Mr Kunoth states at one point that it took 12 months to obtain a lease but it is not clear which lease he was referring to[7]. CLC's records indicate that Mr Kunoth applied for a grazing licence over the area of Alkwert ALT known as "Waite River" in June 2017 and withdrew that application a month later. At a meeting with traditional owners to consider the application of another Aboriginal entity over the same area in October 2017, Kunoth put forward his interest again, and traditional owners gave consent to Kunoth being granted a licence, which was finalised in February 2018.

A previous lease application by Mr Kunoth involving the Three Bores area was made after an application by a local Aboriginal Corporation, of which Dennis Kunoth was a director, for the same area. The processing of Mr Kunoth's application was delayed when he subsequently indicated that he wished to have a lease over a larger area than had been applied for. This larger area was also partly the subject of a competing application by the local Aboriginal Corporation. The CLC requested further information from the applicant to allow traditional owners to make an informed decision about the various applications. Mr Kunoth did not provide the requested information. The grant of the lease of the Three Bores shed was ultimately consented to in favour of Mr Kunoth. With the intervening complications, the total length of time to process the application was 18 months.

The CLC notes the recent application for a grazing licence made by Mr Kunoth in August 2019 and Kunoth's complaint that Bill Scott has applied for a licence over the same area even though Scott had used a bore on the area without a grazing licence[8]. CLC advises that the Kunoths had made an application over the same area previously, which was not consented to by traditional owners as it is close to their communities and would use bores that could be used by the communities. The Kunoths were advised of the views of traditional owners about the previous application. Nevertheless the Kunoths have made another application for the same area and a traditional owner meeting was scheduled to consider the applications in December 2019. This meeting was cancelled because of weather conditions and a consequent need for CLC land management staff to engage with feral animal culling. Mr Kunoth was advised that the meeting with traditional owners to consider these application is to be rescheduled early in 2020 when weather conditions are more suitable and traditional ceremonial business has concluded.

Assistance to Prescribed Bodies Corporate (PBCs)

In response to questions from the Chair regarding the nature of the services provided to PBCs by the CLC, and possible alternative service providers in this area the following information is provided;

While there are numerous governance and corporate service providers in the Alice Springs region that may offer specific services, the CLC is not aware of any that provide native title services. In the absence of a PBC with mining agreements or other economic activity it is not known how these providers would consider service delivery in this area as a profitable or sustainable sector to engage

[7] Official Committee Hansard, Joint Standing Committee on Northern Australia, 12 December 2019, p 24.
[8] Official Committee Hansard, Joint Standing Committee on Northern Australia, 12 December 2019, p 24.

with, There a only a few PBCs in the CLC region with such economic activity and the vast majority of PBC's in Central Australia do not have resources to engage 'for profit' service providers.

Factors that would prohibit an external entity from providing services to PBCs include:

- Funding available for supporting these PBCs is annual in nature, with no guarantee of recurrent funding.
- Knowledge of each Corporation and their individual circumstances would be needed to even write such an application.
- Notifying and gathering native title holders together to provide this information may incur extensive costs.
- Inefficient economies of scale in provision of services to a small number of PBCs, with no established resources to offer a broader scale service delivery.

The CLC has existing resources and expertise, and importantly, longstanding relationships with its constituents built up over last 40 years. The CLC has a presence and network across the region, which provides Aboriginal people with access to expert advice and assistance, including legal, anthropological, mining, land management, community development services, financial distribution and corporate governance services. The historical presence of the CLC as a statutory body under ALRA has established expectations of service delivery and advocacy amongst Aboriginal people and government departments. The CLC has harnessed these existing expectations and structures to meet the needs of native title holders.

Neighbouring NTRB/SPs may be in a position to extend service delivery over state boundaries. The internal PBC support units established by these NTRB/SPs bodies could in some circumstances have an advantage in building on existing relationships with native title holders who reside in cross border regions.

Central Mount Wedge

Senator McMahon commented that there was a "very viable commercial enterprise" on the Central Mount Wedge pastoral lease prior to its purchase by Aboriginal interests. She asked that the CLC provide information on whether it is still operating as a pastoral lease and whether a horticultural enterprise was developed on the land.

The CLC disagrees with Senator McMahon's characterisation of the state of the Central Mount Wedge property. At the time of purchase in 1995 there were no other bids from potential pastoral buyers and due to the poor state of infrastructure and plant considerable funds to re-establish the cattle operation would have been required. Only 120 head of cattle were transferred with the sale and the traditional owners were unable to access the funding to re-establish a cattle operation.

Reports commissioned by the CLC indicate that the property cannot sustain a stand-alone cattle operation. At its peak in the early 1980s during a period of unusually high rainfall the station ran up to 4,000 head of cattle, however it appears that subsequent overgrazing when conditions returned to more normal rainfall caused land degradation and in particular the loss of important perennial species. After 25 years without significant intensive grazing the land is still only in fair condition. A resource appraisal commissioned in November 2019 advised that the maximum carrying capacity for the property is 500 adult equivalents in average rainfall conditions.

Horticulture has never been pursued on the land as it is not considered to be a sustainable or commercially viable option for this property due to water quality resource constraints.

[1] Central Land Council 2019. Annual Report 2018-19, CLC, Alice Springs, p.56.
[2] *ibid*, p.55.
[3] Jemena 2017, 'Jemena secures land access with Wakaya People for the Northern Gas Pipeline' < https://jemena.com.au/about/newsroom/media-release/2017/jemena-secures-land-access-with-wakaya-people-for> accessed 14 January 2020.
[4] AGIG 2019, 'Tanami Gas Pipeline,' < https://www.agig.com.au/articles/tanami-gas-pipeline> accessed 9 January 2020.