NATIVE TITLE AND LAND ACCESS IMPLICATIONS IN THE KIMBERLEY

On 3 October 2001, Steve White treated us to a detailed account of many aspects of Native Title, particularly that relating to the access of miners to land, for the purpose of mining or mining exploration, where the land is the subject of Native Title or under Native Title claim. This is a subject that we were keen to hear about from “the horse's mouth” as most of us only see or hear what appears in the media.

Steve is Manager, Aboriginal Affairs Land Access branch of the Dept of Minerals and Petroleum Resources. He is a geologist and he knows the Kimberley well from his work and knows every inch of one part having jogged the Gibb River Road in 8 days to raise money for the RFDS.

An early significant judicial decision in regard to land rights in the Kimberley was made in 1998. In a Claim brought by Ben Ward on behalf of the Miriuwong Gajerrong people (Kununurra area), Justice J Lee found that they had extensive rights to land and water, to control access and to trade in resources, eg arguably to collect royalties in respect of petroleum and minerals. This decision was appealed before the Full Bench of the Federal Court and in March 2000 it was found that Native Title was extinguished on enclosed and improved pastoral leases, certain mineral tenements, State Agreement Acts (e.g. Argyle Diamond Mine), and Large public works e.g. Ord Stage 1. This decision was in turn appealed to the High Court and a decision is expected late this year. The decision naturally has huge implications. One of the significant outcomes could be an answer to the question “Do enclosed and improved leases extinguish Native Title?” and, if so, what is the definition of enclosure and improvements.

Steve first outlined the current position in the Kimberley in regard to Native Title claims. Initially there were many overlapping claims but now there are proposed boundaries in which representative Aboriginal bodies operate. This change will facilitate consideration of claims. There are seven representative Aboriginal bodies, with the Kimberley extending into the Great Sandy Desert, the Tanami and part of the Pilbara.

There are around 130 Native Title Claims on the books at present covering 85% of the land in WA including huge areas of Vacant Crown Land. Curiously there is a lesser density of claims in the Kimberley than elsewhere in the State. Smaller claims (called “Polygon Claims”) have been raised in response to future Act applications. Many such small claims on the books at present have been made, which define the same areas as mineral tenement claims, in order to protect Aboriginal interests when the mining claims are processed. Other claims are either yet to be listed in the Federal Court, have been listed, or have been settled by consent determination. Examples of consent determination include 200 hectares by the Rubibi people at Broome, land in Noonkanbah Station and the area around Lake Gregory near Balgo for the Jurabalan people. There are 20 to 25 pastoral leases

held by Aboriginal interests at present which cover a high percentage of the Kimberley. Obviously these have a strong claim to Native Title. It can be argued that Vacant Crown Land is likely to be determined in favour of Native Title.

Steve then went on to talk about the mining industry. There are a number of significant existing mining operations which probably won't be affected such as Argyle Diamonds (largest in the world), Pillara lead and zinc and lesser projects nearing the end such as Blina oilfield. Other mining operations about to commence or exploration projects such as the large Coyote Gold project in the Tanami, Ellendale Diamonds near Fitzroy Crossing, Sally Malay (nickel, copper and cobalt) and Panton Hill (platinum) both north of Halls Creek and Ashmore Diamonds in the north Kimberley. Some of the leases for these projects were either granted before Native Title or the land concerned is not the subject of Native Title.

The big impact of Native Title is on explorers and developers. A map presented by Steve showed the applications forming a wide almost continuous strip surrounding Great Northern Highway from Willare to Kununurra and another large area in central Kimberley. Following standard procedures it takes 15 to 22 months for an application to be considered. This is a real problem for small projects. They simply haven't the financial resources to wait so long for resolution of their applications.

The mining and Aboriginal interests agreed that the cumbersome standard procedures were not usually necessary and as a result drew up a Kimberley Model Agreement for explorers to use to negotiate with the Kimberley Land Council (KLC) to obtain Heritage clearance for their proposed mineral tenements. The KLC first consults with the Native Title claimants to determine the type of survey required and advises the explorer. It may be determined that the impact of the proposed work is minimal in which case the explorer can proceed without further consultation, the procedure taking only 4 weeks. Otherwise it may be determined that either a joint field inspection is carried out or a professional work clearance survey be carried out, a written report being prepared in each case. If the reports are favourable the explorer may proceed. These procedures have the potential to reduce the time to about 2½ months.

The Agreement is not operating as adequately or as smoothly as hoped however. One difficulty, which is not uncommon, involves Native Title Claimants requesting quite large sums of money for access to the land. If the standard procedure is followed, such payments are not required. Nevertheless access in the Kimberley has the potential to be lot easier than elsewhere as a result of the Agreement.

Steve's talk was followed by lively discussion, which had to be drawn to a premature end as time was getting on. Supper followed.

Daphne Choules Edinger and Gilbert Marsh