

26 February 1999

The Chairman  
House of Representatives Standing Committee  
on Aboriginal and Torres Strait Islander Affairs  
Parliament House  
**CANBERRA ACT 2600**

Dear Sir

**ABORIGINAL LAND RIGHTS (NT) ACT 1976 ("ACT") - REVIEW**

As confirmed in our correspondence dated 23 February 1999, Colin Agnew and Bruce Simmons are to meet with your Committee on Thursday 4 March to make submissions regarding the effect of the Aboriginal Land Rights (Northern Territory) Act 1976 ("Act") on the Gove Project. We understand that written submissions may be made to the Committee until 24 March 1999. Whilst we may make a further submission, we provide the following comments as a precursor to next week's meeting.

This submission is made on behalf of Swiss Aluminium Australia Limited and Gove Aluminium Limited, the "Participants" in the Gove Project which is situated on land leased from the government under special mining and associated leases near Nhulunbuy in East Arnhem Land, of which Nabalco Pty Limited is the manager. The Special Mining Lease SML11 and the various supporting leases are held by the Participants pursuant to the Mining (Gove Peninsula Nabalco Agreement) Ordinance (the "Gove Ordinance") and the Gove Agreement (as amended) referred to therein. Copies of these documents can be supplied if they are not readily available to you.

The Gove Project comprises a bauxite mine which currently yields 6.5 million tonnes of bauxite per annum and an alumina refinery which refines approximately 4.5 million tonnes of the mined bauxite into some 1.8 million tonnes of alumina. Both the alumina and the residual bauxite are exported. The Project commenced operations of the mining of bauxite and the refining of alumina in 1971. Since inception in 1968 the Project has been, and remains, the largest private enterprise employer in the Northern Territory and currently employs 750 personnel directly

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with a further 400-500 personnel being employed by contractors to the Project. Annual sales revenue approximates \$500 million. The township of Nhulunbuy, which is situated on part of the land leased to the Participants by the government was established in conjunction with establishment of the Project and now has a population of almost 4,000 making it one of the largest towns in the Northern Territory. The township is administered by Nhulunbuy Corporation Limited which performs the traditional functions of local government. Although the underlying lifeblood of the town is, and has always been, the Project, the township houses many other people whose livelihood is not directly dependant upon the Project. Indeed 43% of the town rates are paid by persons or organisations not directly involved in the Project. Additionally, the governments of both the Commonwealth and the Northern Territory own and occupy a significant number of buildings in the town (school, hospital etc), on a rate free basis.

Since the Project first commenced operation, the Participants and Nabalco have co-existed and co-operated with local Aboriginal groups living in and around Nhulunbuy, including at Yirrkala (which was a mission but which is now a widely recognised centre of Aboriginal culture and art in the Northern Territory) as well as in the “homelands” for the Aboriginal clans from the area. In the 1996 census, a total of 876 Aboriginal people were disclosed as living within the Gove peninsula (Marrngar, Nhulunbuy and Yirrkala) The majority of those people have a traditional affinity with the land affected by the Project and may accordingly be said to be impacted by its operations. A further 622 Aboriginal people were recorded as resident in the broader region of the Gove area (including the homelands, serviced by Laynhapuy (the homelands association)). Although their places of residence are physically separated from the Gove leases by tracts of Aboriginal Land they may also be said to be more indirectly affected by the Project.

Since the beginning of the Project, the Participants and Nabalco have closely interacted with YBE (Yirrkala Business Enterprises Pty Limited) a company owned, operated by and employing members of the local Aboriginal community which has provided increasing levels of contractual services to Nabalco in connection with the Project. In January 1996, Nabalco and YBE signed a contract for the haulage of bauxite from Rocky Bay to the mine stockpile. Nabalco anticipates expenditure of more than \$7.0 million in 1999. Since 1977 Nabalco has employed Bruce Simmons as a full time Manager - Aboriginal Relations. Bruce and his wife Denyse have had very long and close dealings with the Aboriginal peoples in the area and are widely accepted into the Aboriginal community and have been “adopted” by local Aboriginal families.

Nabalco and the Participants particularly wish to raise the following issues in connection with your review:

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- 1 Distribution of royalties and royalty equivalents
- 2 Recognition of payment of mining royalties by the Participants in respect of the Gove Project.
- 3 Road access from Katherine to Gove
- 4 Territorial Sea
- 5 Access

**1 DISTRIBUTION OF ROYALTIES AND ROYALTY EQUIVALENTS**

We believe that the current distribution of royalty equivalents in accordance with the Act fails to achieve its purpose in that:

- (i) the Act disproportionately allocates funds to the broader population of Northern Territory Aboriginal people and therefore does not adequately compensate the Aborigines residing in the area affected by the mining operations; and
- (ii) in any case, the residual 30% (the local 30%) amount paid out of the Trust Account in accordance with Section 64(3) and distributed in accordance with Section 35(2) of the Act:
  - (a) is restricted in its distribution; and
  - (b) has not been used for the provision of infrastructure or services which have benefited the Aboriginal people of the Gove region.

Since commencement of the Project, the Participants have paid a total of \$90 million in mineral royalties for bauxite to the Commonwealth and Northern Territory governments and since 1993 (when the Gove royalties were last reviewed) those royalties have averaged approximately \$9 million per annum. The rate of royalty payments is equal to or higher than for any other Australian bauxite producer.

When approval in 1952 was given for mining activities to take place on what was then the Arnhem Land Aboriginal Reserve, the concept was

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born that statutory royalties from minerals extracted in Aboriginal reserves should be earmarked for the collective benefit of Aborigines residing in the Northern Territory and that local Aboriginal people would also be reimbursed or compensated for the impact of the particular mining operation on them.

At that time, the Northern Territory (Administration) Amendment Ordinance 1952 established the Aborigines (Benefit from Mining) Trust Fund.

The provisions of Section 64 of the Act continued the concept that mining royalties would be applied to the benefit of all Aborigines residing in the Northern Territory with a specific (30%) proportion of royalty equivalents to be paid in accordance with Section 35(2) to compensate local Aborigines for the impact of the operations on them.

A letter from Senator Grant Tambling to Mr John Reeves QC dated 11 November 1997 regarding the distribution of receipts of royalty equivalents by Aborigines Benefit Reserve (“ABR”) from all sources for the 19 year period to 30 June 1997 showed that approximately \$203.8 million was distributed for administrative costs of the Land Councils and ABTA, representing approximately 53% of the total receipts over that period.

Of the total expenditure of royalty equivalents of \$386,767,239 (refer Senator Grant Tambling’s letter of 11 November 1997), a sum of \$116,233,302 has been available to compensate Aborigines affected by mining operations (ie the local 30%), the balancing amount of \$270,533,937 having been allocated to the benefit of all Northern Territory Aborigines. The Participants make no comment as to whether this sum of \$270,533,937 was of measurable benefit to all Aborigines residing in the Northern Territory. However, the mining operations are visible to the local Gove Aboriginal groups and our view is that the local 30% amount is an insufficient proportion of the overall compensation paid. Specifically, of the total royalty payments of the Participants of approximately \$9.0 million annually, only a residual of \$2.7 million is earmarked for the benefit of those affected by the mining operations.

Presently the local (ie. Section 64 (3)) royalty equivalents amounting to approximately \$2.7 million annually are paid as to:

- 65% to Gumatj Association with which about 23% of the Aboriginal people resident in the Gove region are connected

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- 20% to some members of the Rirratjingu clan representing an unknown percentage of the Aboriginal people resident in the Gove region are connected; and
- 15% to Laynhapuy Association with which about 41% of the Aboriginal people resident in the Gove region are connected.

Over the years, the distribution of ‘local’ royalty payments has moved from the original 100% distribution to Yirrkala Dhanbul Association, to 50% to Dhanbul and 50% to Gumatj, to 100% to Gumatj, and finally to the above distribution.

Leaving aside the “fairness” of the apportionment between the various groups, there is no accountability as to how the local proportion of the royalties are spent. Not all of the 876 Aboriginal people living within the Gove Peninsula nor all of the 622 Aboriginal people in the homeland areas, receive benefits from this money. As well, there is little evidence that any of the Aboriginal people deemed to be affected by the Gove mining operations have benefited in any tangible way (eg. housing, health, communication, training etc) from the receipt of mining royalty equivalents.

If the royalty payments made by the Participants were paid directly to the Aboriginal people who have a close geographic proximity to the mining and processing operations (namely those resident at Marngarr, Nhulunbuy and Yirrkala) the payments would be equal to approximately \$51,300 per family per annum free of tax (5 family members assumed). Even if the Aboriginal people living in the homelands of the broader Gove region were included in this calculation, the distribution would still amount to approximately \$30,000 free of tax per family per annum.

There is significant disputation today at Gove in relation to the distribution of ‘local’ royalty equivalents. One group of Aborigines feel that the monies should be disbursed to the traditional owners of the area from which the bauxite is extracted. This raises the first problem of defining who the traditional owners of an area are.

A section of the Gumatj clan claims ‘ownership’ of the area on which the mine is situated. This is disputed by the members of another section of the Gumatj clan who claim that they are the traditional owners of the land by virtue of being nominated as caretakers of that land by the Lamamirri clan. The situation is exacerbated by the fact that descendants of the Lamamirri clan have recently surfaced at Gove to claim they are the traditional owners.

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There is sufficient anthropological evidence that ‘ownership’ of land by a particular Aboriginal group is not so precise as the definition of ‘ownership’ of land under the European style title system. There are all sorts of spiritual, occupational, and historical issues which Aborigines take account of in deciding ‘traditional’ ownership and which in many cases leads to multiple or overlapping claims.

The situation at Gove in defining traditional ownership is more complex because, even if traditional ownership could be established over the bauxite operations, there is different traditional ownership of the plant site, the waste disposal ponds, the township, the bauxite conveyor corridor and the mine site all of which are essential interrelated ingredients of the overall Gove Project in addition to the actual bauxite mining operations.

Section 35(2) of the Act does not make it clear as to which Aboriginal people are due to be paid Section 64(3) monies. A narrow view is that only the traditional owners of the actual mined area would receive those funds. It is the failure of Section 35(2) to adequately define ‘area affected by those mining operations’ which has resulted in more than 20 years of disputation between Aboriginal groups in the Gove region as to the proper distribution of ‘local’ royalties. There is no requirement to account for the local royalty disbursements.

Whereas we agree with the recommendations of Mr Reeves QC in Chapter 16 of his report that “area affected” monies should only be paid for the benefit of those communities that can establish an actual adverse affect from mining on the community in net terms, we suggest that there needs to be adequate definitions of the “area affected” and “adverse affect”.

We submit that the Regional Land Council should be provided with a clear direction as to the definition of “affected areas”. Given that there are at least thirteen (and possibly nineteen) clan groups in the Gove region, it is highly unlikely that all clan groups would be adequately represented on the RLC and therefore the mere creation of a RLC may not be sufficient to ensure that the ‘local’ royalty equivalents are distributed in an even handed manner.

We have a further concern that there will be a lesser proportion of ‘local’ royalty equivalents available unless there is some prescription about the administrative expenses of the proposed NTAC and the RLCs.

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Our view is that no Section 64(4) type distributions should be made by ABR but rather distributions by ABR be made for the purpose of

- (i) administration costs of NTAC, RLC’s and ABR
- (ii) payment to Aboriginal associations in the affected areas.

subject to some limit applying to the total administration costs.

In summary, the major failure of the royalty equivalent distribution system as defined in the Act is that the amount received by ‘local’ Aborigines in the affected areas is:

- too little (only 30% of all royalty equivalents)
- not applied equitably to all Aboriginal people in the ‘affected area’
- not well spent on lasting improvements to the health and well-being of Aboriginal people in the ‘affected area’.

**2 RECOGNITION OF PAYMENT OF MINING ROYALTIES BY THE PARTICIPANTS IN RESPECT OF THE GOVE PROJECT**

The Northern Land Council repeatedly makes public statements to the effect that:

“No mining royalties are paid by Nabalco to the Aboriginal people”.

Technically speaking, this statement may be true when one reads section 63(2) of the Act but, in an economic and political sense, clearly it is totally untrue and misleading. Unfortunately, it is not possible in the popular press to readily disabuse the general public (including the Aboriginal community) of the misinformation about this issue. Therefore, our preferred path would be to pay “royalties” directly to the ABR in lieu of the present regime so as to be able to more readily meet the popular (and totally untrue) statements that no royalties are payable to the Aboriginal people by or in respect of the Gove Project.

**3 ROAD ACCESS FROM KATHERINE TO GOVE**

The Gove Peninsula remains inaccessible by road other than a gravel road which is usually accessible in the dry season. Currently the Northern Land Council requires that a permit, granted under the Aboriginal Land Act, be obtained before commencing the 10 hour drive

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to or from Katherine. Over the years the NLC has reduced the categories of person who may obtain a permit to use the road to Nhulunbuy residents or persons visiting a particular Nhulunbuy resident. The Participants understand that at the time of signing the deed of grant over the Arnhem Land region, the road was open for use by the public. Based on this historical background and the road’s existence as the only vehicular access to Nhulunbuy, the Participants suggest that it is inappropriate that any permit regime should be applied to it.

**4 TERRITORIAL SEA**

Due to physical and administrative difficulties associated with road transport and the volume of supplies and product transported to and from the region, the Project and Nhulunbuy are, in effect, entirely dependent upon unrestricted sea access to and from the port at Gove. Apart from limited quantities of perishables, all incoming foodstuffs and supplies come by sea, usually by barge from Darwin. Similarly, all industrial consumables for the Project come by sea, such as 500,000 tonnes of fuel oil, 200,000 tonnes of caustic soda and approximately 100,000 tonnes of other plant, goods and materials each year. In addition each year approximately 2.5 million tonnes of bauxite and 1.8 million tonnes of alumina are exported from the port by sea.

The port at Gove is also a strategically important regional port for Eastern Arnhem Land and provides fuel and services for the Royal Australian Navy and Australian Customs Service surveillance vessels and others in need of supplies and services.

Any successful Aboriginal claim over the territorial sea in or around Gove could have a potentially serious impact on the viability of the Project and the amenity and well-being of all inhabitants of the Gove region, including traditional owners and consequently the Participants hold the view that such claims should not be able to be made.

**5 ACCESS AND PERMIT SYSTEM**

One of the lifestyle draw-cards for working at Gove is its proximity to an unspoilt environment and the availability of family outdoor activities such as camping, swimming, boating, hiking and fishing. Freedom of movement is part of the Australian ethos. Nhulunbuy residents must purchase a “recreation permit” from the Dhimurru Land Management Aboriginal Corporation each year (at a cost of \$55 per family) to enter certain “recreation permit areas” (the overall area of which has been progressively reduced) surrounding the town. Two weeks written notice



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is required for requests to visit non recreation permit areas. Threats of disruption to the access regime including to “recreational areas” have surfaced at times of tension between the Participants and the local Aboriginal people over their respective rights.

The Participants submit that an established set of rules regarding access that are not flexible depending on the relevant political and quasi-political issues which erupt from time to time would be preferable. Any threat to or rumblings about access rights to areas outside the leasehold areas impacts adversely on the actual and perceived quality of life in Nhulunbuy and, in turn, the quality of employees that can be attracted to Gove and the “character” of the township of Nhulunbuy and the end of the day will also impact negatively on the Aboriginal people themselves.

If you would like any further information please do not hesitate to contact Colin Agnew on (08) 89875 202.

Yours faithfully

**NABALCO PTY LIMITED**

Colin J Agnew

**MANAGING DIRECTOR**