

# “....Jealous for Our Country<sup>1</sup>”

A short legal history of the attempts of government and miners to obtain and consolidate control of the natural resources of the McArthur River region and the continuing resistance of the Yanyuwa, Gurdanji and Garawa people.

By Anthony Young<sup>2</sup>

## Introduction

The history of the various legal battles fought in the McArthur River region and over the McArthur River mine provides a revealing and profoundly disturbing picture of economic development in Northern Australia and the place given to Aboriginal people in that development.

Over the past 30 years Yanyuwa people, and neighbouring Gurdanji and Garawa people, have struggled to regain control of their traditional lands using the mechanisms provided by the Australian parliament in the *Aboriginal Land Rights (Northern Territory) Act 1976* and, more recently, the recognition of native title by the High Court in 1992.

That struggle has been made possible by the legal rights conferred or recognized by the Australian parliament and the High Court. However, the actual roles of government, particularly the Northern Territory government, and the mining companies, Mount Isa Mines, McArthur River Mining (“MRM”) and Xstrata<sup>3</sup>, have been ambivalent at best and deeply hostile at worst towards the ambition of the Aboriginal people of the region to maintain some residual control of their traditional lands and waters.

The struggle of the Yanyuwa, Gurdanji, and Garawa people to resist complete domination by these powerful outside forces continues to the present.

## Geography and History

The McArthur River<sup>4</sup> rises in the Barkly Tableland and flows about 240 kilometres north to its mouth in the Gulf of Carpentaria. In the dry season the upper part of

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<sup>1</sup> “Too much government and mining mob been jealous for our country”: Yanyuwa man Don Miller pers. comm. to John Bradley, *Warnarrwarnarr-Barranyi (Borroloola 2) Land Claim Submission*, Northern Land Council, 1993.

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<sup>3</sup> Xstrata plc, a Swiss company, bought Mount Isa Mines and MRM in 2003.

<sup>4</sup> Ludwig Leichhardt gave the river its present name in 1845, after the Macarthurs of Camden, New South Wales.

the river becomes a chain of pools but during the mighty northern monsoon the river becomes a great torrent, carrying about 4.2 trillion cubic metres<sup>5</sup> of water into the Gulf. The landscape is harsh but provides refuge for native animals, many of them significant, vulnerable or endangered, such as the orange horseshoe bat, ghost bat, Gouldian finch, purple crowned fairy wren, Carpentaria grass wren and hooded parrot. One vulnerable fish, the freshwater sawfish, inhabits the middle and upper reaches of the river and the dry season pools of the river provide a refuge for the species. There are also flora values of international and national significance in the region<sup>6</sup>.

The Sir Edward Pellew Islands, an archipelago of five large islands and myriad of islets<sup>7</sup>, lie opposite the mouth of the McArthur River. These bare, rocky islands provide a refuge for fauna that has disappeared from the mainland. The endangered Carpentarian antechinus, once widely distributed on the mainland, is found nowhere else. The seas at the mouth of the river shelter dugong, flatback turtle and green turtle. The nationally endangered little tern occurs here and the shallow inshore waters provide essential habitat for migratory wading birds from the northern hemisphere. The Pellew Islands and surrounds are listed on the National Heritage register because of their outstanding natural values<sup>8</sup>.

The Aboriginal people of the Gulf coast had extensive contacts with the trepang gatherers from Makassar in South Sulawesi who sailed to the north coast of Australia during the 18<sup>th</sup> and 19<sup>th</sup> centuries. There are loan words from Makassarese in the Yanyuwa language<sup>9</sup>. The first recorded contact between Aboriginal people of the region and Europeans was during Matthew Flinders' expedition of 1802-3. Ludwig Leichhardt recorded the sophisticated life of the people in the region in 1845 and described fishing traps and weirs, well-used footpaths, substantial dwellings, wells of clear water and a complex method<sup>10</sup> of de-toxifying poisonous cycad nuts for eating<sup>11</sup>.

In the 1870's and 1880's Queenslanders began to overland cattle through the region, heading towards the Pine Creek goldfields, Palmerston (Darwin) and, later, the Kimberley. These were the "wild times", a time of massacre, murder, kidnap and rape for the Aboriginal people of the region. The Binbingka people of the middle region of the McArthur River, in the direct path of the cattlemen, were obliterated. The Gurdanji, whose ancestral country is in the upper region of the river, around the present McArthur River mine, were much reduced in number and scattered across the Gulf region<sup>12</sup>. This is still the case today. The "wild

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<sup>5</sup> Or 4.2 cubic kilometres of water.

<sup>6</sup> Northern Territory Department of Lands and Housing, *Gulf Region Land Use and Development Study 1991*, Northern Territory Threatened Species List.

<http://www.nt.gov.au/nreta/wildlife/animals/threatened/specieslist.html>, sighted 13.10.2007.

<sup>7</sup> The archipelago has a land area of 1,846 sq km and the intervening seas cover a further 2,458 sq km.

<sup>8</sup> <http://www.environment.gov.au/heritage/>, sighted 13.10.2007. MRM opposed the listing.

<sup>9</sup> Bradley, *Warrnarrwarnarr ...*

<sup>10</sup> A method still known and recently used around Borroloola, pers. comm. John Bradley.

<sup>11</sup> Tony Roberts, *Frontier Justice – A History of the Gulf Country to 1900*, UQP, 2005.

<sup>12</sup> *Ibid.* p 185.

times” took a heavy toll on the Garawa people, too, whose country is immediately to the east of the Gudanji<sup>13</sup>.

The Yanyuwa people, whose traditional country is the lower McArthur River region and adjacent Sir Edward Pellew Islands, were able to avoid the worst of the “wild times” by retreating to their isolated country in the islands<sup>14</sup>.

The Yanyuwa permanently occupied their islands until the Second World War when many were forced to relocate to Borrooloola and the Barkly region<sup>15</sup>.

In 1960 the Welfare Branch of the Northern Territory Administration attempted to relocate the Yanyuwa to a place away from their traditional lands at Dangana on the Robinson River. They objected to this and made dugout canoes and paddled out to sea, to the Pellew Islands and eventually back up the McArthur River to Borrooloola<sup>16</sup>.

Through the 1950’s and 1960’s Yanyuwa people still travelled to the Pellew Islands and coastal country. Ceremony was still conducted there. The 1960’s and 1970’s saw fewer Yanyuwa employed in the pastoral industry and a concentration of the Yanyuwa and other Aboriginal people in Borrooloola. Although a few Yanyuwa people continued to live on the islands many did not have the means or the boats to travel to the islands.

The “HYC”<sup>17</sup> lead-zinc deposit at McArthur River had been discovered by Mount Isa Mines in the 1950’s. This was reportedly the largest lead-zinc deposit in the world but uneconomic to develop with existing technology. Nevertheless, Mount Isa Mines developed proposals for a railway from the mine and a town and a port in the Sir Edward Pellew Islands.

It was against this background that the first land claim under the new *Aboriginal Land Rights (Northern Territory) Act* was launched in 1977.

## **Land Claims under the *Aboriginal Land Rights (Northern Territory) Act***

### **The first Borrooloola land claim**

The Borrooloola land claim was the first<sup>18</sup> claim heard under the *Aboriginal Land Rights (Northern Territory) Act* (“ALRA”). The claim was to vacant Crown land around Borrooloola; the Borrooloola Town Common, an area originally set aside for

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<sup>13</sup> Ibid. p 199.

<sup>14</sup> Baker, R M, *Land is Life*, 1989, Ph D thesis, University of Adelaide, quoted in Bradley, *Warnarrwarnarr ...*, p 21.

<sup>15</sup> Bradley, *Warnarrwarnarr ...*, p 24.

<sup>16</sup> Bradley, *Warnarrwarnarr ...*

<sup>17</sup> Reputedly from “Here’s Your Chance”.

<sup>18</sup> Although the Fox Inquiry into uranium mining in the Alligator Rivers region had previously resulted in a recommendation for a grant of land in what is now Kakadu National Park.

passing cattle drovers to graze cattle, and the Sir Edward Pellew Islands. The claim was heard in Darwin and Borroloola. Evidence from the Aboriginal claimants was heard before a largely hostile audience of local Europeans and government and mining representatives in a hall at Borroloola. There was little effective use of interpreters. There were no site visits to the islands under claim. The Yanyuwa claimants found the process an ordeal<sup>19</sup>.

On 3 March 1978 the Aboriginal Land Commissioner, Justice Toohey, recommended the grant to the traditional owners of the Borroloola Town Common and West Island and Vanderlin Island, at the western and eastern extremes respectively of the Sir Edward Pellew Islands archipelago.

He refused to recommend the grant of the islands in the centre of the archipelago; South West Island, Centre Island and North Island, on the ground that the traditional owners, who had for so long been forced off their islands, lacked sufficient strength of traditional attachment to this part of the claim area. These islands were at the heart of the claim area and most accessible to the Yanyuwa.

The area excluded from recommendation for grant included that part of the claim area Mount Isa Mines planned to use for a port and a town.

Shortly after the decision, on 25 January 1979, the Yanyuwa claimants instructed the Northern Land Council to make a repeat claim (permitted under the ALRA subject to certain criteria) over the area not recommended for grant.

### **Declaration of the “Town of Pellew” over part of the land claim area**

In 1980 the Northern Territory Government proclaimed the “Township of Pellew” over South West Island and Centre Island, the areas earmarked for Mount Isa Mines’ township and port. The intention of the proclamation was to put the area beyond the jurisdiction of a claim because “land in a town” could not be claimed under the ALRA. The land at the time was almost wilderness with no artificial structures except a meteorological observation facility. The consent of the Yanyuwa claimants to the declaration of the “Town of Pellew” over their traditional lands was not sought nor were they consulted.

The then NT Solicitor-General advised the NT Government that the existence of the repeat claim did not prevent the NT Government dealing with the land in such a way so as to put it beyond further claim. That advice was proved to be wrong by later decisions of the High Court<sup>20</sup>.

Negotiation continued between Yanyuwa representatives and the Northern Territory government after the land claim. This negotiation, conducted in an

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<sup>19</sup> Bradley, *Warmarrwarnarr* .., p 27.

<sup>20</sup> *R v Toohey: Ex parte Northern Land Council* (1981) 151 CLR 170 at 179, *R v Kearney; Ex parte Northern Land Council* (1984) 158 CLR 365.

atmosphere of defeat for the Yanyuwa, appeared to result in agreement in principle that “the Borroloola people” would

- (a) accept leases under Northern Territory leasehold title (rather than inalienable freehold title under the ALRA) of those parts of the Pellew Islands outside the “Township of Pellew” not recommended for grant;
- (b) lease back North Island to the NT Government for a park and wildlife sanctuary;
- (c) accept an offer by Mount Isa Mines to surrender 810 sq kms on Bing Bong pastoral lease and an area known as Kangaroo Island (in the McArthur River estuary) for use by Aboriginal people.
- (d) accept \$500,000 over 5 years for the development of outstations on their land; and
- (e) agree to the exclusion of a one kilometre wide corridor across the Borroloola Town Common from the grant under the ALRA. This was to be used as a transport corridor by Mount Isa Mines.

In March 1981 an officer of the Northern Land Council advised that when the agreement was “implemented” the repeat land claim would be withdrawn. However, it was never stipulated by the NT Government that the repeat claim would be withdrawn as a condition of any agreement nor did the claimants ever appear to agree to its withdrawal. It was simply assumed that it had no chance of success<sup>21</sup>.

The steps outlined above were partly carried out (the grants of interests outside the “Township of Pellew” but within the claim area were invalid for the same reason as the proclamation of the township).

However, the repeat claim was never withdrawn.

### **Purported sale of land at Camp Beach, Centre Island**

On 17 August 1985 the NT Government purported to sell by auction 11 blocks of leasehold land on Camp Beach at Centre Island. Each lease contained a covenant requiring development of the block. Purchasers were not advised by the NT Government of the decisions of the High Court<sup>22</sup> that made the grant of any interest in the blocks invalid while a claim remained on foot.

The consent of the Yanyuwa who claimed traditional ownership of the land which was to be sold was not sought nor were they consulted.

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<sup>21</sup> Report of Aboriginal Land Commissioner into Warnarrwarnarr-Barranyi Land Claim, AGPS, 1996, paragraph 1.13.12.

<sup>22</sup> *R v Toohey* (1981) 151 CLR 170, and *R v Kearney; Ex parte Northern Land Council* (1984) 158 CLR 365.

The NT Government was probably aware that the grants might be invalid because of the existence of the unresolved repeat claim. This is evident from the following extraordinary clause inserted by the NT Government in each contract of sale:

"Whilst the land is believed at the time of the execution of this contract to be available for leasing under the Crown Lands Act the Minister gives no warranty that this belief is accurate and in the event of the belief proving to be inaccurate the purchaser shall not be entitled to any recompense by way of damages for breach of contract or otherwise in any manner whatsoever other than refund of all monies paid by the purchaser under this agreement."

The conclusion is inescapable that the NT Government was attempting to bolster the proclamation of the "Township of Pellew" by creating an entirely artificial impression of residential development. At the time the Pellew Islands were a wilderness. They were remote and the blocks on Centre Island were accessible only by a long boat journey. The structures eventually built at Camp Beach were not much more than fishing shacks (albeit constructed at considerable expense), occupied by their owners from Alice Springs or Darwin for a few days a year.

These invalid sales were later to cause great difficulty and delay in finally resolving the second Borroloola land claim.

### **The second Borroloola land claim**

Although the corporate memory of the Land Council of the existence of the repeat claim seemed to have dimmed with time, the traditional owners had not forgotten its existence<sup>23</sup>. At around this time Mount Isa Mines also announced that it had made a technological breakthrough which meant it believed it could economically mine the HYC lead-zinc deposit at McArthur River.

In 1991 and 1992 the Northern Land Council, responding to the promptings of the Yanyuwa, revived the repeat land claim. The hearing began in November 1992 at Centre Island<sup>24</sup>. About 200 people camped at East Neck on Centre Island, including the Aboriginal Land Commissioner, Justice Peter Gray of the Federal Court, claimants, anthropologists and lawyers. Evidence from claimants was heard over about 14 days. Visits were made to sites across the Sir Edward Pellew Islands. Transport was by barge, dinghy and by helicopter.

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<sup>23</sup> The Northern Land Council did not prosecute the repeat claim after it was lodged, possibly because it was thought not to have much chance of success. However, eleven years after it was lodged, Annie Karrakayn, a senior Yanyuwa woman, asked me about it on my first visit Borroloola as a Northern Land Council lawyer in 1991. The Yanyuwa were keen to revive the claim. This was the genesis of the second Borroloola land claim.

<sup>24</sup> The claimants were represented by a fine advocate, Ross Howie QC (now Judge Howie of the Victorian County Court). Dr John Bradley, Yanyuwa speaker and a passionate supporter of the Yanyuwa people, was the claimants' consulting anthropologist.

The NT Government opposed the claim on a variety of grounds: it argued that the claim was “unconscionable” in view of the “agreement” referred to above. The Land Commissioner rejected the argument because there was no evidence that the traditional owners had ever actually agreed to the proposal and, further, the purported grants of interests to them in the islands outside the Township of Pellew were invalid in any event. The Land Commissioner found that the claimants, dispirited by the defeat of aspects of the first claim, were not trading off their rights but simply accepting that they could not do better.

The NT Government argued that the traditional owners had “stood by” and allowed the Camp Beach block owners to build and it was therefore unconscionable for the claimants to assert their ownership of the land. The Land Commissioner rejected this argument, finding that the claimants had not approved the project in any sense.

The NT Government also asserted that the land earmarked for the port should be excluded from any grant on the basis that it might be required for future economic development of the Gulf region. By this time Mount Isa Mines had abandoned that proposal in favour of a much smaller loading facility at Bing Bong, on the mainland coast. One of the NT Government’s own witnesses referred to the port as “mythical”. The Land Commissioner did not accept that such a port development was viable.

In 1996 the Land Commissioner recommended the grant of the land to its Yanyuwa traditional owners. After ten years of negotiation and delay, the land was granted to them on 28 June 2006.

A significant cause of the delay was the need to resolve the position of the occupiers of the blocks at Camp Beach. In place of the invalid grants of land by the NT Government the traditional owners agreed to give 20 year leases in favour of the “purchasers”. The Commonwealth then granted the land to the traditional owners. The NT Government has never compensated or apologised to the unsuspecting “purchasers” of the blocks or the Yanyuwa traditional owners of the land.

## **The McArthur River Mine development**

In 1992 Mount Isa Mines announced it was going ahead with the McArthur River Mine. In early 1993 the Northern Land Council, representing affected Aboriginal people: the Yanyuwa traditional owners of the land around the mouth of the McArthur River and the Pellew Islands and the Gurdanji traditional owners of McArthur River mine site, wrote to the Northern Territory and Federal Governments. They sought to be heard in relation to aspects of the proposal, particularly social impacts on the Aboriginal people at Borrooloola and environmental impacts on the McArthur River. Neither government replied to the letters<sup>25</sup>.

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<sup>25</sup> The author drafted the letters.

Only when the Northern Land Council threatened to challenge the validity of the mine approvals process in proceedings based on a claim of native title (which had been recognized by the High Court shortly before in the Mabo decision) did the Federal Government respond. The Keating Government was concerned about perceptions of an unfriendly investment environment following the decision not to mine Guratba/Coronation Hill. The new McArthur River mine was to be “fast tracked” and a team of senior officials from the Department of Prime Minister and Cabinet were appointed for the purpose.

Aboriginal people were divided over whether to continue to oppose the project. At consultation meetings held by the Northern Land Council in late 1992 and early 1993 the majority of people remained resolutely opposed to it<sup>26</sup>. However, one senior influential leader, in particular, believed the mine offered potential benefits to Aboriginal people.

Ultimately, at a meeting held in Borroloola between Aboriginal people, government and miners, the Aboriginal people agreed to accept or, perhaps more accurately, not oppose the Commonwealth’s proposals.

Subsequently, the McArthur River Mine approvals process of the NT Government was ratified by the McArthur River *Project Agreement Ratification Amendment Act 1993* (NT) to remove any doubt about the validity of the mining interests resulting from the failure to take account of Yanyuwa and Gurdanji native title interests. A right of compensation was given for any acquisition of native title rights. The *Native Title Act* (Cwth) was amended to ensure the validity of and to apply the non-extinguishment principle to the McArthur River mining leases<sup>27</sup>.

The Commonwealth purchased Bauhinia Downs pastoral lease (the subject of a later successful land claim under ALRA) for a group of the Gurdanji traditional owners of the mine site, a 25% interest in the zinc ore trucking/barging operation run by Burns Philp was purchased for the benefit of the Aboriginal community at Borroloola with funds borrowed through the Aboriginal and Torres Strait Islander Commercial Development Corporation. Some Aboriginal employment guarantees were given.

During the settlement negotiations the Yanyuwa expressed particular interest in public environmental monitoring of the impact of the mine on the McArthur River. The NT Government and Mount Isa Mines were resolutely opposed to this<sup>28</sup>. Public access to the results of environmental impact monitoring has not been available until relatively recently<sup>29</sup>.

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<sup>26</sup> The author was present at most of these meetings.

<sup>27</sup> s 46, Native Title Act.

<sup>28</sup> The author was present at negotiations when this issue was raised with the Northern Territory government.

<sup>29</sup> In 2006, as part of the open cut approval process, Environment Minister Marion Scrymgeour recommended an independent environmental monitoring agency for the mine. This recommendation was adopted and an independent monitor appointed – presently Environmental Earth Sciences Pty Ltd.



## The open cut and the diversion of the McArthur River

In 2002 MRM announced that it proposed to commence open cut mining at McArthur River. It proposed to mine the ore body under the river by diverting the river and digging an open cut in the bed of the river. The river was to be diverted through a giant channel around the open cut over a distance of 5.5 kilometres. A levee wall (80 – 100m wide and 6 – 60m high) was to be built around the pit to keep out the McArthur River's huge wet season flow<sup>30</sup>.

Both Commonwealth and Territory governments have joint but different environmental responsibilities in relation to the project. The Commonwealth is specifically responsible for protecting threatened species, including the freshwater sawfish, and migratory bird species under the *Environmental Protection and Biodiversity Conservation Act* (Cwth) ("the EPBC Act"). In 2003 both governments concluded a Bilateral Agreement under the EPBC Act that provided for the Northern Territory Environment Protection Agency ("TEPA") to supervise the environmental assessment of the proposed project.

In 2005 MRM released a draft environmental impact statement. The TEPA, after expert scientific assessment, provided an assessment report advising NT Environment Minister Marion Scrymgour that the diversion should not proceed<sup>31</sup>. On 23 February 2006 the Minister refused to approve the diversion. Her press release of that date said:

"The assessment concludes that there are significant uncertainties over the long term environmental impact associated with diverting the McArthur River and managing an open mine pit in the river flood plain.

"The proposal does not therefore meet the test of sustainability—the EPA's assessment provides a compelling argument for caution. That is the basis for my decision."

Under the Bilateral Agreement the Commonwealth Environment Minister took into account the assessment report provided by the TEPA in assessing potential impacts on threatened species, including the freshwater sawfish, and migratory bird species protected under the *EPBC Act*. The Commonwealth Minister concluded there was not sufficient information on whether or not to approve the proposal.

After the rejection of the proposal by the Northern Territory Environment Minister MRM and contractors mounted a noisy publicity campaign seeking to reverse the decision. In March 2006 the Northern Territory government requested MRM to

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<sup>30</sup> *Lansen v Minister for Environment and Heritage* (2008) FCR 14, [294], [2008] FCAFC 189.

<sup>31</sup> A description of the TEPA's review is contained in the reasons for judgment of Tamberlin J in decision of the Full Court of the Federal Court in *Lansen v Minister for Environment and Heritage* (2008) FCR 14, [211] – [229], [2008] FCAFC 189.

enter further “discussions”<sup>32</sup>. The Northern Territory government asked MRM to submit an amended open cut proposal<sup>33</sup>.

In July 2006 the Northern Territory government asked MRM to prepare a Public Environmental Report (PER) under the *Environmental Assessment Act* (NT). The PER, a truncated version of an EIS with shorter timelines for consideration and decision by the relevant Minister, attempted to address the TEPA’s criticisms of the project. It addressed flaws in the modeling of changes to the diversion channel intended to give its flow characteristics greater resemblance to the natural riverbed and by further assessment of how MRM proposed to manage, monitor and mitigate potential impacts on the freshwater sawfish.

In its further assessment report (AR54) the TEPA noted that:

... the proponent has adopted a similar approach to that taken in the previous Environmental Impact Statement and Supplement. That is, rather than taking action to minimise longer-term environmental impacts of operations, it proposes to wait to see what impacts occur and then take remedial actions. This is not best practice risk management as defined by AS/NZS4360, nor does it meet the principles underpinning ecologically sustainable development as set out in the intergovernmental agreement on the environment (COAG 1992).

It is recognized that taking a precautionary and best practice management approach will potentially raise the level of capital investment required to commence operations. Information contained in the PER as well as discussions with representatives of the company indicated that the proponent places a high value on avoiding/deferring such expenditure.

For example ...the company proposes to manage its tailings storage facility by allowing seepage to the natural ground water system and relying on monitoring and collecting seepage both during and post-operations to deal with the impact, rather than by taking active steps to prevent it reaching the ground water system.

The approach adopted by the company requires a heavy reliance on rigorous monitoring, and a clear and agreed understanding of trigger points for action (which in turn requires a good understanding of ecological implications of the mining operation). The PER does not demonstrate this approach is backed up with appropriate levels of knowledge and understanding.

...There is likely to be a significant regulatory cost for Government to ensure that the on-going performance of post-operations systems is adequate. The proponent’s approach of remediating environment issues if

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<sup>32</sup> MRM website, <http://www.mcarthurriver.com.au/news.html>, “Response to Cabinet Recommendations for Further Discussion”, sighted 5.1.09

<sup>33</sup> *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14, [220], [2008] FCAFC 189.

and when they arise rather than investing in comprehensive preventative measures has the potential to shift the risk associated with dealing with any long term environmental damage from the proponent to Government<sup>34</sup>.

The TEPA concluded that:

- the diversion channel for the McArthur River had been re-engineered to withstand up to 1 in 500 year flood events (where the previous design was estimated to have a 20 – 50% chance of failing in any year) and the velocity of stream flows would approximate the unmodified river;
- approximately 5 km of natural riverine vegetation along both banks of the McArthur River would be removed and a diversion channel created. This would create a barrier to the movement of wildlife and create a highly visible scar on the landscape. There was a significant risk that it would not be possible to revegetate to mitigate these effects;
- there was a significant risk that contaminated seepage from the mining and milling operations would enter regional groundwater. The company relied on reactive rather than preventative management strategies. This was not best practice and there was an increased risk of contaminants reaching the river; and
- the indigenous population of Borroloola remained strongly opposed to the river diversion, even if they favoured the continuation of mining, despite commitments by the company to invest in community infrastructure<sup>35</sup>.

The TEPA made no recommendation about whether the proposal should proceed or not.

On 26 August 2006 the Northern Territory Minister for the Environment, according to her press release<sup>36</sup>, advised the Mining Minister "...that MRM should take an active approach to preventing environment damage rather than waiting for damage to occur and then reacting when things go wrong." She recommended that any approval of the project be subject to conditions as to:

- the provision of a substantial bond,
- a properly researched and managed program for revegetating the diversion channel,
- retention of the existing river channel until the diversion channel was successfully revegetated and approval for the diversion to be contingent on that,

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<sup>34</sup> TEPA Assessment Report AR54, p 17 -18  
[http://www.nt.gov.au/nreta/environment/assessment/register/mcarthur/pdf/rpt54\\_pt7\\_14.pdf](http://www.nt.gov.au/nreta/environment/assessment/register/mcarthur/pdf/rpt54_pt7_14.pdf),  
sighted 12.1.09

<sup>35</sup> Ibid p 18

<sup>36</sup> <http://newsroom.nt.gov.au/index.cfm?fuseaction=viewRelease&id=284&d=5> sighted 20.10.07.

- proper management of contaminants from the mine site and tailings facility well beyond the projected life of the mine,
- the establishment of a mine funded monitoring and regulatory agency and
- a legal agreement or legislation to provide social benefits for the Gulf community.

The Minister's press release recognised that environmental risks and concerns remained including:

- significant and long term risks of contaminants entering the river and ground water - the proposed tailings facility would not be accepted in Queensland and Victoria;
- the approach to revegetation of the river diversion;
- insufficient attention to the social impact of the mine on the local region.

On 13 October 2006 the Northern Territory Minister for Mines and Energy, Chris Natt, apparently satisfied that MRM's mining management plan addressed environmental issues, approved the mining management plan incorporating the conversion of the mine from an underground to an open cut mine. The mining management plan incorporated conditions requiring independent monitoring of the mine's environmental impacts<sup>37</sup>.

On 17 October 2006, under the Bilateral Agreement, the Territory Minister for Mines and Energy informed the Commonwealth Minister for Environment and Heritage that, being satisfied that environmental issues had been addressed, he had approved the open cut proposal.

On 20 October 2006 the Commonwealth Minister for Environment and Heritage granted approval under the *EPCB Act* for MRM to operate an open cut mine.

In 2006 a leaked NT Treasury document showed that the mine had never made a profit or paid a royalty to the NT Government.

McArthur River Mining asserted the open cut would make the mine profitable<sup>38</sup>.

The leaked document also revealed that the Northern Territory government had given MRM a subsidy<sup>39</sup> of \$5 million a year for electricity since the mine commenced in 1995 and that over the life of the mine the subsidy was expected to be worth almost \$100 million to MRM<sup>40</sup>.

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<sup>37</sup> *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14, [230], [2008] FCAFC 189.

<sup>38</sup> MRM website, "MRM Facts in response to ECNT claims", 29 May 2007, <http://www.mcarthurriver.com.au/news.html>, sighted 4.1.09

<sup>39</sup> MRM deny a subsidy has been paid but neither it nor the NT government have released the terms of the relevant agreement.

<sup>40</sup> ABC news item, 28 September 2006, <http://www.abc.net.au/news/items/200609/1751447.htm?nt>, sighted 14.12.08

## **The open cut approval by the NT Mines and Energy Minister is found to be invalid**

The Northern Territory Minister for Mines and Energy purported to approve the conversion of the mine from an underground mine to an open cut by approval of an amended mining management plan under the *Mining Management Act* (NT)<sup>41</sup>.

The Gurdanji people of the immediate area of the mine and the Yanyuwa and Garawa people downstream from the mine site, along with neighbouring Mara people<sup>42</sup>, commenced proceedings<sup>43</sup> in the Northern Territory Supreme Court challenging the approval on a number of grounds. First, they alleged that the terms of the *Mining Management Act* required the Minister to vary or revoke the underlying Mining Authorisation rather than merely approving an amendment to the mining management plan. They argued that the original Mining Authorisation, being for an “underground lead/zinc/silver mine”, did not encompass an open cut mine and that variation of the Mining Authorisation was required rather than mere approval of a change in the mining management plan. Alternatively, they argued that the Minister had failed to comply with the requirements of the *Mining Management Act* as to the applicable environmental assessment procedures.

On 30 April 2007 the trial judge, Angel J, found for the Gurdanji, Yanyuwa, Garawa and Mara plaintiffs on their first argument<sup>44</sup>. He found it was unnecessary to decide the other grounds raised by the plaintiffs. He found the Minister’s purported approval of the open cut was invalid.

The Northern Territory government and MRM filed an appeal against the decision.

## **The Supreme Court decision is immediately overturned by special legislation**

The legal victory for the Aboriginal people was short lived. Instead of awaiting the uncertain outcome of an appeal the Martin Labor government quickly legislated to overturn the result of the Supreme Court decision.

On 4 May 2007 the Northern Territory government passed special legislation<sup>45</sup> declaring the invalid authorisations and mining management plans to be valid and effective “despite any law to the contrary” and providing that the legislative validation was to be “retrospective and prospective”. The legislation closed off further challenge to the mine approvals on any ground, including the ground related to the insufficiency of the environmental approval process argued before Angel J but not decided by him.

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<sup>41</sup> *Lansen & Ors v NT Minister for Mines and Energy* (2007) 20 NTLR 6, [11], [2007] NTSC 27.

<sup>42</sup> The traditional country of the Mara lies on the coast to the west of the Yanyuwa but many Mara people live in Borroloola

<sup>43</sup> The Northern Land Council represented the plaintiffs.

<sup>44</sup> *Lansen & Ors v NT Minister for Mines and Energy & Ors* (2007) 20 NTLR 6, [2007] NTSC 27.

<sup>45</sup> McArthur River Project Amendment (Ratification of Mining Authorities) Act 2007

Support for the legislation was not unanimous within the Martin government. Three Aboriginal Labor MLA's crossed the floor and voted against the government's bill: Malarndirri McCarthy, a Yanyuwa woman from Borroloola, Karl Hampton and Alison Anderson<sup>46</sup>. Another Aboriginal MLA, Environment Minister Marion Scrymgour, evidently unable to support the legislation, deliberately absented herself from the Legislative Assembly vote on the bill<sup>47</sup>.

On 7 May 2007 the Northern Territory Chief Minister, Clare Martin, responding to public criticism of her government's actions, justified the special legislation as protecting jobs and dismissed the Supreme Court's judgment in the following terms, "It is a difference of opinion between the judge and the Department of Justice"<sup>48</sup>. Her remark ignored the constitutional role of the Supreme Court to supervise the executive arm of government to ensure its actions remained within the law.

Notwithstanding the validation of the decision by legislation, MRM and the Northern Territory continued with their appeal against the decision to the Full Court of the NT Supreme Court. On 18 July 2007 the Full Court allowed the appeal<sup>49</sup> but only because the special legislation declared the approvals were valid and could not be challenged in any court. As the appeal was determined on the law at the time of the appeal - not the time of the decision appealed from - it followed that the appeal must succeed. MRM and the Northern Territory sought an order for costs against the Aboriginal respondents. The Court refused to award costs to MRM and the Northern Territory and upheld the costs order in the court below that MRM and the Northern Territory pay the majority of the costs of the Aboriginal plaintiffs.

### **A further legal challenge in the Federal Court**

At the time of the challenge to the mine authorisation in the NT Supreme Court, the Yanyuwa, Gurdanji, Garawa and Mara people also challenged the approval of the open cut by the Commonwealth Minister for Environment and Heritage in the Federal Court pursuant to the *Administrative Decisions (Judicial Review) Act* (Cwth) on four grounds:

- the environmental assessment should have been, but was not, conducted under Part 8 of the EPBC Act rather than under the Bilateral Agreement.
- The assessment report was not a valid assessment report because it did not contain enough information.
- The Minister was required pursuant to section 134(4) of the EPBC Act to take into account conditions as to independent monitoring imposed on the proposal by the Northern Territory but failed to do so.

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<sup>46</sup> Northern Territory News website, 8 May 07, [http://www.ntnews.com.au/article/2007/05/08/977\\_ntnews.html](http://www.ntnews.com.au/article/2007/05/08/977_ntnews.html), sighted 14.12.08

<sup>47</sup> ABC News Online, <http://www.abc.net.au/news/newsitems/200705/s1931356.htm>, sighted 12.1.09

<sup>48</sup> Transcript of "The 7.30 Report" for 7 May 2007,

<sup>49</sup> *McArthur River Mining Pty Ltd v Lansen* (2007) 21 NTLR 6, [2007] NTCA 5

- The Minister was required to, but did not, give effect to the principles of ecologically sustainable development, in particular the precautionary principle as required by the EPBC Act.

On 13 June 2008 Mansfield J decided against the Aboriginal applicants on each of these grounds. In relation to the third ground he found that the Minister had failed to take into account the conditions imposed by the Northern Territory (requiring independent monitoring of environmental impacts) but it was not invalid because the failure could not have made a material difference to the Minister's decision.

The applicants appealed the decision to the Full Court of the Federal Court.

On 4 December 2008 MRM cut back mine production, announced that 206 workers were to be dismissed because of a fall in the price of zinc and refused to guarantee that the mine would continue to operate<sup>50</sup>.

On 17 December 2008 the Full Court allowed the appeal, upholding Mansfield J's finding that the Minister for Environment and Heritage failed to take into account the conditions imposed by the Northern Territory but overturning his conclusion that the failure could not have made a material difference to the decision. The Full Court declared the Minister's approval of the open cut proposal was invalid and quashed the Minister's decision.

Work on the open cut ceased.

On 22 January 2009, the Federal Minister for Environment and Heritage, Peter Garrett, gave preliminary, conditional approval for the open cut proposal, subject to a 10-day consultation period<sup>51</sup>. The Northern Land Council urged him to reconsider the entire approval process in view of past shortcomings in the process. He rejected that submission and approved the open cut on 20 February 2009, subject to further conditions in relation to monitoring of the freshwater sawfish and migratory birds. Work on the open cut recommenced.

## Conclusion

The Yanyuwa, Gurdanji and, Garawa people affected by the McArthur River Mine have not been brought into a partnership by governments or miners. Governments have consistently considered it unnecessary to seek the consent of these Aboriginal groups to actions affecting them or, frequently, to even consult them. This is a colonial relationship, with the rights and interests of the colonised people ignored or considered unimportant in comparison to the interests of the

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<sup>50</sup> ABC News, <http://www.abc.net.au/news/stories/2008/12/04/2438216.htm>, "Xstrata slashes jobs at MRM", sighted 5.1.09

<sup>51</sup> Xstrata Annual Report 2008, [http://www.xstrata.com/annualreport/2008/pdf/full\\_report.pdf](http://www.xstrata.com/annualreport/2008/pdf/full_report.pdf), sighted 12.7.09

coloniser. The few material benefits to Aboriginal people flowing from the mine are hardly more than crumbs from the table.

Recognition of the interests of Aboriginal people in the McArthur River region, particularly in their traditional lands and resources, has been wrung out of governments only through the determination over decades of the Aboriginal people of the region to resist marginalisation and dispossession. That is the foundation of their successes through legal proceedings under the ALRA and in the courts. Sometimes those successes have been short lived, as with the Supreme Court finding of invalidity of the mining approval. In the successful Federal Court challenge to the Commonwealth Environment Minister's decision the Court's judgment was not about the merits of the decision but the correctness of the administrative process involved in making the decision. The decision was simply made again. The initial success was made illusory (although some monitoring conditions were added) because Minister Garrett made the same decision as his Howard government predecessor.

The Aboriginal people opposed to the diversion of the McArthur River and the open cut mining operation have been forced to challenge MRM and the Commonwealth and Northern Territory governments in the courts. Those challenges have been possible only because the Northern Land Council, a statutory body formed under the *Aboriginal Land Rights (Northern Territory) Act*, has the financial resources to provide competent legal assistance. Without access to such assistance legal rights are empty. The McArthur River legal battles emphasise the crucial importance of access to such support.

At times, governments, in particular Northern Territory Country Liberal Party governments, have stooped to sharp dealing and common trickery to defeat the legitimate claims of Aboriginal people. However, Northern Territory Labor Party governments have also demonstrated an equal willingness to disregard the wishes and interests of Aboriginal people, as well as environmental best practice, in the pursuit of economic development.

MRM was permitted to apply lower standards of environmental protection than industry best practice to the open cut and river diversion and not required to meet principles underpinning ecologically sustainable development. This has resulted in environmental risks, including a significant risk of ground water contamination and increased risk of contamination of the river, and a potential shift in risk associated with long-term environmental damage from MRM to government. Concerns expressed by the TEPA about the inadequacies of the environmental regime adopted by MRM have been echoed by the independent monitor<sup>52</sup>.

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<sup>52</sup> For example, the independent monitor's report for 2007 says "Much of the monitoring [by MRM] has been assessed as inadequate to barely adequate in evaluating environmental performance" [p 10] and "The 2006-2007 groundwater monitoring program undertaken at the McArthur River Mine facility appears to be in contravention of the commitments and conditions specified in the mine management plan and approvals documentation. Furthermore, there is a lack of scientific interpretation and rigour to the presentation of the monitoring results." [p 12], <http://www.mrm-independentmonitor.com.au/downloads/207136%20IM%20Audit%20Report%201%20December%202008.pdf>, sighted 21.7.09.



The McArthur River mine also raises questions about the economics of northern development and the public cost involved in the generation of private profit. The McArthur River Mine operated for 12 years as an underground mine. It did not, apparently, make a profit until 2007 when it first paid a royalty to Northern Territory<sup>53</sup>.

In support of its open cut mine proposal MRM projected that the mine would produce product worth \$271 million a year or \$5.4 billion over the 21 year life of the mine<sup>54</sup>.

Despite the enormous income expected to be generated from the mine, the Northern Territory government agreed to provide an electricity subsidy of \$5 million a year to MRM, a public subsidy potentially worth more than \$100 million over the life of the mine.

The Territory government imposed a condition of approval of the open cut that, over the 21 years of its operation, a total of \$32 million was to be paid to a community benefit trust, a step forced on MRM by the Environment Minister, Marion Scrymgour. The projected payment is less than a third of the amount MRM could expect to receive through its electricity subsidy from the Northern Territory government.

21 July 2009

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<sup>53</sup> MRM website, "News", "MRM pays first royalties to Northern Territory Government, 16 July 2007". The royalty payment was \$13.06 million. It is unclear whether more than the one royalty payment was ever paid.

<sup>54</sup> MRM website, "Development Summary", <http://www.mcarthurriver.com.au/develop.html>, sighted 7.1.09